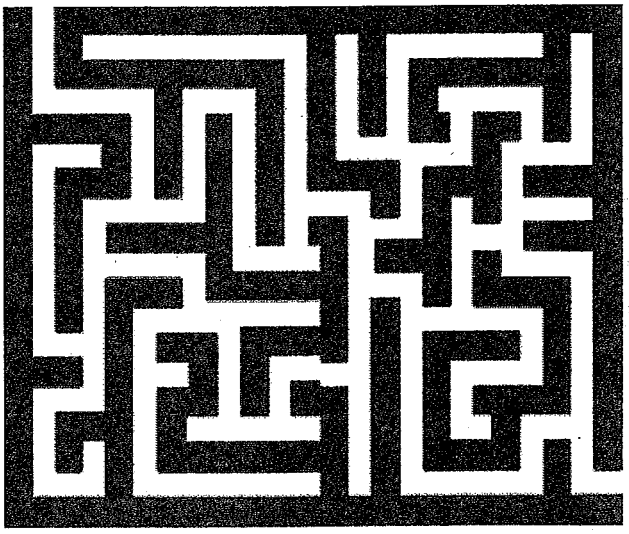
THE CONTRACT MAZE



A real estate elective course designed to navigate the intricate details and elusive question of "When does an offer become a contract?"

Created by:

George Bell
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The CONTRACT MAZE

This real estate elective course is designed to navigate the intricate details and often elusive question of **"When does an offer become a contract?"**

Though the answer to this "basic" question may appear obvious, there have been instances where real estate agents learned almost too late the legalities of this question. For example, the N.C. agent who "sold" one house to three different buyers in one day! And all because he did not understand the potential power of initials on a contract.

NCREC Course: 2430

v 19.3

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ABOUT THIS ELECTIVE COURSE

The Contract Maze

A real estate elective course designed to navigate the intricate details and elusive question of "When does an offer become a contract?"

Each real estate licensee should be familiar with the concepts of basic contract law, especially real property contract law. However, the above caption seems to appropriately capture the simplicity of a subject that can become very complex.

For example, most everyone knows that when a prospective buyer presents an offer to a seller that the seller has the option of either (1) accepting the offer; (2) rejecting the offer; or (3) submitting a counteroffer to the prospective buyer.

Most everyone in the real estate business also is aware of the following formula:

Offer + Acceptance + Communication = Contract

However, the reality of the legal concept that underlies this formula isn't as straightforward as it may appear. After all, what constitutes a valid offer? Yet better, what constitutes a valid acceptance? And yet even better, what constitutes a valid communication of an offeror's acceptance?

When considering these questions, one also must consider the impact of using electronic equipment, such as fax machines, voice mail, and email, in regards to the issue of valid communication.

The primary objective of this course is to clearly and definitively address, among other things, each of these issues as they relate to today's fast paced world of business.

In summation, this is a course that attempts to navigate the maze of contract law by dissecting its intricacies and relating it to real estate contracts and the everyday practice of real estate.

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Knowledge Quiz Number ONE

Match the legal terms listed below with its corresponding definition by placing the letter of the term in the space before each definition.

A: Offer **B:** Counteroffer **C:** Multiple Offer **D:** Contract

E: Back-Up Offer **F:** Offeror **G:** Offeree **H:** Statute of Frauds

I: "Time Is Of The Essence" **J:** "Reasonable Period of Time"

_____ 1. An agreement between two or more parties to do or not to do a thing or set of things. Also, an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law.

_____ 2. An offeree's new offer that varies the terms of the original offer and therefore, rejects the original offer

_____ 3. An English statute enacted in 1677 declaring certain contracts judicially unenforceable (but not void) if they are not committed to writing and signed by the party to be charged. A statute designed to prevent fraud and perjury by requiring certain contracts to be in writing and signed by the party to be charged.

_____ 4. The act or an instance of presenting something for acceptance. A display of willingness to enter into a contract on specified terms, made in a way that would lead a reasonable person to understand that an acceptance, having been sought, will result in a binding contract.

_____ 5. When more than one offer exists on a property at the same time.

_____ 6. An offer accepted by a seller when there already exists a contract.

_____ 7. One who makes an offer to purchase or offer to sell.

_____ 8. A phrase often included in a contract that requires punctual performance of all obligations in the contract. If such a clause is included and the obligation(s) is not performed, the failure to perform is a breach of the contract.

_____ 9. A fair, proper, or moderate period for which a contractual obligation, especially one relating to dates, may be extended.

_____ 10. One who receives an offer to purchase or offer to sell.

NOTE: Each of these definitions are from *Black's Law Dictionary, Seventh Edition*

Knowledge Quiz Number TWO

Match the legal terms listed below with its corresponding definition by placing the letter of the term in the space before each definition.

A: Enforceable **B:** Unenforceable **C:** Vendor **D:** Vendee

E: Valid **F:** Void **G:** Voidable **H:** Liquated Damages

I: Specific Performance **J:** Compensatory Damages

_____ 1. Legally sufficient. A contract that is fully operative in accordance with the parties' intent.

_____ 2. Of no legal effect. A contract that is of no legal effect, so that there is really no contract in existence at all.

_____ 3. Valid until annulled. A contract that can be affirmed or rejected at the option of one of the parties; a contract that is void as to the wrongdoer but not void as to the party wronged, unless that party elects to treat it as void.

_____ 4. A seller of real estate.

_____ 5. A purchaser of real estate.

_____ 6. (Of a contract) valid but incapable of being enforced. A valid contract that, because of some technical defect, cannot be enforced. A contract having some legal consequences, but that may not be enforced.

_____ 7. Any agreement, such as a valid contract, in which the parties to it can be compelled to perform by a court of law.

_____ 8. An amount contractually stipulated as a reasonable estimation of actual damages to be recovered by one party if the other party breaches.

_____ 9. Damages [awarded by a court] sufficient in amount to indemnify (reimburse) the injured person for the loss suffered.

_____ 10. A court-ordered remedy that requires precise fulfillment of a legal or contractual obligation when monetary damages are inappropriate or inadequate. In essence, this remedy enforces the execution of a contract according to its terms.

NOTE: Each of these definitions are from *Black's Law Dictionary, Seventh Edition*

REALTOR® Code of Ethics
Required Learning Objectives in every Two-year Cycle:

At the conclusion of this program, each licensee will be able to:

1. Identify at least two aspirational concepts in the Preamble to the Code of Ethics, describe the concept of general business ethics and identify how the Code of Ethics compares and contrasts with the concept of general business ethics.

2. Describe the concepts of at least two of the following Articles of the Code of Ethics:
1, 2, 3, 9, 11, 12, 16 & 17.

3. Identify possible violations of the Code of Ethics, specifically related to at least one of the two Articles selected in Objective #2 after participating in interactive learning methods such as case studies, quizzes, role play, and group discussion of fact scenarios.

4. Briefly describe the professional standards enforcement process of the board or association.

Aspirational Objectives in the Preamble: REALTOR® Code of Ethics

Becoming and remaining informed
REALTORS® will find it difficult to advise clients and customers properly if they do not know the requirements and limitations imposed by laws impacting upon a property or its owner.

Requests for opinions and unsolicited criticism
A REALTOR® is not precluded from responding to a request for an opinion as to a competitor's business practices in general, or a real estate transaction in particular. If the REALTOR® deems it appropriate to respond, the REALTOR® should provide the opinion with strict professional integrity and courtesy (i.e., provide objective, reliable information in a professional manner).

Active participation in enforcement of law, regulations and the Code.
If the REALTOR® becomes aware of any practice damaging to the public or which may bring discredit upon the real estate profession, the Preamble encourages the REALTOR® to bring such actions to the attention of the State Real Estate Commission.

Exclusive representation of clients
REALTORS® should urge the exclusive listing of property unless contrary to the best interest of the owner. This prevents dissension and misunderstanding and assures better service to the owners and lessors.

Sharing knowledge and experience
This concept encourages a high standard rarely established by business and professional groups. As a general rule, business competitors do not share the lessons of their experience with each other for the benefit of the public. Rather, such experience is zealously guarded lest it fall into the hands of competitors. But REALTORS®, although intensely competitive with each other, at the same time cooperate with each other in the best interest of clients and customers. In cooperative transactions, it is desirable that the combined professional abilities and talents, as well as the shared commitment to high standards of conduct, prevail. This cooperation benefits clients and customers.

Avoidance of unfair advantage
REALTORS® who care for the interests of every individual involved in a real estate transaction are not apt to take any unfair advantage. REALTORS® who consider all points of view are not likely to take unfair advantage. Good relationships and good results in real estate matters are commensurate with good communication between principals, agents, and cooperating brokers.

SECTION ONE

BASIC LEGAL CONCEPTS

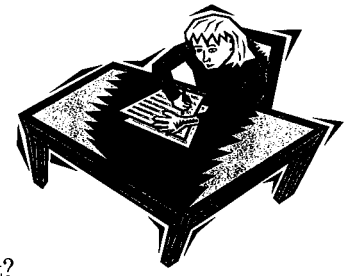
Before embarking upon a journey to discover the intricacies of the wonderful world of offers, counteroffers and acceptance, thus resulting in a contract, we first must understand several basic legal concepts that the North Carolina courts have set forth in the form of case law. These concepts address such basic, yet diverse, concepts as what constitutes a "signature" and when is an electronically submitted signature valid. Are you ready? Are your bags packed? Let's take a journey!

REQUIREMENT for CONTRACT

A contract is a deliberate agreement between two or more parties to do or refrain from doing a particular act. To be enforceable in a court of law a contract must meet four basic legal requirements. These are:

1. The parties must be competent, which is comprised of three things:

   a. _____, at least _____;
   b. _____; and
   c. _____.



2. A contract must be for a lawful purpose.

3. A contract must be supported by legal consideration.

   Q: What is the consideration in the NCAR Offer-to-Purchase & Contract?

4. The parties must mutually agree as to the terms of the contract.

Q: What is missing? Don't contracts have to be in _____ ?

While *all* contracts *should* be in writing, only those contracts which fall under the scope of the statute of frauds, which declares that certain contracts are judicially unenforceable (but not void) if they are not committed to writing and signed by the party to be charged, *must* be in writing.

Specifically, the N.C. Statute of Frauds reads, in part, "All contracts to sell or convey any lands, ... or any interest in or concerning them, ...and all leases and contracts for leasing lands exceeding in duration three years from the making thereof, shall be void unless said contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized."

SUMMATION: The N.C. Statute of Frauds requires *all contracts for the sale of real property to be in writing* if they are to be enforceable.

REQUIREMENT for SIGNATURE

The statute of frauds reads, in part, "All contracts to sell or convey any lands, ... shall be ... put in writing and ***signed*** by the party to be charged therewith, or by some other person by him thereto lawfully authorized." This appears quite clear!

A signature ***is*** required on an offer to purchase and sales **contract**. However,

Q-1: Is a signature required on an offer? _____

Q-2: Is a signature required on a counteroffer? _____

WHAT about the part that reads: "...signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized [by him to sign]."

Q-3: Does this mean that a real estate agent can lawfully sign a document on the behalf of his/her principal?

A contract or memorandum may be signed either by the party to be charged or by that party's agent! It is only "the party to be charged," the party against whom relief is sought, the defendant (in the event of a lawsuit), who must have signed the contract or memorandum in order for it to be enforceable. While the party who does not sign a written contract or memorandum may not be bound, the party who does sign is obligated on the contract.

NOTE: In the event a real estate agent signs a contract or memorandum on behalf of his/her principal, the party whom the agent does *not* represent may or may not have legal recourse against the agent, but surely would have legal recourse against the other party (the principal) in the contract. In turn, the agent's principal would have legal recourse against the agent if the agent exceeded his authority or otherwise lawfully wronged his principal.

Specifically, *the standard NCAR sales contracts do **NOT** confer authority upon a real estate agent to execute documents on the behalf of his/her principal/client.* When such authority is needed the principal and agent should consult an attorney for the preparation and execution of the necessary authorizing documents.

There have been a few instances where the N. C. courts have produced what appears (we do not have all the details here) to be some rather peculiar decisions regarding the issue of signature, a party's obligation to convey land, etc. Here are four such [historic] cases:

CASE # 1: In the case of Mizell v. Burnett, 49 N.C. 249 (1857), the court stated, "...if one agrees in writing to convey land in consideration of a verbal promise of the other party to pay the price, the contract is binding on the vendor (seller), although the vendee (buyer) may avoid the obligation on his part if he chooses to protect himself under the provisions of the statute."

INTERPRETATION: In this case the court said that even though the agreement to purchase and sale was verbal (not in writing as required by the statute of frauds) that the seller was bound to sell his property if the buyer was willing to pay the agreed upon price. However, it also said that since the agreement was not in writing that it was voidable by the buyer and that he could "walk away" if he desired.

CASE # 2: In the case of Reichler v. Tillman, 21 N.C. App. 38, 203 S.E.2d 68 (1974), where Mr. Tillman and Mrs. Tillman, as husband and wife, owned land as tenants by the entirety, and where husband entered a contract to sell the property "belonging to Ted Tillman," referring to the "seller" in the singular, as if only Mr. Tillman was the owner. The court nevertheless held that subsequent oral evidence (parol-evidence was admissible) showed that Mrs. Tillman (the wife) had made Mr. Tillman (the husband) her agent to contract to sell the land belonging to the husband and wife as tenants by the entirety.

INTERPRETATION: Mr. and Mrs. Tillman owned property as husband and wife. Mr. Tillman [only] signed a contract to sell the land. Mrs. Tillman later stated that even though she did not sign the contract it *was* her intention to sell the land under the terms of the contract. The courts interpreted Mrs. Tillman's oral evidence of agreement to the terms of the contract to mean that Mr. Tillman was acting as her agent.

[**NOTE:** The parol-evidence rule is the principle that a writing intended by the parties to be a final embodiment of their agreement cannot be modified by evidence that adds to, varies, or contradicts the writing. This rule operates to prevent a party from introducing extrinsic evidence of negotiations that occurred before or while the agreement was being reduced to its final written form.]

CASE # 3: In the case of Devereux v. McMahon, 108 N.C. 134, 12 S.E. 902 (1891), the initials "D.S.C." were held to mean "Solomon Davis." The person who placed these initials on a legal document testified "...that is my name, D.S. for Davis, C. for Solomon. That is the way I sign it. The rest was put there merely to fill in ..."

INTERPRETATION: In this case the court held that affixing one's handwritten name in the form of a "signature" is not the only method by which it may be considered "signed." The court also indicated that a contract or memorandum may be considered "signed" when "the party to be charged" with the document impresses his name on the paper by any of the known modes of writing, printing, lithographing, or other mode, provided the same is done with the intention of signing.

CASE # 4: In the case of Yaggy v. B.V.D. Co., 7 N.C. App 590, 173 S.E.2d 496 (1970), the court held that a teletyped or printed name of a vendor (seller) on a telegram constituted a "signing" of the telegram as a memorandum sufficient to satisfy the Statute of Frauds.

INTERPRETATION: As will be addressed under the subject of 'Acceptance of Offer', it is NOT a legal prerequisite that an offer and acceptance be on the same piece of paper. In this case the court held that the name of "the party to be charged" (along with testimony presented during the trial) indicated that the message of acceptance contained in the telegram constituted a binding contract.

WHAT is a SIGNATURE?

The Webster dictionary defines "signature" as "the name of a person written by himself."

Black's Law Dictionary (7th edition) defines "signature" as (1) a person's name or mark written by that person or at the person's direction. (2) any name, mark, or writing used with the intention of authenticating a document.

The Restatement (Second) of Contracts § 134 (1979) states "The signature to a memorandum may be any *symbol* made or adopted with an intention, actual or apparent, to authenticate the writing as that of the signer." [Emphasis added]

Thus, a signature may appear in a variety of forms. While preferred, it is not legally necessary for a formal signature to be written (signed) "by the party to be charged" with the terms of a contract. N.C. case law has shown that a "signature" may take the form of a cross mark (a.k.a. an 'X') or any other symbol, including, but not limited to, initials.

PLACEMENT of SIGNATURE

It is ***not*** legally necessary for the "signature" of "the party to be charged" with the terms of the document to "sign" the document in any particular place, even when there is a "signature line". It may be legally sufficient for the "signer's signature" to appear anywhere on the instrument. However, the location of one's signature may indicate that the signer only agreed to a portion of the instrument's terms.

NOTE: When a contract provides "a place for a signature" it is a good practice for each signer to sign in the designated place(s).

This subject will be addressed further under the subject of 'Acceptance of Offer', this issue can become very important when initialing changes on offers and counteroffers.

NOTE:

As of July 1, 2015, several of the NCAR forms, including the Offer to Purchase and Contract, were revised in an attempt to enhance the understanding that any "missing initial" at the bottom of any page of the contract, in and of itself, in no way invalidates the legality of the contract.

(g) "**Effective Date**": The date that: (1) the last one of Buyer and Seller has signed or initialed this offer or the final counteroffer, if any, and (2) such signing or initialing is communicated to the party making the offer or counteroffer, as the case may be. The parties acknowledge and agree that the initials lines at the bottom of each page of this Contract are merely evidence of their having reviewed the terms of each page, and that the complete execution of such initials lines shall not be a condition of the effectiveness of this Agreement.

REALTOR® Code of Ethics

Article 9

REALTORS®, for the protection of all parties, shall assure whenever possible that all agreements related to real estate transactions including, but not limited to, listing and representation agreements, purchase contracts, and leases are in writing in clear and understandable language expressing the specific terms, conditions, obligations and commitments of the parties. A copy of each agreement shall be furnished to each party to such agreements upon their signing or initialing. (Amended 1/04)

Standard of Practice 9-1

For the protection of all parties, REALTORS® shall use reasonable care to ensure that documents pertaining to the purchase, sale, or lease of real estate are kept current through the use of written extensions or amendments. (Amended 1/93)

Standard of Practice 9-2

When assisting or enabling a client or customer in establishing a contractual relationship (e.g., listing and representation agreements, purchase agreements, leases, etc.) electronically, REALTORS® shall make reasonable efforts to explain the nature and disclose the specific terms of the contractual relationship being established prior to it being agreed to by a contracting party. (Adopted 1/07)

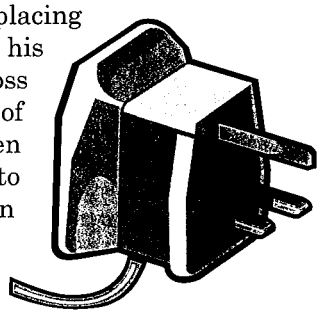
SECTION TWO

ELECTRONIC DOCUMENTS & SIGNATURES

SUBMITTING "SIGNED" DOCUMENTS ELECTRONICALLY

With the rapid development during the 1990s of the electronically based business transaction, much attention has been devoted to the subject of electronic contracts and its application to traditional contract law. While the outcome remains uncertain, the following addresses developments in this arena to date.

CASE LAW RE: MECHANICAL REPRODUCTIONS: In the 1976 case of State v. Watts, 289 N.C. 445, 222 S.E.2d 389, the court had to address the question of whether or not a mechanical reproduction could constitute a valid and legally binding "signature". The N.C. Supreme Court stated: *"In regard to a signature, it is the **intent** rather than the form of the act that is important.* While one's signature is usually made by writing his name, the same purpose can be accomplished by placing any writing, indicia or symbol which the signer chooses to adopt and use as his signature and by which it may be proved; e.g., by finger or thumb prints, by a cross or other mark, or by any type of mechanically reproduced or stamped facsimile of his signature, as effectively as by his own handwriting. ...A signature has also been defined as that act of putting down a person's name at the end of an instrument to attest its validity, any mark or sign made on an instrument or document in token of knowledge, approval, or device one may choose to employ as representative of himself. Stated in greater detail, in legal contemplation 'to sign' means to attach a name or cause it to be attached by any of the known methods of impressing the name on paper with the intention of signing it.



A signature consists of both the act of writing the person's name and the intentions of thereby finally authenticating the instrument." [Emphasis added]

CASE LAW RE: FAX TRANSMISSIONS: There is no known N.C. statute or case law to date that addresses the subject of the validity of a "faxed" legal document and more specifically the validity of a faxed signature. However, based upon the N.C. Supreme Court statement listed above, there appears to be ample reason to believe that a faxed signature, affixed with the intent to bind "the party to be charged" with the terms of the document, would survive any challenge to the contrary. However, in the 1999 Oklahoma Appellant case of Osprey v. Kelly-Moore Paint Co., Inc., (984 P.2d 194, 1999 OK 50) the court addressed whether or not a faxed delivery of a written notice renewing a commercial lease was sufficient to exercise the timely renewal option of the lease. The court concluded, "Under the facts presented, we hold that it is."

NOTE: The topic of "when does a faxed offer become a contract" will be addressed under the subject of "Acceptance of Offer".

CASE LAW RE: E-MAIL TRANSMISSIONS: Electronic mail, or email, poses a potentially different issue. Among other things, the terms and conditions of a legal document transmitted via email has the potential of more easily being altered. However, alteration of the terms and conditions of a document is a separate issue from the validity of the signatures of an emailed document. With respect to the later, it appears that the mystery may have been resolved, in part, with the passage of laws in both the N.C. Legislature and the U.S. Congress.

N.C. ELECTRONIC COMMERCE ACT: This Act, which became effective January 1, 1999, allows all public agencies to accept electronic signatures, except that signatures requiring notarization by a notary public may not be in the form of an electronic signature. While this Act does not specifically address the subject of the validity of electronic signatures in non-governmental business transactions it does "open the door" for the governmental acceptance of such. Specifically, this Act is Article 11A of Chapter 58 of the N.C. General Statues.

ELECTRONIC SIGNATURES IN GLOBAL & NATIONAL COMMERCE ACT: Better known as the "E-SIGN Act", this federal law gives electronic signatures the same legal status as a handwritten "John Hancock" on a paper document. The law was effective October 1, 2000. E-SIGN is technology-neutral so that the parties entering into electronic contracts can choose the system they want to use to validate an online agreement.

The North Carolina UNIFORM ELECTRONIC TRANSACTIONS ACT: Herein referred to as NC-UETA, and specifically known as NCGS 66-308, this law also became effective October 1, 2000. *NC-UETA provides that electronic documents and electronic signatures generated in North Carolina (after October 1, 2000) are equivalent to ink-on-paper documents and signatures* ***if the parties agree.***

NOTE: This presentation of the NC-UETA is limited to its application to real estate transactions. A complete copy of the statute can be found at:

https://www.ncleg.gov

Once at this site for the N.C. General Assembly, click on "Bills & Laws" across top bar, then "Statutes Table of Contents", then scroll down and click on "Chapter 66", then scroll down to "Article 40".

The NC-UETA applies to *electronic signatures* (aka e-signatures) and *electronic records* (aka e-records) relating to a *transaction*. The statute defines an "electronic signature" is an electronic sound, symbol, or process attached to, or logically associated with, a record and executed or adopted by a person with the intent to sign the record. An "electronic record" is a record created, sent, generated, communicated, received or stored by electronic means. A "transaction" is an action or set of actions occurring between two or more persons relating to the conduct of business, commercial or governmental affairs.

NC-UETA applies only where parties to a transaction have agreed to conduct transactions by electronic means. The key rules of the NC-UETA provides that: (1) a record or signature may not be denied legal effect or enforceability solely because it is in electronic form; (2) a contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation; (3) if a law requires a record to be in writing, an electronic record satisfies the law if the record complies with NC-UETA; and (4) if a law requires a signature, an electronic signature satisfies the law if it complies with NC-UETA.

NC-UETA provides that legal requirements for signatures or records to be notarized, acknowledged, verified or made under oath are satisfied if the electronic signature of the notary is attached to or logically associated with the signature or record. This does not change the nature of what the notary does, only how he/she records what has been done. A notary still must appear in the room with a signor and become satisfied as to the signor's identity. This function cann*ot* be done electronically.

Q: So how does one "make" this work? How is a real estate agent or firm to process a transaction utilizing "electronic signatures"? How does one "write" an "electronic signature"? Is there special equipment needed? Where do I start?

A: Both the NC-UETA and E-SIGN are technology neutral – meaning that to facilitate an "e-signature" one does *not* need to utilize any particular format or technology in order to be valid. The basic requirement is that the parties to the transaction must agree on the method for digitally authenticating the documents of the transaction. There are numerous companies currently offering "digital signature products" using so-called "public key infrastructure" or PKI.

To "digitally sign" documents, a person must first obtain a digital certificate supporting his/her identity – the equivalent of a driver's license or passport. The digital certificate turns a person's "signature" – which is more of a computer password – into a numerical value, computed by a complex mathematical formula (up to 100 digits), and delivers it over the internet using two numerical keys. One key – the private key – is a series of characters that determine the way the text is encrypted and is kept secret and stored as a software file on a computer. The other number – the public key – is stored online, in a kind of electronic vault. When a document with a digital signature is sent – after the initiator "signs," usually by typing in his/her password that encrypts the data using the same complex mathematical formula – the receiving party's computer verifies the signature by pairing the private key with the public key, which allows the recipient to verify that the signature is valid and decrypt the message. The transaction is complete.

The "keys" of the pair may be mathematically related, but it is virtually impossible to figure out the private key despite the fact that you know the public key. This is deemed to eliminate the possibility of forgery. Furthermore, a portion of the cryptographic process involves creating the mathematical "fingerprint" that is unique to the message and signature. Any post-signature change to the document would alter the makeup of that "fingerprint" and therefore make it obvious that the document had been altered. Verification of a digital signature involves a reconstruction of the "fingerprint" process, and if the "fingerprint" matches, it is unshakable proof that it is the correct sender's signature and that the message or document remains intact.

§ 66-58.5. Validity of electronic signatures.

(a) An electronic signature contained in a transaction undertaken pursuant to this Article between a person and a public agency, or between public agencies, shall have the same force and effect as a manual signature provided all of the following requirements are met:
  (1) The public agency involved in the transaction requests or requires the use of electronic signatures.
  (2) The electronic signature contained in the transaction embodies all of the following attributes:
    a. It is unique to the person using it;
    b. It is capable of certification;
    c. It is under sole control of the person using it;
    d. It is linked to data in such a manner that if the data are changed, the electronic signature is invalidated; and
    e. It conforms to rules adopted by the Secretary pursuant to this Article.

(b) A transaction undertaken pursuant to this Article between a person and a public agency, or between public agencies, is not unenforceable, nor is it inadmissible into evidence, on the sole ground that the transaction is evidenced by an electronic record or that it has been signed with an electronic signature.

(c) This Article does not affect the validity of, presumptions relating to, or burdens of proof regarding an electronic signature that is accepted pursuant to Article 40 of this Chapter or other law. (1998-127, s. 1; 2003-233, s. 2.)

Q: How does one obtain an electronic digital signature certificate?

A: There are numerous companies now offering digital certificates – some for free and some for a fee. Some of the more common providers are:

Thawte Consulting	www.thawte.com
VeriSign, Inc.	www.verisign.com
Entrust	www.entrust.com
GlobalSign	www.globalsign.net

If you use MS Outlook (2010, 2013 or Office 365) as your email manager you may do the following:

1. Open Outlook
2. At the upper top left of page, click on File
3. On left of page, click on Options
4. On left of page, click n Trust Center
5. Under Microsoft Outlook Trust Center, click on Trust Center Settings
6. On left of page, click on Email Security. Within this view there should be an option for Digital IDs (Certificates)

CONCLUSION: At this time there [probably] are more questions regarding the use of "e-signatures" in real estate transactions – and business affairs, generally – than there are answers. Many anticipate that (in the near future) the use of "e-signatures" in connection with real estate transactions likely will be limited to the "contract stage" of the transaction as opposed to the "closing stage", though there have been reported instances of where real estate transactions have been completed in an entire electronic format – all the way from contract preparation to closing, including the closing documents.

NOTE # 1: Both the Federal (E-Sign) and State (NC-UETA) statutes address *only* governmental matters and matters where the parties have agreed in advance to be bound by the electronic communications. These statutes do NOT speak to the issue of communications via fax or email. Therefore, generally it is held that the faxing or emailing of documents is an acceptable form of communications [in other situations] so as to comply with the Statue of Frauds requirements.

NOTE # 2: NC-UETA applies only to transactions governed by N.C. law. Therefore, in interstate transactions the laws of other states may apply.

NOTE # 3: Like the federal E-Sign Act, the NC-UETA does ***not*** apply to certain transactions, such as:

a. a notice of the cancellation or termination of utility services, e.g., water, heat and power;

b. any notice of default, acceleration, repossession, foreclosure or eviction, or the right to cure, under a credit agreement secured by, or a rental agreement for a primary residence;

c. any notice of the cancellation or termination of health insurance or benefits, or life insurance or benefits (excluding annuities);

d. any notice of the recall of a product or material failure of a product that risks endangering health or safety; or

e. any document required to accompany the transportation or handling of hazardous materials, pesticides, or other toxic or dangerous materials.

FINAL NOTE: As with all forms of signatures, the "signer's" intent generally is considered more important than the form of the act.

SECTION THREE

THE OFFER

THE OFFER

DEFINITION of OFFER: A display of willingness to enter into a contract on specified terms, made in a way that would lead a reasonable person to understand that an acceptance, having been sought, will result in a binding contract; the act or an instance of presenting something for acceptance. An offer may be either an "offer to purchase" or an "offer to sell."

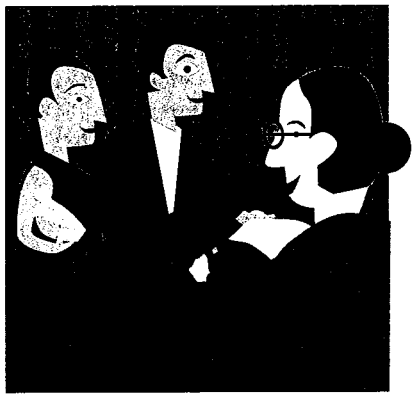
PARTIES: Generally there are two parties in an offer. These are:

OFFEROR: The party that *makes* an offer to purchase or offer to sell. Typically, the offer process starts with a prospective purchaser.

OFFEREE: The party that *receives* an offer to purchase or offer to sell.

WHAT IT IS: An 'offer' is a *proposal* to purchase or sell real estate. An offer is *not* a contract because it lacks mutual agreement between the offeror and offeree. An offer is the first step towards a contract. The [initial] offer is a request. It is a request from the offeror to the offeree to agree to a set of terms – those being the terms of the offer. An offer sets forth the terms and conditions under which one party, the offeror, attempts to purchase or sell a property owned by the other party.

True or False: Evaluate each of the following as a requirement of an offer and render an opinion of True or False:



T or F **1.** An offer must be communicated to the offeree or the offeree's agent.

T or F **2.** An offer must be "complete" in that its terms must be definite and certain.

T or F **3.** Death of the offeror *prior to* acceptance of the offer terminates the offer.

T or F **4.** A counteroffer effectively rejects or terminates the original offer.

T or F **5.** An offeror may withdraw his/her offer at any time prior to it being accepted by the offeree.

T or F **6.** An offer is not considered legally revoked until notice of revocation is given to the offeree or the offeree's agent.

T or F **7.** In the event an offeror orally withdraws his/her offer the offeror or his/her agent *should* immediately follow-up with a written confirmation of the revocation.

T or F 8. An offeror may include in his/her offer a time and/or method by which the offeree must render a decision of acceptance.

NOTE: The NCAR *Additional Provisions Addendum,* Item #1, reads, "EXPIRATION OF OFFER: This offer shall expire unless unconditional acceptance is delivered to Buyer on or before _____ □ AM □ PM, on _____, *TIME BEING OF THE ESSENCE*, or until withdrawn by the Buyer, whichever occurs first."

NOTE # 1 – [Even] when there is an "expiration of offer" provision, an offer may be withdrawn at any time: When an offer ***does*** include a provision regarding a time and/or method by which the offeree must render a decision of acceptance, the offeror may still withdraw the offer prior to the offeree's acceptance being communicated to the offeror or his agent. The inclusion of a time and/or method by which the offeree must render a decision of acceptance merely indicates that the offer will automatically cease (or end) at the stated time if the offeree has not rendered a decision of acceptance.

NOTE # 2 – An offer may be withdrawn at any time - period: An offeror may withdraw his offer at any time until the offeree's acceptance of the offer has been communicated to the offeror or his agent! This issue will be discussed in detail under the topic of 'Acceptance of Offer'.

NOTE # 3 – Cancel offer on property 'A' prior to making an offer on property 'B': Any agent working with a prospective buyer, whether working as a buyer's agent or a seller's subagent, *should* (but *not* legally required) make certain that the buyer withdraws or otherwise terminates any pending offer before making another offer on another property. Failure to do so may result in the buyer becoming the proud buyer of more properties than he can afford!

NOTE: When NCAR Form 2-T (or some similar due diligence style of contract) is utilized, a buyer may simultaneously make offers on multiple properties, and may simultaneously put multiple properties under contract. In such event, a buyer that does not "close" on all such properties likely will lose any due diligence fee(s) paid. Additionally, there is no legal obligation imposed upon a buyer's agent to voluntarily disclose to a seller or seller's agent whether or not a buyer is simultaneously making offers on multiple properties. However, in the event a seller or seller's agent inquires of the buyer or buyer's agent of such, it would be a misrepresentation to not tell the truth (as known).

NOTE # 4 – A counteroffer is "nothing more than" another offer: All the rules and requirements of offers apply also to counteroffers.

NOTE # 5 – When there is NOT an "expiration of offer" provision regarding a time and/or method by which the offeree must render a decision of acceptance, the offer terminates after the passage of a ***reasonable period of time,*** which was earlier defined as a fair, proper, or moderate period for which a contractual obligation, especially one relating to dates, may be extended.

Q: So then, just how long is a reasonable period of time?

A: No one can say for sure. The real answer depends upon the circumstances of each case and rests with the judge and jury.

NOTE # 6 - What is the difference between "reasonable period of time" and "time is of the essence"? At the beginning of this material:

"reasonable period of time" was defined as "a fair, proper, or moderate period for which a contractual obligation, especially one relating to dates, may be extended;" and

"time of the essence" was defined as "a phrase often included in a contract that requires punctual performance of all obligations in the contract. If such a clause is included and the obligation(s) is not performed, the failure to perform is a breach of the contract."

The Black's Law Dictionary definition is "so important that if the requirement [date] is not met, the promisor will be held to have breached the contract and a rescission by the promise will be justified."

The following N.C. Real Estate Commission article further explores this topic.

THE BULLETIN

The following article was published by the N.C. Real Estate Commission
in its quarterly publication *The Bulletin*, Vol. 22, No. 4, Winter 1992, Page 4

Q: Generally, is a party in breach of the purchase contract if closing does not occur by the date stated in the purchase contract?

A: No.

When is Time of the Essence?

Is a party in breach of the purchase contract if closing does not occur by the date stated in the purchase contract? This question is frequently asked by licensees as well as by members of the general public, who wonder if a buyer or seller of property can consider the other party in breach of the purchase contract under those conditions. The answer depends upon the wording of the contract: Does the contract have a "time is of the essence" provision?

The standard offer to purchase and contract form (Standard Form No. 2 jointly approved by the N.C. Association of REALTORS® and the N.C. Bar Association), provides a blank in which the parties may insert the projected date on which the transaction should close. Unless the words "time is the essence" are added to the contract, the law implies that the parties intend for the contract to be viable for a reasonable period of time after this date. Therefore, in the absence of such a provision, neither party can automatically consider the other party to be in breach of the contract simply because of a closing has not occurred by that date. [**NOTE:** The current OTP&C form addresses this issue with a preprinted passage allowing for a 14-day "Delay in Settlement/Closing."]

Real estate brokers and salesmen who represent sellers may feel that in order to protect their clients, they should insert a "time is of the essence" provision in every contract they complete. However, in some situations, this provision may, instead, serve to benefit the buyer or may not benefit either party. For example, assume that the parties have agreed to a contract written on the standard form. Pursuant to Standard Provision 8 of the form, the buyer has the property inspected, and the inspection report indicates the air conditioning unit is in need of major repair. Although the seller agrees to have the repair made, his is told that the unit cannot be repaired for at least two weeks, which is beyond the closing date stated in the contract. If the contract contains a "time is of the essence" provision, the seller may lose the sale due to his inability to have the repair completed by the closing date.

Likewise, a buyer may feel protected with a "time is of the essence" provision when, in fact, it works to the seller's advantage. Case in point: A buyer's offer to purchase contains a loan contingency providing that the buyer must obtain a loan commitment by a given date, and "time is of the essence," but the lender is unable to process the buyer's loan application by such date. Meanwhile, another buyer who is willing to pay a higher price submits a "back-up offer". The first buyer loses the contract.

In each of these examples, if the real estate agent had not included a "time is the essence" provision in the offer to purchase, the respective party would have had a reasonable period of time beyond the projected closing date to comply with the requirements of the contract. The question then arises, "What is a reasonable time?" The answer depends upon the particular circumstances of each transaction. Perhaps a shorter period of time would be reasonable in cash and no-qualifying loan assumption transactions, with a longer time frame being reasonable in transactions where the buyers must obtain financing from a government-backed loan program requiring numerous inspections and documents.

The Real Estate Commission recommends that agents use caution with regard to "time is of the essence" provision. Sometimes, such provisions are both appropriate and advisable, such as when it is essential to either the buyer or seller to close the transaction rapidly. The Commission further cautions, however, that if either party requesting the "time is of the essence" provision has any questions about the pros and cons of including it in the contract, that party should be referred to a private attorney. END

GROUP EXERCISE

One should agree that an agent who is in possession of an offeror's offer should communicate the terms of the offer to the offeree; ... and, ... based upon the above discussion, further agree that this should be done ASAP (reasonably speaking); and that in the event the offeree accepts the offer that his/her acceptance be communicated to the offeror or his agent ASAP (reasonably speaking).

But STOP and think about this concept ....

Should you <u>always</u> present offers and counteroffers quickly ?

Q: Should the quickness with which an agent presents an offer from a prospective buyer to a seller, or a counteroffer from a seller to a prospective buyer, coupled with the circumstances of the transaction, vary?

Would your agency status make any difference?

Would it, or should it, be any different when you are a buyer's agent versus a seller's agent versus a dual agent?

Would it, or should it, be any different if you have an offer to present versus a counteroffer to present?

EXERCISE: In groups of three-to-five people, discuss this issue. See if your group can determine when, or if, an agent should "not be so quick" to present or communicate and/or present an offer or counteroffer. If your group comes up with any situations, jot them down.

You have about 3-5 minutes to complete this exercise.

1.

2.

3.

4.

5.

6.

7.

SUBMITTING OFFERS

GENERAL BACKGROUND: The communication of offers, counteroffers, and acceptance should be communicated through each agent involved in the transaction. There are several reasons why all communication should flow through the agent(s), with perhaps the most notable being to make certain the agent(s) is fully aware of all terms, conditions and general details of the negotiations.

Furthermore, the **NAR Code of Ethics**, Standard of Practice 16-13 reads, "All dealings concerning property exclusively listed, or with buyer/tenants who are subject to an exclusive agreement shall be carried on with the client's representative or broker, and not with the client, except with the consent of the client's representative or broker or except where such dealings are initiated by the client.

Before providing substantive services (such as writing a purchase offer or presenting a CMA) to prospects, REALTORS shall ask prospects whether they are a party to any exclusive representation agreement. REALTORS shall not knowingly provide substantive services concerning a prospective transaction to prospects who are parties to exclusive representation agreements, except with the consent of the prospects' exclusive representatives or at the direction of prospects." (Adopted 1/93, Amended 1/04)

FLOW OF INFORMATION

While there is no "legalistic" method for the flow of communication of offers, counteroffers and acceptance between the parties and/or their agents (representative), the following generally is the preferred "flow".

OFFERS flow:

From Buyer ⇒ to ⇒ Buyer Agent ⇒ to ⇒ Seller's Agent ⇒ to ⇒ Seller

COUNTER-OFFERS & ACCEPTANCE flow:

From Seller ⇒ to ⇒ Seller Agent ⇒ to ⇒ Buyer Agent ⇒ to ⇒ Buyer

CO-BROKER PARTICIPATION

when Submitting Offers and/or Counteroffers

Q: Is it legal and/or ethical for a buyer's agent (the "selling associate") to be present (and/or to otherwise participate) when the seller's agent (the "listing associate") submits an offer to the seller? Or, in reverse, is it legal and/or ethical for a seller's agent to be present (and/or to otherwise participate) when the buyer's agent submits a counteroffer to the buyer.

A: _____

Q: If you answered NO, then why is it not legal or ethical?

A: _____

Q: If you answered YES, then when might it be appropriate?

A: _____

THOUGHTS to PONDER ...

and situations when, or reasons why, one *should* consider or allow Co-Broker participation when submitting offers

Situation # 1: When the offer is "complicated". For example, when the buyer is asking for "things" that are not routine, e.g., seller financing, later than typical possession, unusual terms, etc.

Situation #2: When an associate is a buyer's agent and the prospective buyer asks his/her agent to be present when his/her offer is presented.

Situation # 3: When there are multiple offers. [NOTE: There are at least three categories of multiple offers to consider. Also, assume there are only two offers]:

a. There are two competing offers and each is from a different firm. For example, firm A is the listing firm, and associates with firm B and C submit offers. Do the two offers from firm B and C have an equal chance of being accepted if both are presented to the seller(s) by the listing associate? What if the listing associate is "pals" with the associate with firm B and has previously had a really bad experience with the associate with firm C? If you were the associate with firm C, would you rather trust the listing associate to present your offer or would you prefer to be present when it is presented?

b. There are two competing offers and one is from an associate with a competing firm and one is from an "in-house" associate. If you were the associate from the competing firm would you rather trust the listing associate to present your offer or would you prefer to be present when it is presented?

c. There are two competing offers and one is from an associate with a competing firm and the other offer was written by the listing associate. If you were the associate from the competing firm would you rather trust the listing associate to present your offer or would you prefer to be present when it is presented?

   NOTE: In this latter situation, the listing associate *should* have some third person, such as his/her Broker-in-Charge or a fellow associate, present both offers *if* the competing agent is not going to present his/her offer.

Situation # 4: Though one may disagree, one easily can argue that any time an associate/firm is a buyer's agent that it is incumbent upon them to be present when their client's offer is presented – otherwise, how does the buyer's agent even know [for certain] that the offer was presented? Or if it was presented, that it was presented in a manner that was in the buyer's best interest?

Situation # 5: If you are a native Carolina broker – where this practice is not customary and may seem a bit "pushy" to you – and, as a listing associate you're thinking, "I don't want the other agent meeting and chatting with my seller," consider this: Might it be to the benefit of a listing associate to invite the associate who writes a really "low ball" offer to present the offer him/herself to the seller (with the listing associate present)?

Other Situations???

Question:

What should a selling associate do if the listing associate will not allow the selling associate to be present when the buyer's offer is presented to the seller?

A: First and foremost, it is *not* the listing associates decision to make as to whether or not the selling associate can or cannot be present with the buyer's offer is presented to the seller. *This is a decision that is to be made by the seller!*

Possible Solution # 1:
As the selling associate, ask the listing associate for something in writing from the seller stating that he/she does not want the selling associate present during the presentation of the offer.

Possible Solution # 2:
Place the buyer's offer in a sealed envelope and have the buyer(s) write across the front of the envelope "To be opened in the presence of the seller, listing agent and my agent, [insert name of buyer's agent]." And have the buyer sign and date the envelope.

Possible Solution # 3:
As a last resort – and this technique should be reserved as an absolute last resort – have the buyer(s) insert a contingency into the offer stating that the offer is valid only if his/her buyer's agent is present during the presentation of the offer to the seller(s). This contingency may go so far as to state that the offer is to be presented to the seller(s) *only if* the buyer's agent is present for the presentation of the offer.

NOTE # 1: It is only a buyer's agent that may "run into a problem" with being present at the presentation of an offer. After all, if the associate that writes an offer is working as a (sub)agent of the seller(s), the selling associate and the listing associate both are on the same "team" in that both represent the seller(s); and therefore, neither the seller(s) nor the listing associate should object to the selling associate being present.

NOTE # 2: If anyone objects to the selling associate being present for the presentation of an offer, generally it will be the listing associate – not the seller(s).

REALTOR® Code of Ethics

Article 3

REALTORS® shall cooperate with other brokers except when cooperation is not in the client's best interest. The obligation to cooperate does not include the obligation to share commissions, fees, or to otherwise compensate another broker. (Amended 1/95)

EFFECT of AGENCY STATUS
on the
COMMUNICATION of OFFERS & COUNTEROFFERS

EXPLANATION: Remember, an agent must first and foremost act in the best interest of the party that he/she represents. The party that the agent represents is the "boss". As an agent you must follow the instructions of your "boss" in all negotiations, provided such instructions are lawful. Thus, when it comes to communicating offers, counteroffers and acceptance the agent must do that which is in the best interest of his/her "boss", who also is known as the principal or client.

PARTIES: The parties in an agency relationship are:

PRINCIPAL: (1) One who employs another to perform an act or service in his place; (2) The person from whom an agent's authority is derived; (3) Also called a "client"; (4) A principal may be a seller, buyer, landlord or tenant.

AGENT: (1) A person acting or doing business for another; (2) A person or entity authorized by the principal to act on behalf of the principal; (3) In real estate, generally the agent is the real estate firm, with each individual sales associate within the firm serving as a subagent.

SUBAGENT: (1) One who is an agent of an agent; (2) The person who is an agent of the party that is serving as the agent of a principal; (3) In real estate, the licensee that is authorized by an agent (firm) to assist in the sale or purchase of a property, such as a sales associate within the agent's firm or a licensee from a different (cooperating) firm when the cooperating firm is representing the same principal as the agent.

THIRD PARTY: (1) One who negotiates with the agent of a principal; (2) The person with whom the agent negotiates on behalf of the principal; (3) When a real estate firm represents a seller/landlord, the buyer/tenant is the third party; (4) When a real estate firm represents a buyer/tenant, the seller/landlord is the third party.

OBLIGATION to PRESENT OFFERS

The **N. C. Real Estate Commission** (NCREC) Rule A.0106 states, in part, "...every broker shall *immediately*, but in no event later than *five days* from the date of execution, deliver to the parties thereto copies of any required written agency agreement, contract, *offer*, lease, or option affecting real property." [Emphasis added] Thus, a seller's agent or subagent must *immediately* submit all offers to the seller and must inform the seller of all matters, including that fact that another offer(s) may be forthcoming that might affect the seller's decision to accept, counter or reject the offer.

NOTE: The portion of the NCREC rule that reads "... immediately, but in no event later than five days from the date of execution..." does NOT mean that an agent, whether acting as a buyer's agent or seller's agent, can "sit-on" an offer or counteroffer for five days before submitting it to the appropriate party. Nor is it intended to mean that an offer or counteroffer can be presented at any time within "five days of execution." The key word in the rule is "immediately."

REALTOR® Code of Ethics

The **NAR Code of Ethics**, Standard of Practice 1-15 reads, "REALTORS, in response to inquiries from buyer or cooperating brokers shall, ***with the sellers' approval***, disclose the existence of offers on the property. Where disclosure is authorized, REALTORS shall also disclose, if asked, whether offers were obtained by the listing licensee, another licensee in the listing firm, or by a cooperating broker." (Adopted 1/03, Amended 1/09)

Under the **law of agency**, a seller's agent, whether the listing agent or seller's subagent, has a duty to communicate (present) *all* offers on a listed property to the seller *as soon as possible* and to disclose to the seller all information that the agent knows that might affect the seller's decision to accept, counter or reject an offer. Additionally, the seller's agent has a duty to inform the seller of any possible offers of which the agent is aware that may be forthcoming.

> **NOTE:** The word "all" means ALL! A listing agent must present ALL offers to the seller (or counteroffers to the buyer or seller)! This includes all verbal offers, *all* multiple offers, and offers received while the seller is already under contract to sell the property to another buyer. Each of these subjects will be addressed later, but suffice it to say that if a seller is [presently] considering an offer and the listing agent receives a second offer, verbal or written, the listing agent MUST present the second offer to the seller for consideration.

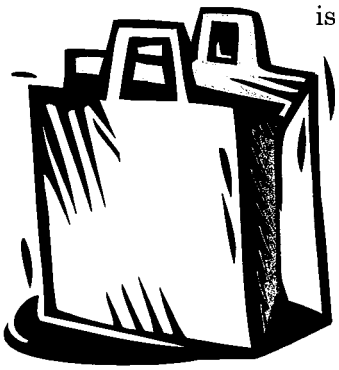
REALTOR® Code of Ethics

As of January 1, 2019, the **NAR Code of Ethics**, Standard of Practice 1-7 reads," When acting as listing brokers, REALTORS® shall continue to submit to the seller/landlord all offers and counter-offers until closing or execution of a lease unless the seller/landlord has waived this obligation in writing. Upon written request of a cooperating broker who submits an offer to the listing broker, the listing broker shall provide a written affirmation to the cooperating broker stating that the offer has been submitted to the seller/landlord, or written notification that the seller/landlord has waived the obligation to have the offer presented. REALTORS® shall not be obligated to continue to market the property after an offer has been accepted by the seller/landlord. REALTORS® shall recommend that sellers/landlords obtain the advice of legal counsel prior to acceptance of a subsequent offer except where the acceptance is contingent on the termination of the pre-existing purchase contract or lease. (Amended 1/19)

SHOPPING OFFERS

"Shopping an offer or contract" is a general phrase that has multiple meanings. In some marketplaces "shopping a offer/contract" is considered both illegal and unethical. In others, it is the norm.

When used to describe the actions of an agent that reveals information that he/she otherwise should *not* reveal, such as the confidential terms of an existing offer to a competing party in an attempt to get the competing party to submit an offer on the same property at better terms (e.g., at a higher price), it is both illegal and unethical. The terms of one offeror's offer should NEVER be shared with another offeror (or his agent) unless an offeror specifically grants such permission, or until *after* the transaction has "closed."



As of July 1, 2008, any agent representing any buyer, tenant, or property owner is prohibited from disclosing price or material terms of any offer the agent receives on behalf of his/her client without the express authority from the offeror. Specifically, NCREC Rule A.0115 reads, "A broker shall not disclose the price or other terms contained in a party's offer to purchase, sell, lease, rent, or to option real property to a competing party without the express authority of the offering party."

However, when used to describe what a listing agent does when he/she informs other agents and/or prospective buyers of the mere existence of another offer(s) or the probability of another offer being submitted, especially if done so with the seller's approval, it is both legal and ethical; and arguably an obligation [of the listing agent] as an agent of the seller.

NC Real Estate Commission 2017 Case RE: Shopping Offer
2018-19 Update Course: Section 3 – Contract Issues

The Complainant was the BIC of a firm representing a buyer.
Respondents were the Listing Agent and Listing Firm, and the Listing Agent was QB/BIC.

COMPLAINT:
The BIC's complaint stated that an agent with his Firm, acting as a Buyer's Agent for a prospective buyer, submitted a written offer on behalf of the buyer to the Listing Agent for the listed property. The complaint alleged that a multiple offer situation ensued and that the Listing Agent disclosed to each of the three other prospective buyers' agents the amount of her client's offer.

FACTS:
The Complainant/Buyer's Agent stated that on December 10, 2016, she emailed to the Listing Agent a copy of her buyer's signed offer for $176,000. On the same day, she received a voice mail from the Listing Agent stating that there were multiple offers, and, per his seller's request, he would inform all prospective buyers that the highest offer was $176,000 and ask all buyers to submit their highest and best offers. There were four competing offers (including the Complainant's buyer-client's offer).

Two of the three other buyers' agents confirmed the allegations in the complaint. One of the three stated that shortly after he submitted an offer to the Listing Agent, the Listing Agent left a voice mail and sent an email to him giving notice of multiple offers and disclosing that the current highest offer was $176,000. Though he no longer had a copy of the voice mail, he provided a copy of the December 10, 2016, email in which the Listing Agent stated: "Did you get my message about the other offer that was 176k in the initial offers before we called for highest and best?"

The third buyer's agent responded similarly, and provided a copy of a December 10, 2016, text message from the Listing Agent which stated: "Ok, did you hear my voice mail that we had at least a $176,000 net to seller from initial offer? Just want to make sure."

The fourth buyer's agent, whose buyer-client's 2nd offer of $181,000 was accepted by the seller, alleged that she had no written communications with the Listing Agent regarding terms of other offers, and that she could not recall the Listing Agent disclosing the amount of any particular offer, only that the transaction was a multiple offer situation and the Listing Agent had requested highest and best offers.

"Shopping Offers" is Illegal

Commission Rule 58A .0115 states:
A broker shall not disclose the price or other material terms contained in a party's offer to purchase, sell, lease, rent, or to option real property to a competing party without the express authority of the *offering* party.

Brokers may not share the price or other material terms in offers with competing parties without the express authority of the offering party (the buyer). All buyers must be treated fairly, honestly and equally. Disclosing terms of an offer to other buyers gives those receiving the information an unfair advantage over the buyer whose competing offer is disclosed. Thus, it is not in the interest of most buyers to allow disclosure of their offers.

DUTIES of BUYER'S AGENT

The NCREC Rule A.0106 (earlier quoted) applies to *ALL* real estate agents, regardless of whom the agent represents or from whom they or their firm will be compensated. When an agent represents a buyer the agent should have an understanding (agreement) with the listing firm/seller prior to showing the seller's property to his buyer client as to whether or not the listing firm/seller will or will not compensate the buyer's agent.

EXERCISE: In groups of three-to-five people, discuss this issue and answer the following questions.

QUESTION # 1: When an agreement regarding the co-broke compensation is *not* obtained prior to showing a property, can the buyer's agent lawfully show the property [anyway]?

A: _____

QUESTION # 2: When an agreement regarding the co-broke compensation is *not* obtained prior to showing a property and the prospective buyer wishes to submit an offer on the seller's property, can the buyer's agent lawfully withhold the offer from the listing firm and/or seller until such time as an agreement is made regarding the issue of compensation?

A: _____

QUESTION # 3: Should an agent (firm) representing a prospective buyer as a buyer's agent, *prior to showing any property*, have a clear (preferably written) understanding of whether or not the listing firm is willing to co-broke the transaction?

A: _____

QUESTION # 4: Should an agent (firm) representing a prospective buyer as a buyer's agent, *prior to showing any property*, have a clear (preferably written) understanding of whether or not the listing firm is willing to share their compensation with the firm that is working with the buyer as a buyer's agent?

A: _____

QUESTION # 5: Should an agent (firm) representing a prospective buyer as a buyer's agent, *prior to showing any property*, have a clear (preferably written) understanding of whether or not the buyer is obligated to compensate the buyer's agent (firm), and if so, how much?

A: _____

QUESTION # 6: Should an agent (firm) representing a prospective buyer as a buyer's agent, *prior to showing any property*, have a clear (preferably written) understanding of how to use, if a REALTOR, the NCAR Standard Form 220, *Confirmation of Agency Relationship, Appointment & Compensation*, in a co-broke transaction?

A: _____

NOTE # 1: Does this scenario clearly illustrate how it may be possible for any agent, especially one representing a buyer as a buyer's agent, to "end-up working for free" if the agent either assumes things improperly or attempts to "jump from 'C' to 'G' without touching on 'D, E and F"?

NOTE # 2: For the last time, ***ALL*** offers (and counteroffers) shall be communicated to the offeree not more than five [calendar] days following the date of execution!

NOTE # 3: Consult the NCAR Standard Form 220, *Confirmation of Agency Relationship, Appointment & Compensation*, and 220G (Guidelines).

EXTENT of AGENT'S AUTHORITY

When acting as an agent of a principal there are certain duties and responsibilities that the agent must fulfill on the behalf of the principal. There also is a limited degree of authority that an agent has to perform certain tasks on behalf of the principal.

However, an agent does NOT have the authority to determine if an offer is a "good" offer or a "bad" offer. Thus, an agent [normally] does NOT have the authority to accept an offer on behalf of his principal, even when the terms of the offer clearly are to the principal's advantage; or to counter or reject an offer when the terms of the offer clearly are to the principal's disadvantage. Instead, based upon the agent's knowledge and experience he/she should make his/her principal aware of the possible advantages and/or disadvantages of the offer.

NOTE #1: An agent would have this authority only when the principal had duly authorized the agent to perform such an act on his behalf, preferably in the form of a properly executed power-of-attorney that confers such authority upon the agent.

NOTE #2: The subject of how an agent's agency status affects the concept of "when does an offer or counteroffer become a contract" will be addressed under the subject of 'Acceptance of Offers.'

REALTOR® Code of Ethics

Article 1

When representing a buyer, seller, landlord, tenant, or other client as an agent, REALTORSPPP®PPP pledge themselves to protect and promote the interests of their client. This obligation to the client is primary, but it does not relieve REALTORSPPP®PPP of their obligation to treat all parties honestly. When serving a buyer, seller, landlord, tenant or other party in a non-agency capacity, REALTORSPPP®PPP remain obligated to treat all parties honestly. (Amended 1/01)

Standard of Practice 1-12

When entering into listing contracts, REALTORS® must advise sellers/landlords of:

1) the REALTOR®'s company policies regarding cooperation and the amount(s) of any compensation that will be offered to subagents, buyer/tenant agents, and/or brokers acting in legally recognized non-agency capacities;
2) the fact that buyer/tenant agents or brokers, even if compensated by listing brokers, or by sellers/landlords may represent the interests of buyers/tenants; and
3) any potential for listing brokers to act as disclosed dual agents, e.g. buyer/tenant agents.

Standard of Practice 1-13

When entering into buyer/tenant agreements, REALTORS® must advise potential clients of:

1) the REALTOR®'s company policies regarding cooperation;
2) the amount of compensation to be paid by the client;
3) the potential for additional or offsetting compensation from other brokers, from the seller or landlord, or from other parties; and
4) any potential for the buyer/tenant representative to act as a disclosed dual agent, e.g. listing broker, subagent, landlord's agent, etc., and
5) the possibility that sellers or sellers' representatives may not treat the existence, terms, or conditions of offers as confidential unless confidentiality is required by law, regulation, or by any confidentiality agreement between the parties.

THE BULLETIN

The following article was published by the N.C. Real Estate Commission
in *The Bulletin*, Vol. 14, No. 2, 1983, Page 4

Q: I am a licensed North Carolina real estate broker. One of the houses I have listed is owned by a seller who lives in California. When I received an offer to purchase the house, I called the seller in California and read him the important provisions. After considering the offer briefly, the seller accepted it over the telephone. I then immediately informed the offeror and I mailed the offer to California for the seller's signature. When I returned from the post office, my secretary informed me that another written offer to purchase the same property at a higher price had been received. Since I already have informed the first offeror that his offer was accepted, may the seller withdraw his verbal acceptance of the first offer in order to consider and possibly accept the second, higher offer?

A: Yes.

Although the broker has communicated the seller's verbal acceptance to the first offeror, the seller is not bound and may consider and accept the second offer. To create a binding contract for the purchase and sale of real estate in North Carolina, the Statute of Frauds, G.S. 22-2, requires the contract to be in writing and signed by the party to be charged. Because the seller has not yet signed the first written offer, the communication of his verbal acceptance of the offer is insufficient to create a contract which can be enforced against him. The broker should contact the seller immediately to inform him that two offers are being sent for his consideration and that he may accept either or reject both. If the seller rejects the first offer, the broker in the question will be faced with the unenviable task of explaining to the first offeror that his offer was not accepted as he had been informed previously, but rejected by the seller.

Caveat. Unless the written offer has been signed by the accepting party, real estate brokers and salesmen should not represent to the person who made the offer that his offer has been accepted.

SUBMITTING OFFERS & COUNTERS ELECTRONICALLY

REVIEW: As previously addressed, the submission of offers and counteroffers electronically, whether via fax or email, is considered perfectly acceptable provided:

1. the offer or counteroffer form (the preprinted form) is in a legally acceptable format, i.e., the form is not "home-made" or otherwise legally unenforceable; and

2. the offeree has the proper equipment to receive the offer or counteroffer.

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Notes

SECTION FOUR

THE COUNTEROFFER

THE COUNTEROFFER

NOTE: All the rules and requirements of offers apply also to counteroffers. This includes, but is not limited to, the NCREC Rule A.0106, which states, in part, "...every broker shall *immediately*, but in no event later than *five days* from the date of execution, deliver to the parties thereto copies of any required written agency agreement, contract, *offer*, lease, or option affecting real property." [Emphasis added]

DEFINITION of COUNTEROFFER: A display of *un*willingness to enter into a contract based upon the terms specified in the original offer. A *rejection* of the original offer, coupled with a proposal to the original offering party of terms made in a way that would lead a reasonable person to understand that an acceptance, having been sought, will result in a binding contract.

PARTIES: Generally there are two parties in a counteroffer. These are:

OFFEROR: The party that *makes* an offer (counteroffer) to sell or offer (counteroffer) to purchase. Typically, the counteroffer process starts with a prospective seller upon finding the terms of a prospective buyer's offer to be unacceptable.

OFFEREE: The party that *receives* an offer (counteroffer) to buy or offer (counteroffer) to sell. Typically, the first offeree in a counteroffer situation is the prospective buyer.

WHAT IT IS: A *proposal* to sell or purchase real estate. A counteroffer is *not* a contract. It is a rejection of an offer; a proposal from the original offeree, who now, in the counteroffer, is the offeror, to the original offeror, who now, in the counteroffer, is the offeree.

WHAT CREATES A COUNTEROFFER: A counteroffer is created when an offeree makes *any* change, regardless of how minor it may seem, to the *terms* of the original offer or a previous counteroffer. Once an offer or counteroffer is altered in any manner by an offeree the offer or counteroffer is considered rejected and "gone forever". Occasionally an offeree will state something like "I've accepted the offer but with just one minor change." This is an oxymoron! There is no such thing as "acceptance with a change." A change to an offer creates a counteroffer, and a change to a counteroffer creates another counteroffer.

NOTE # 1: Do not confuse a "change" in an offer with a "correction" in an offer. For example, if the original offer has the name of one party misspelled, but the offer is acceptable to the offeree, the misspelled name can be corrected without this constituting a counteroffer. Generally, however, unless the mistake or item that is to be changed is anything other than a typographical error it should be considered a "material change" and thus creating a counteroffer.

NOTE # 2: Since a counteroffer is a rejection of the original offer or a previous counteroffer, it is legally impossible "to go back to" a previous offer or counteroffer. Therefore, it is erroneous for an offeror and offeree to think that they can [at any time] "fall back" onto any prior offer or counteroffer. It is possible, however, to create a new offer or counteroffer that contains the same terms and conditions of a prior version of a particular negotiations.

MODIFICATION of an OFFER
to CREATE a COUNTEROFFER

There is no single correct method to create a counteroffer. There are, however, some methods that are more legally prudent than others. Basically, there are three different ways to modify an offer to create a counteroffer. These are (1) for the parties to negotiate the offer and any subsequent counteroffer(s) verbally until such time as an agreement is reached; (2) for the offeree to scratch through the item(s) he finds unacceptable and to send the offer form back to the original offeror; or (3) for the parties to use memorandum to buyer, such as the NCAR Standard Form No. 340, *Response to Buyer's Offer.*

VERBAL MODIFICATIONS

In today's fast paced world with multiple methods of constant communication, this appears to be the preferred method of handling offer/counteroffer negotiations. This method is simple. However, its simplicity can prove to be its weakness.

With verbal negotiations of offers/counteroffers each party (and their agent) must operate upon a foundation of trust, yet so often it seems that verbal negotiations often operate under a cloud of doubt. In other words, the parties and their agent can negotiate an offer/counteroffer situation for hours or days (or longer) and finally reach a mutual agreement only to have another offer surface from another prospective buyer before everything is signed.

Q-1: When an offer has been verbally negotiated and the parties (buyer and seller) agree [verbally] to a set of terms, what do you have – really?

A: _____

Q-2: If you answered that the verbal agreement is a contract, then what happens to this mutually agreed upon "contract" if another offer comes in ***before*** the verbally agreed upon terms are "in writing"?

A: _____

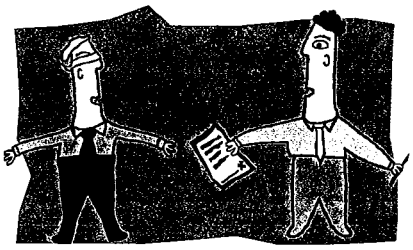
Do you remember the Statute of Frauds? As I have always said, "until you got it in writing, you don't got nothing."

However, some sellers do remain committed
to the party with whom they have already reached a verbal agreement.

NOTE: As a rule-of-thumb, and for most real estate agents in today's environment, verbal negotiations probably are the best way to deal with the offer/counteroffer situation. There are several reasons for this rationale, but perhaps the greatest is that a seller's agent can help his/her seller retain control of who buys the property all the way to the point of signing "the final, binding contract," and a buyer's agent can help his/her buyer retain control of which property he/she buys all the way to the point of signing "the final, binding contract." In other words, until the final contract is "signed, sealed, and delivered" either party can 'walk'.

SCRATCH METHOD

Historically, this was the preferred method for handling the offer/counteroffer situation. Basically, as the name implies, with this method the objecting party strikes through the term(s) he/she does not agree to, writes or notes the term(s) he/she will agree to [his/her counteroffered term(s)], initials the change(s), and sends his/her counteroffer to the other party for either acceptance, rejection or another counteroffer.



While this method remains legally acceptable, it is NOT the preferred method! There are too many possible legal pitfalls that can occur with this method! And while this material is intended to be comprehensive, the information listed below reveals only some of the potential pitfalls.

NOTE: ***In the interest of brevity and simplicity, assume in each of the following scenarios the seller finds the terms of each offer acceptable in all matters except the price (e.g., price is the only term modified).***

EXERCISE: In groups of 3-5 people, discuss this method and answer the following questions.

►SCENARIO # 1

SELLER CHANGES OFFER *WITH* SIGNATURE: In this situation assume an offer is presented to the seller/offeree, he modifies the offer by scratching or lining through the offered price, initials and dates the change, and sends the offer back to the prospective buyer in the form of a counteroffer. Additionally, the seller SIGNS his counteroffer.

When the buyer receives the counteroffer he finds the countered price acceptable, so he initials and dates the price change and sends the "accepted" counteroffer back to the seller. Once the seller receives the counteroffer, or word of the buyer's written acceptance of the counteroffer,

Q: Do we have a contract? **A:** _____

►SCENARIO # 2

SELLER CHANGES OFFER WITH*OUT* SIGNATURE: In this situation assume an offer is presented to the seller/offeree, he modifies the offer by scratching or lining through the offered price, initials and dates the change, and sends the offer back to the prospective buyer in the form of a counteroffer. The seller does NOT sign his counteroffer.

When the buyer receives the counteroffer he finds the countered price acceptable, so he initials and dates the price change and sends the "accepted" counteroffer back to the seller. Once the seller receives the counteroffer, or word of the buyer's written acceptance of the counteroffer,

Q: Do we have a contract? **A:** _____

►SCENARIO # 3

SELLER CHANGES OFFER WITH*OUT* *INITIALS OR SIGNATURE*: In this situation assume an offer is presented to the seller/offeree, he modifies the offer by scratching or lining through the offered price, he does NOT initial or date the change, and sends the offer back to the prospective buyer in the form of a counteroffer. The seller does NOT sign his counteroffer.

When the buyer receives the counteroffer he finds the countered price acceptable, so he initials and dates the price change and sends the "accepted" counteroffer back to the seller. Once the seller receives the counteroffer, or word of the buyer's written acceptance of the counteroffer,

Q: Do we have a contract? **A:** _____

DANGEROUS TERRITORY: The first two examples above illustrate the potential pitfalls of "scratching through" and initialing changes in an offer/counteroffer situation. The reason rests, in part, with a review of Devereux v. McMahon (1891). This is the case wherein the initials "D.S.C." were held to be the signature of the maker of the contract.

NOTE: As a general rule, one should consider that a "signature", whether in the form of a hand-signed name, a set of initials, an "X", one's "mark", or any other "symbol" that is intended to authenticate the writing as that of the signer, has the potential to bind the "signer" of the document. *From a legal viewpoint, when an offeree makes a counteroffer he should NOT sign, initial, or otherwise "place his symbol" any place on the document unless he/she is prepared to [potentially] be bound to the terms as stated in the document.*

RECOMMENDATION: It is recommended that a seller/offeree *never* make a ***written*** counteroffer to a buyer. It is much wiser, legally speaking, for a seller/offeree to reject a buyer's offer and to provide to the prospective buyer a "memorandum" or "note" setting forth the terms that the seller would most likely find acceptable in the event the prospective buyer chooses to submit another offer in accordance with such terms. This recommendation illustrates the primary reason for the existence of NCAR's Standard Form No. 340, *Response to Buyer's Offer.* [See next two pages.]

RESPONSE TO BUYER'S OFFER form

This is the preferred method for handling a written counteroffer situation.

Use of the NCAR *Response To Buyer's Offer* form does ***not*** constitute a counteroffer!

As indicated above, this method calls for an outright rejection of the prospective buyer's offer by the seller. If the prospective buyer wishes to pursue this property with another offer under a different set of terms he/she actually "starts from the beginning" with a new offer, preferably utilizing some of the terms suggested by the seller. The "beauty" of this method is that, if properly handled, neither party becomes bound to a binding contract until such time as they are prepared to make a binding commitment to one another.

NOTE: It is understandable as to why many agents in today's world of real estate utilize the "Verbal Modifications" method of handling counteroffers. And, in many ways, this is probably the best of the three methods addressed. However, each party (and especially their agent) should take great care to make certain that they distinguish between when they are making a counteroffer and when they merely are asking for a clarification of a contractual term or condition. It is possible for an inquiry to be misconstrued as a counteroffer by the other party.

For example, assume a prospective buyer makes an offer, the seller in turn makes a counteroffer, and so "the ball now is back in the buyer's court." Assume the buyer or his agent does not understand a term or condition imposed by the seller in the counteroffer, so they inquire about its meaning. The seller or his agent clarifies the intent of the term, and the buyer or his agent says, "oh, okay". A seller may interpret this as an acceptance of the counteroffer, when all that the prospective buyer or agent meant was "oh, okay, now I understand, but I do not yet agree." This situation further illustrates a reason for utilizing verbal counteroffers.

THE BULLETIN

The following article was published by the N.C. Real Estate Commission
in *The Bulletin*, Vol. 16, No. 3, 1985, Page 3

Q: A prospective purchaser makes an offer to purchase certain real estate. The seller rejects the purchaser's offer but makes a counteroffer which the prospective purchaser does not accept. A second prospective purchaser then makes an offer to purchase the property on terms substantially the same as the seller's counteroffer. This offer is accepted by the seller. The seller's agent then informs the first prospective purchaser that the property has been sold, but the purchaser protests, saying that he thought the property was "off the market" until he made up his mind or at least until the acceptance date contained in his original offer. The seller's agent told this prospective purchaser, "You snooze you lose; the property has been sold." Is the agent correct?

A: Yes.

Q: From the above scenario, does purchaser #2 have a valid sales contract or does purchaser #1 have a valid claim?

A: Purchaser #2: Yes. Purchaser #1: NO!

You Snooze–You Lose!

In two companion cases which were recently decided by the North Carolina Supreme Court, the issue of multiple offers/counteroffers was addressed: The fact situation was as follows: A prospective purchaser made an offer to purchase certain real estate. The seller rejected the purchaser's offer but made a counteroffer which the purchaser did not accept. A second purchaser then made an offer to purchase the property on terms substantially the same as the seller's counteroffer. This offer was accepted by the seller. When the seller's agent informed the first purchaser that the property had been sold, the purchaser protested, believing the property to be "off the market" until he had made up his mind or at least until the acceptance date contained in his original offer. But the seller's agent informed him "You snooze you lose; the property has been sold."

Two lawsuits ensued (Normile v. Miller and Segal v. Miller, 313 N.C. 98 [1985]) which were ultimately decided by the North Carolina Supreme Court. (In analyzing the cases, the Supreme Court relied in large part on the Real Estate Commission's textbook, **North Carolina Real Estate for Brokers and Salesmen.)** The court determined that since the purchaser's offer had been rejected by the seller, the acceptance date shown in the purchaser's offer did not apply, and therefore, the seller remained under the common law rule that "...an offer is generally freely revocable and can be countermanded by the offeror in this case, the purchaser)."

The court further stated: "Notice of the offeror's revocation must be communicated to the offeree to effectively terminate the offeree's power to accept the offer. It is enough that the offeree receives reliable information, even indirectly, that the offeror had taken definite action inconsistent with an intention to make the contract." The statement of the agent, "You snooze, you lose; the property has been sold", was sufficient to notify the purchaser that the counteroffer had been revoked; therefore, the purchaser's later attempt to accept it amounted only to a new offer which was rejected because the property had already been sold.

Caveat. Agents involved in multiple offer/counteroffer situations should be extremely careful to ensure that each offer or counteroffer is properly presented, considered, rejected or accepted, and that the parties are promptly notified of such action. END

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Notes

SECTION FIVE

ACCEPTANCE of OFFER or COUNTEROFFER

ACCEPTANCE of OFFER or COUNTEROFFER

DEFINITION of "ACCEPTANCE": (1) An agreement, either by express act or by implication from conduct, to the terms of an offer so that a binding contract is formed. (2) An agreement by an offeree to be obligated to the terms of an offeror's offer. (3) Agreeing to an offer and becoming bound to the terms thereof. (4) The second of the three requirements for the formation of a binding contract.

PARTIES: Generally there are two parties involved in an "acceptance". These are:

OFFEROR: The party that made an offer.

OFFEREE: The party that agrees to an offer.

WHAT IT IS: An agreement to purchase and sell real estate. There is mutual agreement between the offeror and offeree. Whereby the *offer* sets forth the terms and conditions under which the offeror *attempted* to purchase or sell a property, *acceptance* is the *agreement* between the parties to consummate the transaction in accordance with the terms and conditions set forth in the agreement.

Acceptance of an offer does <u>not</u> create a contract.

"Acceptance" is the second of three requirements for the formation of a binding contract.

What is lacking?

IMPORTANT REQUIREMENTS: The following is a summation of the more important requirements of "acceptance".

1. The terms of acceptance must be a mirror image of the terms of an offer.
2. An "acceptance" of an offer that alters any of the terms of the offer is NOT "acceptance", but rather is a rejection of the offer and creates a counteroffer.
3. To be legally enforceable, the acceptance of an offer to purchase and sell real estate must be in writing.
4. An offeree's acceptance of an offeror's offer need not be on the same piece of paper as the offeror's offer. In other words, it is legally possible for an offeree's acceptance of an offeror's offer to be on separate documents.

NOTE: With use of the NCAR Standard Form No. 2-T, *Offer to Purchase and Contract*, both parties generally sign the same piece of paper. However, it is possible for a seller to accept a buyer's offer by writing a letter and informing the buyer that he (the seller) accepts the offer as written. With the seller's signature on this letter and the buyer's signature of the offer [itself], there is evidence of mutual agreement. While this is both legally permissible and enforceable, it is NOT the recommended method.

5. To be effective (binding and enforceable), an offeree's acceptance of an offer must be communicated to the offeror or his agent. NOTE: This is the third of the three requirements for an offer to become a binding contract.

EFFECT of AGENCY STATUS on the *ACCEPTANCE* of OFFERS & COUNTEROFFERS

COMMUNICATION OF ACCEPTANCE: When an offeree's acceptance is communicated directly to an offeror, this subject becomes rather straightforward. However, when the subject of agency and one's agency status enters the scenario, this subject can become quite tricky! Before embarking on this part of our journey let's quickly address the topic of imputed notice.

IMPUTED NOTICE – Defined: (1) Information attributed to a person whose agent, having received actual notice of the information, has a duty to disclose it to that person. (2) Something is 'imputed' to a person if, even though that person does not know a fact, he *should have known* it (both legally and actually) or if, even though that person is not physically responsible for something, he is legally responsible.

IMPUTED NOTICE – Example: If Sally is given notice of something and Sally is Mark's agent, then notice to Sally can be 'imputed' as notice to Mark. Sound familiar? How does this concept affect the communication of acceptance?

EXERCISE: To illustrate how one's agency status *may* affect an offeree's acceptance of an offeror's offer, as well as the communication of offers and counteroffers [generally], once again form groups of three-to-five people and discuss and answer the following three scenarios.

In this exercise, assume that in the first ***two*** scenarios there are:

a). two real estate companies – i.e., this is a co-brokered transaction;

b). four parties involved:

Seller, Listing Agent (firm), Selling Agent (firm) and Buyer

c). and the property is listed at a price of $200,000 and that price is the *only* term being discussed.

The ***third*** scenario is an in-house transaction.

►**SCENARIO # 1:**

SELLER *SUB*AGENT (Selling Agent represents Seller): Selling Agent shows Seller's house to Buyer. Buyer makes an offer of $195,000. Selling Agent communicates offer to Listing Agent. Listing Agent presents offer to Seller. Seller says "okay", and signs the offer in the presence of Listing Agent. Listing Agent phones Selling Agent to say "congratulations, the Seller has accepted the offer."

Q: Do we have a contract? _____

►**SCENARIO # 2:**

BUYER'S AGENT (Selling Agent represents Buyer): Selling Agent shows Seller's house to Buyer. Buyer makes an offer of $195,000. Selling Agent communicates offer to Listing Agent. Listing Agent presents offer to Seller. Seller says "okay", and signs the offer in the presence of Listing Agent. Listing Agent phones Selling Agent to say "congratulations, the Seller has accepted the offer."

Q: Do we have a contract? _____

►**SCENARIO # 3:**

DUAL AGENCY - [in-house] (Selling Agent & Listing Agent work in same firm, and thus both agents represent Buyer & Seller): Selling Agent shows Seller's house to Buyer. Buyer makes an offer of $195,000. Selling Agent communicates offer to Listing Agent. Listing Agent presents offer to Seller. Seller says "okay", and signs the offer in the presence of Listing Agent. Listing Agent phones Selling Agent to say "congratulations, the Seller has accepted the offer."

Q: Do we have a contract? _____

Q: If yes, at what point was there a contract?_____

NOTE # 1: Remember the concept of imputed notice! When a message is communicated to an agent it is the same as if the message has been communicated to the agent's principal.

NOTE # 2: When a party (an offeror or offeree) communicates "acceptance" (or an offer or counteroffer) to one's own agent the message has **NOT** been legally communicated for purposes of forming a binding contract — *unless the agent is a dual agent!*

NOTE # 3: When a party (an offeror or offeree) communicates "acceptance" (or an offer or counteroffer) to the agent of the other party the message **HAS** been legally communicated for purposes of forming a binding contract.

NOTE # 4: When a party (an offeror or offeree) communicates "acceptance" (or an offer or counteroffer) to a dual agent – even if acting in the capacity of a "designated agent" – the message **HAS** been legally communicated for purposes of forming a binding contract.

METHOD of COMMUNICATING ACCEPTANCE

Unless an offer states a specific method by which the acceptance of an offer is to be communicated from an offeree to an offeror the acceptance may be communicated in any manner deemed legally acceptable. Such methods include, but are not limited to, (1) oral communication in person; (2) oral communication through an agent; (3) personal delivery; (4) delivery through an agent; (5) written communication via fax, email, telegram, etc.; or (6) mailing the written acceptance.

NOTE: If the communication of acceptance is through any means other than via delivery of the original document, it is strongly suggested that the original document(s), along with original signatures, be executed and delivered to all parties ASAP. Typically, this is the "cleaned-up" version of the final agreement.

But how quickly is ASAP? Since each situation is unique it is difficult to say with great certainty, but ASAP probably means "as soon as practicable", and in today's world of cell phones and other methods of rapid communications, ASAP normally will mean well within the five days allowed by NCREC Rule A.0106.

THE BULLETIN

The following article was published by the N.C. Real Estate Commission
in *The Bulletin*, Vol. 24, No. 4, Winter 1994, Page 3 & 6

Q: When a buyer makes a written offer to purchase a property and the seller signs (accepts) the offer, does the offer immediately become a binding contract?

A: No.

When Does a Contract Become Enforceable?

Have you ever been involved in a real estate transaction in which you were not certain whether the parties had a binding contract? Perhaps the buyer and seller had reached an oral agreement when another buyer made an offer on the property. Maybe one of the parties got "cold feet" and wanted to back out of the deal even after signing the contract.

To determine whether parties have an enforceable contract, you must be familiar with two basic concepts of contract law: the Statute of Frauds and the concept of acceptance.

The Statute of Frauds. Every state has a law known as the "Statute of Frauds" which requires certain contracts to be in writing in order to be enforceable. Included in the North Carolina Statute of Frauds are certain long-term leases and ***all*** contracts for the ***sale of land*** or any interest in land. To be enforceable, these leases and contracts must also be "signed by the party to be charged"; i.e., the person against whom you want to enforce the contract.

So, if one party has not signed a purchase contract, and has only *orally* agreed to its terms, he or she may not be held to the agreement. This means that if a buyer makes a written, signed offer to which a seller has only *orally* agreed, the agreement is not enforceable. If the seller receives a second offer, he is free to accept it.

The Concept of Acceptance. The second important concept in determining whether you have an enforceable contract is that of "acceptance." Along with "offer" and "consideration," "acceptance is required in every contract between two or more parties in order for the contract to be legally signed.

Generally, it is easy to determine when you have an "offer" in a real estate transaction. In North Carolina, a buyer usually makes the initial offer in writing (often on the standard Offer to Purchase and Contract form), signs the offer and presents it to the seller or the seller's agent.

Likewise, "consideration"–something of value given to induce the other party to enter the contract–is usually not an issue in real estate contracts. Typically, the buyer promises to give money or property to induce a seller to convey real property. (This does not mean that earnest money is required to form an enforceable contract; the parties can form an enforceable contract without the buyer giving earnest money, provided the other requirements are met.)

The remaining issue in real estate contracts, then, is the question of whether "acceptance" has occurred. Only when a contract has been properly accepted does it become enforceable. To achieve a valid acceptance, a contract for the sale of real estate must meet two elements: "signature" and "communication of acceptance."

Signature. While full signature is preferred, any mark will suffice–including initials or even an "x" (for instance when one of the parties is unable to write)–as long as it is made with the intent of the signer to be bound to the contract. There have even been cases in which a letterhead was considered a sufficient signature for a party.

Similarly, the signature does not have to appear at the bottom of the document. Although it is preferable for the signature to be at the bottom, the contract will still be valid if the signature appears elsewhere. A party can therefore initial a contract at the side (as when rewriting a counteroffer) and be bound to the contract.

Communication of Acceptance. Signature alone is not sufficient to constitute a valid acceptance: the accepting party must also *communicate* acceptance to the party who made the last offer or counteroffer.

Assume, for example, that a buyer makes a written, signed offer which is delivered to the listing agent and then to the seller. The seller likes the offer exactly as written and signs it. Has a binding contract been created? No! The seller has not communicated acceptance back to the buyer. The contract will not be binding until the buyer (or the *buyer's agent)* learns of the seller's acceptance.

Unless the parties have agreed to a particular method of communication, communication of acceptance can be made in any manner that is convenient for the parties, and can even occur accidentally. Therefore, in a typical residential sales transaction, communication of acceptance can be made orally, e.g., by calling and advising the buyer of acceptance. This oral acceptance does not violate the Statute of Frauds because the contract itself has been written and signed. It is only the *communication* of acceptance that is oral.

Note that ***delivery*** of the contract document is not required to make a contract enforceable. The contract is formed at the time of communication. The real estate agent does, of course, have a duty to provide copies of the contract to the parties under the real Estate License Law.

Because communication must be made to the other party in the transaction or to the other party's agent, it is important to know whether the real estate agents involved represent the buyer or seller.

Communicating acceptance of a buyer's offer or counteroffer. Suppose a seller signs a buyer's written offer and then tells the listing agent that he has accepted the offer. Is the seller's statement to the listing agent sufficient to create a binding contract? No. The seller has communicated acceptance only to his own agent, not to the buyer or to the buyer's agent. So, the contract is not yet enforceable.

Assume then the listing agent tells the selling agent that the seller has signed and accepted the buyer's offer. Has communication of acceptance been accomplished? The answer depends upon which party the selling agent represents. If the selling agent is a subagent of the seller, communication to the selling agent does not create a binding contract. However, if the selling agent is a buyer's agent, communication to him is as good as communication to the buyer herself; the contract is enforceable once the buyer or the buyer's agent learns that the seller has signed the buyer's written, signed offer.

Communicating acceptance of a seller's counteroffer. Now suppose that the seller rejects the buyer's offer but makes a written, signed counteroffer. To accept the seller's counteroffer, the buyer must do two things: (1) sign the counteroffer; and (2) communicate acceptance back to the seller or to the seller's agent. A signature, without communication, does not create a contract. Conversely, communication of acceptance, without a signature, does not create a contract.

Remember that communication of the buyer's acceptance must be made to the *seller* or to the *seller's agent or subagent.* If a buyer communicates acceptance to his own agent, i.e., a buyer's agent, no binding contract has been created.

Oral negotiations. Often after the buyer makes an initial written offer, all subsequent negotiations are communicated orally through the real estate agents involved in the transaction. This practice is acceptable, but may delay reaching a *binding* agreement. A "gentleman's agreement" is unenforceable; to be binding, the terms must be put in writing and signed by the parties.

In a "Nutshell". A contract for the sale of land is enforceable only if: (1) it is in writing and signed; and (2) an offer has been made, is supported by consideration, and is properly accepted. Acceptance requires not only the *written signatures* of the parties, but also *communication of acceptance* from the party accepting the last offer/counteroffer to the party (or party's agent) who made it. END

THE BULLETIN

The following article was published by the N.C. Real Estate Commission
in *The Bulletin*, Vol. 14, No. 2, 1983, Page 4

Q: As a licensed real estate broker I recently received a written offer to purchase on one of my listings. Naturally, I rushed to present the offer to the seller. He accepted the offer and I returned to my office with the signed contract. When I got there, I was astonished to discover that another offer to purchase the same property had been received, and for a price higher than the offer I had just presented. Since the seller has already signed and accepted the first offer, is it now too late for him to consider the second, higher offer?

A: No.

The seller may consider and accept the second offer if he so desires. To create a legally binding contract for the purchase and sale of real estate, the written offer must be accepted and signed, and the acceptance must be communicated to the offeror. Although the seller in question had assented to and signed the first offer presented by the broker, he is not contractually bound to sell because the broker has not communicated the seller's acceptance to the first offeror.

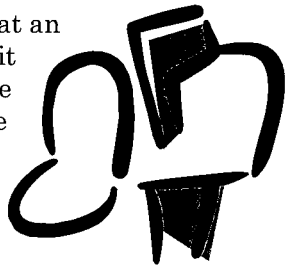
Unless otherwise specified, the acceptance may be communicated by any means adequate to manifest the accepting party's assent. To communicate the acceptance of an offer to purchase real estate, it is not necessary for the broker to return the offer bearing the seller's signature to the buyer. Once the seller has accepted and signed the contract, a letter, telegram or telephone call to the buyer will be sufficient to communicate the acceptance and bind the parties. Of course, even though the acceptance is communicated by mail or telephone, Commission Rule .0106 requires the broker to supply both parties a copy of the contract within five days after it is executed.

Since he has not communicated the seller's acceptance to the first offeror, the broker in the question should return both offers to the seller so that he may consider their relative merits and choose between them. END

SUBMISSION of ACCEPTANCE via THE "MAILBOX" RULE

DEFINITION: The "mailbox rule" is the principle that an acceptance becomes effective, and therefore binds the offeror, once it has been properly mailed. Once the acceptance is ***"out of the control of the offeree"*** the offer is considered to be a contract as of the date and time of the mailing, even though the acceptance is not actually received by the offeror until a later date.

WHAT IT IS: The "mailbox rule" is a legal concept based upon the theory that an acceptance of an offer is made, and therefore forms a binding contract, when it [the acceptance] is mailed (out of the control of the offeree). Thus, neither the person making the offer nor the person accepting it can take it back after the acceptance is in the mail.



NOTE # 1: The mailbox rule does not apply if the offer provides that an acceptance is not effective until received (at some other stated point).

NOTE # 2: One of the requirements for establishing a valid communication of acceptance via the mailbox rule is that the piece that is mailed (i.e. the envelope, package, etc.) must have a proper and adequate amount of postage affixed and have a proper and correct address for the addressee.

NOTE # 3: The basic [and general] rule of contract law is that communication of acceptance is not effective to form a binding contract until the offeror has [actually] received such notification – either orally or in writing. However, there may be exceptions, and the "mailbox rule" is [generally] held to be one such exception. Again, the basic premise is that once an offeree "communicates" the acceptance in a manner that he/she cannot retrieve or revoke, i.e., the communication retrieval is "out of his/her control", the offer is considered to be a contract as of the date and time of the mailing.

Therefore, the question of the moment is – "Does the general principle that sending a communication – not receipt of communication – form a binding contract when communicated via other forms of communications?" This principle can become extremely important in today's fast paced world of communication via fax, email, and voice mail. This issue will be addressed following the next exercise.

EXERCISE: Read the following case regarding the "mailbox rule" and if you were the judge determine if you would rule there is a binding contract and American Savings must convey the house for $180,000?

CASE LAW: Consider the intricacies of the "mailbox" rule in light of the 1990 California Appeals Court decision in Gibbs v. American Savings, 266 Cal. Rptr. 517.

James and Barbara submitted an offer for $180,000 to American Savings to buy a house which American had acquired by foreclosure. At about 9 AM on June 6, Barbara received a counteroffer from American which contained several additional sales terms but no mention of the purchase price. Barbara immediately drove to her husband's job site where they signed American's counteroffer at 9:39 AM. She drove back to her office, typed an envelope with a certified mail tag, placed the accepted counteroffer in an envelope and before 10 AM handed it to the mail clerk at her office, instructing him to mail it for her at the post office. But at approximately 11 AM, Dorothy, an American Savings employee, phoned Barbara to say the counteroffer was in error since American intended to raise the price to $198,000. Dorothy told Barbara the counteroffer was revoked because of the error. But Barbara and James felt there was a contract formed when the signed counteroffer was handed to the mail clerk. They sued American for damages, specific performance, breach of contract, and declaratory relief. However, at the trial, American presented the mailed envelope which had a June 7 postmark, one day after Dorothy revoked the counteroffer.

If you were the judge would you rule there is a binding contract and American Savings must convey the house for $180,000?

The judge said _____ .

"It is basic contract law that an offer may be revoked any time prior to acceptance," the judge began. Since the counteroffer was revoked at 11 AM on June 6, but the letter wasn't postmarked until June 7, there was no offer which could be accepted, he explained. "This rule has long been interpreted to require that *the acceptance be placed out of the control of the accepting party* in order to be considered in the course of transmission. Typically, this is found when the acceptance is delivered to the post office," the judge said as he dismissed the case. End of case

SUBMISSION of ACCEPTANCE
via
Voice Mail, Fax or E-mail

The submission of offers and counteroffers electronically, whether via voice mail, fax or email, is considered appropriate. Likewise, the communication of an offeree's decision to accept an offeror's offer (counteroffer) is considered appropriate provided:

1. the acceptance is in a legally enforceable format, i.e., the offeree has signed a form that is legally enforceable or has written a letter of acceptance, etc.; and
2. the offeror has the proper equipment to receive the notification of acceptance.

Q: When does an offeree's acceptance of an offeror's offer become a binding contract when the notification of acceptance is via a voice mail message, a fax, or an email?

EXERCISE: In groups of three-to-five people, discuss the question from above and attempt to determine which of the following methods of electronic communication can be used to create a legally binding contract following "acceptance" of an offer. Specifically, assume a seller has "accepted" a buyer's offer and the listing agent communicates the seller's acceptance to the buyer's agent via each of the following. Which method of communication, if any, would likely constitute the creation of a "contract"?

1. Voice Mail:
2. Fax:
3. E-mail:

Though there is no known *definitive* case law on the application of the "mailbox" rule as it does or may apply to today's technology, that is, the leaving of a voice mail message, the transmission of a fax, or the sending of an email, generally it is held that the courts likely would find that each of these modes for communicating acceptance constitutes a binding contract once the message of "acceptance" is "received" by the offeror's (or his/her agent's) communication device. In other words, once the message is "out of the control of the offeree" (or his agent).

When applying the "mailbox" rule of electronic communications regarding the "acceptance" of an offer, keep in mind the theory of "out of the control of the sending party".

Voice Messages: When one leaves a voice mail message for another – and "hangs-up" – it is not possible for the caller to retrieve the message. The (voice) message of "acceptance" has been communicated and is "out of the control of the caller".

Faxes: When one "sends" a fax – the paper has "gone through" the fax machine – it is not possible for the "sender of the fax" to retrieve the fax. The faxed (message) of "acceptance" has been communicated and is "out of the control of the sender".

E-mails: When one "sends" an email – the message has "left the machine" – it may still be possible for the "sender of the message" to retrieve the emailed message. The email (message) of "acceptance" has been communicated but is not [necessarily] "out of the control of the sender". YOU ARE READING THIS CORRECTLY. E-mailed messages *may* be retrieved! But granted, some systems make this task easier than others. To retrieve a message "sent" using Outlook, for example, open your "Sent" folder and open the email you've sent and that you wish to retrieve. In the tool bar, click on "Actions", scroll down and click on "Recall This Message", and it will ask you what you want to do – recall, replace, etc. *NOTE: You cannot retrieve or recall a message once it has been opened and read by the recipient.*

Therefore, one *may* argue that the communication of "acceptance" via e-mailing does not constitute a legally binding contract. This is one that the court system likely will have to figure out as time passes!

Judge Thinks a Series of

E-Mails *may* Constitute a Binding Contract

Shattuck v. Klozbach

Civ. Act. No. 01-1109A (Plymouth Superior Ct., Mass., Dec. 11, 2001

David and Barbara Klotzbach wanted to sell their house at 5 Main St, Marion, MA. Over a course of six months of negotiating terms of a sale with Jonathan Shattuck via a series of emails a deal was struck. Or was there?

Beginning in April (2001) David Klozbach and Jonathan Shattuck began negotiating the terms of a sale via an exchange of emails. An agreement was reached between the two men for a sale price of $1.825 million – all via emails. Among other things, Klozbach wrote, "Once we sign the P&S (purchase and sale) we'd like to close ASAP. You may have your attorney send the P&S and deposit check for 10% of purchase price ($182,500) to my attorney." The email concluded by stating, "I'm looking forward to closing and seeing you as the owner of '5 Main Street,' the prettiest spot in Marion village." All the emails between the two men were concluded with the "typewritten" names of the sender.

But in September (2001) Klozbach backed away from wanting to sell his house. When Shattuck tried to enforce the contract he thought they had, Klotzbach and his lawyers argued that the emails were not signed documents and therefore there was no binding contract. Shattuck sued Klozbach for breach of contract. In turn, Klozbach attempted to have the suit dismissed.

On December 11 (2001), Plymouth Superior Court Judge Ernest Murphy decided the emails, taken together, constituted a legally binding purchase and sale agreement that outlined all the necessary terms of the contract. [Emphasis added]

Among other things, Defendant Klozbach argued that even if the emails bound him, they did not bind the other owner of the house – his wife, Brenda – because she had not "signed" the emails. However, Judge Murphy wrote, *"the correspondences suggest that the defendant-wife was aware of the ongoing negotiations concerning the sale of the property. Thus, a reasonable trier of fact could conclude that the defendant-husband's signature on the memorandum acted as a signature of both defendants ..."* [Emphasis added]

In conclusion [at least to this part of this suit], Judge Murphy refused to dismiss the case and scheduled the case for trial.

NOTE: There was no subsequent trial as the parties settled the case.

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Notes

SECTION SIX

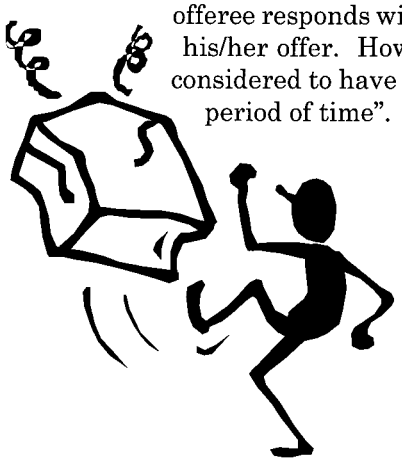
REJECTION of OFFER or COUNTEROFFER

REJECTION of OFFERS & COUNTEROFFERS

COMMENT # 1: When an offeree finds an offer (or counteroffer) unacceptable and wishes to *not* provide the offeror with a counteroffer (for whatever reason), the offer (or counteroffer) should be unquestionably, definitely, and affirmatively rejected in a timely manner. While an oral rejection of an offer (or counteroffer) is lawful and is all that is legally required to terminate an offer (or counteroffer), it is highly recommended that the offeree provide a written rejection. Such a written rejection may take any of several forms, including simply writing the word REJECTED across the face of the document. When an offeree rejects an offer (or counteroffer) in this manner he should NOT sign, initial, or otherwise place his "mark" on the document. However, the preferred method for providing a written rejection of an offer (or counteroffer) is with a separate letter that clearly states that the offeror's offer (or counteroffer) is affirmatively rejected.

COMMENT # 2: An offeror should ALWAYS withdraw or otherwise revoke his offer or counteroffer on a property *prior to making another offer on another property!* Failure to do this may result in the buyer being obligated under the terms of more than one contract.

COMMENT # 3: Though not recommended, an offeree can "reject" an offer by taking no action. Generally, an offer will "expire" or "terminate" with passage of time if the offeree does not respond. However, this can be a risky situation because technically an offer is "on the table" until either the offeree responds with an acceptance, rejection or counter, or until the offeror withdraws his/her offer. However, like most other components of contract law, an offer may be considered to have "expired" with lack of response from an offeree "within a reasonable period of time". But again, what constitutes "a reasonable period of time?"



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Notes

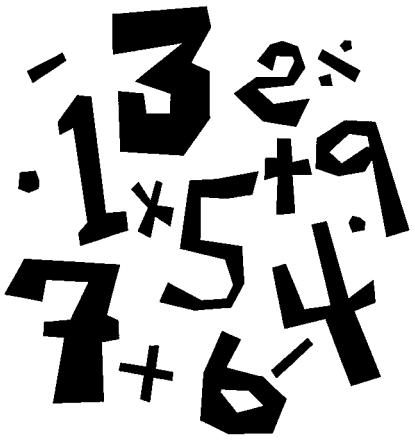
SECTION SEVEN

MULTIPLE OFFERS

MULTIPLE OFFERS

DEFINITION: When an agent has a property listed for sale and two or more prospective buyers simultaneously wish to purchase the property.

WHAT IT IS: A difficult situation for all parties, but generally a desired position for a seller.



WHAT TO DO: Most real estate agents who have found themselves in the position of having multiple offers on one of their listings have asked such questions as "how much information can I share with one party about the other?"; or, "should I just deal with one offer at a time or must I give all of them to the seller at once?"; or, "what do I do if my seller wants to accept all of the offers?"; or, "how did I get myself in this mess in the first place?"

Perhaps the best way to address this subject in detail, and with timely and accurate information, is to share the writings of Will Martin, General Counsel for the N.C. Association of REALTORS. The following information, entitled MULTIPLE OFFERS, was written by Mr. Martin and appeared in the Spring 2000 edition of the General Counsel Quarterly, Vol. IV, Issue One. Reproduced with permission.

MULTIPLE OFFERS

General Counsel Quarterly
Volume IV, Issue One: Spring 2000
Will Martin, Legal Counsel, NCAR
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Judging from the number of calls received by NCAR legal staff, NCAR members are frequently involved in multiple offer situations. Multiple offers can be stressful, and can raise complicated legal and ethical issues. A comprehensive treatment of the subject could form an entire chapter of a textbook. The following questions and answers attempt to address at least some of the issues that can arise in connection with a multiple offer situation.

Q: Suppose a seller gets similar offers on the same property. Is the seller under any obligation to deal with the buyer whose offer came in first?

A: No. The seller is at liberty to deal with the buyers in whatever order the seller chooses, or even to ignore both buyers entirely, for that matter.

Q: If my seller gets multiple offers on his property, am I obligated to inform the agents for each buyer that other offers have been made?

A: As a general rule, yes. Although it would be impermissible "shopping" to disclose any of the terms of the competing offers to the other buyers, disclosure of the existence of the other offers is considered by the North Carolina Real Estate Commission to be within the listing agent's duty to treat other parties fairly, provided however, the seller has so instructed. [See NCREC Bulletin article at end of this section].

Notwithstanding the general rule, there could be situations where a listing agent would not be expected to disclose the existence of competing offers. Suppose, for example, that a listing agent has delivered a counteroffer from her seller to an agent for buyer A, and that while the counteroffer is outstanding, the listing agent receives a second offer from an agent for buyer B. Depending on the circumstances, the seller might choose to revoke the counteroffer immediately and then review the offer from buyer B, or review buyer B's offer first before making a decision to either revoke the counteroffer and accept buyer B's offer, revoke the counteroffer and ask both buyers to submit their best offers, or reject or ignore the offer from buyer B and leave the counteroffer in place.

However, if the listing agent were to call the agent for buyer A right away to inform him of the existence of the offer from buyer B, buyer A could accept the counteroffer before the seller has had an opportunity to decide what to do. Thus, in this situation, the listing agent probably should *not* inform either the agent for buyer A or the agent for buyer B of the existence of the competing offers until the seller has had an opportunity to decide how to proceed.

Q: Let's say I get an offer from an agent for buyer # 1, which I submit to my seller. Then, before the seller makes a decision, I get an offer from an agent for buyer #2. I tell buyer # 2's agent about the existence of buyer # 1's offer. Am I required to inform the agent for buyer # 1 about the existence of buyer # 2's offer before I submit buyer # 2's offer to the seller?

A: Unless you were instructed to do so by your seller, you should *not* hold off on submitting buyer # 2's offer to the seller pending notification of the agent for buyer # 1 about the offer from buyer # 2. However, you should attempt to contact the agent for buyer # 1 if reasonably possible and inform him or her about the existence of the offer from buyer # 2.

Q: Assume the same facts as the preceding question. Further assume the offer from buyer # 2 comes in at 3:00 p.m. and that the listing agent contacts the seller right away to inform her about the second offer. Seller expresses great interest in buyer # 2's offer and indicates that she would like the listing agent to drop by her home to present it to her at 4:00 p.m. Should the listing agent contact the agent for buyer # 1, and if so, what should the agent for buyer # 1 be told?

A: The listing agent should attempt to reach the agent for buyer # 1 to inform him/her of the offer from buyer # 2. If the listing agent is successful in reaching the agent for buyer # 1, the listing agent should simply inform him/her of the existence of the second offer and that the listing agent is scheduled to present it to the seller at 4:00 p.m.

Q: Same facts as the preceding question. Further assume that upon being notified of the offer from buyer # 2, the agent for buyer # 1 indicates that he feels sure buyer # 1 will want to submit another offer, and asks that he be given an opportunity to submit another offer on behalf of buyer # 1 before the seller makes a final decision. What should the listing agent do?

A: The listing agent should tell the agent for buyer # 1 that the listing agent will certainly inform the seller of buyer # 1's possible interest in submitting another offer, and that the seller, not the listing agent, will decide whether to defer making a decision on buyer # 2's offer pending receipt of another offer from buyer # 1.

Q: Suppose I've just received an offer from a cooperating agent, and before I present it to my sellers, another agent calls to inform me that she will probably be submitting an offer on behalf of her buyer clients soon. Do I wait for the second offer to come in and then submit both offers to my sellers at the same time?

A: The Real Estate Commission's rules require offers to be presented immediately and in no event later than 5 days following receipt. The Code of Ethics also obligates REALTORS to "...submit offers and counter-offers objectively and as quickly as possible." (see Standard of Practice 1-6) Thus, it would probably be a violation of the Commission's rules and the Code of Ethics to delay presentation of the offer that has been received. You should contact the sellers to discuss the situation with them and let them decide whether they want to review the first offer immediately or wait to review both offers at the same time (assuming a second offer even comes in).

Q: In addition to advising the agent working with the buyers of the existence of multiple offers, should the listing agent keep the agents informed about the status of their respective offers?

A: NCAR's legal staff receives occasional complaints from agents working with buyers about a listing agent's failure to communicate with them about the status of the buyer's offer. The complaining agent oftentimes suspects that the listing agent may not have even presented the offer. Although neither the Code of Ethics nor the real estate licensing law appear to impose on listing agents any specific duty to communicate with cooperating agents about the status of offers they have submitted on behalf of buyers, listing agents would be well advised to keep the agents working with the buyers reasonably apprised of where things stand, as this may help avoid allegations that the listing agent is acting inappropriately, such as failing to deliver the offer at all.

Q: I've received two offers on one of my listings. One of them has been submitted by an agent from another firm and the other is an "in house" offer from an agent in my firm. I advised the agent from the other firm of the "in house" offer, and the agent from the other firm now insists on presenting her buyer's offer directly to the seller. Do I have to allow this?

A: NAR's model MLS rules provide that a cooperating agent has the right to present an offer from his or her buyer to the seller unless the seller prohibits it in writing. Your own MLS probably has a similar provision. If so, the agent from the other firm would have the right to present her buyer's offer to the seller. Of course, if the agent from the other firm doesn't ask, the listing agent is not obliged to handle the presentation of the offers in this fashion. However, if the seller ultimately accepts the in-house offer, there is certainly a chance that the agent from the other firm and her buyer might suspect that they were not treated fairly. Allowing the agent from the other firm to present her buyer's offer directly to the seller should at least help dispel any suspicions of unfair treatment. Thus, from a risk management point-of-view, a firm might consider establishing a policy that would require agents from other firms to present their buyer's offers to the seller in situations where there is a competing in-house offer, unless, of course, the seller instructs the listing agent otherwise in writing.

Q: I don't see the big deal about a seller countering two offers at the same time. I mean, the seller can only sell his property to one buyer, so the first buyer to accept wins and the other buyer loses, right?

A: You might be right about which buyer would ultimately be entitled to purchase the property; however, it is absolutely wrong to conclude that just because the seller can only convey his property to one buyer, the seller can't contractually obligate himself to sell his property to more than one buyer. Stated differently, buyer # 1's acceptance of the counteroffer has no legal impact on the counteroffer made to buyer # 2. The seller could attempt to revoke the counteroffer made to buyer # 2; however, if buyer # 2 accepts the counteroffer and communicates acceptance before the seller revokes it, the seller is probably under contract to sell the property to both buyers. As between the buyers, one of them would ultimately get the property, but the other one might well be entitled to monetary damages based upon the seller's breach of contract. It would be safer for the seller to either counter one offer at a time, or reject both offers and ask both buyers to submit second offers. (NCAR's "Response to Buyer's Offer" form (standard form #340) may be used if the seller decides on the latter approach.)

Q: My out-of-town sellers reached an oral understanding with a couple interested in buying the seller's house. The agent working with the buyers as a buyer agent submitted an Offer to Purchase and Contract signed by the buyers, and I in turn mailed it to the sellers via overnight mail. The next day, the sellers called me to say that they had received the Offer, signed it and were about to put it back in the mail to me. I called the buyer's agent to inform her that the sellers had accepted the Offer. Not ten minutes later, I got a call from another agent with a different firm who informed me that his buyers wanted to make a full-price offer on the property. I immediately called the sellers back to inform them of the second buyer's interest in the property, and of course, they asked me if they were obligated to sell to the first buyers. I told them I wasn't sure, but that since they hadn't put the Offer in the mail yet, they might not be under contract with the first buyers. We agreed that they would hold off on returning the signed Offer to me until I could find out what the legal implications were. So, are the sellers under contract with the first buyers, or may they consider the offer of the second buyers?

A: Before I attempt to answer the question, let me first say that multiple offer situations present potentially complex legal issues, the answers to which require an analysis of all the facts of the situation and the application of principles of contract law (and perhaps other areas of law, such as agency law). You should never put yourself in a position of giving the sellers legal advice or even volunteering to get answers to their legal questions for them. Clients should always be advised to seek their own counsel if a legal question arises.

To answer the question, in my opinion the sellers *are* under contract to sell the property to the first sellers, and therefore should not consider the second offer. It is a general principle of contract law that the acceptance of an offer must be communicated to the party who made the offer. This principle is embodied in the Offer to Purchase and Contract (standard form # 2-T), which provides that "...this offer shall become a binding contract on the date that; (i) the last one of the Buyer and Seller has signed or initialed this offer or the final counteroffer, if any, and (ii) such signing or initialing is communicated to the party making the offer or counteroffer, as the case may be. Such date shall be referred to herein as the 'Effective Date'."

It is also a principle of contract law that acceptance may be communicated in a variety of ways unless the offer specifies a particular manner in which acceptance is to be communicated. Thus, absent special language inserted in the Offer to Purchase and Contract (the preprinted language of which does not require acceptance to be communicated in any particular manner), acceptance could be communicated orally (in person or by telephone), by personal delivery of the signed Offer itself, by mail (traditional or special), by facsimile or e-mail. If acceptance is communicated by mail, the so-called "mailbox rule" provides that communication of acceptance occurs as of the date and time of the mailing, even though the offering party might not actually receive it for several days. In your situation, though, the issue of mailing is irrelevant, because you, as the seller's agent, already communicated the seller's acceptance of the Offer to the buyers when you called their agent and informed her that the sellers had signed the Offer. Also, note that even if the sellers had mailed the signed offer to you, it would not have constituted communication of acceptance according to the mailbox rule, since acceptance must be communicated to the offering party, and you, as the listing agent, do not represent the offering party (i.e., buyer).

End of Martin Article

NOTE: After all of the forgoing information, just how should a listing agent handle multiple offer situations? Answer: In the words of Laurie Janik, Legal Counsel for the National Association of REALTORS, "the safest way to proceed — to represent sellers' interests and therefore be consistent with the listing broker's fiduciary duties — is for the listing broker to adopt and follow a standard policy on multiple offers that's reviewed with sellers *before* any offers are received. The policy should state that sellers will decide how multiple offers on their property are to be handled, because it's the sellers who may not get as high a price if some buyers aren't told about other buyers' offers. It's also the sellers who risk losing all offers if potential buyers back out after being told of other offers. Sellers should understand the risks and instruct their brokers how they'd like the situations to be handled."

Disclosure of Multiple Offers

Release Date: 3.6.2012

QUESTION: I am a listing agent on a property where there has been a lot of buyer interest. Earlier today, I received offers from two different buyers. The buyers are represented by two different agents. Neither agent is aware that this is a multiple offer situation, and neither one has asked me if there are any other offers. I know that some sellers are reluctant to disclose the existence of multiple offers to competing buyers because they are afraid that the buyers will withdraw their offers rather than compete. In the absence of an inquiry from the buyers or their agents, do I have any legal or ethical obligation to disclose the existence of multiple offers?

ANSWER: The short answer is no.

Standard of Practice 1-15 in the REALTOR Code of Ethics provides guidance as to a REALTOR's ethical obligations. That provision imposes a disclosure obligation on a listing agent, but only if: (a) the REALTOR first obtains the seller's approval, and (b) there is an inquiry from a buyer or a cooperating broker. Since no inquiry has been made in your situation, you have no ethical obligation to disclose. You should note that where an inquiry *is* made and disclosure has been authorized by the seller, Standard of Practice 1-15 requires REALTORS to disclose whether the offers were obtained by the listing licensee, another licensee in the listing firm, or by a cooperating broker. You should consult with your seller to discuss whether it is in the seller's best interest in this situation to disclose the existence of the multiple offers. If the seller thinks disclosure would be a good idea, there's certainly nothing that would prohibit you from disclosing the existence of the multiple offers to the agents for the competing buyers, even though the agents haven't asked if there are any other offers.

There is nothing in North Carolina's licensing law that requires a listing agent to volunteer information about other offers. The North Carolina Real Estate Commission does require agents to treat all prospective buyers equally in the multiple offer context. This means that if the listing agent does disclose the existence of multiple offers to one competing buyer, the agent must also disclose that fact to all other competing buyers.

SAMPLE OFFICE POLICY

The following "sample office policy" is from the NCAR Office Toolkit.

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The following sample policy regarding the Presentation of Offers, including information on the presentation of multiple offers, is for illustrative purposes only. Each company should establish its own procedures for dealing with multiple offers. The procedure set forth below is one option that may be followed to minimize risk and offer a fair presentation to all parties. Neither the Code of Ethics nor the Rules of the North Carolina Real Estate Commission require any specific method.

Presentation of Offers

In accord with the Code of Ethics and North Carolina Real Estate Commission Rules (Section 58A.0106), S.S. SMITH, INC., REALTORS®, requires its agents to present all offers to the seller until closing and all counter offers to the buyer, regardless of how many offers received and regardless of the order in which the offers were received. S.S. SMITH, INC., REALTORS®, urges any agent involved in a multiple offer situation to contact management to review the proper procedures.

> (NOTE: A company should establish its own procedures for dealing with multiple offers. The procedure set forth below is one option that may be followed to minimize risk and offer a fair presentation to all parties. Neither the Code of Ethics nor the Rules of the North Carolina Real Estate Commission require any specific method. An exclusive buyer agency company will not use this option and should delete this reference.)

The company will always be guided by lawful instructions of the client in any multiple offer situation. While the company believes that these procedures protect the client, the client may choose to give the company other lawful instructions. The agent should discuss with the client, whether seller or buyer, the customary procedures for handling multiple offers so that the client may determine whether the client wishes to give the agent or company different instructions.

Standard of Practice 1-15 of the Code of Ethics requires that the listing agent, in response to inquiries from buyers or cooperating brokers shall, with the sellers' approval, divulge the existence of offers on the property. In addition, Standard of Practice 1-15 requires that, when disclosure is authorized, the listing agent has an affirmative obligation, if asked, to disclose the "source" of the offer, i.e. whether the other offer(s) are from a prospect of the listing licensee, another licensee in the listing licensee's firm or a cooperating broker.

In the event of multiple offers on one property, S.S. SMITH, INC., REALTORS®, follows a policy, with the seller's approval, of notifying all offerors that his/her offer is in competition with other offers as well as giving the opportunity to change the offer. The notification shall take place only after multiple offers actually exist and not when the listing agent may have knowledge of other offers being written or possibly being written.

An exception to this policy exists if the seller has a currently effective counter offer in possession of a buyer. In that event, the agent will not disclose the competition to the second or later offeror until the seller has had the opportunity to examine the second offer. This gives the seller the ability to determine whether he/she desires to revoke her/his counter offer to the first offeror to negotiate with the second offeror.

NC Real Estate Commission Rule A.0115 prohibit disclosure of the price or other material terms contained in a party's offer to purchase to a competing party without the express authority of the offering party. Therefore, the agent should not reveal any terms of the offer to any other party including expiration time of the offer, price, closing dates, earnest money amounts, financing types, amounts or dates or other terms.

If another agent, whether from S.S. SMITH, INC., REALTORS®, or another company, asks the listing agent to "let me know if another offer comes in", S.S. SMITH, INC., REALTORS®, has a general policy of not acknowledging such requests. If other offers come in, the agent should advise the client that inquiries of this nature have been made and ask the client whether those requests should be followed up.

If multiple offers exist and the listing agent has written one of those offers, the policy of S.S. SMITH, INC., REALTORS®, in such circumstance is that the listing agent may not present any of the offers. In this case, a sales manager or broker (or other S.S. SMITH, INC., REALTORS®, agent if management is not available) must be asked to present the multiple offers.

If a listing agent has already presented an offer from another agent and a customer of the listing agent asks to write a competitive offer, the policy of S.S. SMITH, INC., REALTORS®, is that the listing agent must ask the sales manager, broker or other S.S. SMITH, INC., REALTORS®, agent to write the offer for the listing agent's customer. The listing agent's prior knowledge of the first offer could be seen as influential or biased if the listing agent's customer should be successful in negotiation.

In general, whenever the listing agent has knowledge of an offer presented, or could use information he/she has to the detriment of one of the competing parties, S.S. SMITH, INC., REALTORS®, strongly recommends that a third party agent, such as a manager, broker or other agent, become involved to assist in the negotiations.

A final issue regarding presentation of offers regards whether an oral offer must be presented. The rules of the North Carolina Real Estate Commission speak to presentation of "instruments," thereby implying that only written offers need to be submitted. However, common law agency principles dictate that all material and relevant information of which the agent has knowledge should be given to the client. In addition, Standard of Practice 1-7 of the REALTOR Code of Ethics speaks only of submitting all offers to the seller.

In accord with agency obligations of disclosure and loyalty and in the spirit of the Code of Ethics, S.S. SMITH, INC., REALTORS®, has a policy of giving the seller client all material and relevant information of which the agent has knowledge. In accord with this policy, if a customer insists on an oral offer, the company believes that the seller is entitled to that information.

The company recognizes that such an oral offer alone is almost certainly unenforceable under the laws of North Carolina. However, it is prudent to tell the seller what the agent knows, that is, an oral offer was made by this party and it is unknown whether the party will ultimately be willing to commit the offer to writing. At this point, a seller may choose to make a written offer to sell and thereby initiate the contract process him/herself.

Additional resources on this topic are available on NAR.realtor, Law and Policy. The NAR Professional Standards Committee has published a guide for agents and brochure for buyers and sellers on "Presenting and Negotiating Multiple Offers."

Timing of Presentation:

S.S. SMITH, INC., REALTORS®, also strongly supports and maintains a policy to present all offers and counter offers as quickly as possible. Standard of Practice 1-6 of the Code of Ethics and North Carolina Real Estate Commission Rule 58A.0106 provides the standards in this area. The Rule requires offers and counter offers to be delivered "...immediately, but in no event more than five days from the date of execution..." and the Code states offers must be submitted "as quickly as possible."

The policy of S.S. SMITH, INC., REALTORS®, is that these terms are to be interpreted to mean "immediately" or "as soon as humanly possible". As an example, a listing agent's receipt of an offer should immediately generate a telephone call to the owner to determine when the seller is available for presentation of the offer. Once contacted, the seller can then instruct the listing agent as to when to present the offer. The critical point is that S.S. SMITH, INC., REALTORS®, believes that the listing agent MUST make a diligent effort to contact the seller immediately upon receipt of the offer - not an hour later, not when the agent finishes lunch, not after the agent shows property.

In the case of a buyer agency, the same principles apply with equal weight. The buyer is the client and must be treated with the same high levels of fiduciary duty as a seller who is a client. These same principles should be adhered to even in the case of a buyer who is a customer and not a client. The North Carolina Real Estate Commission Rule speaks to the delivery of offers with no reference to client-agent relationship.

This is an extremely simple yet very important risk reduction technique. Every agent of this company should consider this of prime importance. The obvious danger in not taking this issue seriously is that the offeror can revoke/withdraw her/his offer at any time prior to a valid acceptance. S.S. SMITH, INC., REALTORS®, does not want to be in a position of defending an action where an offer was withdrawn before a seller was contacted or diligent efforts to contact the seller were not made.

> **NOTE**: These issues are common, daily events that the agent should learn to handle with skill and ease. The agent's ability to understand and deal with these issues will act as a significant risk reduction method and contribute to an agent's successful practice of the real estate business.

NAR Code of Ethics and Arbitration Manual
Appendix IX to Part Four
Presenting and Negotiating Multiple Offers

"When representing a buyer, seller, landlord, tenant, or other client as an agent, REALTORS® pledge themselves to protect and promote the interests of their clients. This obligation to the client's interests is primary, but it does not relieve REALTORS® of their obligation to treat all parties honestly." (from Article 1 of the REALTORS® Code of Ethics)

"REALTORS® shall submit offers and counter-offers objectively and as quickly as possible." (SOP 1-6)

Perhaps no situation routinely faced by REALTORS® can be more frustrating, fraught with potential for misunderstanding and missed opportunity, and elusive of a formulaic solution than presenting and negotiating multiple purchase or lease offers and/or counter-offers on the same property. Consider the competing dynamics. Listing brokers are charged with helping sellers get the highest price and the most favorable terms for their property. Buyers' brokers help their clients purchase property at the lowest price and on favorable terms. Balanced against the Code's mandate of honesty is the imperative to refrain from making disclosures that may not, in the final analysis, be in a client's interests. (Revised 11/01)

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?

What is fair? What is honest? What is to be done? Who decides? And why is there not a simple way to deal with these situations?

As REALTORS® know, there are almost never simple answers to complex situations. And multiple offer presentations and negotiations are nothing if not complex. But, although there is not a single, standard approach to dealing with multiple offers, there are fundamental principles to guide REALTORS®. While these guidelines focus on negotiation of purchase offers, the following general principles are equally applicable to negotiation of lease agreements. (Revised 11/01)

◄ Be aware of your duties to your client—seller or buyer—both as established in the Code of Ethics and in state law and regulations. (Revised 5/01)

The Code requires you to protect and promote your client's interests. State law or regulations will likely also spell out duties you owe to your client.

◄ The Code requires that you be honest with all parties. State law or regulations will likely spell out duties you owe to other parties and to other real estate professionals. Those duties may vary from the general guidance offered here. REALTORS® need to be familiar with applicable laws and regulations.

Be aware of your duties to other parties—both as established in the Code of Ethics and in state law and regulation.

◄ Remember that the decisions about how offers will be presented, how offers will be negotiated, whether counter-offers will be made and ultimately which offer, if any, will be accepted, are made by the seller—not by the listing broker. (Revised 5/01)

◄ Remember that decisions about how counter-offers will be presented, how counter-offers will be negotiated, and whether a counter-offer will be accepted, are made by the buyer—not by the buyer's broker. (Adopted 5/01)

◄ When taking listings, explain to sellers that receiving multiple, competing offers is a possibility. Explain the various ways they may be dealt with (e.g., acceptance of the "best" offer; informing all potential purchasers that other offers are on the table and inviting them to make their best offer; countering one offer while putting the others to the side; countering one offer while rejecting the other offers, etc.).

Explain the pluses and minuses of each approach (patience may result in an even better offer; inviting each offeror to make their "best" offer may produce a better offer[s] than what is currently on the table—or may discourage offerors and result in their pursuing other properties).

Explain that your advice is just that and that your past experience cannot guarantee what a particular buyer may do.

Remember—and remind the seller—that the decisions are theirs to make—not yours, and that you are bound by their lawful and ethical instructions.

◄ When entering into buyer representation agreements, explain to buyers that you or your firm may represent more than one buyer-client, that more than one of your clients or your firm's clients may be interested in purchasing the same property, and how offers and counter-offers will be negotiated if that happens. (Adopted 5/01)

Explain the pluses and minuses of various negotiating strategies (that a "low" initial offer may result in the buyer purchasing the desired property at less than the listed price—or in another, higher offer from another buyer being accepted; that a full price offer may result in the buyer purchasing the desired property while paying more than the seller might have taken for the property, etc.). (Adopted 5/01)

Explain to the buyer that sellers are not bound by the Code of Ethics. Sellers, in multiple offer situations, are not prohibited from "shopping" offers. Real estate brokers may, unless prohibited by law or regulation, "shop" offers. Therefore, REALTORS® assisting purchasers in formulation purchase offers should advise those purchasers it is possible that the existence, terms, and conditions of any offer they make may be disclosed to other purchasers by seller or by sellers' representatives except where such disclosure is prohibited by law or regulation. (Adopted 5/05)

Remember—and remind the buyer—that the decisions are theirs to make—not yours, and that you are bound by their lawful and ethical instructions. (Adopted 5/01)

◄ If the possibility of multiple offers—and the various ways they might be dealt with—were not discussed with the seller when their property was listed and it becomes apparent that multiple offers may be (or have been) made, immediately explain the options and alternatives available to the sellers—and get direction from them.

◄ When representing sellers or buyers, be mindful of Standard of Practice 1-6's charge to "... submit offers and counter-offers objectively and as quickly as possible." (Revised 5/01)

◄ With the seller's approval "...divulge the existence of offers on the property" consistent with Standard of Practice 1-15. (Adopted 11/02)

◄ While the Code of Ethics does not expressly mandate "fairness" (given its inherent subjectivity), remember that the Preamble has long noted that "...REALTOR® has come to connote competency, fairness, and high integrity..." If a seller directs you to advise offerors about the existence of other purchase offers, fairness dictates that all offerors or their representatives be so informed.

◄ Article 3 calls on REALTORS® to "... cooperate with other brokers except when cooperation is not in the client's best interest." Implicit in cooperation is forthright sharing of information related to cooperative transactions and potential cooperative transactions. Much of the frustration that occurs in multiple offer situations results from cooperating brokers being unaware of the status of offers they have procured. Listing brokers should make reasonable efforts to keep cooperating brokers informed. Similarly, buyer brokers should make reasonable efforts to keep listing brokers informed about the status of counter-offers their seller-clients have made. (Revised 5/01)

◄ Realize that in multiple offer situations only one offer will result in a sale and one (or more) potential purchasers will be disappointed that their offer was not accepted. While little can be done to assuage their disappointment, fair and honest treatment throughout the process; coupled with prompt, ongoing and open communication, will enhance the likelihood they will feel they were treated fairly and honestly. In this regard, "...REALTORS® can take no safer guide than that which has been handed down through the centuries, embodied in the Golden Rule, "Whatsoever ye would that others should do to you, do ye even so to them."' (from the Preamble to the Code of Ethics).

THE BULLETIN

The following article was published by the N.C. Real Estate Commission
in *The Bulletin*, Vol. 25, No. 1/2, Spring/Summer 1994, Page 8

Q: When a listing agent has the opportunity to present multiple offers to his/her seller, should the listing agent:

a. Promptly present all offers?
A: Yes.

b. Inform all buyers that more than one offer has been made without disclosing the terms of the competing offers?
A: Yes.

c. Assist the seller in choosing the best offer?
A: Yes.

Handling Multiple Offers

Like most real estate agents, you are probably confident in your ability to handle the negotiation of a single offer to purchase. However, you may feel less certain when presented with more than one offer for the same property. To answer your questions and address your concerns, here are some guidelines for the proper handling of multiple offers.

Listing agents must promptly present each offer to their seller-clients, whether there is only one offer or several offers on the same property. In no event may an agent wait more than five days to present any offer. If multiple offers arrive at the agent's office before he or she has had a chance to deliver any of them, the agent should present all of the offers to the seller at the same time.

There is no "first come, first served" rule: just because an offer is the first to arrive does not mean that it has priority over an offer that arrives later. The seller may accept any offer, without regard to the order in which the offers were made and received. Alternatively, the seller may choose to negotiate with any prospective purchaser so long as the choice is not made for a reason that would violate Fair Housing laws.

The listing agent should (with the seller's permission) inform the agent working with each prospect that other offers have been made on the property so that all of the competing buyers can be encouraged to make their best offer. However, a listing agent is **not** permitted to disclose the terms of competing offers to one or more of the buyers, which is called "shopping" offers to purchase. The law requires that real estate agents treat prospective buyers honesty and fairly. An agent who discloses the terms of competing offers to one buyer gives that buyer an advantage over the others and thereby breaches the duty of fairness owed to the other buyers. An agent who informs each buyer that there are competing offers for the property, without disclosing the terms of the other offers, keeps all the buyers on an even playing field, and thereby fulfills the duty of fairness.

Once offers are presented to the seller, the listing agent may then assist the seller in determining which offer is best for the seller and whether or not the best offer should be accepted. If none of the offers is acceptable, the seller may reject all of them. In that case, the listing agent should advise the agents working with the prospective purchasers to invite those prospects to make new, better offers. The listing agent may orally outline what price and terms the seller would be willing to consider.

Alternatively, the seller could make a counteroffer to one of the prospective buyers. However, listing agents should be careful not to allow the seller to make written counteroffers to more than one buyer and thereby run the risk that each will be accepted.

In summary. To handle multiple offers successfully, you must (1) promptly present all offers to the seller; (2) (with the seller's permission) inform all buyers that more than one offer has been made without disclosing the terms of the competing offers; and (3) assist the seller in choosing the best offer.
END

NC Real Estate Commission 2017 Case RE: Shopping Offer
2018-19 Update Course: Section 3 – Contract Issues

The Complainant was the prospective Buyer in a transaction.
Respondent was the Listing Agent. (The Listing Agent was not acting as a dual agent.)

COMPLAINT AND FACTS:
The prospective Buyer found a listing on LoopNet (a commercial real estate listing service) for a mini storage facility and reached out to the Listing Agent on October 16, 2017, for information. The Listing Agent provided a description of the property and an income summary by email. The Buyer then requested a tour of the facility and made an appointment with the Listing Agent for a showing on October 20, 2017. The Buyer drove from another state to see the property.

The Buyer arrived for the appointment on October 20, 2017, but the Listing Agent was not there. The Buyer called the Listing Agent, and the agent said that he could not make the appointment due to a problem with a closing. The Listing Agent gave the Buyer an access code for the property so that the Buyer could tour the facility on his own.

On October 23, 2017, the Buyer called the Listing Agent and told him he wanted to make an offer. The Listing Agent asked the Buyer to send his offer by email and said he would present it to the owner upon receipt. The Buyer sent an email shortly thereafter, stating he wanted to purchase the property for $360,000. A few hours later, the Listing Agent called the Buyer and stated the owner had accepted the Buyer's offer and that the Listing Agent would send the agreement for purchase right away. At approximately 9:00 pm on the same day (October 23, 2017), the Listing Agent sent the Buyer an agreement for purchase, *Working with Real Estate Agents* brochure, and *Professional Services* form (commercial form #585).

On October 24, 2017, the Buyer sent an email to the Listing Agent, stating he was going to have the paperwork reviewed by an attorney. The Buyer then contacted a North Carolina attorney to review the paperwork and began his due diligence process by contacting companies to begin inspections.

On October 25, 2017, the Listing Agent emailed the Buyer, telling him another offer had arrived and that a 3rd party was also expressing interest (though that party had not submitted a formal offer). The Listing Agent asked the Buyer to submit his highest and best offer by 5:00 pm on October 26, 2017. [Note: Emails to both interested buyers calling for highest and best offers were the same to each interested party.]

The Buyer submitted an offer of $380,000 on October 26, 2017. On October 27, 2017, the Listing Agent contacted the Buyer and told him his bid had not won. Soon after, the Buyer filed a complaint with NCREC, alleging that the Listing Agent should not have entertained any additional offers since he (Buyer) was already under contract with the Seller.

Offer and Acceptance

To create a valid real estate sales contract, there must be an **offer**, an **acceptance** of the offer, and **communication of acceptance** to the last offeror.

- Offeror: Person making an offer to enter into a contract.
- Offeree: Person to whom the offer is made.

An offer must be accepted, and the acceptance must be appropriately communicated to the offeror before a contract for the sale of real estate is created.

Under contract law, offers and acceptances may be communicated in a variety of ways — orally, by personal delivery in writing, by mail, by email or text message, or by other electronic means. However, an offer can specify the exact manner in which acceptance is to be communicated, in which case the offeree must communicate acceptance in the manner directed to create a contract.

In real estate practice communicating an offer or acceptance to a principal's agent is the same as communicating directly to the principal.

REALTOR® Ethics General Provisions

Purpose of an Ethics Proceeding

An ethics proceeding has two essential purposes: education and vindication. It is educational in that it raises the consciousness of members to the meaning and significance of the Code. Many ethics violations occur inadvertently or through ignorance, and the hearing proceeding serves as an effective educational tool.

In filing a charge of an alleged violation of the Code of Ethics by a REALTOR®, the charge shall read as an alleged violation of one or more Articles of the Code. A Standard of Practice may be cited only in support of the charge. The Preamble is aspirational. Articles 1 through 17 establish specific obligations for which REALTORS® may be disciplined.

Disciplinary Measures Available for Violations of the Code of Ethics

The Association has wide latitude in the sanctions which may be applied for violations of the Code of Ethics. It must, however, act responsibly in the application of these sanctions, attempting always to make the punishment commensurate with the offense. Recommendations of Ethics Hearing Panels may range from a mild Letter of Warning to termination of membership as follows in order of severity, provided that such actions are specifically authorized in the Professional Standards procedures of the Associations Bylaws:

(a) Letter of Warning with copy to be placed in member's file;

(b) Letter of Reprimand with copy to be placed in member's file;

(c) Requirement that member attend the ethics portion of the Indoctrination Course or other appropriate course;

(d) Appropriate and reasonable fine not to exceed **$15,000** (Amended 5/13);

(e) Membership of individual suspended for a stated period not less than thirty (30) days nor more than one (1) year, with automatic reinstatement of membership in good standing at the end of the specified period of suspension.

(f) Expulsion of individual from membership

(g) Suspension or termination of MLS rights and privileges may also be utilized.

(h) Realtors® who are not members of a Board from which they purchase the multiple listing service and their users and subscribers remain obligated under the Code of Ethics on the same terms and conditions as Realtor® and Realtor-Associate® members of that Board.

(i) Members may also be required to cease or refrain from continued conduct deemed to be in violation of the Code, or to take affirmative steps to ensure compliance with the Code, within a time period to be determined by the hearing panel.

SECTION EIGHT

BACK-UP OFFERS
or
BACK-UP CONTRACTS

BACK-UP OFFERS
or
BACK-UP CONTRACTS

DEFINITION: An offer (or contract) to purchase a property where there already exists a sales contract.

WHAT IT IS: Where there already exists a valid and binding contract for the purchase and sale of a property, but a second offer is made by a second prospective buyer whereby this second buyer is attempting to be first-in-line to purchase the property in the event the current contract fails. A seller can accept a back-up offer and, with proper communication, it can become a back-up contract. However, the terms of any back-up contract will be valid only in the event the first contract fails to go through closing.

COMMENT: Though NCAR does have available Standard Form No. 2A1-T, *Back-Up Contract Addendum,* for use in a back-up offer/contract situation, an agent would be well advised to inform his client that he may wish to consult with legal counsel prior to the making of a back-up offer or acceptance of a back-up contract. This situation can pose many potential legal entanglements. [See next two pages].

A back-up contract should address, at minimum, such topics as:

1. Under what circumstance(s) would the existing contract be considered "failed."
2. Should there be a time limit on the back-up offer or subsequent contract.
3. What happens to this back-up contract if the [second] buyer locates another property that he finds more suitable.
4. Under what circumstance(s) can the [second] buyer get out of the back-up contract.

AND the list goes on, and on, and on. Be careful!

NOTE # 1: All the topics previously addressed in this material dealing with offers, counteroffers, and acceptance apply to back-up offers and back-up contracts.

NOTE # 2: It *is* proper for an agent to discourage a prospective buyer from making a back-up offer on a property that is already under contract. However, when a buyer insists on making such an offer, the agent MUST accept and present such an offer to the seller. Likewise, it is proper for an agent to discourage a seller from accepting a back-up offer. However, when a seller wishes to accept such an offer, the agent MUST proceed as he would with any other offer/acceptance situation.

THE BULLETIN

The following article was published by the N.C. Real Estate Commission
in *The Bulletin*, Vol. 16, No. 3, 1985, Page 2

Q: Must a listing agent continue to present offer-to-purchase to a seller who has already accepted an offer and whose property is "under contract?"

A: Yes.

Response to a Recent Inquiry Regarding Presentation of Offers After Seller Has Accepted Offer.

Dear _____:

You have inquired as to whether a real estate agent must continue to present offers to purchase to a seller who has already accepted an offer.

In this regard, the Real Estate License Law requires real estate agents to deliver offers to purchase real estate to sellers within a "reasonable time" which the Real Estate Commission has defined as not later than five days after the signing of the offer. Neither the Real Estate License Law nor the Commission's Rules relieve the agent of further responsibility for presenting offers upon the acceptance of an offer by a seller.

Aside from his legal requirement, there appears to be sound rationale for continuing to present offers; namely, that in the event the sale is not **consummated** due to the offeror's failure or inability to satisfy some material term, condition or contingency of the offer, then the seller (who is usually the agent's client) would benefit by having accepted a "backup offer" committing a second buyer to the purchase of his or her property.

However, the agent must make it perfectly clear to the seller that although the "backup contract" may be more advantageous to the seller than the primary contract, nevertheless it must remain dormant unless and until the primary sales contract has been breached or is otherwise terminated. Likewise, persons who make "backup offers" must clearly understand that the primary contract will take precedence over any "backup contract" and will not become operative until the primary contract is no longer pending.

Of course, if after accepting an offer a seller instructs the agent not to solicit any further offers, then the agent should follow his principal's wishes. However, if a subsequent offeror insists on making a written offer, the agent should present the offer to the seller to be rejected.

Yours very truly,

NORTH CAROLINA REAL ESTATE COMMISSION

END

SECTION NINE

CONTINGENT SALE ADDENDUM

CONTINGENT SALE ADDENDUM

DEFINITION: "Contingent" means (1) possible, uncertain, unpredictable; (2) dependent on something else; (3) conditional; (4) subject to. "Contingency" means (1) an event that may or may not occur; (2) a possibility; (3) the condition of being dependent on chance.

NOTE: Any contract that contains a "contingency" is a contract that has the possibility either of "closing" or "failing". Perhaps the most common contract contingency is financing, wherein a prospective buyer makes an offer to purchase property but is able to complete the sale only if he/she is able to obtain a loan.

WHAT IT IS: A "contingent sale addendum" is an addendum to an offer to purchase and sale contract wherein the buyer's offer to purchase is "subject to" or "contingent upon" his ability to sale a property that he already owns [elsewhere] in order to be able to purchase the contracted property.

ISSUES: A contingent sale addendum should address, among other things, such issues as:

1. Whether or not the seller will be allowed to continue to market his property during the term of the contingent contract.

2. If the seller is allowed to continue to market his property as described in # 1 above, what happens if the seller receives an offer from another prospective buyer with terms that the seller finds acceptable.

3. The period of time that the prospective buyer has in which to secure a purchaser for his property and to close the transaction.

4. What happens if the prospective purchaser's property does not sell and close within a specified period of time?

5. If the prospective buyer removes his contingency, for whatever reason, but then fails to close on the transaction, what happens?

— KEY —

Page iv: 1-D 2-B 3-H 4-A 5-C 6-E 7-F 8-I 9-J 10-G

Page v: 1-E 2-F 3-G 4-C 5-D 6-B 7-A 8-H 9-J 10-I

Page 1: 1a: age, at least 18
1b: sanity
1c: sober
What is missing?
Contracts do not have to be in writing

Page 2: Q-1: No
Q-2: No
Q-3: Not unless specifically so stated in writing in some agreement as between agent and principal.

Page 9-10: 1-T 2-T 3-T 4-T 5-T 6-T 7-T 8-T

Page 12 Comments:

The **NAR Code of Ethics**, Standard of Practice 1-6 reads, "REALTORS shall submit offers and counter-offers objectively and as quickly as possible". (Adopted 1/93, Amended 1/95)

The **N.C. Real Estate Commission** (NCREC) Rule A.0106(a) states, in part, "...every broker shall *immediately*, but in no event later than *five days* from the date of execution, deliver to the parties thereto copies of any required written agency agreement, contract, *offer*, lease, or option affecting real property." [Emphasis added]

Thus, a *seller's* agent or subagent must *immediately* submit all offers to the seller and must inform the seller of all matters, including that fact that another offer(s) may be forthcoming that may affect the seller's decision to accept, counter or reject the current offer.

Page 13: Yes

Page 19: 1-Yes 2-No 3-Yes 4-Yes 5-Yes 6-Yes

Page 24: 1- A "conversation"
2- The second offer must be presented to the seller, as no enforceable "contract" yet exists, and the seller may accept the second offer, counter the second offer, or make the first offeror aware there now is a second offer and ask both buyer for their "highest and best" offer. In short, until there is a binding (written and communicated) contract, "all bets are off".

Page 25: 1-Yes 2-Yes 3-No

Page 30-31: 1- No
2- Yes
3- Yes, and at the moment Seller signs the offer as both Agents represent the Buyer (and Seller).

Page 35: The judge said NO

Oh my, just how much things have changed …

"No deal is done until the paperwork is finished"

Bones McKinney
Former Wake Forest University Basketball Coach and Humorist

Two hundred years ago my Great-Great-Great Grandfather McKinney wanted to sell two acres of farm down in Lowland, North Carolina, for $100 an acre. The two met in a cornfield, shook hands and it was a "done deal." The man paid Great Grandfather McKinney the $200 and immediately started plowing his two acres – no paperwork, no legal documents, no taxes and no lawyers needed. Two weeks ago, I stood in the same cornfield with a fella and agreed to sell him two more acres of land my family still owned in Lowland. The price agreed upon was $10,000 an acre.

Here is the correspondence that followed the agreement:

Dear Bones,
I'm glad we were able to agree on a price for your family's two acres of land located in Lowland. My lawyers will be in touch. Hope you are well.
Sincerely,
John Dillion

Dear Mr. McKinney,
My client, John Dillion, called me on my car phone and told me you and he had agreed on a price on some property your family owns. We are proposing your family pay the closing costs, legal fees and other expenses involved in the transaction. If you agree, as representative of the estate, please leave a message on my answering machine. I will be in the Bahamas for two weeks.
Sincerely,
Harry Smith, attorney, P.A., L.L.H. and S.O.B.
Smith, Smith & Smith

Dear Landowner,
We have been advised that you are attempting to sell some land that contains contaminants dating back to 1923 when the land was being used as a dumping ground by a local industry. Although we understand your family had no knowledge of this violation, you still technically owned the land. We have set the date for the hearing. If you are found guilty of said violation, you, as the trustee for the property, could be fined up to $5,000 and sentenced to two years in prison.
Signed: J. Pot Hole, Federal Land Commissioner
P.S. In the future, we suggest you station some member of your family as a 24-hour security guard at the property so this won't happen again!

Dear Cousin Bones,
I understand you are attempting to sell some of the land owned by Great Grandfather McKinney. Before you sell it, why don't we get together, put up a cheap building on the land and open a bingo parlor with poker machines.
Cousin Josh McKinney - C/O San Quentin

Dear Mr. McKinney:
The following are the closing costs on the land sale you consummated with my client Mr. John Dillion:

Due family from sale		$ 20,000
LESS Expenses:		
Taxes	7,500	
Soil Tests	2,000	
Closing Costs	2,500	
Penalty to Federal Land Comm.	5,000	
A new axle on my car and a new pair of alligator shoes ruined after getting stuck in the mud walking your property last week	1,700	
TOTAL Expenses		$ 18,700
TOTAL DUE YOU		$ 1,300

Divided equally between the heirs of Great Grandfather McKinney: $37.50 per heir.
(We will mail you your check for $37.50 upon your release from prison for violating the federal land statue.)
Attorney Smith.

The Contract Maze

Each real estate licensee should be familiar with the concepts of basic contract law, especially real property contract law. However, the above caption seems to appropriately capture the simplicity of a subject that can become very complex.

For example, most everyone knows that when a prospective buyer presents an offer to a seller that the seller has the option of either (1) accepting the offer; (2) rejecting the offer; or (3) submitting a counteroffer to the prospective buyer.

Most everyone in real estate also is aware of the following formula:

Offer + Acceptance + Communication = Contract

However, the reality of the legal concept that underlies this formula isn't as straightforward as it may appear. After all, what constitutes a valid offer? Yet better, what constitutes a valid acceptance? And yet even better, what constitutes a valid communication of an offeror's acceptance?

When considering these questions one also must consider the impact of using electronic equipment, such as fax machines, voice mail and email, on the issue of valid communication.

The primary objective of this course is to clearly and definitively address, among other things, each of these issues as they relate to today's fast paced world of business.

SECTIONS	SUBJECTS
Section One:	Basic Legal Concepts
Section Two:	Electronic Documents & Signatures
Section Three:	The Offer
Section Four:	The Counteroffer
Section Five:	Acceptance of Offer or Counteroffer
Section Six:	Rejection of Offers and Counteroffers
Section Seven:	Multiple Offers
Section Eight:	Back-Up Offers or Back-Up Contracts
Section Nine:	Contingent Sale Addendum

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