

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

The Commission has received questions concerning the circumstances under which a brokerage must be available to receive and present all written offers and counteroffers. The inquiries pertain to the application of Sections 54-2083(8) and (16), 54-2086, 54-2087, and 54-2051, Idaho Code.

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 its 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

This guideline is not a new law but is an agency interpretation of existing law.

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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, electronic transmission, or face-to-face meeting.

Frequently Asked Questions

Question #1: 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 #2: 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 #3: 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 requests; the brokerage must remain available to receive written offers.

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Question #4: 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.)*
