
MULTIPLE OFFERS: THE SELLER, THE BUYER & YOU!

The following material was prepared by William Johnston for OREA's Continuing Education Program and is reprinted with permission of the author and the Ontario Real Estate Association. The material has been modified for the Manitoba marketplace.

INTRODUCTION

While multiple offer situations are the seller's best friend, they can be very painful for the would-be buyers, and for salespeople who fail to follow proper procedures.

This material is designed to prepare you for handling multiple offer situations, whether you have the listing, are preparing the offer for a buyer, or represent both as clients. The key to success in handling multiple offer situations is fairness. As long as all parties are operating on a level playing field throughout the offer process, nobody will have any valid grounds for complaint.

The issues of agency disclosure and representation (customer, client, joint representation) further complicate multiple offer situations. It is critical that you tailor your approach to fit the agency relationships that you have established with the participants.

By the time you have completed this course, you will:

1. Be able to explain the multiple offer process to your seller/clients.
2. Be able to explain the multiple offer process to your buyers.
3. Have a clear understanding of the proper procedures to follow in representing multiple offers.
4. Be able to tailor your approach to fit your agency relationships.
5. Be able to ensure that your actions conform to the requirements of your Board's rules and your Code of Ethics.
6. Be aware of non-traditional multiple-offer situations, such as a "flip" or an auction.
7. Have some useful negotiating tactics to help your clients (sellers or buyers) maximize their results in multiple offer situations.

There is no doubt that sellers benefit from the multiple offer process. When there are multiple offers on a property, it is not uncommon for the property to sell for more than the list price. While the law typically dictates that products and services cannot be sold for more than the asking price, real estate is an exception.

Owners of real estate who list their property for sale are not obliged to sell, even if a buyer offers them the exact price and terms that they have indicated are acceptable. Sellers of real estate always have the right to change their mind about selling their property right up to the point where they accept an offer in writing.

Based on the standard wording in the commission clause contained in the Manitoba MLS[®] listing contract, a broker's right to commission is not triggered unless the following occur:

- a. A buyer and the Seller enter into a legally enforceable contract of sale (Clause 5A); and
- b. The buyer assumes legal possession of the Property (Clause 7B).

Barring some unusual circumstances, if these two events occur, the broker has a right to commission even if the seller or the buyer decide not to close the deal. Alternate compensation in the case where the Seller does not accept an offer to purchase without cause, or where the buyer defaults is provided for in Clause 5B. The standard MLS[®] Listing Contract used in Manitoba contains the following words:

5. *The Seller agrees:*

A. *To pay the Listing Brokerage a commission on the total selling price or rental value of the property listed as follows: _____ plus applicable Goods and Services Tax, if:*

- i) *a legally enforceable contract of sale between a buyer and the Seller is entered into during the period of this contract (from any and all sources whatsoever); or*
- ii) *a person inspects the Property during the period of this listing contract and purchases the Property within 60 days (unless otherwise negotiated) after the expiry date of this contract; or*
- iii) *a legally enforceable contract of sale between a buyer and the Seller is entered into within 60 days after the expiry of the listing contract in respect of which the efforts of the Listing Brokerage were an effective cause.*

provided however that if the Property is subsequently listed after the expiration of this listing contract then the Seller shall be liable only for the payment of one commission on any sale, and such commission shall be payable to the Brokerage which has a current listing contract with the Sellers.

B. *To pay alternate compensation to the Listing Brokerage if:*

- i) *a buyer presents an unconditional offer to purchase the Property upon the terms outline in this listing contract but the Seller does not accept the offer to purchase without cause, in which case the full commission as outline in 5A will be payable; or*
- ii) *a legally enforceable contract of sale is entered into between a buyer and the Seller but the transaction is not concluded because the buyer defaults, in which case the compensation will be either 50% of the deposit or the commission payable as outlined in 5A, whichever is less.*

MULTIPLE OFFERS AND THE SELLER

Preparation is important to success in any activity. If you are taking a well-priced listing in a hot market, you may want to prepare your seller for the possibility of multiple offers. Point out to them that they will have several options if they receive more than one offer. It is your professional duty to point out all of the available choices to your seller/client, in order for them to be able to make an informed selection from the full menu:

- a. Accept one and reject the others;
- b. Counter one of the offers and reject the others;
- c. Reject all offers, sending them back to the buyers for improvement;
- d. Counter one offer and hold on to the other offer(s) pending a response from the buyer getting the counter offer; or
- e. Hold on to one or more offers while sending the other offer(s) back to the buyers for improvement.

Each of the above options has some benefits and costs from the seller's point of view:

- a. **Accept One & Reject the Others** – The benefit is that the seller has sold the property; the cost is the lost opportunity to try for a better deal by using one of the other options.
- b. **Counter One Offer & Reject the Other(s)** – The benefit is that the seller may negotiate a better result with the buyer receiving the counter offer; the cost is the lost opportunity to get better offers from the other buyer(s).
- c. **Reject All Offers** – The benefit is keeping all buyers in play; the cost or risk is that all or some of the buyers may not return to the offer table, or that the buyer who made the best initial offer may not return.
- d. **Counter One Offer, Hold the Others** – The benefit is keeping all buyers in play; the risk is that the buyer receiving the counter offer won't accept the counter offer and the other buyer(s) will simply let the offers die.
- e. **Hold on to One Offer, Send the Others Back** – The benefit is keeping the most appealing offer in your hands; the risk is losing the other buyers and not being able to reach a firm agreement with the buyer whose offer you held onto.

Options d and e are possible because, while the offers are open for acceptance, they are the seller's property until the time for acceptance expires. However, it should be pointed out to the seller that the buyer can legally revoke his/her offer at any time, up until he/she receives notification of acceptance. It is only when this communication of acceptance has occurred that there is a legally binding contract, subject only to the fulfillment of any conditions precedent contained in the offer. Some provinces use an irrevocable time period in their offers, whereby the prospective buyer cannot revoke his/her offer until that time deadline has passed – Manitoba statutory offers do not contain such an irrevocable time clause.

Point out to the seller that, in multiple offer situations, it is standard practice to keep the details of each bidder's offer secret from other bidders. This "blind" bidding process can be contrasted with the "open" bidding process used at a typical live auction, where bidders are aware of competing bids and can tailor their bids accordingly.

In fact, your seller could instruct you that he/she wants the essential terms of each offer revealed to other bidders. While you are normally required to abide by your client's lawful instructions, you may refuse to do so if it violates your ethical or regulatory rules or procedures. The MREA does NOT allow you to reveal the terms of competing offers; likewise, the Manitoba Securities Commission. Accepted Manitoba protocol is that buyers MUST be advised, on a timely basis, that they are in competition (when a competing offer arises), but must NOT be advised of any of the terms of competing offers, either directly or implicitly.

If you choose to follow the Seller's instructions to disclose, you will not be spared from potential disciplinary action by the MSC or MREA (or local board).

By providing your sellers with all of the above information, you enable them to make an informed decision from all available choices if and when the multiple-offer situation arises.

By discussing these issues with your seller when you take the listing, you can prepare them for the possibility of multiple offers in a relatively relaxed setting. It is more difficult to have such a discussion for the first time in the emotion-charged atmosphere that surrounds multiple-offer situations.

MULTIPLE OFFERS AND THE BUYER

In a "seller's market", you may wish to prepare your buyers for the possibility of locating their dream home, only to find themselves in a bidding war. Whether your buyer is a client or a customer, it is fair to them and smart from a business point of view to prepare them for battle by covering all possible scenarios as they begin their search for a property under your guidance.

Make sure that you tell your buyer that:

- a. Real estate can sell for more than the list price,
- b. Sellers can refuse a full-price offer, and
- c. In multiple offer situations, properties often sell for more than the list price.

Your buyers may simply decide that they will not enter a multiple-offer process. You will want to indicate to such buyers that, in a hot market, they may find that every good property is attracting more than one offer, most of which will be unconditional offers. It is in their best interests not to rule out homes that attract more than one offer. Point out to your buyers that, even in a multiple-offer situation, they may be able to buy the property on terms acceptable to them.

Discuss with your buyer a seller's options when receiving multiple offers. Point out to your buyer what his/her choices are in each situation:

- a. **Seller Accepts Your Buyer's Offer** – Break out the champagne!
- b. **Seller Counters Your Buyer's Offer** – Your buyer can accept the counter offer, ensuring that he/she has bought the property, but losing the opportunity to negotiate a better deal. In the alternative, the buyer could sign back the seller's

- counter-offer by drawing up a new offer. (In Manitoba, counter offers are not countered – the expectation is that a new offer is prepared.) The risk, in this situation, is that the seller may re-open the bidding to the other buyers.
- c. **Seller Rejects all Offers** – Your buyer could choose to resubmit the same offer, or submit a different offer, or withdraw from the offer process.
 - d. **Seller Holds onto Your Buyer’s Offer, Counters Another Offer** – Your buyer may leave his/her offer on the table, may revoke his/her offer, or submit a better offer.
 - e. **Seller Holds onto Your Buyer’s Offer, Rejects Other Offer(s)** – Your buyer may leave his/her offer on the table, submit a better offer, or revoke the existing offer.

Your buyers should:

- Be readily available on offer-presentation day to respond quickly in the event that the seller counters his/her offer back or sends all offers back for improvement; and
- Get pre-qualified for needed financing. Point out to your buyer that, even if the financial institution approves him/her for needed financing, such approvals typically are conditional upon the property appraising at a value equal to or greater than the price paid and indeed, may still be subject to other “qualification” matters.

When buyers know that they are entering a multiple offer situation, it may be an option for them to get a professional inspection report PRIOR TO the presentation of their offers. That way they can go to the table with a good idea of the property’s strengths and weaknesses, while avoiding the need for a deal-killing inspection condition. Make sure that your buyer knows that a pre-presentation inspection is a possibility. Most sellers will permit these inspections if asked as it shows that the buyer is serious and already has some money invested in the property. Also, some sellers may already have an inspection report available.

Warn your buyers that the standard practice in multiple-offer situations is for the listing broker and the seller to conduct a “blind” bidding process; your buyer will never know what the other offers were. If your buyer is successful, he/she will never know how much more he/she offered than the next-best bidders.

“Back Pocket Offers”

It is quite proper for a buyer/client to equip his/her agent with more than one signed offer! Such “back pocket offers” are the property of the buyer/client as long as they remain in the possession of his/her agent. There may be practical reasons for a buyer/client to put more than one signed offer for the same property in your hands. If you use this tactic, make sure that you get clear written instructions from your buyer/client regarding presentation of such offers.

If the seller is also a client, you must have, as a minimum, a properly executed *Acknowledgement of Limited Joint Representation* signed by both the seller and the buyer before accepting such a “back pocket offer” from your buyer/client; otherwise you are in breach of your fiduciary duty if you withhold telling the seller about the other offer from the buyer/client.

CONDUCTING MULTIPLE OFFER PRESENTATIONS

It is the obligation of the listing broker, through its salespeople, to ensure that the presentation process is fair to all parties. By following a few simple rules, the duty of fairness can be met, while ensuring that the seller/client's interests are fully protected.

Here are the rules:

1. Immediately inform all other salespeople, who have called you to say that they have a signed offer, upon receiving word that another offer has materialized for the property. Salespeople and buyers with offers on your listing have a right to know how many competitors they have for the property.
2. If necessary, seek the seller's instruction to delay offer presentations if a salesperson calls to indicate that they are in the process of preparing an offer but won't have it ready for the scheduled presentation time. It is in your seller's best interests to provide sufficient time to all interested parties to get to the table with their offers. However, it is important that all offers be presented before their time for acceptance elapses. Therefore, don't delay the presentation of any offer for which the time for acceptance will pass before the new presentation time. Also, any decision to await the arrival of the second offer is entirely the Seller's.
3. At the offer presentation, it is considered proper etiquette to present the offers in the order that the listing salesperson received notice of their existence, or to at least inform the seller of the order in which they were received. In Manitoba, all offers are presented by the listing salesperson; the selling salesperson is not usually present unless it is a case of Limited Joint Representation. (However, the buyer agent may certainly request to be present at the offer presentation, at the discretion of the seller)
4. Once all offers are presented and your seller has decided on a response, inform each of the salespeople with competing offers of your seller's decision. Buyers and their representatives have a right to know what the seller has decided to do with the offers.
5. If you or another salesperson with your firm has one or more of the competing offers, make sure that salespeople from other firms with competing offers are aware of that fact, but do not disclose the specific terms or conditions of the competing offers, as to do so is in violation of MSC and MREA protocol.
6. If you have one of the competing offers and are offering your seller a reduced commission if your buyer is the successful bidder, you must inform the other salespeople with competing offers of the amount of the commission reduction you are offering to your seller. This is simply a reflection of the duty imposed upon the listing brokerage to keep the playing field level for all bidders.
7. If your seller chooses to counter one of the offers, and the buyer who receives the counter-offer comes back with a new offer, the seller has the opportunity to re-open the bidding to other parties. Point this out to the seller if the situation arises and get your seller's instructions. They can choose to proceed with negotiations with the buyer who replied to the counter offer or they can invite other bidders back to the table.

8. If your seller chooses to counter or accept a second offer conditional upon the first countered offer not being accepted, make sure that you insert the proper condition in the second offer – that acceptance of the second offer is conditional upon the first offer not being accepted or the first offer collapsing. Your seller does not want to be in the position of having sold the property twice.
9. If your seller has accepted a conditional offer but has inserted a 48-hour time clause, follow the procedure recommended by the Association for the handling of any other offers and the invoking of the 48-hour time clause. This procedure was fully documented in the MCE 3 Workbook, as well as in the Manitoba Edition of the Real Estate Encyclopedia – See *Conditions and the Offer to Purchase* in the PROFESSIONAL CONDUCT Section.
10. Consult your Company Policy Manual, as well as local Board Rules, to ensure that your actions conform to the “in-house” rules. Understand that your company policies or local rules cannot in any way restrict the legal options available to consumers of your services. **THEY HAVE A RIGHT TO INDEPENDENT LEGAL ADVICE.**

By following the rules, you will honour your fiduciary duties to your seller/client, while meeting the duty of fairness owed to your colleagues and the competing buyers.

RULES AND GUIDELINES IN MANITOBA

While The Real Estate Brokers Act is silent on the issue of offer presentation, other organizations in Manitoba that govern our activities do deal with the matter.

The Manitoba Real Estate Association -- Rural MLS® Rules

- a. All negotiations with the vendor, including the submission of all offers to purchase, must be done through the listing broker or salesperson, who may at his or her discretion permit the party who obtained the offer to accompany him or her on its presentation to the vendor. (Section 3, Par. a)
- b. Where a listing broker has been advised that an additional offer(s) will be forthcoming, he or she will so advise the vendor when presenting the first offer. The decision to await the second (or subsequent) offer(s) is clearly the vendors. (Section 3, Par b)
- c. In those cases where the listing broker is also the selling broker and the listing broker is reducing the commission rate or fee, the listing broker is required to disclose any such reduction to all brokers with competing offers to purchase, in order that such competing selling brokers shall not be at a disadvantage and that the vendor shall receive the full benefit of competition from such selling brokers. (Section 8, b)

- d. When a listing broker has competing offers to purchase on a listing, with one or more from the listing agent, and one or more from a co-operating agent, and the listing agent has an agreement with the vendor to reduce the commission payable if the listing agent's offer is successful, than the listing agent must present all offers to the vendor at the same commission rate that would be charged if his/her offer was successful. If the successful offer is that of a competing agent the listing broker must pay the co-operating agent the commission indicated on the listing contract. Note that other offers may be received after a first offer has been accepted, either as a result of a time clause being in place or as a back-up offer should the first offer fail. These offers are considered to be competing offers and must be treated in the same manner as any other competing offer. (Section 8, C)

Brandon REB – MLS® Rules

A – Submission

All negotiations with the vendor, including the submission of all offers to purchase must be done through the Listing Broker or Salesman who may at his discretion permit the party who obtained the offer to accompany him on its presentation to the vendor. Where a listing Broker or member of his firm cannot be located, the selling broker may contact a member of the Board of Directors who may present the offer direct. Such Board member shall be from a firm which has no interest in the transaction and will base his decision to do so on all pertinent facts. (Section 3, Par. A)

B – Procedures for Handling More than One Offer

Where a listing broker has been advised that an additional offer will be forthcoming by a specified time, he will so advise the vendor when presenting the first offer. The decision to await the second offer is clearly the vendors. (Section 3, Par. B)

Portage la Prairie REB – MLS® Rules

- a. All offers should be presented by the listing agent or a member of the listing agent's firm. (Section 109:01)
- b. Where the listing agent or a member of his/her firm cannot be located to present an Offer, the selling agent may contact a member of the Board of Directors, requesting authorization to present the offer direct. The board member will be from a firm which has no interest in the transaction, and will base his decision on all pertinent facts. The selling agent must keep a record of his efforts to contact the listing agent. (Section 109:02)
- c. The selling agent is a sub-agent of the listing agent and, except as set out above, all negotiations with a vendor shall be through the listing agent. (Section 109:03)
- d. Where there are two or more offers on the same property or where the listing agent has reason to believe that a second offer will be received in the same time frame as the first, the listing agent shall instruct the selling agents to place their offers in sealed envelopes. The sealed envelopes shall be opened in the presence of the vendor in the order in which they are received. (Section 109:04)

- e. Under no circumstances will the terms and conditions of an offer be passed from the listing agent to any other agent or used by him as a leverage to obtain another offer. (Section 109:06)
- f. Where a listing agent has been advised that an additional offer will be forthcoming by a specified time, he will so advise the vendor when presenting the first offer. The decision to await the second offer is clearly the vendor's. (Section 109:07)

Winnipeg REALTORS® Association

Section 3(b) Competing Offers

If the Listing Agent receives competing Offers, and he has an agreement to reduce his commission if he is the Selling Agent as well as the Listing Agent, he must present all Offers received, to the seller, at the agreed upon reduced commission amount. Should an Offer from a competing Agent be successful Offer to Purchase, then the commission paid to the Selling Agent will be that published on the co-operative MLS® System.

A Buyer Agent may not reduce the selling portion of the commission on an Offer to Purchase to advantage his buyer. If a Buyer Agent wishes to rebate to his purchaser all or a portion of the selling commission received, the Buyer Agent must do that after the fact when he has received the commission due to him.

Remember that other Offers may be received after a 1st Offer has been accepted, either as a result of a Time Clause being in place or as a back-up Offer should the 1st offer fail. These Offers are considered to be “Competing Offers” and must be treated in the same manner as any other competing Offer.

Section 3, Par. D – Confidential Document

All Offers are confidential documents and the duty of confidentiality survives the acceptance or rejection or the counter of the Offer. However, where there are competing Offers, a Member acting as a Listing Agent shall inform the other Member and/or parties involved, prior to or during the presentation process, of the existence of the other Offers, without disclosing their specific terms or conditions.

CREA Code of Ethics

Article 3 states that “A REALTOR® shall protect and promote the interests of his or her Client. This primary obligation does not relieve the REALTOR® of the responsibility of dealing fairly with all parties to the transaction.

3.3 A REALTOR® shall not, during or following the relationship with his/her Client, reveal Confidential information of the Client.

3.5 In a competing offer situation, a listing REALTOR® acting as a dual agent shall not sue the information contained in another offer to put either client at a competitive advantage.

Your Company Policy Manual

Your company policy manual may also contain specific guidelines for the handling of multiple offers. Ask your manager or broker/owner for detailed information.

MULTIPLE OFFERS AND FAIR PLAY – A CASE STUDY

The MREA Professional Standards Hearing Panel had to consider a complaint respecting the protocol surrounding multiple offers. This issue has been considered in recent MCE seminars and this case is yet another reminder that fair play must rule the day.

The Facts

Agent Lister marketed a property in Ruraltown for \$36,500. Agent Buyer submitted an offer on behalf of his client – Mr. Interested – for \$36,500. Mr. Interested was assured by Agent Buyer that he would be informed if there were any competing offers. Too make a long story short, there were competing offers and Agent Buyer and Mr. Interested were not advised, leading to an unhappy Agent Buyer and his client.

The offer prepared by Mr. Interested was delivered by Agent Buyer at about 3:30 p.m. with an expiry of 7 p.m. Mr. Interested contacted Agent Buyer at 7:30 p.m. to see what had transpired but Agent Buyer had not heard back from Agent Lister, despite leaving message on both his cell phone and home answering machine. Agent Lister advised that he was tied up until 10:30 that evening and did not return the call because of the late hour.

Mr. Interested called Agent Buyer the next morning at 9:00 at which point Agent Buyer sent a fax to Agent Lister enquiring as to the status of the offer; and in turn providing an extension for consideration of the offer to 6:00 p.m. that evening. By return fax, Agent Lister advised Agent Buyer that the Seller had accepted another offer, conditional on financing.

Agent Buyer and Mr. Interested were disappointed to discover that there were competing offers and that they were not made aware of that fact. Mr. Interested suggested that he would have offered as much as \$38,000 for the property and did in fact submit an offer in this amount a few days later. This follow-up offer was rejected by the Seller who noted that the property was already sold. (It had sold for the list price of \$36,500.)

The Findings

In reviewing the case, the hearing panel was advised that in fact there were six buyers, in addition to Mr. Interested, who had submitted offers on the property. These other six offers were all written by Agent Lister, noting limited joint representation. Not all were still alive at the time of Mr. Interested's offer, but a number were.

Agent Lister had forwarded a letter of apology to Agent Buyer for having overlooked advising him of the competing offers, noting the hectic activity of the multiple showings and offers.

Agent Lister acknowledged that at least some, if not all, of the other potential buyers were aware that they were in competition with other offer(s) because they had

asked that question. In the final analysis, the facts appear to be that there was only one buyer, namely Agent Buyer's client, who was not advised of the existence of competing offers.

In reaching its conclusions, the hearing panel noted that the Code of Ethics provides that a REALTOR® shall seek no unfair advantage over other REALTORS®. The Code also stresses the requirement for fair dealing with high integrity resulting from adherence to a lofty standard of moral conduct in business relations.

The panel found that Agent Lister had not met the standard on both of these counts. Fellow REALTOR® Agent Buyer was placed in a position where he and his client were not aware of the existence of competing offers; while some, if not all, of the competing buyers were aware of these facts. This created a situation of an unfair advantage in favour of Agent Lister's clients over Agent Buyer's client (likewise an unfair advantage to Agent Lister over Agent Buyer). Agent Lister did not meet the expectation of high integrity and lofty moral standards.

Article 2 of the Standards of Business Practice provides that a REALTOR® shall protect and promote the interests of his or her client. This primary obligation does not relieve the REALTOR® of the responsibility of dealing fairly with all parties to the transaction. Agent Lister failed to advise Agent Buyer of the fact that there were competing offers in existence. It is a possibility that this buyer may have chosen to amend his offer with more favourable terms had this information been made available. As a result, the interests of Mr. Interested were not served by this omission.

The failure to level the playing field, in terms of advising all buyers of competing offers, amounts to unfair dealing with all of the parties to the transaction.

Article 15 of the Standards of Business Practice provides that a REALTOR® shall present all written offers and counter-offers as objectively and as quickly as possible. In particular, Interpretation 15-6 provides that where there are competing offers or counter-offers, a REALTOR® acting as the listing agent should inform the other REALTORS® and/or parties involved of the existence of the other offers or counter-offers, without disclosing their specific terms and conditions.

Without question, Agent Lister failed to advise Agent Buyer of the existence of the other offers. This breach is particularly glaring when the evidence showed that some or all of the other buyers were advised of the fact that they were in competition.

Article 17 of the Standards of Business Practice provides that a REALTOR® is obliged to render a skilled and conscientious service, in conformity with standards of competence, which are reasonably expected in the specific real estate disciplines in which the REALTOR® engages. The panel found that Agent Lister did not meet this standard.

It was the finding of the panel that Agent Lister did not meet the requirements outlined in the Code of Ethics, and did not meet the requirements outlined in Articles 2, 15, and 17, (together with their interpretations), of the Standards of Business Practice. The panel assessed Agent Lister a fine in the amount of \$1,000 together with the requirement to successfully pass an examination related to certain sections of MREA's course materials.

JOINT REPRESENTATION AND MULTIPLE OFFERS

It is conceivable that you or another salesperson in your firm will be working with a buyer/client who is interested in competing with other bidders for a property listed with your firm. This of course creates a limited joint representation situation for your company, because you have a buyer/client wanting to buy a seller/client's property. Before you proceed, you must do several things:

- a. You must fully explain the limitations of joint representation to both the seller/client and the buyer/client, and get their informed consent to your acting as a representative of both parties – that is, have both parties sign an *Acknowledgement of Limited Joint Representation* form. Without the consent of both parties, you cannot proceed – dual agency is illegal under the common law of agency. Remember, it is the broker who enters into a contract with the client, not the individual salesperson. The same rules apply, whether you personally bring both clients to your firm, or you and another salesperson with your firm bring them in separately. There are two limitations that occur in all joint representation situations. Both limitations must be disclosed to, and consented to, by the clients before you can proceed. They are:
 - Both clients must agree to waive their right to your negotiating skills. You can't try to get the highest price for your seller/client while getting the lowest price for your buyer/client. You can only operate as an impartial mediator, favouring neither client's interests over the other.
 - Among the fiduciary duties owed to all clients are the duties of confidentiality and full disclosure. You have a duty to keep your client's bargaining position secrets confidential, and you have the duty to disclose to your client anything about the other side's bargaining position that would be helpful to your client in the negotiation. When you are a dual agent under the common law of agency, these duties conflict. You cannot both keep and share bargaining position secrets! Therefore, under the common law of agency, clients must choose between a "secrets kept" version of dual agency (preserving the duty of confidentiality and waiving the duty of full disclosure), or a "no secrets kept" version of dual agency (preserving the duty of full disclosure and waiving the duty of confidentiality).

CAUTION

How is this Conflict of Duties Handled in Manitoba?

Dual agency is impossible under the common law of agency – it is not possible to act for both parties to the transaction and fulfill the fiduciary duties of confidentiality and full disclosure. In Manitoba, we have introduced a limited form of dual agency, which is referred to as *Limited Joint Representation*. Basically, limited joint representation attempts to permit joint representation subject to certain defined restrictions relating to the duties of confidentiality and full disclosure; namely:

- a. The salesperson cannot disclose what the buyer is willing to pay, or the seller is willing to accept.
- b. The salesperson cannot disclose the motivation of each party unless authorized to do so.
- c. The salesperson cannot disclose personal information of or about the buyer or seller unless authorized to do so.
- d. The salesperson cannot disclose terms or conditions of competing offers or negotiations.

These restrictions are all itemized in the *Acknowledgement of Limited Joint Representation*, a copy of which is provided on the following page.

- b. You must advise the salespeople with competing offers that you, or another salesperson in your company, have an offer from a buyer/client.
- c. You must advise your buyer/client and your seller that your buyer will not get special treatment in the negotiating process, because you have a duty to ensure that there is a level playing field for all participants.
- d. **In joint representation situation, you must have each party sign an *Acknowledgement of Limited Joint Representation*. Without this signed consent to LJR, your duties of full disclosure and confidentiality conflict when you are representing the seller/client and the buyer/client in the same transaction.**

ACKNOWLEDGEMENT OF LIMITED JOINT REPRESENTATION

With: _____ (hereafter called “the Brokerage”)

I, the undersigned, acknowledge and agree as follows:

1. The Brokerage, by its authorized salesperson(s), is assisting me in the sale or purchase of real estate.
2. In the course of dealings leading up to a transaction in real estate, it is possible that the Brokerage may be placed in a situation of *limited joint representation* for the following reasons:
 - (a) If I am a **Seller**, because an interested buyer is represented by the Brokerage;
 - (b) If I am a **Buyer**, because the Brokerage may also represent the Seller of certain property I am interested in or alternatively, the Brokerage may represent another Buyer who is interested in the same property.
3. I acknowledge that, in these circumstances the Brokerage may act as agent for more than one party and I consent to the Brokerage acting as a *limited joint representative*. Further, I agree that, should *limited joint representation* arise, the Brokerage/salesperson(s) shall be required to deal with each party fairly and impartially.
4. In the interests of fairness and confidentiality, the Brokerage/salesperson(s) shall **NOT** disclose certain information, namely: the motivation of the Seller to sell or of any Buyer to buy, the price and terms that any party may be prepared to agree to, personal information about any of the parties involved, and terms or conditions of competing offers or negotiations.
5. I understand that the Brokerage/salesperson(s) will advise the other parties involved in such *limited joint representation* of these terms and conditions and will obtain their agreement to such terms and conditions.
6. This acknowledgement shall take priority over any other agreement between myself and the Brokerage.
7. By signing this Acknowledgement, I acknowledge having read and understood the brochure entitled *Working with a Real Estate Salesperson* published by The Manitoba Real Estate Association.

Acknowledged and Agreed to by the undersigned this _____ day of _____ 20____.

Witness

Witness

- e. It is possible that you or another salesperson in your firm will obtain an offer on your listing from a buyer/customer. This is NOT dual agency or limited joint representation; only the seller is a client in such a case. Obviously, you or the other salesperson will have explained the limitations of customer status to the buyer before proceeding. You must still advise salespeople with competing offers that you, or another salesperson in your company, have an offer from a buyer/customer.

Consult your broker or office manager to determine what your company's policies are for multiple offer presentations, particularly when the listing salesperson has his/her own offer.

“FLIPS”

The “flipping” of a property is a form of multiple offers. A “flip” usually involves the buyer of a property “selling” or assigning his agreement of purchase and sale prior to the deal closing, or selling the property shortly after taking possession.

Unlike the typical multiple offer situation, with a “flip” the offers are separated in time. How you handle a flip depends upon the nature of your agency relationships when the first sale was made:

- a. If you were the listing agency at the time of the first sale, and prior to closing, the buyer approaches you to sell the property for him/her, you must first get the consent of your seller/client before you can proceed. Your fiduciary duty of loyalty to the seller/client makes this necessary.
- b. If you were a subagent of the seller at the time of the first sale, and prior to closing the buyer/customer approaches you to sell the property for him/her, you must first get the consent of your seller/client before you can proceed. Again, your fiduciary duty of loyalty to your seller/client makes this necessary.
- c. If the buyer was your client on the first sale, and prior to closing your buyer/client approaches you to sell the property for him/her, you do not need to get the seller's consent, unless the seller was also a client of your firm in a limited joint representation situation. From a practical point of view, you will likely need the seller's agreement anyway, because you will want to advertise and show the property on behalf of the buyer prior to the closing of the first sale.
- d. If the buyer approaches you to sell the property AFTER the closing of the transaction, you may not need the seller's consent, depending upon the nature of your agency relationship with the seller and the buyer on the first sale. If the seller was your client, remember that the fiduciary relationship can still apply even after closing. Your duties will be measured by circumstances, particularly the amount of time that has passed. If the buyer approaches you a day after closing, you probably have a continuing fiduciary duty to inform your seller/client. If a year has gone by, it is highly unlikely that you would have a fiduciary duty to advise the seller.

AUCTIONS

An auction is also a form of multiple offers. The same general rule applies: you must ensure that all bidders are provided a level playing field. Auctions may be conducted by electronic means, by a sealed bidding process, or via the traditional live bidding process seen at country fairs. The rules of the game vary with the style of the auctioneer and the instruction of the property owner. As long as everyone is fully informed of the rules, the game is a fair one.

The proper conducting of auctions requires special training and accreditation. However, Alberta is the only province that requires auctioneers to have an auctioneer's licence. The Auctioneer's Association of Ontario is lobbying the provincial government to develop similar requirements for Ontario.

If an auctioneer is simply determining the highest bidder and not actually selling the property, the auctioneer does not need to be licensed under The Real Estate Brokers Act. Section 41(j) of the Act provides an exemption for auctioneers "to the performance by an auctioneer of his duties as such at an auction sale". However, an auctioneer selling real property in Manitoba requires a salesperson's licence or a broker's licence in accordance with The Real Estate Brokers Act. Auctioneers, like lawyers, must be licensed under The Real Estate Brokers Act to trade in real estate on behalf of others on an ongoing basis.

While auctions are becoming a more popular means of selling real estate, particularly commercial properties, they still represent a very small proportion of the market in Canada. However, in Australia and New Zealand, the auction process is used almost 100% of the time by brokers.

CONCLUSION

Whether a multiple offer situation is a blessing or a curse depends entirely upon how you handle it.

If you are the listing salesperson and you follow the guidelines provided, you should end up with a very happy seller and one happy buyer. You should also have one or more would-be buyers and their salespeople who, although unhappy with the result, are content that they were treated fairly by you throughout the process.

If you are one of the salespeople who brought an unsuccessful buyer to the table, you will need to deal carefully with the sadness that always follows an unsuccessful attempt to purchase. You can be confident that your buyer will stay with you as long as you prepared them properly going into the bidding process, and as long as you used your best efforts on their behalf to ensure that the offer process was fair and that they had every opportunity to give it their best shot.