

## **Broker's Duty Regarding Multiple Offers** (Guidelines by NYSAR)

### **A. Overview**

Many real estate transactions involve a listing broker and cooperating brokers. Questions frequently arise regarding the proper course of action where there are multiple offers for a listed property. Confusion sometimes arises regarding rights and obligations of the brokers and the parties in the transaction, including the proper course of dealing where an initial offer is "in negotiation" and subsequent offers are submitted.

The proper procedure for handling multiple offers must be analyzed in the context of the broker's duties to the seller and the buyer. There are four sources of law pertaining to the broker-client and the broker-customer relationships:

1. License Law and Regulation
2. Law of Agency
3. Tort Law – misrepresentation and negligence
4. Code of Ethics

### **B. Identification of Broker's Client**

The first step in determining a broker's duties in a particular transaction is the identification of the broker's principal. The real estate broker is an agent, that is a person authorized by another to act for him, one entrusted with another's business. The party for whom the broker is acting as a fiduciary is the broker's "principal" or "client." In the most typical situation, this will be the homeowner. The other party to the transaction, typically the would-be buyer, is identified as the "customer."

### **C. Review of the Broker's Duties**

Under the Law of Agency the broker owes three basic fiduciary obligations to his principal:

1. Good faith and loyalty
2. Reasonable care and diligence
3. Disclosure of pertinent information

The broker's primary obligations to his principal co-exist with the broker's obligation to the third parties:

1. Integrity and fair business dealing
2. Proper care of deposits and purchase offer
3. Tort responsibility for verbal and written statements (fraud and misrepresentation)

In addressing a particular transaction, the broker must fulfill not only his duties as an agent, noted above, but also the requirements of the License Law, the Tort Law, and the Code of Ethics. Among other, the following precepts are important:

1. The License Law requires that a broker must be trustworthy and competent. Regulation 175.7 provides:

"a real estate broker shall make it clear for which party he is acting and shall not receive compensation for more than one party except with the full knowledge and consent of all parties."

2. The Tort Law imposes on all parties, including brokers, responsibility for misrepresentations. In addition, the broker's fulfillment of his obligations to his client can be analyzed under the rubric of negligence.

3. The Code of Ethics has a series of provisions pertaining to this matter including:

Article 1:

“When representing a buyer, seller, landlord, tenant, or other client as an agent, REALTORS® pledge themselves to protect and promote the interests of their client. This obligation of absolute fidelity to the client’s interests is primary, but it does not relieve REALTORS® of their obligation to treat all parties honestly. When serving a buyer, seller, landlord, tenant or other party in a non-agency capacity, REALTORS® remain obligated to treat all parties honestly.”

#### **D. Analysis of Broker’s Duties in Typical Situations**

With the foregoing as a legal framework, the following typical scenarios are provided for illustrative purposes:

**Scenario 1:** When several purchase offers are submitted to a listing office, what is the proper procedure for the listing broker to follow?

**Answer:** The broker’s fiduciary obligations require that the principal be advised of all available opportunities. Accordingly, a listing broker must promptly arrange for all offers to be presented to the homeowner. The listing broker should not withhold subsequent offers while the first one is “in negotiations.”

**Scenario 2:** When presented with several purchase offers, is the listing broker under any obligation to inform the cooperating brokers or their customers that theirs is not the only offer?

**Answer:** In the typical situation, both the listing broker and the cooperating broker are agents of the homeowner, obligated to serve his best interests. They thus have no affirmative duty to advise the customer, but any comments made thereto must be honest and accurate. Accordingly, the customers have no right to require that the listing broker or the cooperating broker inform them that theirs is not the only offer. It must be emphasized, however, that if a customer asks a broker regarding this matter, the answer provided must be forthright.

With respect to the cooperating broker’s right to know of competition, it must be remembered that a REALTOR® must treat all parties honestly. Experience indicates that generally it is in the seller’s interest to advise the cooperating broker and would-be buyer that there is competition for the property. Typically, however, the amount of the competing offer is kept confidential. The listing broker in accordance with his fiduciary obligations to his client (typically the homeowner) must make the determination whether to reveal (a) the fact of competition or (b) the amount. If there is a reason in the seller’s best interest not to reveal the existence of multiple offers, then, of course, the listing broker should keep the matter confidential. In making this determination it is appropriate for the listing broker to consult with the homeowner. If a cooperating broker feels that he has been unfairly treated regarding this matter, his remedy is to initiate a professional standards charge under various articles of the Code of Ethics.

**Scenario 3:** If an initial purchase offer is being negotiated by the listing broker and a second or third offer is then submitted to the listing broker, what is the proper procedure?

**Answer:** The listing broker’s obligations require that the principal be advised of all pertinent information. Accordingly, whether or not a prior offer is “in negotiation,” all subsequent offers should be promptly submitted to the homeowner.

**Scenario 4:** If an initial purchase offer has oral acceptance from the seller and the listing broker is then presented with a second or third offer, what is the proper procedure?

**Answer:** As in the foregoing scenarios, the principal is entitled to know all pertinent information. Prompt submission of all purchase offers is thus required.

**Scenario 5:** If an initial purchase offer is orally accepted by the seller, the purchaser is so advised, and then the listing broker presents a subsequent offer which the seller prefers, may the seller “back out” of the orally accepted offer and accept the second offer?

**Answer:** With respect to the seller’s obligation to sell the property, General Obligations Law §5-703(2) requires a written agreement embodying the essential terms, subscribed by the seller. Accordingly, the seller cannot be forced to specifically perform an orally accepted contract. In contrast, the seller may nevertheless be obligated to pay a brokerage commission with regard to the orally accepted deal, depending upon the type of commission agreement involved in the matter. If the first agreement provided that the commission is earned when the broker presents a “ready, willing and able” purchaser, the broker would be entitled to a commission provided he can prove that the buyer was in fact ready, willing and able. Where the commission was to be earned only “as, when and if” title passes and the initial, orally accepted deal did not close, no commission would have been earned.

**Scenario 6:** If an initial purchase offer is orally accepted, a written binder or purchase offer is subsequently signed by the seller, and then a second offer is presented, what is the proper role of the listing broker?

**Answer:** As with all of the foregoing situations, a listing broker should disclose all pertinent information to the seller. Since there is a writing involved in this scenario, there may be a binding contract under the Statute of Frauds. If the homeowner is interested in the subsequent offer, it would be appropriate for the broker to advise the client to consult with his attorney regarding his obligations. This will alert the homeowner to potential difficulties in regard to breach of contract and help avoid the broker being subjected to a charge of inducing a breach of contract in violation of Department of State Regulation 175.9

If the signed binder or purchaser offer satisfies the requirements of the Statute of Frauds, there is a contract to which the seller is bound. The REALTOR® will have earned his commission if his listing agreement provides a test of “ready, willing and able,” but will have to await the closing if an “as, when and if title passes” commission agreement has been utilized (see *Graff v. Billett*, 64NY2d 899).

**Scenario 7:** If an out of state seller orally accepts an offer, directs the deal to be taken to his attorney for the preparation of a contract and, thereafter, a second offer comes in, what is the proper procedure?

**Answer:** As with all the foregoing scenarios, the listing broker should submit all offers. No contract has yet been entered into satisfying the Statute of Frauds (General Obligations Law §5-703 [2]). At this juncture the buyer has no recourse against the seller. Similarly, the buyer has no recourse against the broker, since the broker is not the agent of the would-be buyer and has not misrepresented any material fact to the buyer, which he has relied upon to his detriment.

## **E. Summary**

In summary, the broker’s fiduciary obligations to his principal require that all offers be transmitted to the seller, no matter how low or how late. Throughout the term of the broker’s listing agreement the broker’s fiduciary obligations abide. In the typical arrangement, the broker continues to be the agent of the seller until the purpose of his agency has been accomplished: the property has been sold. This being the case, even where there is a signed contract for the property, the broker continues to be the fiduciary of the seller and, thus, continues to have the duty to advise the seller of all opportunities in the purchase of his premises. In order to help protect the broker against a charge of inducing a breach of contract, it is recommended that once an offer has been accepted in writing, the broker should advise the client in writing of the fact that the subsequent offer is being presented in order to apprise the client of all pertinent information but with the understanding that there may be contract rights involved in the matter. It is appropriate for the broker to recommend that the seller in such a situation consult an attorney regarding his obligations.