

Multiple Offers . . . Again.

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A variety of questions regarding multiple offers continue to be the number one topic for the Legal Information Line. This is entirely understandable. There are many issues, the issues are complex, and often there is no “right” answer. Hopefully this article will provide you with some of the answers, or an explanation as to why there is no specific answer, that you have been looking for. Remember, this article is for general informational purposes only and expresses the thoughts and opinions of the author. It is not to be relied upon for specific legal advice.

When entering into a listing agreement:

It is at this point that you should discuss the issue of multiple offers with your seller and determine how they will be handled. Remember, the seller is the one who makes the decisions about how to handle multiple offers. However, it is your job to explain to the seller what his options are. The seller’s options are generally one of the following:

- a. Accept one of the offers, while rejecting the others;
- b. Counter one of the offers and either (i) reject the others or (ii) wait to see what happens with the one you countered or (iii) a combination of these;
(with option ii or iii, keep the following in mind: make sure the Seller is aware of when the other offers will expire, make sure the Seller is aware that the other offers may be revoked by the buyer if they do not want to keep waiting, communication with all involved is often the best policy, and you as a listing agent have a duty under NAC 645 to notify a buyer in writing signed by the seller if the seller does not accept an offer within a reasonable time)
- c. Accept none of the offers and request the buyers to submit their best offer, suggesting terms that may be acceptable to the seller;
- d. Counter multiple offers (this option must be undertaken with care to ensure that the seller does not end up being bound under more than one contract).

Discuss with the seller the pros and cons of these different options and have the seller instruct you how he wants you to act in the event you receive multiple offers.

NOTE: The Legal Information Line receives many calls from Listing Agents wanting us to tell them which of these options is the “right” one and which they should use. First, none of them is the “right” one. It depends on the seller, his motivations, and personality and comfort level. Second, the one the listing agent should use is the one directed by the seller; it is not for the listing agent to decide.

QUESTION: Can a listing office have a set policy for all of its agents regarding how the office will handle multiple offers?

ANSWER: Yes, the office can have a set policy. However, this policy must be discussed fully with the seller before the seller enters into a listing agreement. The discussion must include a description of the other methods and a statement to the seller that the seller makes the ultimate decision (which in this case could mean the seller making a decision whether to list with that office).

WARNING: If you do not have a discussion with the seller about his options and you simply pick one, you could draw a complaint from the seller that you have breached your fiduciary duties to him if he believes a different method would have brought him a better purchase agreement.

When entering into a buyer brokerage agreement:

Discuss with the buyer the potential that a seller may receive more than one offer that will compete with the buyer's offer. Discuss what the seller's options are and what the buyer can expect. Be sure that you don't give the buyer unrealistic expectations (such as by telling him that the seller is required to accept the highest offer or that the seller has to accept the first offer).

Presenting the Offers:

The Code of Ethics and NRS 645 both basically require a listing agent to present all offers as soon as possible. Obviously, when this is depends on the particular circumstances you are faced with. If the seller is unable or unwilling to view offers for a couple of days, then that will determine what is possible (of course if the seller is unwilling, you should have that in writing from the seller). Let's talk specifics.

EXAMPLE: You have one offer and are scheduled to meet with the Seller at 6:00pm to review it. At 4:00pm, you receive a telephone call from another buyer agent who indicates that her client will be submitting an offer but will not be able to do so until 8:00am the next morning. What should you do?

ANSWER: You should proceed with presenting the first offer as scheduled. However, it is your fiduciary duty to your seller to make him aware that you have been told that another offer may be coming the next morning. You should discuss the pros and cons of the situation. Make the seller aware of when the first offer will expire. Make the seller aware of the possibility that the second offer may in fact never come. Only with all of the facts can the SELLER (remember it is his decision) make a decision about what he wants to do.

Of course, if the Seller demands that you wait until the next morning before presenting the first offer to determine whether another is received, you should advise the seller about the potential cons of doing so (i.e. the first offeror may decide to withdraw his offer because he does not want to get into a bidding war). If the seller still refuses to see you

that night, try get this instruction in writing from the seller (whether by fax from the seller or at the time you do meet with the seller).

EXAMPLE: You have received 3 offers and are scheduled to meet with the seller at 6:00p.m. to present them. Most MLS rules allow the offers to be presented in person unless the seller refuses (which instruction should be in writing) (although the buyer may have the right to be present when his offer is presented, this does not include the right to be present when the seller is considering the offers). Most MLS rules also require that the offers be presented in chronological order. However, the seller does NOT have to dispense with the first offer (i.e. decide whether to accept, reject or counter) before considering the other offers. The seller should always consider all of the offers before making a decision.

Handling the Offers:

At this point, the seller must take action based on one of the options listed above. There are a few things to keep in mind here. Remember, communication is usually the best policy. Keep the buyers' agents informed about the seller's decision. Let me address some other issues more specifically.

Multiple Counter Offers. If your seller decides to make multiple counter offers, it is recommended that you only use a multiple counter offer form that has been prepared or reviewed by an attorney. It is not recommended that you just add some language to a regular counter offer form. Without the proper language and safeguards in the counter offer, the seller could end up with more than 1 binding contract. Although only one buyer will get the house, the others could still sue for damages.

Additionally, many of the multiple counter offers that attempt to reserve the right of the seller to make "final acceptance" have not been clear with their language to this effect creating confusion among the parties and arguments from buyers that they have a binding contract.

New Offer After Counter Offer Has Been Made. What if the seller receives another offer after he has already made one or more counter offers? Generally, the seller is free to revoke a counter offer any time before it has been accepted, even if the counter offer says it will not expire for 2 days. It is also generally the case that a revocation does not have to be in writing signed by the seller (unless the terms of the counter offer state otherwise). Any notice to the buyer (or his agent) that the counter offer is revoked will be effective. However, the law requires that the buyer or his agent actually receive the notice of revocation before the buyer has accepted the counter offer. You need to be clear what constitutes acceptance and receipt. These are generally defined in the offer/counter offer (example: acceptance occurs when the buyer has signed and faxed to the listing broker).

HINT: read the purchase agreement -- all of it. This really isn't a hint; it is simply required to fulfill your duties to your client. I receive far too many calls to the Legal

Information Line where callers ask definitional questions but have never read that part of the purchase agreement.

Disclosing the Terms of a Particular Offer. Boy, this one is tough. Clearly, in some cases the seller would get a higher price if he disclosed the terms of the highest offer received to date. This would seem to comport with your duty to get your seller the highest price.

However, the Nevada Administrative Code places a competing duty on licensees to be “fair” to all parties. See, NAC 645.605. REMEMBER: as a Realtor® in the state of Nevada, you are governed by BOTH the Code of Ethics and NRS 645 and NAC 645. What is “fair”? This is very difficult to quantify or define in set terms. In the case of Nevada real estate licensees, what is “fair” will be ultimately be defined by the Real Estate Commission based on the facts of each case before it. It is for this reason that callers to the Legal Information Line have not been provided with specific “right” answers in response to questions about this issue. We have told you that there are different arguments surrounding the issue of disclosing the terms of offers and that the practice may result in a slippery slope leading to a complaint that you were not “fair.”

In an effort to bring you specifics, I recently had a conversation with Pam Riebe from the Real Estate Division regarding this issue. Based on that conversation, I can tell you that the Real Estate Division has the following interpretations:

It is not permissible for a real estate licensee to disclose the specific terms of any particular offer to other offerors (buyers).

Example: You have 2 offers. Buyer number 3 wants to make an offer and his agent calls and says, “I have a buyer who wants to make an offer. If you tell me what your highest offer is at this time, the buyer will make his offer higher.” At this point, if you disclose to that agent what the highest offer is, you are violating your duty of fairness.

However, the Real Estate Division has indicated that the following scenario would probably be permissible:

Example: You have 3 offers, the listing price was \$195,000, and the highest offer is \$210,000. The seller has decided to not accept any of the offers believing that he can get a better price. The seller decides to ask each of the buyers to submit their best offer and is going to suggest terms that may be acceptable to the seller. The seller indicates to the buyers that their best offer should be for at least \$210,000. (Or the seller sends out multiple counter offers with the price term of \$210,000).

Escalation Clauses. Escalation clauses are NOT invalid, unenforceable, impermissible, or illegal as a matter of rule. However, some escalation clauses have not been drafted specifically enough to be enforceable because they are too vague. Other escalation clauses are specific enough to be enforceable. If the seller is presented with an offer with

an escalation clause you should advise him to consult with his own legal counsel in determining whether it is enforceable. Alternatively, he could counter with a specific price or request the buyer to present a new offer with a specific price term. The choice must be the seller's.

MYTH BUSTER: The seller is not legally obligated to accept the offer with the highest price.

MYTH BUSTER: The listing broker is not legally obligated to pay a commission, offered through the MLS, to a buyer's broker who brought an offer at or above list price that was not accepted.

BUT CONSIDER THIS: Most of the escalation clauses require the seller to provide the buyer with a copy of the next highest offer that the escalation is based upon. According to the Real Estate Division, such disclosure of the next highest offer by the listing agent will result in a violation of the duty to be fair.

I suspect that this is not the last we will hear about this issue. But this goes back to what I discussed at the beginning of this article: Have a complete discussion about these issues with your seller at the start, so that the seller is aware of your limitations and the competing issues.