

Why Won't The Seller Respond?

One of the more common complaints that we hear on the hotline is from buyers' agents who suspect that the listing agent has not presented their client's offer to the seller. Buyers in multiple offer situations, who have often competed and lost out in prior multiple offer situations, often assume that they have a right to some type of response from the seller. These buyers express their frustration to their buyers' agent and the buyers' agents, in turn, often pass on that frustration to the hotline.

BY GAIL A. ANDERSON, ESQ.
MCCLELLAND & ANDERSON, LLP

Realtors® who have called the hotline with this problem are very familiar with the analysis:

A seller who receives an offer, can accept, reject or counter that offer. In addition, the seller can choose to do nothing. There is no requirement that a seller ever acknowledge receipt of the offer. A buyer can request that the seller respond in writing, however, the seller has no obligation to do so.

In our experience, no one is very happy with this response, particularly the cooperating agent whose buyer-clients are beginning to suspect that their agent is either incompetent or simply does not have their best interests in mind.

In an effort to assist buyer's agents who find themselves in this situation, several years ago Michigan Realtors® put together a "Primer on Multiple Offers." This brochure, which is available on Mirealtors.com, was expressly written for buyers and is intended to explain the law as it relates to multiple offers. The idea behind the brochure was that buyer's agents might find it helpful to have something "official" to give to their buyer-clients that explains the rules on offer and

acceptance, including, for example, the rule that the seller has no legal obligation to respond to their offer.

NAR must have received some of these same complaints because beginning in 2019, the NAR Code of Ethics will require listing Realtors® to confirm in writing that an offer was submitted to the seller if the cooperating broker who submitted the offer so requests. The listing Realtor® must respond in the affirmative unless the sellers have provided written notification waiving their listing agent's obligation to present the offer. A listing agent who fails to comply with this requirement may be found to be in violation of Article 1 of the Code of Ethics.

It seems unlikely that this new ethical obligation will entirely satisfy buyers' concerns. Keep in mind that the written confirmation will come from the listing agent and not the seller. Suspicious buyers may feel that without anything directly from the seller, they have no way of knowing whether or not the listing agent is telling the truth. Remember, the Code of Ethics already requires Realtors® to submit all offers and counter-offers until closing unless the seller has waived this obligation in writing. The new requirement simply requires



the listing Realtor® to confirm in writing that he or she has done so. Moreover, the exemption applies whenever the seller has provided the listing Realtor® with notification waiving the obligation to present all offers; it does not require the listing Realtor® to provide copies of that seller's written waiver to the cooperating agent. If your buyers did not believe the listing broker when he told you verbally that their offer has been submitted (or that the seller waived that requirement), it seems unlikely that your buyers will believe the listing broker just because he says so in writing.

As an aside, remember that many listing contract forms used in Michigan, including MR's form, contain a provision whereby the seller agrees that the listing Realtor® will not present any additional offers after the seller enters into a binding purchase contract. Although the ethical obligation speaks of a duty to present all offers "until closing," presumably a seller who has signed such a listing agreement form has waived the listing agent's ethical obligation to present all offers "until closing."

While the new ethical obligation is not perfect by any means, there is really not much more that NAR can do to address this issue. Sellers are not regulated. Neither NAR nor anyone else can require sellers to reject all offers in writing. Moreover, even if a listing agent did return every rejected offer signed by the seller, it is easy to imagine how a disappointed buyer might still not be satisfied that the transaction was aboveboard unless he was explicitly told why his offer was rejected and how his offer compared to the successful offer.

As a practical matter, it seems unlikely that listing agents are withholding offers from their seller-clients with any frequency. In addition to having an ethical obligation to present all offers, Michigan licensees are also required to do so under the Occupational Code (at least until the seller is under contract). And, listing brokers owe a fiduciary duty to bring all offers to the seller. As Realtors® are well aware, breaching this fiduciary duty may result in the forfeiture of their right to a commission and, in addition, a potential damage claim should the seller suffer damage as a result of

the listing broker's failure to submit a particular offer. Buyers who are generally unfamiliar with the process and thus suspicious may assume that there is something nefarious going on if the seller does not acknowledge receipt of their offer in any way. On the other hand, Realtors® who are familiar with the process understand that this is unlikely to be the case and should do their best to assuage the suspicions of their buyer-clients.

While we are on the topic of multiple offers and disappointed buyers, in addition to providing buyers with a copy of the Primer on Multiple Offers, there are a few other steps that you, as a buyer's agent, can take in an effort to assist your buyer-clients to better understand (and trust) the negotiation process.

First, if the listing agent calls you to advise that the seller has accepted your buyer-clients' offers, do not advise your clients that they have a deal unless and until the written acceptance is actually delivered to you. As Realtors® are well aware, in order for there to be a binding contract, the acceptance must be actually delivered. A buyer's agent who advises his or her clients that they have bought


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the home of their dreams based on a phone call from the listing agent will be in a very awkward situation if the sellers subsequently change their minds and accept another offer.

Second, remember that a text or email from the listing agent stating that the seller has accepted your clients' offer is no more binding than a telephone call from the listing agent stating the same. While it is true that the law allows parties to contract electronically, the law still requires a signature from the actual party to the contract, in this case, the seller. A text or email from the listing agent notifying you of her seller-clients' acceptance is not sufficient (unless the actual signed contract from the seller is attached).

Third, make certain that your buyer-clients understand that even if the sellers' counteroffer contains a deadline for a response, the sellers can revoke their counteroffer at any time prior to your clients' acceptance of that counteroffer. Buyers who

rely on the fact that they have a stated period of time in which to make a decision on a counteroffer are going to be very surprised – and very unhappy – if the counteroffer is rescinded prior to the stated deadline.

Fourth, if, in the interest of time, the parties are working out the details of the transaction verbally, make certain that your buyer-clients understand that regardless of what is said, there is no enforceable contract unless and until the agreement is reduced to writing and signed by both parties. Oftentimes, these verbal back and forth negotiations are very stressful and last for several days. Imagine the disappointment of a buyer who has lived through such a negotiation and is relieved to finally have a deal, only to find out later that the seller is moving forward with a different buyer and that there is nothing she can do about it.

Fifth and finally, if you are going to conduct business electronically, do not agree to follow up with a

paper copy. If you email a signed contract that indicates that “originals to follow,” you may be creating ambiguity as to when the contract becomes binding – i.e., whether upon transmission of the electronic signature or upon delivery of the original. To avoid any confusion, select one, and only one, method of delivery.

In conclusion, buyers who compete and lose out in a multiple offer situation are always going to be disappointed and frustrated. There is nothing that can be done about that. What Realtors® can do, however, is try and make certain that their buyers better understand (and trust) the negotiation process so that if they do lose out on a home, they do not immediately jump to the conclusion that they were wronged in some fashion. Remember that if you, as a buyer's agent, express confidence in the negotiation process and in your fellow Realtors®, it is more likely that your buyer-clients will as well. ●