



Courtside *Newsletter*

Presentation of Offers



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Working as a real estate agent is a tricky job, no matter which way you look at it. As a seller's agent, you're trying to get the highest price for your client. As a buyer's agent, you're trying to get the lowest price and the best terms. As a dual agent, the level of complexity skyrockets to heights we can't even begin to touch on in this article. Within this nuanced field there is also the matter of making and presenting offers on behalf of, and to, your clients, a matter that has come under the microscope of late.

Recently the National Association REALTORS® (NAR) was presented with a motion to amend the Code of Ethics (COE) regarding the presentation of offers. As many are already aware, the Code of Ethics is the codification of the ethical duties of REALTORS®, drafted to ensure REALTORS® work together to further their clients' best interest. Apparently, numerous REALTORS® have complained to NAR about their offers not being presented to sellers. The amendment to the COE would require listing agents to provide written verification upon request to the cooperating agent that the offer has been presented to the seller, or the seller has waived the obligation to have the offer presented. While this motion will be further discussed at NAR's upcoming meeting, there has never been a better time to discuss the current requirements for real estate agents when it comes to the presentation of offers.

Listing Agents

Once a listing broker begins to act as an agent for his principal, a fiduciary duty is created. According to the California Bureau of Real Estate [soon to be called the Department of Real Estate (DRE)], included in the scope of this fiduciary duty is the timely presentation of all offers and counteroffers, unless otherwise directed to do so by the principal. REALTORS® must also abide by COE, Article 1, Standard of Practice (SOP) 1-6, which states that

“REALTORS® shall submit offers and counter-offers objectively and as quickly as possible.” SOP 1-7 goes on to state that “when acting as listing brokers, REALTORS® shall continue to submit to the seller/landlord all offers and counter offers until closing or execution of a lease unless the seller/landlord has waived this obligation in writing.”

Failure to present offers could also result in Multiple Listing Service (MLS) violations. For example, the Rules and Regulations for both CRMLS and CLAW state under Rule 9.4 that, “the Listing Broker must make arrangements to present the offer as soon as possible, or give the Cooperating Broker a satisfactory reason for not doing so.” Rule 9.5 also goes on to state that “the Listing Broker shall submit to the seller(s) all offers and counter-offers until closing unless precluded by law, governmental rule, or expressly instructed by the seller(s)/landlord(s) otherwise. The Cooperating Broker acting for a buyer(s)/tenant(s), shall submit to buyer/tenant all offers and counter-offers until acceptance unless precluded by law, governmental rule, or expressly instructed by the buyer(s)/tenant(s) otherwise.” While not all agents subscribe to CRMLS or CLAW, these are some examples of rules that may exist in other MLSs. Brokers and agents should be aware of the rules of whatever MLS they utilize.

Lastly, the failure to present offers can lead to issues with the DRE. Under California Business and Professions Codes (B&P) § 10176, the Real Estate Commissioner can bring an investigation against a licensee for “A continued and flagrant course of misrepresentation or making of false promises through real estate agents or salespersons” and/or “fraud or dishonest dealing.”

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Yet, despite the rules and laws behind the presentation of offers, some common misconceptions still occur:

- The seller's acceptance of an offer does not mean the listing agent may stop presenting offers. Until the seller instructs the agent in writing, all offers must continue to be presented.
- Neither the seller nor listing agent are required to respond to or reject offers, either verbally or in writing.
 - Sometimes, too many offers can play a factor in the lack of response.

So What? Complications for Sellers

Failure to present offers, or even failure to appear cooperative, could result in complications for a broker or agent.

- REALTORS® could face COE violations, leading to disciplinary action with the Professional Standards committee of their Association, including fines and possible suspension.
- Agents and brokers could also find themselves facing disciplinary action and/or sanctions from the MLS following a hearing pursuant to the California Code of Ethics and Arbitration Manual.
 - This could include an MLS citation.
- Problems with DRE could also arise if the broker does not keep his or her files properly. Under B&P § 10148, a real estate broker must “retain for three years copies of all listings, deposit receipts, canceled checks, trust records, and other documents executed by him or her or obtained by him or her in connection with any transactions for which a real estate broker license is required.” The issue here arises when brokers only keep copies of the accepted offer. All offers must be retained in the transaction file. Not doing so is a violation of real estate law that could land a broker in hot water.
- Litigation could also arise, especially if the seller receives a lower purchase price.
- Word travels fast in such a tight-knit industry, and unethical brokers/agents could find their reputation is damaged by their actions. Ultimately, this could lead to loss of business and loss of livelihood as people and other agents are unwilling to send them referrals or work with them when showing properties.

Keep it Right: Best Practices

Luckily, there are some simple practices that can be enacted to help avoid liability when it comes to the presentation of offers:

- Unless otherwise instructed in writing, present all offers

to sellers. Even if an offer has been accepted, subsequent offers should be presented until the transaction has closed.

- Brokers should adopt an office policy that requires licensees to respond in writing when rejecting an offer.
 - Keep in mind that cooperating brokers and agents are in the same industry. Listing agents should avoid being critical of any offers and be respectful when rejecting an offer.
- Save all offers—whether rejected or accepted—for the transaction file. Additionally, save all communications regarding the offers as well. Not only is this a “best practice,” it is the law.

Cooperating Brokers

Where does this leave the cooperating brokers, though? What should the buyer's agent do if she does not think her offer is being presented?

- The California Association of REALTORS® (C.A.R.) provides a Sample Letter under zipForm® titled “Demand that Offer be Presented to Seller” (DPO).” According to C.A.R., cooperating agents can use this letter to try and get a response from seller or listing agent when an offer has been made.
- Request a rejection in writing. As mentioned above, hopefully this is a standard practice in a brokerage, but it may take a little extra cajoling on behalf of the cooperating broker to have it expressly stated that the offer is being rejected.
 - Alternatively, if the seller has requested that certain offers not be presented (such as they're too low or another offer has been accepted), that should also be conveyed in writing to the buyer's agent.
- Report the agent. If the cooperating broker sincerely believes the listing agent is withholding offers in an unethical manner, he or she can report the listing agent to DRE and/or, if the agent is a REALTOR®, to the Association to which the REALTOR® belongs. As mentioned above, this can have serious repercussions for an agent/broker. It is an action that should not be taken lightly.

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With no legal requirement to respond to offers, the presentation of offers can be a gray area in real estate. As either a listing agent or buyer's agent, should you have any questions about current office policies or how you are conducting business, you should see qualified counsel, either via an attorney or your local REALTOR® association.

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