



LEGAL UPDATE

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A MONTHLY GUIDE TO WISCONSIN REAL ESTATE LAW & POLICY

Multiple Offers and Love Letters

Multiple offers come with risks for misunderstanding and missed opportunities. Real estate professionals can best avoid missteps by following basic license law and ethical rules and clearly communicating with the parties to set their expectations. That is the best way to avoid complaints and fair housing issues.

Multiple offers often arise when the inventory of properties falls short of buyer demand, giving rise to bidding wars and different considerations for sellers and buyers.

This *Legal Update* reviews various issues associated with multiple offer scenarios and provides pointers for navigating the churning waters. The *Update* first looks at legal and ethical rules to keep in mind when there are many buyers and offers in play. Then buyer strategies for becoming the winning offer are overviewed including price escalation provisions, excluding standard contingencies, and the controversial “pick me” or buyer “love letters” appearing in many Wisconsin transactions.

Legal and Ethical Rules

When working with multiple offers, listing brokers are charged with helping sellers get the highest price and the most favorable terms for their property. Buyer’s brokers and cooperating brokers help buyers purchase property at the lowest price and on favorable terms – all at a very fast pace!

Amongst all the confusion and bedlam generated by multiple offers and multiple buyers, real estate professionals should not forget their duties to the various parties to ensure the proceedings are fair. The Wisconsin Administrative Code and the REALTOR® Code of Ethics regulate the sharing of information about pending offers on a property.

The Code of Ethics applies to multiple offer scenarios. Article 1 requires REALTORS® to protect and promote the interest of their client, while treating all parties honestly.

Standard of Practice 1-6 requires that “REALTORS® shall submit offers and counter-offers objectively and as quickly as possible.”

Wis. Admin. Code § REEB 24.12(1) states, in relevant part,

A licensee may, but is not required to, disclose information known by the licensee regarding the existence of other offers on the property, the fact that a seller has accepted an offer, that the offer is subject to contingencies and that the offer is subject to a clause requiring removal of certain contingencies upon the occurrence of an event such as receipt, acceptance or conditional acceptance of another offer.

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Therefore, unless the seller has required the broker to keep any information about offers on the property confidential, the agent may disclose the existence of other offers under Wisconsin license law.

The Code of Ethics in Standard of Practice 1-15 provides,

REALTORS®, in response to inquiries from buyers or cooperating brokers shall, with the sellers’ approval, disclose the existence of offers on the property. Where disclosure is authorized, REALTORS® shall also disclose, if asked, whether offers were obtained by the listing licensee, another licensee in the listing firm, or by a cooperating broker. (*Adopted 1/03, Amended 1/09*)

Therefore, with the seller’s approval and prior to the acceptance of an offer to purchase, the agent shall disclose information about other offers. If, however, the seller directs the agent not to disclose, the broker may document this fact and follow the instructions of the seller.

Standard of Practice 3-6 provides,

“REALTORS® shall disclose the existence of accepted offers, including offers with unresolved contingencies, to any broker seeking cooperation. (*Adopted 5/86, Amended 1/04*).”

Therefore, unless the seller has indicated that this information is confidential per Wis. Stat. § 452.133(1)(d), the broker would disclose accepted offers. Any confidentiality directive should be in writing in the listing contract, or an addendum or amendment thereto, or on a copy of an agency disclosure form.

① MORE INFO

See the Code of Ethics & Arbitration Manual, Part 4, Appendix IX – Presenting and Negotiating Multiple Offers at www.nar.realtor/code-of-ethics-and-arbitration-manual/part-4-appendix-ix-presenting-and-negotiating-multiple-offers.

Buyer Strategies

A tight market seems to bring out a flood of offers for the properties on the market. In a group of potential buyers, the challenge for buyers is to write the offer the seller chooses. There are various techniques used to make a buyer's offer the most attractive and most advantageous for the seller.

Some of the strategies employed follow the traditional suggestions to submit a buyer's highest and best offer. Buyers write offers for amounts over the list price, include preapproval letters and may pay higher earnest money deposits, for example, \$5,000 or more. The mission is to make the offer attractive to the seller. Cash buyers may include proof of funds documentation to further sweeten the prospect of a cash offer.

Other non-traditional strategies may be used by buyers to make their offers stand out. These may include price escalation provisions, writing offers with few or no contingencies, or sending a letter to the seller along with the offer describing why they are the perfect fit for the seller's home.

Price escalation provisions

A price escalation provision or an acceleration clause – they go by various names – is a provision or a clause used to negotiate price at an amount above another buyer's offered price. The offer to purchase, as a basic premise, must state the price the buyer is willing to pay to purchase the property. The price, however, may be determined by referencing the price of another offer to purchase.

The basics of price escalation are that a buyer is willing to increase their offered price up to a certain amount over the highest offer, up to a maximum dollar amount. Because agents are precluded by Wis. Admin. Code § REEB 24.12 from sharing the terms of an offer, the seller will have to provide a copy of that highest offer to the buyer directly in order to implement the price escalation provision. Once the new price is established, the parties are prudent to draft an amendment clarifying the new price. If the buyer wants to use such a strategy, the equation used to determine the offered price must be clear and unambiguous.

In response to multiple offers with price escalation provisions, a seller has several options. The seller may choose to negotiate price independent from any price escalation provisions. If the seller elects not to use the price escalation provisions, the seller instead may counter one buyer with a counter-offer. The seller may counter at the maximum price the buyer was willing to pay if the price escalation provisions had been triggered, or any other price. The buyer receiving the counter-offer may accept, reject or counter the seller's counter-offer. Alternately, a WB-46 Multiple Counter Proposal may be used, allowing the seller to negotiate simultaneously with more than one buyer. In response to a seller's multiple counter-proposal, a buyer may approve, counter or reject the multiple counter-proposal.

Another option for the seller is to accept one of the offers. If it is one with a price escalation provision, the steps to implement the price escalation provision would need to be followed. The seller, or the seller's attorney, may provide the buyer with the price escalation provision along with a copy of the other buyer's offer. It is important that the **seller** provides the document – not the broker – because the broker must observe the duty of confidentiality to the other buyer. Under Wis. Admin. Code § REEB 24.12(1), a licensee may not disclose "any of the terms of one prospective buyer's offer to purchase ... to any other prospective buyer or to any person with the intent that this information be disclosed to any other prospective buyer."

① MORE INFO

For information about using price escalation provisions and multiple counter-proposals, see the WRA LegalTalks video, "Escalation Clauses and Multiple Counter Proposals," with Tracy Rucka at www.wra.org/LegalTalks/EscalationClause, "The Best of the Legal Hotline: Price Escalation" in the July 2020 *Wisconsin Real Estate Magazine* at www.wra.org/WREM/Jul20/Hotline, the January 2017 *Legal Update*, "Price Escalation Clauses and Multiple Counter-proposals," at www.wra.org/LU1701 and, regarding the multiple counter-proposal, pages 4-5 of the *Legal Update* 99.07, "Form Revisions," at www.wra.org/LU9907.

Offers without contingencies

Some buyers in a competitive market may leave out the contingencies typically found in an offer. They may choose not to include an Inspection Contingency, a Financing Commitment Contingency, an Appraisal Contingency or a Radon Testing Contingency in order to find favor with the seller. These omissions do not come without a price and a risk for the buyer: they are not learning information about the property condition, they are taking the risk they can secure the funds to pay the purchase price, they are taking the risk the property will appraise for the purchase price or at least a price acceptable to their lender, and are forgoing advance knowledge about radon levels in the property. The real estate professional working with the buyer should discuss the pros and cons with the buyer before the buyer makes their decision about what contingencies to include in the offer.

① MORE INFO

For a discussion of the considerations involved when a buyer entertains the idea of not including an Appraisal Contingency, read "Pick Me! I Didn't Include an Appraisal Contingency!" in the October 2020 *Wisconsin Real Estate Magazine* at www.wra.org/WREM/Oct20/PickMe.

Love Letters

One of the most controversial strategies used by buyers is the inclusion of a "pick me" or buyer's "love letter." To entice a seller to choose their offer, buyers sometimes write letters to the seller to describe the many reasons why the seller should "pick them." A buyer "love letter" may include personal messages, videos, family photos or any communication submitted to the seller along with the offer to purchase. These letters will often provide details about the buyers and gush about how much they love the home and how happy they would be there. The letter may come with their child's drawing of the home as a special touch. Why go to such lengths? Buyers and their agents use these letters because they often work and may be crucial in bidding wars.

While not every buyer letter written to a seller comes with risks of liability for the buyer, the seller and the real estate agents in the transaction, several possible liability landmines may be present when love letters are used. It all depends on the specifics of the transaction and the contents of the buyer's communication. For instance, letters admiring a home's historical significance or discussing significant features of the landscaping would seem to be innocuous.

The information contained in the letter could raise a misrepresentation issue if it is inaccurate and the seller relied on the information when accepting the offer. Buyers may paint a picture to appeal to the seller, but they may not be telling the truth and thus the letters are unreliable. The contents of the letter could also lead to fair housing issues if decisions regarding the sale are made based on the buyer's protected class status. The information contained in the letter could create contractual obligations between the buyer and seller for the closing of transaction. Likewise, if there are any promises or conditions contained in the letter that were to be implemented after closing, that could be problematic.

The primary discussion regarding buyer letters is the risk they will contain information that will lead to the seller deciding among comparable offers based upon the buyer's personal characteristics relative to the fair housing protected classes. The letters might provide information to a seller enabling them to choose an offer based, for example, upon the race, family status, sexual orientation or religion of the buyers.



These “love letters” often – deliberately or innocently – include personal information that reveals a prohibited basis for discrimination, such as “we can see our family celebrating Christmas around the fireplace” or “the wide hallways will accommodate my wheelchair.” A love letter can trigger implicit bias, putting a seller in the position of preferring a buyer based on a “feeling” or something that the seller “just likes” about the buyer. In some cases, sellers may knowingly choose a buyer based on the characteristics revealed in the buyer's communication, a clear fair housing law violation if it can be proved. Accepting an offer based on anything other than the price, terms and merits of the offer might violate fair housing law.

NAR generally discourages use of buyer “love letters” because of their potential to encourage violations of fair housing laws.

Consider an example from the NAR Fair Housing Corner: Love Letters or Liability Letters? (www.nar.realtor/fair-housing-corner/love-letters-or-liability-letters):

A potential buyer writes to the seller that they can picture their children running down the stairs on Christmas morning for years to come in the house. This seemingly innocuous statement indicates the potential buyer's familial status and their religion, both protected characteristics under fair housing laws. Using protected characteristics as a basis to accept or reject an offer, as opposed to price and terms, would violate the Fair Housing Act.

Consider the following scenarios recounted by an attorney presenting to a NAR conference (www.inman.com/2016/11/18/homesellers-shouldnt-accept-buyer-love-letters):

A buyer is a visible member of a historically oppressed minority. He made a \$145,000 offer on a home. The offer was rejected. Through public records, the buyer later found out that the home sold for \$110,000. “If we had had his life experiences, we might have perceived what he perceived” – that his offer was rejected because he was a member of this minority, in violation of the Fair Housing Act. The Fair Housing Act prohibits discrimination based on an individual's race, color, religion, sex, disability, familial status or national origin. To win this type of case, it would be really helpful to be able to show that listing brokers and agents don't know anything about a buyer other than what's in the offer, according to Goodman. “Love letters change all of that,” he said.

He described a situation in which buyers extolled the virtues of a home and promised to keep it as-is, prompting the sellers to accept their offer. The buyers tore the house down two months after buying it, Goodman said. “Sellers shouldn't be relying on [love letters]. In a perfect world, [they] wouldn't make a difference,” he said. One conference attendee noted that sellers very often Google the buyers and look them up on Facebook. To that, Goodman said, “Remember all this is a risk management technique. There's nothing you can do to prevent that.”



REALTOR® Practice Tip

For these reasons, real estate professionals should discourage the use and consideration of buyer “love letters” to reduce the risk of discrimination and liability for fair housing violations.

Rules for presentation of buyer “pick me” communications

Another issue that arises with regard to “pick me” or “love letters” is whether the letter or similar communication is sent separately along with the offer or is incorporated by reference as a part of the offer.

As usual, there are pros and cons. A letter sent separately and not incorporated by reference may not be presented to the seller. Any document can be made part of an offer if it is incorporated by reference into the offer to purchase.

The offer presentation rules in Wis. Admin. Code § REEB 24.13 regulate the submission of all written proposals to parties, not just offers:

Wis. Admin. Code § REEB 24.13(1) provides:

Refusal prohibited. Licensees shall not refuse to draft or submit any written proposal unless the terms of the written proposal would be contrary to specific instructions of the other party.

Wis. Admin. Code § REEB 24.13(3)(a) states:

Fair presentation of written proposals. (a) Licensees shall present all written proposals in an objective and unbiased manner to their clients and customers. Licensees shall inform their clients and customers of the advantages and disadvantages of all submitted written proposals.

Wis. Admin. Code § REEB 24.02(19) indicates:

“Written proposal” means any written document provided by one party to another during the course of a transaction, including but not limited to notices, offers, counteroffers, options, exchanges, rental agreements, and amendments.



REALTOR® Practice Tip

Under § REEB 24.13(1) sellers and listing brokers have the opportunity to specify in the listing contract that no separate love letter communications and no offer that includes such personal overtures by the buyer written into the offer or incorporated by reference will be read by the listing firm and its agents nor submitted to the seller. Such an agreement would best be specified in the listing contract as non-confidential so the listing firm can share the directive with cooperating firms and buyers and let them know the seller will not see any buyer love letters submitted.

“Love letter” considerations for cooperating agents

- Point out the problems that can occur when the letters include misrepresentations, inaccuracy, misleading statements, contractual obligations, and unrealistic promises and conditions.
- Educate buyers about fair housing law and the pitfalls of buyer “love letters;” point out the non-discrimination provision in the buyer agency agreement if the buyer is a client.
- What the buyer decides to do is their decision and Wisconsin licensees are obligated to draft as instructed by the party they are working with or representing.

“Love letter” considerations for listing agents

- Remind sellers their decision to accept or reject an offer should be based on objective criteria only.
- Point out the fair housing provision in the listing contract and discuss fair housing laws and the potential liability if the seller selects an offer based on buyer “love letters.”
- Discuss whether you will deliver or submit buyers’ “pick me” letters, videos, photos or other personal communications to the seller; put the seller’s directions in writing in the listing contract or an amendment thereto.
- Document all offers received and the seller’s objective reason for accepting an offer.

① MORE INFO

See pages 8-9 of the September 2017 *Legal Update*, “Fair Housing Advancements,” at www.wra.org/LU1709, NAR Fair Housing Corner: Love Letters or Liability Letters? at www.nar.realtor/fair-housing-corner/love-letters-or-liability-letters and “Why a Buyer Love Letter Could Turn Into a Poison Pen” at <https://magazine.realtor/daily-news/2020/10/27/why-a-buyer-love-letter-could-turn-into-a-poison-pen>.



Multiple Offer Transaction Pointers

When working with multiple offers it is important to maintain clear and open communications with the parties and between the real estate agents. Real estate professionals can educate the parties about the issues they may encounter, various strategy options and possible liability pitfalls, but must remember the parties are the decision-makers. They are the ones who must decide how they wish to proceed.



REALTOR® Practice Tip

Listing broker:

- Discuss the possibility of multiple offers, explain the choices available to the seller and get the seller's instructions for handling multiple offers.
- Explain the fair housing implications of a buyer "love letter," obtain written instructions for how such communications should be handled in the listing contract.
- If the seller wishes to receive "love letters," advise that they consult legal counsel and document their decision-making process.
- Get the seller's direction whether to disclose the existence of multiple offers to prospective buyers.
- Make reasonable efforts to keep buyers' representatives up to date on the status of offers.



REALTOR® Practice Tip

Cooperating broker:

- Educate buyers about the current market and their options for making an offer.
- Remind buyers that you may not know if there are other offers on the table.
- If a buyer insists on including a "love letter," explain the fair housing concerns.

① MORE INFO

See the Window to the Law video on multiple offers at www.nar.realtor/videos/window-to-the-law/how-to-handle-multiple-offers and the NAR Multiple Offer resources at www.nar.realtor/multiple-offers.

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