

CINCINNATI AREA BOARD OF REALTORS®

GUIDELINES FOR HANDLING AND SUBMITTING OFFERS

"In accepting employment as an agent, REALTORS® pledge themselves to protect and promote the interests of their client. This obligation of absolute fidelity to the client's interest is primary, but it does not relieve REALTORS® of the obligation to treat fairly all parties to the transaction."

ARTICLE 1 - PREAMBLE

The law of contracts, even the basic concept of offer and acceptance, is extremely complex and no simple rules can govern all factual situations. Therefore, these guidelines are to be considered general in nature and do not purport to be in lieu of, in addition to or an extension of the NATIONAL ASSOCIATION OF REALTORS® Code of Ethics or law. These guidelines can be used as a general guide for all types of properties, whether they are for-sale-by-owner, short sale, lender-owned, estate, residential, commercial or any other type of listing.

ARTICLE 2 - AGENCY DISCLOSURE

The Buyer's agent must provide the *Consumer Guide to Agency Relationships* to the prospective Buyer and obtain a signature receipt at the first substantive meeting between the Buyer and the Buyer's agent.

Discussions and agreements between a Buyer and the Buyer's agent concerning their agency relationship must occur prior to viewing listed properties or prior to any discussions concerning pre-qualification so that the necessary disclosures concerning the agent's relationship with the Buyer are established and are communicated to listing firms at the time showing appointments are set. The *Agency Disclosure Statement*, signed and dated by the Buyer, must be presented to the listing firm at the time of delivery of an offer to purchase. The disclosure shall then be provided to the Seller prior to or at the time of the presentation of an offer to purchase. If the Seller is not represented by an agent, the agent preparing and submitting the offer must provide a copy of the *Agency Disclosure Statement* directly to the Seller at the time of the presentation of the offer.

ARTICLE 3 - LISTING FIRM PROCEDURES AND HANDLING OFFERS

Section 1 - When taking listings, explain to sellers that receiving multiple, competing offers is a possibility. Explain the various ways they may be dealt with (e.g., acceptance of the "best" offer; informing all potential purchasers that other offers are on the table and inviting them to make their best offer; countering one offer while putting the others to the side; countering one offer while rejecting the other offers, etc.).

Explain the pros and cons of each approach (patience may result in an even better offer; inviting each offeror to make their "best" offer may produce a better offer[s] than what is currently on the table—or may discourage offerors and result in their withdrawing their offer and pursuing other properties).

Explain that your advice is just that and that your past experience cannot guarantee what a particular buyer may do.

Remember—and remind the seller—that the decisions are theirs to make—not yours, and that you are bound by their lawful and ethical instructions.

The listing firm's duty is to obtain the best price and terms acceptable to the Seller by making the property available for showing even during the negotiation of offers and counteroffers. If the listing agent is unavailable, the listing firm shall set appointments for cooperating firms unless otherwise restricted by terms of the listing agreement. The listing firm shall disclose to other cooperating firms the existence of any accepted contract (e.g. contingency sale with notice, contingency sale without notice or any other fully executed purchase contract) and, where applicable, that the property "is available" for showings. After explaining the pros and cons listed above, the listing firm may, with the Seller's permission, also relay information in regard to other activity, including pending offers on the property, without disclosing specific terms (all inserted terms and conditions in the offer or contract), unless they have received express instructions to do so. Where disclosure is authorized, REALTORS® shall also disclose, if asked, whether offers were obtained by the listing licensee, another licensee in the listing firm, or by a cooperating broker. The listing firm should make the same disclosures when dealing directly with other potential Buyers. *Note:* Any permission or instructions should be obtained in writing for the protection of the listing agent and seller.

Section 2 - The listing agent shall offer advice and counsel to the Seller, but the Seller has the sole right of final determination of the acceptability of an offer and only the Seller can legally initiate or accept an offer. In the absence of written authorization to an agent, only the Seller can sign a contract.

Note: If an agent is empowered with the authority to render decisions or sign on behalf of the Seller, that authority must be given under a written power of attorney or a letter of authorization that defines the scope of the agent's authority.

Section 3 - Upon receipt of a written offer, the listing firm shall immediately contact the Seller to arrange for prompt presentation of the offer to the Seller. Offers should be presented in person with an explanation of the merits of the terms and conditions of the offer and information regarding the eligibility of the Buyer. Do not disclose terms over the phone if presentation can be done in person. A buyer's agent has the right to present an offer to the Seller and this request must be made through the listing firm. However, the buyer's agent shall not be present during the discussions of the merits of the Buyer's offer between the Seller and the Seller's agent. A subagent or listing agent also has the right to present counteroffers to the Buyer under the same terms and conditions. However, if either principal gives written instructions to prohibit the presentation of an offer or counteroffer by either agent, then that agent may not present the offer but has the right to a copy of the written instructions. *Note:* Verbal offers must also be presented. However, parties must be informed that verbal offers are not enforceable and any verbal offer or acceptance is not binding. The agreement must be reduced to writing and signed by all parties to be enforceable.

Section 4 - The listing firm shall make a diligent effort to obtain a written response from the Seller of acceptance, rejection or counteroffer within the time frame set forth in the contract. Should the Seller reject the offer, have the Seller write "rejected" on the face of the contract and sign and date the instrument as proof of presentation of the offer. If the Seller is out of town, a response by fax/email/telegram/mailgram is appropriate, so long as it refers to the property address, parties involved, date of offer or counteroffer and action taken (e.g.: rejected, countered, accepted). It is good practice to have the faxed or e-mailed copies of the contract replaced with a fully executed original of the contract. If the Seller chooses to not respond in writing, the listing agent should so notify the buyer's agent, in writing, including the date the offer was presented to the Seller.

Section 5 - The cooperating REALTORS® should keep each other well informed on the status of a pending offer.

Note: Agency disclosure shall not impact on the traditional means of communication of offers to Sellers. Where an exclusive agency exists, both subagents and buyer's agents shall contact the listing firm for presentation of offers (unless instructed by the Listing Firm, in writing, to go directly to the Seller). Where the Seller has no agency agreement, the agent preparing the offer (buyer's agent) shall present the client's offer to the Seller.

ARTICLE 4 – BUYER’S AGENT PROCEDURES

Section 1 - Explain the pluses and minuses of various negotiating strategies. Remember—and remind the buyer—that the decisions are theirs to make—not yours, and that you are bound by their lawful and ethical instructions.

The Buyer’s agent shall promptly deliver all offers to the listing agent/broker (or seller, if the property is a for-sale-by-owner (FSBO), or if written authorization has been granted to cooperating brokers). Offers shall be properly executed and should address handling of an earnest money deposit, which may be held by either the listing broker or cooperating broker, as agreed upon by the parties.

Section 2 - Where the Buyer is a client, when entering into buyer representation agreements, explain to buyers that you or your firm may represent more than one buyer-client, that more than one of your clients or your firm’s clients may be interested in purchasing the same property, and how offers and counter-offers will be negotiated if that happens. The Buyer shall direct the buyer's agent, through their agency agreement, as to what information shall be presented to the Seller. If the Buyer does not have an agency relationship, information regarding the Buyer's eligibility should be included as a courtesy to assist in the presentation of the offer. If requested by the Seller and agreeable to the Buyer, information such as employment history, source of down payment and qualification by a recognized lending institution should be provided to the Seller to assist in determining a Buyer's financial ability to close the transaction. In a multiple offer situation, the agent should attempt to obtain as closely as possible, identical information regarding all Buyers.

Section 3 - The buyer's agent or subagent should assume all responsibility for notifying the listing agent promptly when an offer is being delivered to the listing firm. Do not assume the listing firm will contact the listing agent.

Section 4 - The offer must have a specific expiration time and date.

Section 5 - Be certain that the listing agent knows how and where to reach the cooperating agent when a response has been obtained. Timing may be very critical during negotiations, particularly if a multiple offer situation occurs.

ARTICLE 5- HANDLING MULTIPLE OFFERS

Section 1 - Time or order of receipt of a written offer shall have no bearing on preferential consideration. Offers are to be considered on their own merits and the verifiable ability of the Buyer to perform under the terms and conditions of the offer. When more than one offer has been delivered to the listing firm, a multiple offer condition exists and the following should take place:

1.1 The listing agent shall notify the Seller that the listing agent is in receipt of more than one offer. Do not discuss terms on the phone if presentation can be done in person (unless dealing with an absentee Seller). At the earliest possible opportunity, the REALTOR® should present the offers to the Seller. The REALTOR® should explain that, with the Seller's permission, all parties may be notified through their representatives of the presence of another offer. The Seller should be made aware that notification to Buyers of a multiple offer situation may instigate the revocation of one or more of the offers, or may secure each Buyer's best terms (in the event that the original terms submitted do not represent the Buyer's most sincere effort to buy the property).

Upon notification of the multiple offer situation, the Buyer(s) may elect to amend their offers in writing, ask the listing agent to proceed with the presentation of the terms originally submitted, or revoke their offer.

The listing agent shall then request a meeting with the Seller to take place as soon as the listing agent is in possession of each Buyer's final terms and before the expiration of any offer in the listing agent's possession. If it is impossible to meet with the Seller prior to expiration of the offer, a written extension should be secured.

1.2 With the Seller's permission granted, notify each agent, in writing, whenever possible, of the presence of another offer. Changes, if any, should be in writing since verbal contracts are not enforceable.

1.3 Present the amended and/or unchanged offers to the Seller, along with information, if possible, about the Buyer's ability to perform. Remember that the contract with the best terms is without merit if the Buyer cannot perform.

Note: If offer #1 is nearing expiration and Buyer #2 cannot be reached to notify of the multiple offer situation, the Seller may elect to:

1. Request a written extension of time from Buyer #1.
2. Consider all offers, amended or otherwise, prior to the expiration of offer #1.
3. Refuse in writing to respond to offer #1 until Buyer #2 can be notified.

Caution: If Buyer #1's terms and qualifications have merit, be sure the Seller understands that Buyer #2 may elect not to amend the offer.

ARTICLE 6 - RESPONDING TO MULTIPLE OFFERS

Section 1 - In a multiple offer situation, a Seller should:

- 1.1** Not counter more than one offer at a time.
- 1.2** Not fail to respond to an offer before the specified expiration.
- 1.3** Never accept more than one offer unconditionally.

Section 2 - The Seller has the following choices:

2.1 The Seller may counter one offer requiring a response before the expiration of another offer ("time is of the essence" is suggested for such situations - to assure a timely response from the first party). In this situation the Seller awaits response from the first party before acting upon the offer of a second party.

Note: The Buyer who is awaiting a response may revoke the offer any time prior to the Seller's acceptance.

2.2 The Seller may reject one offer and either counter or accept the other offer.

2.3 The Seller may reject all offers.

2.4 The Seller may accept one offer unconditionally and accept another as a back-up offer contingent upon release from the first accepted offer by a specific date. The acceptance of a contract as a "backup" is a counteroffer that requires the Buyer's acceptance to be binding.

Note: The Buyer who is held in abeyance may revoke the offer.

ARTICLE 7 - OFFERS RECEIVED WHILE A COUNTER IS PENDING

Section 1 - If at the time of receipt of a second offer, the Seller has an unexpired counteroffer in the hands of the first Buyer or the cooperating agent, the listing agent shall:

1.1 - Immediately notify the Seller of the presence of another offer and arrange for presentation, in person, of the terms and conditions thereof. The Seller may elect to:

a. Revoke the counteroffer made to the first Buyer (assuming the Buyer has not yet accepted the counteroffer in writing) in order to respond to the second offer with either acceptance or counteroffer. (This usually occurs when the new offer is superior to the counter pending).

b. The Seller may reject the second offer without affecting the pending counteroffer.

Note: A counter in the hands of a Buyer and an offer in the hands of a Seller does not constitute a multiple offer situation and therefore, does not warrant notification to all Buyers. *If* Buyer #1 submits a counter to the Seller's counter while an offer from Buyer #2 is awaiting the Seller's response, a multiple offer situation WOULD exist and all parties, with the Seller's permission, may be notified.

Caution: The Seller should not accept or counter the second offer unconditionally until revocation of the first offer has occurred. Once an offer is accepted, it cannot be revoked.

ARTICLE 8 - REVOCATION

Section 1 - Revocation of an offer or counteroffer is considered legal when the Seller's/Buyer's instructions are communicated to the Buyer/Seller (a message left on an answering device or with a person other than a party to the transaction will not suffice). Communication from the listing agent to the cooperating agent to the Buyer or the cooperating agent to the listing agent to the Seller is preferable, but where time is of the essence, management of the cooperating firm or the listing firm may be called upon to complete the chain of communication.

Section 2 - A written notice of revocation must coincide with the verbal notification. A suggested format is presented at the end of this section.

ARTICLE 9 - COUNTEROFFERS

Section 1 - Any conditional acceptance or modification of terms constitutes a counteroffer. To help ensure that counteroffers are legally correct: include all changes in legible writing, have parties *initial, date and indicate time of each change, sign*, and *include expiration date of counteroffer*. The responsibility of the listing firm is then to deliver the counteroffer to the Buyer, or to the cooperating firm.

ARTICLE 10 - BACK-UP OFFERS

The REALTOR® is obligated to present all offers up to the time of closing. If an offer is received while a contract is pending, the listing firm shall immediately contact the Seller to arrange for presentation of the offer to the Seller. The Seller may accept, reject or counteroffer just as in any other negotiation, but acceptance or counteroffer must be contingent upon obtaining a written release from the pending contract.

ARTICLE 11 - ACCEPTANCE

Section 1 - Upon acceptance, immediately notify the parties to the transaction (through the appropriate agents).

Section 2 - The offer must be accepted in writing and the acceptance communicated to the parties (note: additional acceptance terms may be defined in a contract to purchase). Delivery of a signed contract to the parties must be accomplished immediately to avoid conflicts over the issue of acceptance.

ARTICLE 12 - GENERAL GUIDELINES

Section 1 - By statute in Ohio, all contracts for the purchase and sale of real property must be in writing to be enforceable.

Section 2 - In order for a contract to be *binding*, the written acceptance *must be communicated to the parties*. The written acceptance must then be delivered to the parties. All parties should be provided with a legible copy of the agreement and accompanying addenda, if any.

Note: If a party to the transaction is out of town, a faxed response stating the name of the Buyer/Seller, the property address, date of acceptance and offer amount should be included, along with acceptance language. The contract must be sent for signature immediately thereafter. Facsimile (fax) copies of contracts are considered legally binding when fully executed. It is good practice to have the faxed copies of the contract replaced with a fully executed original of the contract.

Section 3 - Point out to the Seller that *any* change to the language of the contract submitted nullifies that contract and constitutes a counteroffer, which is only binding upon written acceptance of the Buyer.

Section 4 - Do not discourage the Seller from submitting the offer(s) to an attorney for review and approval. Encourage the use of an attorney to advise and counsel the Seller on terms that are complex or where the construction of other instruments such as mortgages, land contracts, etc., will be required. The agent is a real estate practitioner, not a legal advisor. Do not offer legal advice.

Section 5 - Prior to acceptance by the Seller, an offer or counteroffer *may be revoked by a Buyer by verbal notification to an agent of the Seller* (either the listing or cooperating firm). Verbal notification of revocation must be followed with written notification. A message left on an answering device or with a third party is not a form of valid communication. Direct verbal instructions to an agent of the Seller must be followed up in written form.

Section 6 - All offers and counteroffers must have an expiration date. Acceptance after that date will probably not be effective unless the parties have agreed to an extension of time in writing. Where a specific time and date are critical to performance, the term "time is of the essence" should accompany any specified time and/or date stated in the contract. In this case performance (be it acceptance, closing, inspection, etc.) must be within the framework of the time set forth without exception.

Section 7 - A receipt for earnest money must be given to the Buyer by the agent procuring the offer. Often this is embodied in the language of the purchase agreement with regard to the ultimate disposition of the earnest money (which is held in accordance with the Contract to Purchase pending closing). *The procuring agent is asked to acknowledge receipt of the deposit prior to transfer of said deposit to the listing firm.*

Section 8 – Verbal agreements are not binding and agents must notify their clients that until the agreement or amended agreement is signed by all parties, with initials indicating acceptance to all amendments by all parties, there exists no binding agreement. The Seller may receive another offer prior to signing the final document or prior to the buyer signing the final document and rescind the offer. Further, the Buyer may find another property in which they have interest prior to signing the final document or prior to the seller signing the final document and rescind the offer. *Note:* Verbal offers must also be presented. However, parties must be informed that verbal offers are not enforceable and any verbal offer or acceptance is not binding. The agreement must be reduced to writing and signed by all parties to be enforceable.

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NOTICE OF REVOCATION

We, the undersigned, hereby revoke the () offer () counteroffer dated

_____ for the purchase of the property located at

_____ between

_____ (Seller) and

_____ (Buyer).

The offer/counteroffer is hereby withdrawn and is no longer open for acceptance. Any future offer/counteroffer shall be the subject of a separate writing.

Signed:

Date _____ Time _____