

Akron Area Board of REALTORS® Professional Conduct Guide



Revised April 2006

INTRODUCTION

This information has been compiled to help members avoid controversies by establishing practical, recommended guidelines for business practices. Please note that these are only “professional courtesy” guidelines and do not constitute a complete statement of the rules, regulations and statutes governing the real estate profession in Ohio, nor are they to be construed as legal advice.

This manual and its advice are not meant to replace your company policies.

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AGENCY- PROFESSIONAL CONDUCT

There are many different policies that different companies may have regarding Agency. Those that pertain to you are specifically covered in your Broker's Consumer Guide which you must give to all buyers, having them acknowledge receipt in writing, prior to showing any property. The exception to this rule is showing a property at an Open House. You should have buyers sign acknowledgement of this form at first contact, or at least prior to any of the following situations:

1. Before showing the buyer a property.
2. Before having the buyer pre-qualified.
3. Before asking the buyer for any financial information.
4. Before discussing the writing of an offer.
5. Before submitting an offer on behalf of the buyer.

The Agency Disclosure Form, however, is now *transaction* based, and therefore the Agency Disclosure Form itself is not filled out until a buyer makes an offer on a property. It is not necessary to have a seller fill out the Agency Disclosure Form when listing the property.

Due to the fact that the form can be filled out in a variety of ways based on your Brokerage's Agency Policy, and the uniqueness of the situation, we will not detail the various ways to fill out the form. For specific information on filling out the form, see your Broker or Manager.

You may have questions in the day-to-day "field" operations regarding this form. Here are a few common Questions and Answers.

Q: I am showing a FSBO to a buyer that I represent. Do I have to give the seller a copy of my brokerage's "Consumer Guide?"

A: No. Only agents representing the seller must provide one to the seller. If you are acting as the buyer's agent, you are not required to give the seller a "Consumer Guide."

Q: I'm meeting a buyer for the first time to show a property. I forgot my Company's Consumer Guide to Agency. What should I do?

A: Ohio Agency Law dictates that you must give your Company's Consumer Guide to Agency and have a signed receipt by the consumer, in order to proceed in showing them property. If you do not, you are in violation of the law and may be sanctioned by the Division.

Q: I am going on vacation and another licensee in our brokerage will be appointed to represent my seller. When I return will that agent still be considered the seller's agent? Should my name be put on the form as well?

A: Yes, unless the parties agree otherwise. Putting both names on the form is ok.

Q: I represent a buyer who is interested in seeing a property. Another buyer that I represent also wants to see the same property. Is it a violation of my agency duties to show it to both of them?

A: No. Ohio license law specifically provides that this is not a violation of your agency duties. To make sure buyers understand this, you may want to include language in your Buyer Agency Agreement disclosing that you could potentially represent other buyers on

the same property. Such a provision should explain that you will keep the confidential information of each client in confidence and not disclose it to the other party.

Q: If a buyer's agent in my brokerage tells me confidential information about his client, does that make me the buyer's agent?

A: You would become bound to represent the buyer if you learn confidential information from the buyer's agent. If that buyer later wants to purchase one of your listings, you must act as a dual agent and cannot share that information with the seller.

Q: I manage property. Do I have to give a copy of my company's "Consumer Guide" to the owner? What about the tenant?

A: You are required to give the "Consumer Guide" to the owner before you market or show the rental property. The best time to do this is when you sign the Property Management Agreement. As to the tenant, you would only be required to provide him with a "Consumer Guide" if the property is commercial, industrial, retail or involves a residential lease over 18 months. If it is a residential lease of 18 months or less, you are not required to give the tenant a "Consumer Guide."

Q: How do I complete the Agency Disclosure Statement if I represent a buyer who wants to keep his identity confidential?

A: As the buyer's agent, you have a duty to keep the buyer's identity confidential if he so directs. In this situation, provide the buyer with a statement and have him sign his name. Maintain that statement in your file to show that you did provide a statement to the buyer. Do not give a copy of the statement to the listing agent, however, as it would reveal the buyer's identity. Instead, complete another form with the same information and sign it as "an agent for an undisclosed principal." Provide this statement to the listing agent, along with any offer the buyer makes. Another option would be to have the buyer appoint an attorney or a trustee to represent him in the purchase, and then have that attorney or trustee sign the statement.

Q: Can I refuse to present an offer if the cooperating agent fails to give me an Agency Disclosure Statement with the offer?

A: No. If time permits—for example, if the offer is not going to expire soon—you may wish to contact the cooperating agent to request the statement. However, you may not refuse or fail to present it until you receive the statement, as this may result in the seller losing a possible sale. Make sure you disclose to the seller the fact that you have not received the statement. Also, put notes in your file to document what has happened.

Q: What do I do if the seller or buyer refuses to sign the Agency Disclosure Statement?

A: In this situation you are required to note on the bottom of the statement the following: 1) the parties to whom the statement was presented; 2) the date and time the form was presented; 3) the fact that they declined to sign it; and 4) the reason they refused to sign it, if you know. You must also communicate what has occurred to either your principal broker or another management-level licensee in the brokerage that supervises you.

Q: What do I do if the reason the buyer or seller won't sign the form is because they don't agree to dual agency?

A: You must have the consent of both the buyer and seller to act as a dual agent. If either of the parties won't sign the Agency Disclosure Statement consenting to dual agency, then you cannot represent both parties. As an agent you need to notify your broker or

manager immediately. Your broker/manager has a few options. Usually the broker retains representation of the seller and notifies the buyer that they will be treated as a customer. If the buyer wants representation and your brokerage practices "split agency," the buyer can be referred to another agent in your brokerage. If they will not agree to that or your brokerage does not permit split agency, then the buyer will have to be referred to another brokerage or an attorney for representation.

EXPIRED LISTING SOLICITATION

Standard of Practice 16-2 of the NAR Code of Ethics states in part, "Article 16 is intended to recognize as unethical...telephone or personal solicitations of property owners who have been identified by a real estate sign, multiple listing compilation, or other information service as having exclusively listed their property with another agent and...mail or other forms of written solicitations of prospective clients whose properties are exclusively listed with another agent when such solicitations are not part of a general mailing but are directed specifically to property owners identified through compilations of current listings, 'for sale' or 'for rent' signs, or other sources of information required by Article 3 and Multiple Listing Service rules..."

One of the benefits of a computerized MLS is efficiency. But that benefit has the potential of being abused. An example is using the MLS computer to get a printout of expired listings. Some members are generating this list in order to immediately send out a mailer or letter soliciting the expired listing.

There is nothing inherently wrong with soliciting an expired listing. But agents must make sure that the listing is expired. Even though the computer may show that the property listed had expired, the property may have been re-listed, and therefore appear in the system under a new MLS number, either with the same office or with another office.

Why is it necessary to check to make sure the listing is expired? The Code of Ethics makes it clear in Article 16 that "Agents shall not engage in any practice or take any action inconsistent with the agency of other Agents."

In simpler terms, using the MLS computer to generate a list of what is assumed to be expired is prohibited unless every listing has been checked to be sure it is, in fact, expired.

Therefore, the following guidelines have been established:

WHAT YOU SHOULD DO TO SOLICIT EXPIRED LISTINGS:

After running a list of expired listings from the MLS computer, you must run the search program on each expired listing to determine if it has been re-listed. If so, you cannot solicit that listing.

If the agent refuses to disclose whether or not he or she has a valid listing, you may contact the property owner directly, per Standard of Practice 16-4: "Agents shall not solicit a listing which is currently listed exclusively with another broker. However, if the listing broker, when asked by the agent, refuses to disclose the expiration date and nature of such listing (i.e. an Exclusive Right to Sell, an Exclusive Agency, Open Listing, or other form of contractual agreement between the listing broker and the client) the agent may contact the seller to secure such information and may discuss the terms upon which the agent might take a future listing, or

alternatively, may take a listing to become effective upon expiration of any existing exclusive listing.”

After making all reasonable attempts to determine if the listing has expired and you have verified the seller is not on the do not call list, you may contact the seller directly. When contact is made with the seller, you must ask, at that first contact, if the seller has a contractual listing agreement with any agent. If so, you must end the conversation and not solicit the listing. If not, you are free to solicit the listing.

After checking the MLS search program and contacting the seller if the listing has expired, the following disclaimer must appear prominently in any written communication to the seller: If your property is currently listed with another agent, please disregard this notice. It is not (my/our) or (company name's) intent to solicit the listing of another agent.

Remember, soliciting expired listings which are not in fact, expired, is a violation of Article 16 of the Code. Conversely, agents who are going to re-list properties should make every attempt to ensure their listings are relisted prior to their expiration date. Keep in mind that, unless you are entering your listing directly into the computer, it may take a day or two for the listing to arrive at the MLS and be entered into the system.

CAUTION: Disregarding these guidelines could be a violation of both the Code of Ethics and the MLS Rules and Regulations.

OPEN HOUSE GUIDELINES

Agents should recognize that the buying public may be unaware of, and unconcerned with professional courtesies, procedures and ethics. The prospective buyer's interest is to find the most suitable property. Therefore, it is in the agent's best interest to explain to the customer/client the practices and procedures agents use to avoid conflicts. Many buyers are willing to follow "the rules" if they are aware of them and understand that their actions can make it difficult or impossible for you to provide the service they desire. The agents who successfully sell their abilities to the buyers, educate them to agent's customs and practices and ask for their loyalty will seldom find themselves in conflicts with other agents because of their customers' or clients' actions.

The following guidelines have been developed to assist the agents in maintaining proper professional courtesies as they apply to those situations. They will also help in establishing and recognizing procuring cause in relation to the unaccompanied prospect.

EXPLAIN TO PROSPECTIVE BUYERS

Prospective buyers should be cautioned at the earliest opportunity not to view homes (listed or open) unless you accompany them, or unless you have made arrangements in advance with the host agent holding the open house.

If the prospects desire to attend open houses unaccompanied by you and you are unable to call ahead, you should instruct them to ask the host agent upon their arrival on the premises,

PRIOR TO ENTRY, if the agent will agree to honor you without your presence during the initial showing. If so, they should record your name and company, as well as their own, on the guest register.

HOSTING AN OPEN HOUSE

It is a good business practice to determine whether the prospective buyer coming through the home is working with another agent. The open house agent may allow the prospect to see the property or to show it to him, but **MUST NOT** write an offer, discuss terms or financing, or show other properties with that prospect without first asking whether he is party to any exclusive representation agreement. If the prospective buyer affirms that he is party to such an agreement, then the open house agent is precluded from having any “negotiations” without:

- A. The buyer obtaining a release from the exclusive contract,
- B. The contract expiring, or
- C. Verification there is no exclusive contract.

If the open house agent fails to do this, then he or she is guilty of a license law violation as well as a Code of Ethics violation.

NOTE: It is not permissible for the open house agent to write an offer for the buyer even if the intention of the agent is to turn the whole deal back over to the other agent.

APPOINTMENTS

When setting an appointment to show a listing, first call the listing agent, the broker’s office, or follow instructions according to the information provided in the MLS. For security purposes, the listing broker may request your license number and/or client’s name.

Whether showing one property or many, if you are running behind schedule, it is a courtesy to call the listing agent or the listing broker’s office and inform them of your revised schedule. The seller can be notified of the change in scheduling. Always cancel all showing appointments made if the buyer cancels your appointment to show them properties.

The showing agent should leave a business card to let the seller know who showed the property and to verify the actual showing. The listing agent should have available the Residential Property Disclosure Form on the premises at the time the property is ready to be shown. This form is available online at www.com.state.oh.us/real. The agent working with the buyers should obtain a copy of the Residential Property Disclosure Form and Lead-Based Paint Disclosure Form at the time of showing. It is the responsibility of the showing agent to make sure all lights are turned off (unless already on), all doors locked, and the property is secure upon leaving. Follow up should include a call to each listing agent with feedback from the prospective buyer regarding the buyer’s reaction to viewing each property.

In the event a property is entered into the MLS system and has a delayed showing date, the property cannot be shown to ANYONE until that time. If the seller changes the “begin to show” date, any agent who has called to request a showing should be called and informed of the availability of the property for showings. This gives every agent the same opportunity and gives the seller more opportunity for offers to purchase.

GUIDELINE FOR HANDLING AND SUBMITTING OFFERS

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

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. These rules are simply suggested methods of practice and are not binding.

DEFINITIONS

“Acceptance” – When the offer or counteroffer actually becomes a binding contract. In order to have acceptance the offer or counteroffer must first be in writing and signed by all parties (including initialing all changes, additions or deletions). Acceptance occurs when the other party, or their agent to the transaction is notified that the offer or counter offer has been signed by the opposite party.

NOTE: All parties shall receive a fully signed copy of the contract. It is also a license law and ethics violation to fail to give proper copies of signed documents at the time of signing.

“Cooperating Broker” – That selling broker which earns a portion of the professional fee by functioning as the agent of the listing broker (subagent) or as the agent of the buyer (buyer's agent) or disclosed Dual Agent.

“Delivery” – The act by which a written offer is placed within the possession or control of a party.

“Listing Broker” – The real estate brokerage retained on an exclusive basis to represent the seller.

“Listing Agent” – The agent at the listing brokerage who is responsible to carry out the obligations of the firm to the sellers.

“buyers Agent” – The agent of a real estate brokerage who represents only the buyer.

“Dual Agent” – The agent or agents of a real estate firm acting as agents for both the buyer and seller in the same real estate transaction.

“Party or Parties” – The individuals, buyer and seller who enter into the contract. An agent is not considered to be a party.

AGENCY DISCLOSURE

The cooperating broker's agent or buyer's agent should deliver an Agency Disclosure Statement to the listing agent along with the purchase offer. This Agency Disclosure Statement should be signed by the seller (who would then get a copy) and returned to the cooperating broker or buyer's agent. Should the listing agent receive an offer without the Agency Disclosure Statement, the listing agent should attempt to get it from the cooperating broker or buyer's agent but in no event should the listing agent delay presenting the offer to the seller. If the listing agent cannot get this form then the listing agent should note on his or her file that the offer was received without the Agency Disclosure Statement and the attempts made to get the form.

The cooperating broker's or buyer's agent's company policy form need not be given to the listing agent.

EARNEST MONEY

Misrepresenting the Receipt of Earnest Money

Licensee should not represent receipt of earnest money on the offer to purchase when they do not have the earnest money in their possession at the time. Such a knowing misrepresentation of the earnest money constitutes a violation of Ohio Revised Code Section 4735.18(A). It should be brought to the attention of the listing agent or if there is none, directly to the seller.

Deposit of Earnest Money

Earnest Money should be deposited in the broker's trust account upon acceptance of the offer by seller.

Earnest Money Problems

Failure to notify the seller of the fact that the prospective buyers have stopped payment on an earnest money check, that the earnest money check has NSF or the buyer has failed to pay a note that was tendered for earnest money deposit is a violation of the Ohio Revised Code Section 4735.18(A)(5).

Return of Earnest Money

Earnest money should ONLY be disbursed when authorization in writing has been obtained from all parties to the purchase contract or when ordered by a court of law. Improper disbursement of earnest money has been found to constitute misconduct in violation of Ohio Revised Code Section 4735.18(A)(5).

LISTING FIRM PROCEDURES AND HANDLING OFFERS

The listing broker'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 broker shall set appointments for cooperating firms unless otherwise restricted by terms of the listing agreement. With the seller's permission and understanding, the listing broker may disclose that the property "is available" and may relay information in regard to other activity, including pending offers on the property.

The listing agent shall offer advice to the seller, but the seller has the sole right of final acceptance of an offer and only the seller can legally accept an offer or initiate a counter offer.

NOTE: Though it is legal in Ohio for an agent to be empowered with the authority to render decisions or sign documents on behalf of a client, (i.e. as a legal agent or power of attorney), it is recommended not to do so because of the strong conflicts of interest involved.

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, if possible, with an explanation of the merits of the terms and conditions of the offer and information regarding the ability of the buyer to fulfill the terms of the contract.

A faxed document when fully signed and accepted is binding. However, all parties should be given a fully signed copy of the agreement. Even if these signatures are not on the same purchase agreement.

NOTE: Though it is not necessary to have all signatures on the same purchase agreement form, many agents wish to get all parties signatures on the original purchase agreement even after the faxed copy has been signed and accepted. It is only recommended the original be signed by all parties if the faxed copy is illegible. The clients should be made aware the reason for replacing the faxed copies with originals is solely for clarity purposes and has no effect on the enforceability of the contract.

CAUTION: It is not an enforceable contract until either the original contract or a copy thereof has been signed and accepted by all parties. Copies of all completed documents should follow as soon as practical. Not doing so could put an agent at risk of violating Ohio Revised Code, Canons of Ethics, and Code of Ethics.

Cooperating agents should keep each other well informed of the status of a pending offer and must remain aware of their fiduciary responsibility to their client which includes: Loyalty, Obedience, Disclosure, Confidentiality, Care and Diligence, and Accountability.

NOTE: Agency Disclosure does not impact on the traditional means of communicating offers to sellers. When an Exclusive Right to Sell Agreement exists, the listing broker shall be responsible for presenting offers. However, the cooperating broker (subagent or buyer's agent) or his representative has the right to participate in the presentation to the seller or lessor of any offer he secures to purchase or lease. He does not have the right to be present at any discussion or evaluation of that offer by the seller or lessor and the listing broker. However, if the seller or lessor gives **written instructions** to the listing broker that the cooperating broker not be present where an offer the cooperating broker secures is presented, the cooperating broker has the right to a copy of the seller's written instructions. None of the foregoing

diminishes the listing broker's right to control the establishment of appointments for such presentations.

Agents should be aware that offers may be withdrawn at any time before acceptance. This is so, even if the offer contains such language as: "This offer will remain open for three days."

COOPERATION AND COMPENSATION

Duty of Cooperation – In accepting employment as a seller's agent, agents have a duty under Article 3 of the Code of Ethics to "cooperate with other brokers except when cooperation is not in the client's best interest."

Broker's Policy on Cooperation – The decision to cooperate or not to cooperate needs to be made with consent of the seller's client. Ohio real estate agency law requires that prior to performing any agency duties, the licensee must provide the Consumers Guide to Agency to the licensee's client (seller) and written disclosure of the company's policy on cooperation.

Broker's Policy on Compensation – The obligation to cooperate as stated above does not include an obligation of compensation. The listing broker is not required by any law, the Code of Ethics, or the Rules and Regulations of the Centralized Real Estate Information Services, Inc., (CRIS) to share commissions, fees or to, otherwise, compensate another broker.

However, Ohio Agency Law does require written disclosure to the seller, not only of the broker's policy on cooperation, but also whether the broker offers compensation to subagents or buyer agents.

Disclosure Through Multiple Listing Service – The rules of CRIS require that each listing filed specify the amount of compensation offered to buyer agents or subagents. Such offers are unconditional offers to compensate cooperating agents whose acts are the procuring cause of the sale.

Terms of Compensation – Cooperating brokers should determine the terms of compensation, if any, before beginning efforts to accept the offer of cooperation (See Standard of Practice 3-1).

Members are cautioned that listings not filed with the MLS usually contain no written record of offers of cooperation or compensation. To avoid disputes and misunderstandings, a written agreement between the brokers would be appropriate.

Changes in Compensation – The listing broker can change the amount of compensation to the other agent prior to the time such agent produces an offer to purchase/lease the property (See Standard of Practice 3-2).

Attempts by Cooperating Agents to Modify Offers of Compensation – Selling agents cannot use the terms of an offer to purchase/lease to attempt to modify the listing broker's offer of compensation to subagents or buyer's agents nor make the submission of an executed offer to purchase/lease contingent upon the listing broker's agreement to modify the offer of compensation (See Standard of Practice 16-16).

Requesting seller to Pay buyer Brokerage Fee – The fee charged by a buyer's agent is by agreement between the buyer's agent and the buyer's client.

The fee charged can be the same, less or more than the compensation offered. The buyer's agent can reject all, part, or none of the compensation offered by the listing broker and the buyer can provide in the offer to purchase/lease for the seller to pay all or part of the buyer brokerage fee.

Overpayment of buyer Brokerage Fee – If the amount of compensation including selling bonuses received by the buyer broker is greater than the previously agreed upon compensation, the buyer must be informed and must consent to the buyer broker receiving such additional fee. Without the buyer's consent, the excess fee must be returned to the buyer.

COOPERATING BROKER PROCEDURES

The cooperating broker shall promptly deliver all properly executed offers. The cooperating broker or agent shall have the right to be present when an offer he/she secures is presented by the listing broker or his/her agent to the seller, with permission of the seller.

Where the buyer is a client, 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 creditworthiness 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. In a multiple offer situation, the agent should attempt to obtain as closely as possible, identical information regarding all buyers.

Be certain 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. The cooperating agents should keep each other well informed of the status of an offer.

HANDLING MULTIPLE OFFERS

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 shall take place:

1. The listing agent shall notify the seller that he is in receipt of more than one offer. It could be construed as adverse to the seller's best interest to do otherwise. The agent should explain that any offerors may be notified of the presence of another offer. The listing firm may notify each agent of the existence of other offers and even the terms of the offers but should only do so **with the consent of the seller**. Agent is also required to disclose the source of offers (e.g., the listing licensee, another licensee in the same company, or a cooperating broker). It should be explained to the seller the positives and negatives of disclosing this type of information. This is done to 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).

The buyer may elect to amend his offer in writing or may ask the listing agent to proceed with the presentation of the terms originally submitted or a buyer may elect to revoke his offer from a competitive situation. (Offers may be revoked prior to the seller's

acceptance.) Changes, if any, should be made in writing since verbal contracts are not enforceable.

The listing agent should request a meeting with the seller to take place as soon as the listing agent is assured that he is in possession of each buyer's final terms and before the expiration of any offer in his possession. If it is impossible to meet with the seller prior to expiration of the offer, a written extension should be secured.

NOTE: The duties imposed by Standard of Practice 1-13 to inform clients about company policies on cooperation and compensation in cooperative arrangements were expanded. They now require that agents entering into agreements to represent buyers or tenants make these clients aware of the possibility that sellers or their representatives might not treat offers as confidential where confidentiality isn't required by law, regulation, or by the terms of a confidentiality agreement.

2. Present 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.
3. If offer #1 is nearing expiration and buyer #2 cannot be reached to notify him of the multiple offer situation, the seller may elect to:
 - A. Request an extension of time from buyer #1
 - B. Consider all offers, amended or otherwise, prior to the expiration of offer #1
 - C. Refuse in writing to accept 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 his offer.

RESPONDING TO MULTIPLE OFFERS

In a multiple offer situation, a seller should:

- A. Never counter more than one offer at a time.
- B. Never accept more than one offer.

The seller has the following choices:

- A. The seller may counter one offer, requiring a response before the expiration of another offer. In this situation, the seller awaits the response of the first party before acting upon offer of the second party.
- B. The buyer who is awaiting a response may revoke his offer anytime prior to the seller's acceptance.
- C. The seller may reject one offer and either counter or accept the other offer.
- D. The seller may reject all offers.

- E. 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 back-up is a counteroffer which requires the buyer's acceptance to be binding. Remember, when this "back-up" language is added to the original offer it constitutes a rejection of the original offer and the creation of a counteroffer on behalf of the seller, therefore, the buyer must agree to this additional term and initial the back-up language in the Purchase Agreement prior to acceptance.
- F. If seller doesn't want a backup offer, it is advised to notify all offerors in writing that their offer has been reviewed and rejected.

COUNTEROFFERS

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 and date 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 broker for delivery to the buyer.

When the seller makes a counteroffer, the agent working with the buyer has a professional responsibility to inform the listing agent, within the time limits of the contract, of the buyer's acceptance, rejection or counteroffer.

OFFERS RECEIVED WHILE A COUNTEROFFER IS PENDING

If at the time of receipt of a second offer, the seller has made an unexpired counteroffer that is in the hands of the first buyer or the cooperating agent, the listing agent shall:

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:

1. Revoke the counteroffer made to the first buyer (assuming the buyer has not yet accepted the counteroffer) 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.)
2. The seller may reject the second offer without affecting the pending counteroffer.

NOTE: A counteroffer 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 require notification to all parties. Should buyer #1 submit 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 may be notified, without disclosure of terms, upon consent of the seller.

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

3. The owner may wait to respond to second offer until a response to seller's counteroffer to the first purchase has been received, unless there's a deadline to second offer.

REVOCACTION

Revocation of an offer or counteroffer is considered legal when the seller's or buyer's instructions are communicated to the other party (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 is preferable, but where time is of the essence, an agent of the cooperating firm or the listing agent may be called upon to complete the chain of communication.

A written notice of revocation should follow the verbal notification.

BACK-UP OFFERS

The agent 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.

COMMISSION

There is required wording that should be added to the contract when the commission is reduced from what is published in the MLS as part of the negotiation.

“buyer and seller hereby acknowledge that the broker(s) has/have reduced the commission as part of the consideration to accept this contract.”

NOTE: It is an ethical violation for the selling agent to place in an offer a provision that modifies the offering of the listing broker as presented in the MLS, unless said modification is agreed upon by the listing broker prior to the preparation of the offer. Because reducing a commission constitutes something of value, it would be a prohibited inducement unless it is disclosed in the purchase agreement. To avoid disputes or misunderstandings with the client regarding the amount of the reduction, it is advisable that the agreement to reduce the commission be put in writing in an addendum to the listing contract. It is good practice that any reduction in commission be reviewed and/or approved by your broker/manager.

ACCEPTANCE (AS DEFINED ON PAGE 8)

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

The offer must be accepted in writing and the acceptance communicated to the parties. Delivery of a signed contract to the parties must be accomplished as soon as possible to avoid conflicts over the issue of acceptance.

THE SELLER should determine if the property is to be shown after the acceptance of an offer. It is advisable that the seller provide written authority to discontinue showings after an offer has been accepted.

GENERAL GUIDELINES

By statute in Ohio, all contracts for the purchase and sale of real property must be in writing and signed by all parties to be enforceable.

In order for a contract to be binding, the written acceptance must be communicated to the parties. The copies of the contract should be delivered to parties as soon as possible under the particular circumstances.

All parties should be provided with a legible copy of the agreement including addenda, if any.

Point out to a seller that any change to the language of the offer or counteroffer submitted rejects that offer and constitutes a new counteroffer which is only binding upon written acceptance of the buyer.

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 which 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. Do not counsel any party that legal advice is unnecessary or that your services are an acceptable substitute for legal advice.

Prior to full acceptance by the offeree of the contract, an offer or counteroffer may be revoked by either party by verbal notification to the agent of the other party. Verbal notification of revocation should 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 should be followed up in written form.

If time and date are critical to performance, offers and counteroffers should have an expiration date.

FAIR HOUSING

The agent shall carry out their duties as a real estate professional without regards to the race, color, religion, sex, ancestry, handicap, age, national origin or familial status of their customers, clients and/or associates. In regard to the aforementioned, the agent shall:

1. Sell, transfer, assign, lease, sublease, negotiate for the sale or rental of all housing accommodations.
2. Make truthful claims about a property being available for inspection.
3. Make the same terms and conditions for selling, transferring, renting, leasing or subleasing any housing or for providing any service in connection with the ownership or occupancy or use of any housing.
4. Refrain from indicating a preference, or setting a limitation, on any printed, published, circulated or advertised material relating to the sale, transfer, assignment, rental, lease, sublease, or acquisition of any housing unit.

5. Refrain from soliciting or inducing or attempting to induce or solicit a housing listing, sale, or transaction by representing that a change has or may occur with respect to the racial, religion, sexual, or ethnic composition of the block or neighborhood or area in which the property is located.
6. Refrain from discouraging or attempting to discourage the purchase by a prospective buyer of a housing unit, by representing that any neighborhood or area has undergone or might undergo a change with respect to the religious, racial, sexual, or ethnic, composition of the block, neighborhood or area.
7. Refuse to provide any services such as listing, selling, transferring, leasing, subleasing or renting any housing accommodation when the seller indicated an unwillingness to treat all prospects equally, without regard to their race, color, religion, sex, ancestry, handicap, age, national origin or familial status.
 - A. The agent will immediately notify the Board Office and notification will be provided to all agent offices whereby no agent will provide any of the aforementioned services.

PROCURING CAUSE

Basically, the concept of procuring cause is the standard used to determine who gets the selling portion of the real estate commission if there is a dispute between agents as to who sold the property. Exclusive buyer Agency determines who can act as the agent on behalf of the buyer under Ohio law. The important point to remember is that the agent who has the exclusive right under the law to represent the buyer is not automatically entitled to the commission.

7 Key Questions to Determine Procuring Cause

The majority of commission disputes hinge on disagreements over whether individuals contributed significantly to making a sale. In determining if a cooperating salesperson or broker is entitled to a commission, consider the following:

1. When and how was the original introduction (of the buyer to the property) made?
2. Did the original introduction start an uninterrupted series of events leading to the sale?
3. Did the broker/salesperson who made the original introduction maintain contact with the buyers?
4. Did the broker/salesperson engage in conduct that prompted the buyer to look elsewhere for assistance?
5. If more than one cooperating broker was involved, was the second broker/salesperson aware of the prior introduction of the buyer to the property?
6. Was the introduction of a second broker an intrusion into the transaction or the result of estrangement or abandonment by the original broker?
7. Did the cooperating broker initiate a separate series of events, not dependent on the original broker's/salesperson's efforts, that led to the successful transaction?

To help avoid procuring cause issues, agents should counsel buyers about practices which will help avoid this problem.

MEGAN'S LAW

Ohio's Sex Offender Registration and Notification Law, known as Megan's Law, was adopted in 1996 and amended in 2002 and again in 2003. Megan's Law requires individuals convicted of a sexually oriented offense to register with the local sheriff's office.

If the offender is subject to the community notification requirements, the sheriff is required to notify neighbors in writing of the offender within 5 days of the offender registering. Neighbors who will be notified include: a) all residences within 1,000 feet of the offender's residence which are not in a "multi-unit building" (more than 12 units with entry doors that open directly into the unit from a shared hallway); b) If a multi-unit building is within 1,000 feet of the offender's residence, a notice will be given to the building or condominium manager and a notice will be posted in each common entryway; c) If the offender lives in a multi-unit building, notice will also be given to all units that share a common hallway with the offender's unit.

Megan's Law prohibits an offender from establishing or occupying a residential property that is within 1,000 feet of any school.

Megan's Law does not address a property seller's or real estate licensee's duty to disclose to a tenant or buyer that a known sex offender lives in the neighborhood. It is impossible to say with certainty how a court would rule on this disclosure issue as some decisions state that information of public record does not have to be disclosed and other decisions indicate that this could be found to be material information that should have been disclosed. Due to the uncertainty, if the sheriff has notified the property seller, the cautious approach would be to disclose this information to the buyer or tenant. Of course, this issue and the brokerage disclosure policy must be discussed with the property seller and consented to. If the property seller does not consent, the broker must decide whether to comply with the seller's request not to disclose or decline to sell/rent the property due to the risk involved.

Many companies use either the purchase contract or the listing contract to advise potential buyers and sellers about Megan's Law.

STIGMATIZED PROPERTY

Can an agent be held liable for failing to disclose to a buyer that a murder or suicide took place on a property they have listed?

In general, a real estate agent has an obligation to disclose any latent defects to the buyer. An agent must also disclose any other latent fact of which they have knowledge that could be material to the buyer's decision to purchase the property. In the case of a murder or suicide, this event would probably not affect the physical condition of the property and would not constitute a latent defect. It could, however, be considered to be a material fact to some buyers. Therefore, to avoid the potential for a claim against both the seller and agent, it may be prudent

for an agent to err on the side of caution and to disclose the fact of a murder or suicide to a buyer. The agent should, of course, discuss the issue with the seller before doing so.

CLARIFYING AIDS DISCLOSURE

Although this fact may be material to some buyers, both HUD and the Ohio Civil Rights Commission have taken the position that AIDS is a handicap. Under federal and state fair housing laws, an agent may not discriminate against persons with a handicap. Therefore, it should not be disclosed that the person living in a property has or did have AIDS. Moreover, ORC Section 3701.244 provides that no person can be held liable for failing to disclose that information to a third person, unless such a disclosure is expressly required by law. And since law currently requires no such disclosure, an agent cannot be held liable for failing to disclose such information.

HANDLING COMMISSION DISPUTES AND UNETHICAL CONDUCT

One of the most important reasons to hold REALTOR® membership is to take advantage of the mediation, arbitration and ethics complaint procedures offered by all Boards of REALTORS®. Yet, most agents hesitate to use this very valuable service. If more agents understood the process and benefits of each, professionalism would improve dramatically.

Commission Disputes -- Since Ohio law requires the broker be paid the commission in a real estate transaction, only the broker/owner of a company can make the decision to mediate and/or arbitrate a commission dispute. The agents involved in the transaction serve as parties to and witnesses of the facts of the case. But, the broker/manager must be the person to agree to file to have the dispute resolved by the Board of REALTORS®. Brokers do have options:

Arbitration vs. Mediation? Both resolve commission disputes. Mediation is the less formal route and involves the use of a Mediation Officer. Mediation officers have received special training to bring out the facts of the case and establish an atmosphere for compromise. To participate in mediation, the brokers of the companies must voluntarily agree to use the service. A mediation officer is assigned to the case. The agents involved in the transaction participate in the mediation. Through a series of discussions, the mediation officer attempts to guide the parties to a compromised resolution to their dispute. When it is successful, mediation offers a win-win ending. A mediation agreement is signed—binding all the parties to the promises made during the mediation. Once signed, the agreement is final.

What happens if the mediation is not successful? You still have the right to file for and attend arbitration proceedings. All you are out is the time spent in mediation. You'd move on to have your dispute heard by a panel of trained arbitrators.

Arbitration – All parties are notified of the date, time and names of panelists. The Board can easily provide an unbiased panel of arbitrators since we have cooperative agreements with three different surrounding Boards of REALTORS®. Three panelists are chosen—with one acting as the chair.

An arbitration proceeding is formal with parties being sworn in to provide testimony. Evidence is presented and reviewed by the panelists. Both sides of the dispute are given plenty of time to present their reasons why they believe they are owed the commission. Below is some information you should know about how a panel conducts the hearing:

- There are no predetermined rules or assumptions regarding who should be entitled to the commission.
- Every arbitration must be heard on its own merit with the facts and evidence particular to that transaction being presented.
- Arbitration awards are not granted on the basis of an alleged ethical violation. Alleged ethics violations must be filed by either a member of the public or another agent—they can no longer be forwarded to Grievance Committee by an arbitration panel.
- Arbitration awards cannot violate the law in the State of Ohio.

What disputes can be heard? Whether it be a mediation or an arbitration, commission disputes arising out of the sale or lease of real estate may be heard by a Board of REALTORS®. The Grievance Committee will review the request to make certain it meets some minimum criteria—are the parties agents, did the transaction close, is the request filed within 180 days, etc. Once these standards are met, the case moves on to a mediation officer or a hearing panel.

Alleged Ethics Violations – Whenever a member of the public or an agent believes that another agent has violated the Code of Ethics, complaints may be filed at your Board. The process is simple and should be viewed as a way to improve the professionalism of our industry.

All complaints must be received in writing and must name the alleged Code violation. Most also include a letter that describes the alleged unethical conduct and facts of the case. Most also include copies of purchase agreements, agency disclosure forms and other addenda and agreements. Once received by the Board, the respondent – or person being accused of the unethical conduct – is asked to provide their version of what happened leading to the allegations. All this information is presented to Grievance Committee, whose function it is to determine whether the Board has a right and obligation to hear the case. Again there are standards, does it involve a real estate transaction, is the person a member of our Board, was it filed within 180 days, and IF TRUE, could the act violate the Code of Ethics. If these answers come back yes, it is moved forward to a hearing.

This hearing is very similar to an arbitration hearing. It is formal, involves an unbiased panel of three and it allows all sides to present their case. The most important role of the Board in an ethics hearing is to make certain all receive due process—which basically means it is conducted fairly and all parties have an ample opportunity to present their case, defend their actions, and question the other party.

Agents who have chosen real estate as their career should consider the tools of mediation, arbitration and ethics review as an important part of their duty as professionals. If you believe you are owed a commission that is not being paid, discuss the options of mediation and arbitration with your broker/manager. If you believe a fellow agent has violated the Code of Ethics, you owe it to the industry to help educate that agent. We should demand excellence. These tools help educate and improve the industry. Use them!