

Multiple Offers
To tell or not to tell ???

Mississippi Association of Realtors®

Foundational Concepts

Client versus Customer
Dual Representation

Client – Fiduciary Duties

- Obedience to lawful instruction
- Loyalty to the client's interests above the agent's or any 3rd party's interests
- Disclosure for material / pertinent facts
- Confidentiality for financial information, motivation, urgency, personal secrets
- Accounting for money, paperwork, dates
- Reasonable Care and due diligence
- REC Regulations Sec IV 4E – 2g

Customer – Not Represented

- Honest and fair dealing
 - Concept of 'fair warning' through the agency disclosure notice preparing consumers up front, before they harm their negotiating position
 - Informed consent that they aren't our client
 - Awareness that they aren't entitled to any level of loyalty, confidentiality or obedience
- Disclosure of facts materially affecting value which are known, you should have known or are readily observable

Dual Representation

- Requires seller & buyer client relationships validated in writing per Reg IV-4B – 2&3 with informed consent
- Modified Fiduciary Duties
 - Confidentiality over-rides Full Disclosure
 - Obedience over-rides undivided Loyalty
- Fairness rather than advocacy to both
 - What one knows, both know
 - Equal treatment – equal information
- Everyone in the firm (including branch offices) also represents the seller and the buyer clients

Agent's Role in Representation

- Promote our client's interests
- Advise and guide according to process
- Provide options and alternatives
- Understand the ramifications of all actions
- Provide them with market and general information to make educated decisions
- Follow their lawful instructions

*Clients make all decisions –
Agents follow and implement them*

Nuances of Offers

Client Authorizations

Seller Client Authorizations – Listing Agreement:

- Dual or Variable rate commissions
- Existence of Multiple Offers to competing agents
- Written authorization to disclose terms and conditions of any offers received

Buyer Client Authorizations – Buyer Agreement:

- Permission to see properties when the compensation offered is not sufficient to satisfy the buyer “employment” agreement
- Buyer has a right to provide 15 day notice to terminate
- Absent a confidentiality agreement signed by seller and listing agency, buyer client must realize that offer may not remain confidential

Multiple Offers

- REC Rules and Regulations IV-4B-4
 - In the event that more than one written offer is made, before the owner has accepted one, all are presented to the owner and the broker “should” caution the seller regarding countering more than one offer at the same time
- REC Rules/Regulations IV-4A-8
 - Broker shall document and date an acceptance or rejection of an offer and upon written request provide a copy
 - Records of any type transaction – must be kept for 3 years
- Seller can instruct listing agent to clarify and explore options, adjustments, improvements without formal written response before accepting, rejecting or formally countering any offer or offers before them

Scenario 2a: Single Agency
Cooperating Firms – Multiple Offers

- Sally lists a property; it is a level and even market
- She takes a variable rate commission when she lists the property so that if Sally sells it herself, the total gross commission reduces by 1%
- After much discussion on the pros and cons, Sally's client instructs and authorizes her to "disclose the existence of multiple offers to competing agents" in their listing agreement
- Brenda – a cooperating agent, contacts Sally prior to writing an offer on behalf of her buyer client.
- She asks Sally if there are other offers; Sally says no.

Scenario 2a: Single Agency
Cooperating Firms – Multiple Offers

- Tom, a cooperating agent, calls Sally later that day, to inform her that he is writing an offer for his buyer client
- Tom asks Sally the following questions
 - Are there any other offers on the table?
 - What is the variable rate differential?
 - Have you written an offer?
 - Has anyone from your firm written an offer?
 - Is the other offer from a cooperating agent?
 - When are the presentations being made?
 - Can he present his own offer?
 - Were any offers refused? If so, when and why?
 - What is the number to beat?

**What should Sally
do and say ?!!!**

Q1: Are there any other offers on the table?

- COE – Article 1, SOP 15
 - Realtors®, in response to inquiries from buyers or cooperating brokers shall, *with the sellers' approval*, disclose the existence of offers on the property
 - COE does NOT authorize Sally to respond without client authorization
- MS license law prevents Sally from revealing her client's confidential (motivation, urgency, financial, personal secrets) info unless her client provides written instruction to the contrary
- Sally must look at her listing agreement and in this case, tell Tom that he is in a multiple offer

Q2: What is the variable rate differential?

- COE – Article 3; SOP 4
 - Realtors®, acting as listing brokers, have an affirmative obligation to disclose the existence of variable rate fees
 - The listing broker shall disclose the existence of such arrangements to potential cooperating brokers
 - In response to inquiries from cooperating brokers shall disclose the differential
 - If the cooperating broker is a buyer agent, they must disclose such info to their client before an offer to purchase is made. (Amended 1/02)
- Sally must disclose the variable rate in her MLS and tell Tom what the differential is
- Tom is then obligated to tell his buyer client

Q3: Have you written an offer?
Has anyone from your firm written an offer?
Is the other offer from a cooperating agent?

- COE – Article 1, SOP 15
 - Where disclosure is authorized, Realtors® shall also disclose whether offers were obtained by the listing licensee, another licensee in the listing firm, or by a cooperating broker. (Adopted 1/03, Amended 1/06)
- Sally is obligated to answer all of the questions that Tom has asked

**Q4: When are the presentations being made?
Can he present his own offer?**

- COE – Article 1, SOP 6
 - Realtors® shall submit offers and counter-offers objectively and as quickly as possible. (Adopted 1/93, Amended 1/95)
 - There is no MS law/rule/reg that the offer be in writing; Statute of Frauds stipulates enforceability of written offers
- Sally cannot demand a loan pre-approval prior to presenting; demand the offer in writing or on any specific type of contract – presentation is separate from the acceptance phase and can't be delayed
- Sally cannot refuse Tom from presenting his offer
 - Seller can refuse the buyer agent's presentation and the buyer agent can request the refusal be in writing

Q5: Were any offers refused? If so, when and why?

- Duty of confidentiality requires Sally to consult with her client before answering 1st question
- Sometimes agents, thinking they are helping their clients, tell cooperating agents submitting offers that \$X has already been refused to encourage higher offers ... this is a mistake.
- If there are any material defects that must be disclosed, the second question may require her to offer information

Q6: What is the number to beat?

- COE – Article 1, SOP 13-5
 - The possibility that sellers or sellers' representatives may not treat the existence, terms, or conditions of offers as confidential unless confidentiality is required by law, regulation, or by any confidentiality agreement between the parties. (Adopted 1/93, Renumbered 1/98, Amended 1/06)
- Sally cannot answer Tom's question without 'written' authorization from her client
- Sally should provide her client with options and ramifications to choices; then wait for lawful instruction
- Sally's client could give her a directive to tell Tom the terms, conditions and price of other competing offers from cooperating firms unless she and Sally are bound by a confidentiality statement
- If Sally's client does not want the terms, conditions or price revealed, Sally proceeds accordingly

Dos and Don'ts of 'Shopping' Offers

When offers arrive, some agents – for the benefit of their client – attempt to 'shop' for additional offers

- You may certainly contact other agents and buyers who have shown/seen the property
 - If you client instructs you to
 - Only if you contact all – not just the buyers you showed it to (self-dealing)
- Never shop an office with price unless your seller client has provided you with written authorization

What about Brenda?

What about Brenda?

- Since Sally has written direction from her seller client to disclose the existence of multiple offers to competing agents, Sally now tells Brenda that another offer has arrived and she is in multiple offers
- If Brenda does not exercise her affirmative obligation to question, Sally is under no obligation to provide additional details
- If Brenda asks the same questions as Tom, the responses are the same
- Prior to submitting their offer, Brenda's buyer client requests that Sally and the seller sign a confidentiality agreement agreeing to not reveal the terms and/or conditions of the offer
- Sally and her client sign the confidentiality statement and Brenda submits her offer

Scenario 2b: Dual Agency
Multiple Offers in and out of Firm

- Brenda and Tom presented their offers knowing they were in a multiple offer
- If Sally received written permission to reveal price/terms/conditions of offers – Tom's could be revealed but Brenda's could not
- Sally begins "negotiating" both offers per her client's lawful instructions
- Joan, an agent in a branch office of the same firm as Sally, writes an offer on Sally's listing and wants it presented – she has no idea what's going on!!!!
- Now what does Sally do?

Scenario 2b: Dual Agency
Multiple Offers in and out of Firm

- Since both the buyer and seller are clients of the same firm, both clients are entitled to 'equal treatment – equal information'
- Joan's buyer client is entitled to know all of the non-confidential details and any additional information that the seller has authorized regarding the transaction
- If the seller didn't authorize disclosure of terms and/or conditions, the in-house agent would not be entitled to that additional info

Scenario 2c – Subsequent Offers

- Sally's client accepts one of the offers and the buyers in the transaction proceed with their 'due diligence'
- Prior to the transfer of title, Harry calls Sally regarding the status of the property.
 - Sally informs Harry that the property is under contract and the seller has ceased showings
- Harry's clients are relocating from California and need to secure a replacement property immediately.
 - Compared to California – prices are fantastic; they have sufficient assets to pay cash
 - Although they cannot get in to see it, they love the neighborhood and instruct Harry to write an offer, way over asking price, subject to their satisfactory viewing the property and property inspections
- What does Sally do now?

Scenario 2c: Subsequent Offers

- COE – Article 1, SOP 7
 - When acting as listing brokers, Realtors® shall continue to submit to the seller/landlord all offers and counter-offers until closing unless the seller has waived this obligation in writing
 - Realtors® shall recommend that sellers obtain the advice of legal counsel prior to acceptance of a subsequent offer
- Sally presents the offer and waits for legal instruction from the seller and their attorney

The screenshot shows the REALTOR INSTITUTE website navigation menu. A red arrow points to the 'Online Course Access' link. Below the arrow, text reads: 'If you are a student currently enrolled in an online course, please select the "Online Course Access" link to continue taking your course.' The main content area features a compass graphic and the text 'CLASSROOM & ONLINE COURSES'.

The screenshot shows the 'Frequently Requested Documents' page on the REALTOR INSTITUTE website. A red arrow points to the link 'Buyers' and Sellers' Guide to Multiple Offer Negotiations', and another red arrow points to 'Presenting and Responding to Multiple Offers'. The left sidebar contains various navigation links like 'Have a question?', 'Course Calendar', and 'Registration Policies'.
