

Meeting Minutes 5.18.23:

- * We discussed low inventory creating competition, and had the opportunity to hear from both listing agents and buyers agents about what this looks like from their perspective
- * Some tactics listing agents are seeing used are trying different concessions and offering money to cover appraisal gaps
- * New Construction has become a more favorable option in many cases, but some considerations/drawbacks presented were:
 - *Considering rate locks, what are rates now vs. what they'll be at closing time? Will the buyer still be able to afford the house at a higher rate?
 - *Rate locks can sometimes hurt also if rates were to decrease and your client is locked in the previous higher rate
 - *Higher EMDs can price first-time buyers out of this option
- * Other tactics discussed included waiving up to a certain dollar amount worth of inspection items & offering up to a certain amount to cover appraisal gaps
- * **Note from Kevin: See the attached handout from last year's seminar for details on how to write these offerings so they are clear to all parties.**
- * The suggestion was made to help determine the age of appliances by pulling serial numbers and looking them up, which can be a way to gather more information if you have a client pushing to waive inspections to improve their offer (which we know you advised them against! 😊)
- * Take the time to reach out to the listing agent to see what might help improve your offer, what does the seller need most?
- **Be mindful that there are likely 10 other agents doing the same thing, so keep it brief and friendly, be positive, show you're easy to work with, and stand out!
- * One of our listing agents had 69 showings booked on a listing over 3 days! Competition is high, prepare your buyers for this, and use it to encourage them to have their financing in order so they're ready when they see "the one"
- * The suggestion was presented that if you see a listing with a future offer review date, but you have a strong client with a really good offer, you could present it with an earlier deadline to try to get it reviewed and accepted sooner
- * Remember that the seller drives when offers are reviewed and presented, and they can also change their mind, just be sure to protect yourself and get their instructions in writing! ***See more from Kevin on the attachment**
- * Another thing suggested to always try to get acknowledged in writing is when buyers are waiving inspections against your advice
- * A good practice shared was for agents to call the buyers lender and confirm buyer approval is based on financial documents having been presented and reviewed, and not just based on unverified buyer-provided information - This is a good idea for listing agents to help their seller weigh and compare the strength of different offers, and for buyer agents to make sure they're presenting the strongest possible offer
- * A good point was made that with gas prices where they are, agents should be mindful of the cost of driving around to show property to buyers who aren't fully qualified
- * Our listing agents were posed the question of whether they prefer to work with represented buyers or unrepresented buyers – represented won out, so buyer agents should consider this when approaching folks who think they don't need an agent!
- * There was a discussion of unrepresented, dual, and designated agency - as a reminder, **dual** should always be discussed with your broker first so liability can be weighed, **unrepresented** is preferred, and you want to be sure that on your listing agreements your sellers allow **designated agency** if you want your fellow VCR agents to be able to show and sell the property

Additional attachments to follow include a handout from a March, 2022 class, as well as a document from local attorney Michael P. Lafayette, Esquire from that same timeframe.

Handling Multiple Offers, Escalation Clauses And Related Topics

By

Michael P. Lafayette, Esquire¹

March 28, 2022

I. LEGAL AND ETHICAL CONCERNS RE: MULTIPLE OFFERS:

A. “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.” (quoted from REALTOR® Code of Ethics and Arbitration Manual. Ethical considerations throughout this outline are adapted from the Manual).

B. There are both legal and ethical considerations when handling multiple contract offers.

C. Legal requirements to consider:

1. Virginia Code Sections 54.1-2131 and 54.1-2132 state that a licensee must promote the interests of their client. In particular, a licensee must:

a. Receive and present in a timely manner written offers and counteroffers to and from the seller and purchasers, even when the property is already subject to a contract of sale.

b. Maintain confidentiality of all personal and financial information received from the client during the brokerage relationship and any other information that the client requests during the brokerage relationship be maintained confidential, unless otherwise provided by law or the seller consents in writing to the release of such information.

c. Treat all parties honestly (both buyers and sellers).

2. Based upon the above, a licensee may not delay the submission of any offer or counter-offers due to multiple offers, nor may a licensee representing the seller divulge confidential information of offers received to other parties unless the seller has authorized such disclosure.

¹ Michael P. Lafayette is Legal Counsel to RAR/CVRMLS and is a partner in the law firm of Lafayette, Ayers & Whitlock, PLC, 10160 Staples Mill Road, Suite 105, Glen Allen, Virginia 23060, tel. (804) 545-6250.

D. REALTOR® Code of Ethics:

1. When representing a buyer or seller, REALTORS® pledge themselves to protect and promote the interest of their clients. This obligation to the client's interest is primary, but it does not relieve REALTORS® of their obligation to treat all parties honestly. (from Article 1 of REALTOR® Code of Ethics).
2. REALTORS® shall submit offers and counter-offers objectively and as quickly as possible. (from NAR Standard of Practice 1-6).
3. Although REALTORS® are bound by the Code of Ethics, sellers (and buyers) are not. A licensee should not be influenced to do something that is a violation of the Code of Ethics. "The client made me violate the Code of Ethics" is not a viable defense.

II. **HANDLING MULTIPLE OFFERS:**

A. Representing sellers:

1. Preparation to accept multiple offers should begin during the listing appointment.
 - a. Explain to sellers that multiple or competing offers are possible, and there are various ways to handle such situations.
 - b. Explain that it is a seller decision to make if you encounter a multiple offer situation, and that you are bound by legal and ethical considerations.
2. Do not divulge the existence of other offers to potential purchasers without the consent of the seller.

B. Widely used methods utilized by sellers for multiple offers:

1. Stating in the MLS that offers will be reviewed on a specific day.

Note--it is not unethical or a violation of law or VREB regulations for a seller to accept an offer prior to the stated offer review date.
2. Informing all potential purchasers that other offers are on the table and inviting all prospective purchasers to make their best offer;
3. Countering one offer while putting the other offers aside; or
4. Countering one offer and rejecting the other offers.

- C. Each method has risks and rewards:
1. Inviting each potential purchaser to make their best offer may produce a better offer than what is currently on the table, or countering just one offer may have the same result.
 2. Soliciting the best offers from prospective purchasers may discourage one or more purchasers (who could be viable purchasers).
 3. Potential purchasers may pursue other properties (less competition = better price?)
- D. Representing buyers:
1. Preparation to make an offer on a property subject to multiple offers should occur before an offer is made by the purchaser.
 2. If applicable, explain to your client that you or your firm represents more than one buyer-client who is interested in purchasing the same property, but that you (and your broker) will keep any offers and counteroffers confidential.
- E. Risk or Reward to the Buyer-Client? You should explain the following to your buyer-client:
1. A low initial offer may be successful, but it may also result in another higher offer from another purchaser being accepted.
 2. An “over the list price” first offer may result in the purchaser purchasing the property while paying more than the seller might have taken for the property.
 3. There can only be one successful purchaser in a multiple offer situation. Be open, honest and prompt with your buyer-client so they know they were treated fairly.
 4. **Caution:** If a purchaser wants to be very aggressive in an offer (waiving property inspection or financing contingencies), then be sure they understand the ramifications.
 - a. From a risk management standpoint, document your advice to the buyer-client that their decision carries risk.
 - b. For instance, the house could have damage that only a home inspector could find and buyer will be responsible for all repairs post-closing.

III. **MULTIPLE OFFERS IN SHORT SALE SITUATIONS:**

- A. CVRMLS Short Sale Addendum for a Purchase Agreement provides written authority by the parties on the handling of multiple offers.

8. **MULTIPLE OFFERS.** Seller may continue to present to the lienholders any additional offers that may be received by Seller despite acceptance of the Purchase Agreement with Purchaser. Purchaser acknowledges that this Purchase Agreement may be one of several offers for the Property being considered by the lienholders. The lienholders may deny this short sale request in order to accept another offer that may have been received by Seller prior or subsequent to this Purchase Agreement. If another offer is accepted by the lienholders, then Seller shall immediately provide written notice of such acceptance to Purchaser and this Purchase Agreement shall terminate, and subject to the deposit disbursement provisions of the Purchase Agreement, Purchaser's Deposit shall be refunded in full to Purchaser and neither party shall have any further obligation under the Purchase Agreement. The rights and obligations of the parties under any purchase agreement accepted by the lienholders for the Property are superior to the rights and obligations of the parties to this Purchase Agreement.

IV. **ESCALATION CLAUSES:**

- A. There are numerous articles written on escalation clauses. Simply put, do escalation clauses benefit the seller or the purchaser? You can make an argument for both positions.

- 1. If representing seller, inform seller of pros and cons relating to escalation clauses (for instance, is the purchaser using an escalation clause to scare off other potential purchasers?).

- 2. If representing purchaser, be sure the escalation amounts are set or approved by the buyer-client.

- B. Legal and ethical consideration—client confidentiality.

- 1. A licensee must always maintain client confidentiality (see previously cited Virginia Code Sections 54.1-2131-2132 and REALTOR® Code of Ethics).

- 2. Be careful not to disclose confidential financial information, such as the purchase price of another offer, without your client's consent.

- C. Key points of an escalation clause:

- 1. Seller must receive a bona fide written offer to purchase the property at a net higher purchase price than contained in the original (first) purchase agreement.

- 2. The net purchase price on the original purchase agreement automatically increases a set amount, such as \$1,000, over other bona fide offers.

3. There must be a maximum net purchase price (this is very important for buyers and buyer's agents).

4. Typically "net purchase price" is defined as purchase price less seller concessions.

D. Review CVRMLS Escalation Clause.

V. "AS IS" TRANSACTIONS:

A. "AS IS" transactions can be fraught with danger for the unsophisticated purchaser because the purchaser waives all condition issues regarding the property, so the purchaser acquires the property in its current condition with all faults. From a risk management perspective, if you are representing a buyer, it is important to clearly articulate these issues in writing—CYA.

1. For instance, if the roof is leaking and the HVAC is broken, seller is not required to repair these defects. This would be detrimental to most home buyers because they do not have the resources to make the repairs.

2. Often times, a sophisticated purchaser is willing to accept faults, but they need to make an educated decision about the condition of the property.

B. Review CVRMLS "AS IS" Addendum which clearly sets out the rights and obligations of the parties regarding an "AS IS" transaction.

VI. MISCELLANEOUS CONTRACT PROVISIONS

A. Interpretation of Paragraph 24E of CVRMLS Purchase Agreement:

E. EQUIPMENT CONDITION AND INSPECTION: Purchaser agrees to accept the Property at settlement in its physical condition at the time this Agreement is fully executed by all parties, except as otherwise provided herein. Seller warrants that all appliances, heating and cooling equipment, plumbing systems and electrical systems will be in working order at the time of Settlement or at Purchaser's occupancy, whichever occurs first. Seller agrees to deliver the Property in broom-clean condition and to exercise reasonable and ordinary care in the maintenance and upkeep of the Property between the date this Agreement is executed by Seller and Settlement or at Purchaser's occupancy, whichever occurs first. Seller grants to Purchaser or his representatives the right to make a pre-occupancy or pre-settlement inspection to verify that the condition of the Property conforms to this Agreement and to ensure that repairs, if any, have been completed.

B. Important to understand that any repairs or repair credit pursuant to Paragraph 16 of CVRMLS Purchase Agreement (property inspection) are in addition to treatments or repairs made pursuant to Paragraphs 24E, 24F and 24G.

VII. WRAP UP AND Q & A

How To Bridge Appraisal Gaps – Understanding Competitive Contracts

Do's & Don'ts of Making Your Offer Competitive

Mean what you say and say what you mean. When drafting additional terms or modifying terms, know what that means and explain it concisely. If you have a question, ask. We are seeing some really poorly written terms on our listings and we want to make sure that everyone understands what is being said and its impact on the buyer and sellers rights. It is our job to be clear and concise **and not use tag words that we think everyone understands**. We cannot assume that everyone has the same definition for terms like as-is or informational purposes only.

The main things we are seeing agents/buyers include in their offers are outlined below...

Waiving Appraisals

If you have a loan type that allows buyers to waive appraisals, please let us know...we will all start using that loan. If you don't have a loan product like that... then don't waive it, it's as simple as that. If the buyer can cover an appraisal shortfall then spell that out...but don't waive an appraisal. By checking the box that waives the appraisal the seller is under no obligation to even allow for an appraisal at all and your buyer is in default by not closing without it.

Appraisal Shortfalls

Example 1

Should property not appraise, purchaser will pay an additional \$30,000.

Example 2

"With regards to an appraisal value shortfall, purchaser agrees to pay \$30,000.00 over the appraised value, not to exceed the contract purchase price referenced in paragraph 4. Should the appraisal shortfall be greater than \$30,000.00, then paragraph 5 shall apply to only the amount greater than the \$30,000 agreed to here."

AS-IS

If you are selling a home as-is, then use the as-is addendum. The first paragraph can be crossed out if an inspection is not being completed, but just writing "as-is" into paragraph 23 does not define anything.

The as-is addendum removes paragraphs 16, 24 E, F and G. This means that the systems do not need to be operational and that the inspections are the requirement of the buyer. We need to know and be aware of the differences between waiving an inspection and buying a property as-is using the addendum. Waiving an inspection is never a good idea, make sure that your buyers know and ACKNOWLEDGE what they are doing.

If the purchaser is wanting the home to have operational systems, but is simply waiving the inspection...then waive the inspection and do not include the as-is. Again, paragraphs 16, 24 E.F. & G are deleted from the contract.

If the purchaser is wanting to do an inspection for informational purposes but wants the systems to be operational, then waive paragraph 16 and add the following to the additional terms. **Purchaser reserves the right to have the property inspected, but understands that they do not have the right to request repairs or terminate the contract based on the results of the inspection.** Simply writing that the inspection is for informational purposes only in paragraph 23 does not protect anyone, as it is not defined.

Inspection Waivers/Reductions

If a buyer wants to waive portions of the ability to request repairs, be very specific when writing this up. You should be saying something like this...**With regards to paragraph 16, purchaser agrees to limit their requests for repairs to only include single line items with an estimated cost to cure in excess of \$1,000.** Or **With regards to paragraph 16, purchaser agrees to limit their request for repairs by waiving the first \$10,000 of the total estimated cost to cure.**

Reducing Commissions

As you know, we can not use the terms of a contract to negotiate a commission. This means we are prohibited from using a contract to increase or decrease a commission. Talk with your buyers lender and make sure you can do this, but you can do the following...have myself or Leigh Ann write a letter to the settlement agent and lender stating we agree to credit \$xx.xx of the commission towards the purchasers closing costs, points or other lender authorized expenses. Then have the purchaser agree to pay for \$xx.xx of sellers closing costs. This will net no increase or decrease to the buyer and will increase the net to the seller without violating our code of ethics. If you chose to try this method, please reach out directly to Leigh Ann or myself prior to adding a term like this into the contract.

Buyer Paying Sellers Closing Costs

Check with the buyers lender first, but a buyer can offer to pay the sellers closing costs, just like we have historically seen the seller pay for the buyers. This is happening in other markets more than here, it is just another way for the buyer to increase the sellers net.

Possession By Seller

Lots of folks are spicing up their offers by allowing the sellers to remain in the home post-closing, for free or a reduced expense. This can be effective but you need to execute the possession by seller addendum as part of your purchase offer. Simply writing into the contract that the purchaser agrees to let the seller stay in the home for 60 days after closing does not cover anyone. It leaves the meaning of an entire 2 page agreement up to a judge. The terms in the possession agreements are there for a reason and we need to use the proper form rather than just writing something in additional terms.

Love Letters

Best thing to say here is DON'T DO IT. You are setting yourself up for fair housing violations. I recommend that you discuss this with your seller and write into the listing agreement that love letters will not be presented, and have them sign off. I would also have that conversation with your buyers prior to writing offers, so that they do not put you in a bad situation by asking that it be included.

Oddball Things In Offers

Buyers paying for movers for the seller

Buyers providing a food truck for a sellers moving party

Buyers _____ you name it.

Side Note For Sellers/Listings

If the seller is only reviewing offers after a certain date/time, get that in writing. If it is not in writing and you are holding offers, it is an ethics violation. Do not disclose the existence of other offers without the seller's authorization in writing. These two things should be spelled out in the listing agreement.

Myths

Its illegal or against the rules for a seller to accept an offer before the offer deadline.

Its illegal or against the rules for a seller to accept an offer while in coming soon status

Its illegal or against the rules for a seller to counter an offer without providing "competing offers" when an escalation clause is used.

Truth

Sellers can accept an offer at any time. If there is an acceptance deadline, I suggest you get your offer in ASAP, as you don't know when the seller will choose to move forward. I have seen people have success putting offers on homes in coming soon status, so don't wait. Just because your offer includes an escalation clause, don't be surprised if you receive a counter at your max...without evidence of another contract. Sellers can counter any offer and do not have to honor your escalation. Make sure your buyers know the pitfalls of escalations before using them.

Summary

In summary, the market we are living in is hectic. Its fast paced and learning on the fly is dangerous for both our customers and ourselves. Be prepared with what terms you and your buyer are comfortable with before sitting down to write an offer. As REALTORS we must be educating buyers. We should not be recommending waiving inspections, waiving appraisals, paying significantly over market value, etc. While we should not be recommending that, we can certainly educate buyers and make sure that they know the full picture before choosing to do those things. Some buyers are savvy enough to understand what they are getting into and others have no clue and are not prepared to cover the potential costs associated with buying a home as-is with no inspection at a price over market. Know your client and provide your expert opinion, keeping in mind the needs of each of your clients are different and they need to be making a fully educated decision.