

February 20, 2009

Dear Designated Broker:

In July of 2007, the License Law was amended, creating additional duties that real estate licensees are obligated to perform on behalf of their customers and clients.

All real estate licensees are required “to be available” to receive and present written offers and counter offers. This duty is owed to any consumer – customer or client – who has hired a brokerage to perform any services – whether full or limited. The duty to be available is *mandatory* and cannot be waived, even if the consumer agrees.

Yet, we are seeing MLS printouts that instruct buyer’s agents to present all offers to the seller directly. (There is even one that instructs licensees to fax all offers to the seller and provides the fax number.) The listing broker fails to provide adequate contact information, and if the broker is contacted, he or refuses to receive any offers and instead tells the buyer to present directly to the seller. This is unacceptable!

The Commissioners published a guideline in January of 2008 to address these issues. There is a sequence of questions that address most of the issues with the new laws. Rather than repeat what has already been said, Guideline # 23 is attached to this letter.

Designated brokers also should remember their duty to maintain accurate files. When documents are provided only to a seller, the brokerage could be disciplined for failure to maintain accurate records, and even for failure to supervise the licensee involved.

Familiarize yourself with these laws; read the attached Guideline. Remember -- these duties are not optional, and they cannot be waived by agreement.

Sincerely,

A handwritten signature in cursive script, appearing to read "Andy Enrico".

Andy Enrico, Chair
Idaho Real Estate Commission

Enclosure: *IREC Guideline #23*

**MANDATORY DUTY OF THE BROKERAGE “TO BE AVAILABLE” TO RECEIVE
AND PRESENT ALL WRITTEN OFFERS AND COUNTEROFFERS**

Effective July 1, 2007, the Real Estate License Law requires that any real estate brokerage that has entered a representation agreement, compensation agreement, or customer services agreement owes its customer or client a statutory duty to provide specific brokerage services, namely, “to be available” to its customer or client “to receive and timely present all written offers and counteroffers.” This duty is mandatory and cannot be waived unilaterally or by agreement.

Questions have arisen as the meaning and scope of the mandatory duty requiring the brokerage “to be available.” The purpose of this Guideline is to provide the Commission’s interpretation of what is - and what is not - required by this brokerage duty.

The Listing Brokerage. As applied to a listing brokerage, the statute requires the brokerage to be available to his customer/client to: (1) receive written offers from buyers; (2) present those offers to its customer/client; and (3) present any written counteroffer of its seller to the buyer.

It is the Commission’s view that, in order “to be available” to provide these services, the listing brokerage must, at minimum:

- include in any listing or advertisement of the property, sufficient information to allow buyers to submit, and the listing brokerage to receive, written offers from buyers; and
- have in place an adequate means of communication to allow (1) the brokerage to timely present the offers to its seller; and (2) its seller to submit back to the brokerage any written counteroffer for presentation to the buyer.

The Buyer Brokerage. As applied to the buyer brokerage, the statute requires that the brokerage be available to: (1) present its buyer’s written offers to the seller; (2) receive written counteroffers from the seller; and (3) present the written counteroffer of the seller to its buyer.

It is the Commission’s view, in order “to be available” to provide these services, the buyer brokerage should, at a minimum:

- include with any written offer submitted to the seller, sufficient information to allow buyer to submit, and the listing brokerage to receive, written counteroffers from buyer; and

- have in place an adequate means of communication to allow (1) the brokerage to timely present the counter offers to its buyer; and (2) its buyer to submit back to the brokerage any further written counteroffer for presentation to the seller.

“Sufficient information” may include, but is not limited to, the brokerage’s fax number, or e-mail address, physical (delivery) address, or a telephone number. If the contact information does not provide for direct submission of written offers, (e.g., telephone number), the brokerage must respond to inquiries with information that will allow buyers to submit written offers to the brokerage.

“Adequate means of communication” may include any means agreed upon between the brokerage and its client/customer, to permit the broker to present written offers and counteroffers to its customer/client, and for the brokerage to present any counteroffers from its customer/client to the other party. The means of communication may include fax, e-mail, telephone, or face-to-face meeting.

Frequently Asked Questions

Question: Once the brokerage receives the written offer, does it have a duty to review that offer? Or is it permissible for the brokerage to simply relay the written offer to the seller?

Answer: The brokerage must review the offer. Although the level of required services will depend on whether the seller is a customer or a client of the brokerage, a brokerage is obligated to take certain actions regarding any written offer it receives. These obligations, set forth at Section 54-2051, Idaho Code, include: the prompt tender of the offer to the seller; ensuring that the offer recites the actual form and amount of earnest money received; a provision for the division of earnest money; the representation confirmation statement required by statute; appropriate signatures, and a legal description of the property. Fulfilling these statutory obligations necessarily requires that the brokerage review every offer it receives.

Question: Must a brokerage be available to provide advice to its customers or negotiate on their behalf?

Answer: No. The minimum services required by law do not include these services. Unless the brokerage has contracted to provide Agency Representation, or to provide other heightened customer services, a customer is not entitled to these services.

Question: If the seller requests, can the listing brokerage agree that offers are to be presented directly to that seller, instead of the listing brokerage?

Answer: No. The law flatly states that the duty is “mandatory and may not be waived or abrogated, either unilaterally or by agreement.” Therefore, the seller may not elect to waive this service, even if the seller request; the brokerage must remain available to receive written offers.

Question: Does the law prohibit buyers from presenting offers directly to the seller?

Answer: No. The law requires that a brokerage provide certain services to the customer/client with whom it contracted. The *law does not bar a buyer from presenting offers directly to, or inquiring directly of, the seller; *provided a buyer may not “interfere with the contractual relationship between a brokerage and its client.* See Section 54-2054(4), Idaho Code.

* (Realtor Code of Ethics may be implicated here, however.)

Real Estate License Law & Brokerage Representation Act Relevant Provisions

54-2083. DEFINITIONS:

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(8) "Customer services agreement" or "compensation agreement" means an agreement between a real estate brokerage and a customer for the provision of any real estate services for which the brokerage has the right to be compensated by the customer.

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(16) "Representation agreement" or "contract for representation" means a written agreement between a buyer, seller, or both, and a real estate brokerage for agency representation in a regulated real estate transaction. A representation agreement under this chapter can only be made in writing, and cannot be made orally or by assumption or implication.

54-2086. DUTIES TO A CUSTOMER.

(1) If a buyer, prospective buyer, or seller is not represented by a brokerage in a regulated real estate transaction, that buyer or seller remains a customer, and as such, the brokerage and its licensees are nonagents and owe the following legal duties and obligations:

- (a) To perform ministerial acts to assist the buyer or seller in the sale or purchase of real estate;
- (b) To perform these acts with honesty, good faith, reasonable skill and care;
- (c) To properly account for moneys or property placed in the care and responsibility of the brokerage;
- (d) To disclose to the buyer/customer all adverse material facts actually known or which reasonably should have been known by the licensee;
- (e) To disclose to the seller/customer all adverse material facts actually known or which reasonably should have been known by the licensee.

(2) **If a customer has entered into a compensation agreement or customer services agreement with the brokerage, the brokerage shall have the obligation to be available to the customer to receive and timely present all written offers and counteroffers.**

(3) The duties set forth in this section are mandatory and may not be waived or abrogated, either unilaterally or by agreement.

(4) Nothing in this section prohibits a brokerage from charging a separate fee or commission for each service provided to the customer in the transaction.

54-2087. DUTIES TO A CLIENT.

If a buyer or seller enters into a written contract for representation in a regulated real estate transaction, that buyer or seller becomes a client to whom the brokerage and its licensees owe the following agency duties and obligations:

- (1) To perform the terms of the written agreement with the client;
- (2) To exercise reasonable skill and care;
- (3) **To be available to the client to receive and timely present all written offers and counteroffers;**
- (4) To promote the best interests of the client in good faith, honesty and fair dealing including, but not limited to:
 - (a) Disclosing to the client all adverse material facts actually known or which reasonably should have been known by the licensee;
 - (b) Seeking a buyer to purchase the seller's property at a price, and under terms and conditions acceptable to the seller and assisting in the negotiation therefor; or
 - (c) Seeking a property for purchase at a price and under terms and conditions acceptable to the buyer and assisting in the negotiation therefor;
 - (d) For the benefit of a client/buyer: when appropriate, advising the client to obtain professional inspections of the property or to seek appropriate tax, legal and other professional advice or counsel;
 - (e) For the benefit of a client/seller: upon written request by a client/seller, requesting reasonable proof of a prospective buyer's financial ability to purchase the real property which is the subject matter of the transaction. This duty may be satisfied by any appropriate method suitable to the transaction or, when deemed necessary by the real estate licensee, by advising the client to consult with an accountant, lawyer, or other professional as dictated by the transaction.
- (5) To properly account for moneys or property placed in the care and responsibility of the brokerage; and
- (6) To maintain the confidentiality of specific client information as defined by and to the extent required in this chapter, and as follows:
 - (a) The duty to a client continues beyond the termination of representation only so long as the information continues to be confidential client information as defined in this chapter, and only so long as the information does not become generally known in the marketing community from a source other than the brokerage or its associated licensees;
 - (b) A licensee who personally has gained confidential client information about a buyer or seller while associated with one (1) broker and who later associates with a different broker remains obligated to maintain the client confidentiality as required by this chapter;
 - (c) If a brokerage represents a buyer or seller whose interests conflict with those of a former client, the brokerage shall inform the second client of the brokerage's prior representation of the former client and that confidential client information obtained during the first representation cannot be given to the second client. Nothing in this section shall prevent the brokerage from asking the former client for permission to release such information;
 - (d) Nothing in this section is intended to create a privileged communication between any client and any brokerage or licensee for purposes of civil, criminal or administrative legal proceedings.
- (7) Unless otherwise agreed to in writing, a brokerage and its licensees owe no duty to a client to conduct an independent inspection of the property and owe no duty to independently verify the accuracy or completeness of any statement or representation made regarding a property.

Unless otherwise agreed to in writing, a brokerage and its licensees owe no duty to conduct an independent investigation of either party's financial ability to complete a real estate transaction.

(8) The duties set forth in this section are mandatory and may not be waived or abrogated, either unilaterally or by agreement.

(9) Nothing in this section prohibits a brokerage from charging a separate fee or commission for each service provided to the client in the transaction.

54-2051. OFFERS TO PURCHASE.

(1) A broker or sales associate shall, as promptly as practicable, tender to the seller every written offer to purchase obtained on the real estate involved, up until time of closing. A purchase and sale agreement signed by the prospective buyer shall be deemed in all respects an offer to purchase.

(2) Immediately upon receiving any offer to purchase signed and dated by the buyer and any consideration, a broker or salesperson shall provide a copy of the offer to purchase to the buyer as a receipt.

(3) Upon obtaining a properly signed and dated acceptance of an offer to purchase, the broker or sales associate shall promptly deliver true and legible copies of such accepted offer to both the buyer and the seller.

(4) The broker or sales associate shall make certain that all offers to purchase real property or any interest therein are in writing and contain all of the following specific terms, provisions and statements:

- (a) All terms and conditions of the real estate transaction as directed by the buyer or seller;
 - (b) The actual form and amount of the consideration received as earnest money;
 - (c) The name of the responsible broker in the transaction, as defined in section 54-2048, Idaho Code;
 - (d) The "representation confirmation" statement required in section 54-2085(4), Idaho Code, and, only if applicable to the transaction, the "consent to limited dual representation" as required in section 54-2088, Idaho Code;
 - (e) A provision for division of earnest money retained by any person as forfeited payment should the transaction not close;
 - (f) All appropriate signatures; and
 - (g) A legal description of the property.
- (5) All changes made to any offer to purchase or other real estate purchase agreement shall be initialed and dated by the parties to the transaction.
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