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Revocation of Offers in the Day and Age of Transaction Brokerage

As defined under the Real Estate Brokers Act: a “Transaction Broker” is a *qualifying broker, associate broker or brokerage that provides real estate services **without entering into an agency relationship***.

Since January 1, 2000, with the creation of the “non-agency” relationship, brokers have had the option of working with their clients/customers as agents or as, what has since been labeled, “transaction brokers”. Over the last 15 years, we have seen a shift away from the principal-agent model and a trend toward the transaction-broker relationship. What are the significant differences between these two relationships from the brokers’ perspective?

First, on the upside, generally speaking, a transaction-broker relationship creates less liability for the broker. When working as agents for clients, brokers owe fiduciary duties (in its simplest form: obedience, loyalty, disclosure, confidentiality, accounting, reasonable care), but as transaction broker, brokers owe “Broker Duties”, those duties defined by the New Mexico Real Estate Commission, which are less burdensome than fiduciary duties and, in most instances, better defined. Second, and less celebrated by brokers as a benefit of the transaction-broker relationship, is a reduction in the broker’s authority. Generally, agents have the power to bind their principals when the agent is acting within the scope of his/her agency, whereas, transaction brokers do **not** have such authority.

Transaction brokers generally understand that they cannot accept, reject, or counter offers on behalf of their clients (or customers), but when it comes to revoking offers on behalf of their clients or customers, the limitation of authority appears less defined and clear. Arguably, just as transaction brokers lack the authority to accept, reject, or counter offers

for their clients or customers, so, too, they lack the authority to revoke those offers. Which begs the question: how does a transaction broker “properly” revoke an offer/counter for his/her client/customer.

First, except as discussed below, an offer or counteroffer (collectively hereafter referred to as “offer/counter”) may be revoked by the offeror at any time up until the offer/counter is accepted. NMAR’s Residential Purchase Agreement states that the offer/counter is “accepted” when it is signed and delivered to the other party or the other party’s broker, as applicable.

New Mexico Uniform Jury Instruction 13-806: (specific fictitious names added for easier reading: Offeror: John and Offeree: Jane)

An offer may be withdrawn at any time before notice of its acceptance has been received. To have withdrawn an offer, John must have notified Jane that the offer was withdrawn.

Once notice of withdrawal has been received, the offer may no longer be accepted and any attempt to accept thereafter will not be effective. If Jane was notified that the offer was withdrawn, Jane could no longer accept the offer.

If the offer made by John was accompanied by a promise not to revoke the offer and consideration was given for that promise, then the offer cannot be withdrawn by John.

As indicated in the Jury Instruction, one of the most important aspects of a revocation is notification of revocation to

the party who received the offer/counteroffer. A written offer may be withdrawn orally, but as is true with most oral communications, there is greater potential for miscommunication and greater difficulty in proving the revocation occurred and/or the details of the revocation (such as, was the revocation communicated prior to acceptance of the offer/counter). ***This is NOT to say that if a buyer/seller communicates to you orally to revoke his/her offer/counter, that you should not do so as quickly as possible, even if the circumstances are such that you can only do so orally.*** But whenever possible, it is prudent to revoke an offer/counter in writing.

As discussed above, transaction brokers have limited authority to bind their clients with their words or actions. Consequently, whenever possible, the revocation should come from the buyer/seller revoking, opposed to his/her broker. To this end, NMAR has recently created a new Revocation of Offer/Counteroffer Form, which will be released in the NMAR Forms Library on or about July 8, 2019. Brokers should note the language at the top of the first page of the Form that explains that the Revocation Form is NOT the only manner in which an offer/counter may be revoked. As discussed, written offers may be revoked orally, but again, may be at greater risk of challenge. Another option is for the revoking party to send his/her broker instructions to revoke the offer/counter via text or email, which can then be forwarded to the broker on the other side of the transaction.

As to the last paragraph of the Jury Instructions, brokers and parties are often under the assumption that if there is an expiration date/time in the offer/counter, that the party making the offer/counter MUST leave the offer/counter "on the table" until such date/time; such assumption is erroneous UNLESS the party to whom the offer/counter was made has compensated the offeror to leave the offer/counter open until that date and time. In other words, if Jane did not pay John or otherwise provide consideration for John to keep his offer/counter on the table until the date in the "expiration" field, then John may revoke his offer/counter at any time up until Jane signs and delivers that offer/counter.



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July!

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