

Disclosure of Offers Under Standard of Practice 1-15

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REALTORS® are constantly reminded that they “must act honestly and ethically and in the best interests of their client at all times.” REALTORS® also owe to their clients a duty of loyalty, which includes the duty to keep information confidential. It may seem, however, that this duty of confidentiality conflicts with other rules and regulations requiring disclosure of certain information. In particular, National Association of REALTORS® Standard of Practice 1-15 (the “Standard”) requires a REALTOR® to disclose the existence of other offers if a seller has authorized disclosure. This article will address some of the problems inherent in the Standard, as well as offer guidance for REALTORS® who may wonder exactly what the Standard allows or requires.

The Standard reads as follows:

REALTORS®, in response to inquiries from buyers or cooperating brokers, shall, with the sellers’ approval, disclose the existence of offers on the property. 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.

First, it is important to note what the Standard does not say. It does not mention or authorize the disclosure of terms and conditions of an offer. Rather, the Standard authorizes disclosure of the existence of other offers and whether those offers came from a salesperson within the broker’s firm. Although the Standard’s silence with respect to disclosure of the terms of an offer could be interpreted to mean that REALTORS® are allowed to disclose the terms and conditions of an offer, the Standard does not require that terms be disclosed. Rather, that decision is left to the seller; and sellers will look to the REALTORS® to advise them on whether and how much to disclose.

The difficulty with disclosing terms of an offer lies in deciding which terms should be disclosed. If a seller authorizes a broker to disclose the “material” terms of an offer, does that mean the price can be disclosed, or can contingencies be disclosed as well? REALTORS® should be sure to confirm with the seller which terms they are authorized to disclose. In addition, REALTORS® must be careful to disclose the same information to all parties, whether they merely ask whether an offer exists or they ask about the terms of other offers. Otherwise, a disappointed offeror may allege unfair treatment, increasing the risk of an ethics complaint or litigation.

A second concern is whether the REALTOR® should obtain the seller's agreement to disclose the existence of other offers at the time of the listing, at the time that the first offer is presented, or when there are two or more competing offers. While REALTORS® should generally discuss the issue of disclosure of offers with a seller at the time the listing agreement is signed, the appropriate time for the seller to make a decision with respect to disclosure may be when competing offers are received. When the seller is able to compare the terms of competing offers with what the seller is asking for the property, the seller is then able to make a more informed decision with respect to the benefits or drawbacks to disclosure.

In addition to informing the seller that he or she can authorize disclosure, REALTORS® should also discuss the pros and cons of disclosure. At first blush,

the seller may think that disclosure of offers will lead to a bidding war, which most sellers dream of. However, a buyer who hears that an offer is pending may be discouraged from submitting an offer, fearing that his offer might not be as good as the first offer. Furthermore, if a seller has authorized disclosure of offer terms, a buyer may hesitate before putting in an offer if the terms will be made public (and possibly used by the seller only to get other offerors to raise their offer price or to waive contingencies). As noted in Appendix IX to Part Four of the National Association of REALTORS® Code of Ethics and Arbitration Manual, entitled “Presenting and Negotiating Multiple Offers”:

Will disclosing the existence of one offer make a second potential purchaser more likely to sign a full price purchase

offer—or to pursue a different opportunity? Will telling several potential purchasers that each will be given a final opportunity to make their best offer result in spirited competition for the seller’s property—or in a table devoid of offers?

Buyers will also need to be informed of the possibility that an offer will be disclosed by the seller to third parties. A REALTOR® assisting a buyer in preparing an offer should let the buyer know of the possibility of the listing broker disclosing to other brokers not only the existence of the offer, but also the terms of the offer. Unfortunately, a buyer making an offer has no way to ensure that the terms of her offer will be kept confidential, unless the buyer obtains the seller’s signature on a confidentiality agreement before submitting an offer. For a more in-depth discussion on confidentiality agreements, see Attorney Robert Kutner’s article entitled “Disclosure of Competing Offers” in the March, 2006 issue of Bay State Realtor. REALTORS® should also remind buyers that while a listing broker can only disclose what a seller has authorized, absent a confidentiality agreement, the seller is free to disclose whatever he wants, including the terms of an offer such as purchase price, contingencies, etc.

In addition to representing sellers and buyers exclusively, REALTORS® often find themselves in the position of acting as dual agents. REALTORS® should warn prospective buyers that the existence and terms of their offers may be disclosed, unless the seller has specifically stated that offers should not be disclosed. If a prospective buyer asks about whether any offers are pending, he should be provided with all information that the seller has authorized the broker to disclose.

It would seem that a Seller’s authority to disclose information continues until withdrawn by the seller, unless the seller has authorized disclosure only on a specific occasion or for a specific transaction. Therefore, a REALTOR® should not have to ask a seller if she can disclose information each time an offer is received, so long as the seller has previously authorized disclosure. Conversely, if a seller does not authorize the disclosure of offers, a REALTOR® should not be required to question the seller each time an offer is received—unless the seller changes his mind and authorizes disclosure, the existence of offers cannot be disclosed.

Finally, REALTORS® should always be aware that their role is to advise the client, and understand that the decision whether to disclose is always the client’s to make. A REALTOR® who provides the client with a detailed and thorough explanation of the possible benefits and risks associated with disclosure will lessen the possibility of having a dissatisfied client or being the subject of an ethics complaint.