

focus on: Legal Affairs

By: Kelly Shonborn, IAR Senior Staff Counsel

OFFERS AND MULTIPLE OFFERS Q & A

On the Legal Hotline we regularly receive questions concerning many topics of concern to REALTORS®. The following are based on recent actual questions received through the Hotline. By no means are these the only issues of concern to members, so please let us know if you have any questions.



Q: The seller accepted an offer, but the earnest money check bounced. At about the same time that the check bounced, another offer came in. Is the first offer dead because the earnest money check bounced? Can the seller accept the second offer?

A: The seller should give the first buyers a reasonable but short period of time to make the earnest money check good. There may have been justifiable reasons (for example, bank error or incorrect addition or subtraction in the checkbook register) to explain the bounced check. Make sure the notice is in writing and make sure they understand that unless the check is made good in say, 24 hours, that the seller will consider the offer to be dead. At the same time, if the second offer is acceptable, it may be accepted as a back-up offer. Be sure that the acceptance is clear that it is a back-up offer and that it will become the primary offer if, in fact, the first offer is terminated.

Q: Is it legal to accept an offer without any earnest money even if the seller agrees to no earnest money?

A: Yes. With regard to earnest money constituting the consideration, we have taken the position that the mutual promises to buy and sell constitute sufficient consideration to support the contract and make it binding on both parties. As a practical matter, however, it may be foolish in the ordinary transaction to accept an offer without sufficient earnest money. Usually, it is in the seller's best interest to have as large an earnest money deposit as reasonably possible.

Q: Assume that a listing broker receives an offer which she is planning on presenting to the seller that same day. Before she does, she is notified by a cooperating broker that his buyer will be making an offer in the next day or so. Should the listing broker wait for the second offer to come in before presenting the first?

A: Under the Indiana license laws, the listing broker must present the first offer immediately upon receipt of the same. Because the listing broker owes fiduciary duties to the seller, she should notify the seller that another offer may be forthcoming. It should be the client's decision whether or not to wait on the second offer. Further, the listing broker will want to make sure that the first offer does not expire before the seller can accept or counter it.

Q: My seller is out of town, but has verbally told me to accept an offer that was received. Is this OK?

A: In Indiana, a contract for the sale of real estate is not enforceable unless it is in writing, which includes the signatures of both the buyer and seller.

Q: Since the seller is out of town and wants to accept the offer, is it OK for me, as his agent, to sign for the seller?

A: When an agent signs for their client, absent express written authority to do so (a/k/a Power of Attorney), the contract is not legally binding. Further, many principle brokers have strict office policies prohibiting this practice as it subjects the Broker to liability.

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Q: My buyers submitted an offer to a seller yesterday and now they say they have changed their minds. Is there anything I can do?

A: An offer or counteroffer may be withdrawn by the offeror so long as the withdrawal is delivered to the offeree(s) prior to acceptance and delivery by the offeree(s). Therefore, the buyers' written notification of withdrawal would need to be received by the sellers (receipt by the seller's agent would constitute delivery as well) before the seller accepts and delivers the buyers' offer in order for the withdrawal to be effective. This withdrawal procedure is the same for counter-offers.

Q: I have received a counteroffer on a listing. I know the sellers will not agree to the terms presented in the counteroffer and I have just received a new offer from a different buyer. Do I have to present the counteroffer to the sellers?

A: The rules of the Indiana Real Estate Commission require all licensees to communicate all written offers to their principals "immediately upon receipt of such offer" (876 IAC 8-2-2(a)). In addition, all REALTORS® are required by the Code of Ethics of the NATIONAL ASSOCIATION OF REALTORS® to present all offers "as quickly as possible". Therefore, all offers must be presented immediately whether they are good, bad, or indifferent, even if another offer is pending, and for that matter, even if another offer has been accepted. The only exception to this rule is when the seller and the listing broker have agreed otherwise in writing. It is proper for the listing broker and the seller to agree in writing that no offers of less than a certain price, without a certain amount of earnest money, or no land contract, etc., be submitted.

Q: I am representing a buyer who wrote an offer on a property and was awaiting the reply from the sellers when the listing broker informed us that another offer had been accepted. We didn't even know there was another offer on the table at the same. Doesn't the listing agent have an obligation to tell us that before the seller can accept another offer?

A: Not necessarily. Two conditions must be met before a listing agent has any duty to disclose multiple offers according to the NAR Code of Ethics Article 1, Standard of Practice 1-15. The first condition is that the seller must grant permission to the listing broker to disclose such information. The second condition is that the buyer or cooperating broker must ask the listing agent whether there are any other offers. Without the question of multiple offers being asked, the listing agent owes no duty to disclose.

Standard of Practice 1-15 goes on to say that, if authorization is given by seller to listing agent to disclose the existence of multiple offers AND buyer's broker inquires as to whether there are multiple offers, listing broker must also disclose, if asked, whether the other offer(s) were obtained by the listing licensee, another licensee in the listing firm, or by a cooperating broker.

Q: My seller received three offers on the same day. We provided a Multiple Offer Notification form to all three buyers telling them to submit their 'highest and best' offer by noon on Wednesday. One of the buyers immediately submitted a new revised offer and gave the seller until Tuesday at 5:00 p.m. to respond. Is it OK if my seller accepts that revised offer before the time expires for the other buyers to re-submit their offers?

A: In this situation, the seller should notify the other two buyers of the new deadline they are faced with and ask that they re-submit their offers sooner if they want to be considered along with the other revised offer.

Please contact the IAR Legal Hotline if you have any questions or concerns regarding the above. The IAR legal Hotline is available to managing brokers and designated agents from 9am-5pm, Monday-Friday at 1-800-444-5472.