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**Real Estate Practice – Part 4**

**Contract Considerations**

**Program Offered by the Nebraska Real Estate Commission**

**Program Presented by**:

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Nebraska Real Estate Commission

www.nrec.nebraska.gov

**Sources**

* https://www.adwerx.com/blog/184-things-real-estate-agents-do/
* https://nrec.nebraska.gov/legal/article24toc.html - Agency Relationships - NREC
* <https://nrec.nebraska.gov/additional-links/faqlicensees.html>
* Educators may want to work with contract forms targeted for their geographic location or students’ area of practice

**Session Objectives: Upon completion of the course, participant will be able to:**

1. Prepare an offer in a legal manner without doing the unauthorized practice of law when completing terms, conditions and clauses in a contract.
2. Thoroughly explain the impact of a poorly written agreement as it relates to the client and the brokerage combined and describe accurately the proper handling of addendums, counter offers, negotiations, and amendments to a contract.
3. Outline the fundamental elements of contracts in general and what constitutes a legally binding contract.
4. Discuss the essential elements of a contract that addresses legal form, competent parties, the requirements for signatures and material matters to be included in a legally binding contract.
5. List the remedies for Seller and Buyer Default that include mutual rescission of the contract, suit for specific performance, injunction, sue for damages, declare contract forfeited.
6. Develop and enforce internal procedures for the fair handling of multiple offers that incorporate elements of confidentiality, legal seller instructions and shopping for additional offers in various agency representation situations.

**Preparing Offers - Contract Considerations**

**Unauthorized Practice of Law**

* Licensees shall not engage in activities that constitute the unauthorized practice of law and shall recommend that legal counsel be obtained when the interest of any party to the transaction requires it. It includes:
* Drafting documents conferring legal rights or obligations.
* Preparing or expressing legal opinions.
* Representing parties in administrative or other proceedings and before any tribunal.

 How would you handle getting signatures from someone suffering from Alzheimer’s or dementia, but they haven’t been legally declared incompetent?

What is a real estate Licensee’s responsibility in determining whether a customer/client is a competent party and legally able to enter into a contract?

 **Contract Issues**

List the most common “pain” points that arise from working with contracts during any part of the process.

**Amendments and Addendums**

* Electronic delivery of contracts for signatures requires due diligence by the Agent when making alterations or changes to the documents and/or agreements.
* Designated Brokers create and enforce company polices on the handling of counter offers – whether verbal (oral) discussion prior to finalizing the document is allowed or whether all changes are done in writing only.
* Once a document has been signed by all parties, it is “locked” in. A party may not alter the original document in any way. A separate amendment form must be generated and signed by all parties to alter an already agreed to contract.
* Do not make any side deals or agreements, early occupancy, repairs agreed to, etc., without a formal contract addendum signed by all parties to the transaction.

**Agent Allowed to “Step In”?**

If an inspection repair request is received by the Listing Agent and the Listing Agent gets a verbal (oral) approval from their Sellers about doing the repairs, is an email from the Listing Agent to the Buyer’s Agent stating that the Seller’s agrees to the request enough?

Would it be considered a “legal” approval? What is your process?

It is possible a Seller or Buyer may ask that their Agent sign for them on their behalf because they may not be able to address a document in a timely manner?

Does your company policy allow the Agent to sign on their client’s behalf?

If yes, is a specific Power of Attorney required to be in place executed between the Seller and the Agent?

**Digital Signature Dilemma**

How are you ensuring the legal signing of a contract in this digital age? List pros and cons regarding the use of digital signatures.

**Contract Terms and Conditions**

**Delivery**

* Delivery of a signed agreement is an element which establishes whether a contract is valid. In contract law, a contract isn’t valid until delivery of the executed document has been received by all parties and confirmed.
* Delivery of offer and acceptance often happens electronically. It is the confirmation of delivery by the other party that often becomes an issue.

**Agent Ensuring Delivery of Offer**

You are representing Buyers who are very anxious about getting the house they have just written an offer on. What steps should you take as the Buyer’s Agent to ensure delivery of the offer to the Seller?

* Postal Rule – for physical delivery of an offer when the Listing Agent isn’t available:
* An offer is deemed physically “delivered” at the time the Agent places the signed accepted offer in the hands of the US Post Office, DHL, Federal Express or UPS.
* Utilized in extreme cases where electronic delivery isn’t being confirmed or having difficulty in delivering the offer to the other party.

**Mutual Agreement**

* Occurs when both parties have come to a complete and full agreement on the terms and conditions regarding an offer to purchase real estate and results in a contract binding upon both parties. Each party can claim for damages for failure to perform.

 **Protective Clause**

* Represents an agreed amount of time after the listing expires where the real estate Licensee will still be entitled to a fee if the property is sold to anyone who appears on the “reserve” list presented to the Seller prior to the listing expiring. It is typically cancelled out if the Seller relists the property with another real estate brokerage.

 **“As Is” Clause**

* An As Is clause is used when the Seller does not want to make any repairs to the property. Seller must make full disclosure to known defects. Buyer accepts the risk of buying the property in “as is” condition.

**As Is Confusion**

An Agent writes an offer on a co-op listing stating that the Buyer accepts the property in As Is condition and no inspections will be conducted. The offer is accepted. One week before closing, the 15-year-old furnace completely fails and needs to be replaced. The Buyers insist a new furnace of like kind and quality be installed prior to closing on the property and the Seller insists that the property was sold in As Is condition and they don’t have to do anything further.

How do you handle this?

How can you avoid this situation?

**Warranty statements**

* A warranty statement is a Seller’s or Agent’s statement of fact, which if false or incorrect, may entitle the Buyer to restitution that could include claims for actual costs, damages and the right to terminate the contract.

**Time is of the Essence Clause**

* These are contractual clauses that set out the time parameters for fulfilling obligations, such as responding to the offer, doing inspections or obtaining final loan approval. Failure to complete the required tasks on the agreed upon time is regarded as a breach of contract and therefore make the contract voidable.

**Time Matters**

The purchase agreement states that the Buyers must obtain final loan approval three days before the closing date. Must the Buyer’s Agent provide written confirmation that this has occurred to the Listing Agent before the deadline? If they miss the deadline, what is the official status of the offer?

**Missed Deadline**

An Agent has the Buyer on a co-op purchase that is scheduled to close in 30 days. The Buyers conducted inspections and found issues. The Agent failed to provide the repair requests to the Listing Agent within the time frame agreed to on the purchase agreement.

Does the Seller have to respond to the request?

What can you do to ensure that this type of situation doesn’t occur?

Will the Agent be accountable for taking care of the inspection requests because they delayed in getting it to the Sellers?

**Back Up contracts**

* Often contingencies are accepted by a Seller in a real estate purchase agreement. The Seller may also accept other offers in case the primary (first) offer fails to close.
* Always make sure back up offers clearly identified as such and are explained to your client thoroughly

**Back Up Lingo**

An Agent writes up an offer for their Buyers that clearly states that the offer is in a backup position. What terms and conditions do you recommend be in place when writing this type of an offer that best protects the Buyer?

Do your terms and condition recommendations change if there is a Limited Dual Agency situation?

**Back Up Offer Issues**

List issues that come up with writing a backup contract and provide methods to ensure the process is efficient and effective.

**Contingencies**

* These are clauses that are included in a listing or purchase agreement that outline terms and conditions that must be met before the contract can close. It is an area that is often misused, and the authorized practice of law can come into play.
	+ Financing
	+ Inspections
	+ Subject to the Sale and Close of a Property
	+ Back up offers
	+ Escalation Clause

**Pause to Clause**

List other contingency clauses that appear in a real estate purchase agreement.

What issues that come up with writing a subject to sale and close of a property clause and provide methods to ensure the process is efficient and effective.

Is a Bridge loan considered “cash” or should it be listed as a financial contingency? What about state programs subject to accepted offers?

How do you handle writing an offer that has personal property (washer, dryer, etc.) staying with the property after close? What issues can come up relating to this clause?

**Writing the Offer**

The Listing Agent is in a Dual Agency situation and writes an offer for their Buyer on their own listing. Shortly afterwards, the Dual Agent receives notice of 2 other offers coming in from other co-op agents and should be arriving in the next 30 minutes.

What is your company policy in terms of presenting the offer the Agent (who is in Dual Agency) has written? Are you encouraged to get the offer to the Seller right away before the other offers come in? If you don’t do that, are you compromising agency to the Buyer client?

What should the Dual Agent’s responsibility be in a multiple offer situation? Who presents the offer to the Sellers, negotiates it in order to keep it fair?

What if the other offers are coming in from your brokerage? Does the process change?

What is your procedure in discussing multiple offer situations with the Seller?

Can Sellers dictate when to start receiving offers and when to stop, regardless of what may have been received by the Agent? What procedure would you recommend in how to handle this?



1. How can we reduce liability in the taking and presenting of multiple offers?

2. Can the Seller dictate timelines for presentation of multiple offers?

3. Is the Listing Agent obligated to inform other Buyer Agents there are multiple offers?

4. Is an Agent obligated to inform a Buyer’s Agent who has a client “on the fence” that other offers have been received and they need to get their offer submitted?

5. Do multiple offers create energetic competition, or does it cause Buyers to back out of the negotiations?

6. What are the top three things an Agent can do to help minimize disappointment and frustration from other Buyers and/or cooperative Agents when their offer isn’t accepted?

**Breach of Contract**

* Breach occurs when a party to the contract, either oral or written, fails to perform any of the contract’s terms:
	+ Failure to close escrow.
	+ Not delivering the deed in the proper way.
	+ Not completing repairs as approved by all parties.

**Remedies to Breach of Contract**

* Sue for restitution – damages.
* Rescind (terminate) the contract and return of good faith deposits.
* Specific performance of the agreement.

**Multiple Offer Presentation**

As a group, prepare your process on how you feel the offers should be presented to the Sellers. We will compare and contrast the recommendations for Best Practices. Your primary responsibility is to determine the process in which you will present the offers and what information must remain confidential to either party.

**The Market**

* Housing prices have been experiencing an increase of about 3%.
* Average days on market is 45 days.
* Average list price ratio to average selling price is 96%.

**The Brokers**

* The Listing Broker works for you
* One offer is from a competitor company
* One offer is from another Broker in the office
* One offer is written by the Listing Broker and they are in Limited Dual Agency.

**About the Seller**

* Her name is Emily Lang. She is a single, 45-year-old woman who is relocating to a city. It is important that she move as soon as possible.
* She is very protective of her property because it has been in the family for over 60 years, passed down through two generations and is highly emotionally attached to the property.
* Emily needs every penny from the sale of the property as she is moving to a more expensive area.

**About Emily Lang’s Property**

Time on Market: 24 hours - Gentrification has been occurring in the area.

 Renovated properties are raising property values.

List Price: $275,000

Lot: 3 acre lot – mostly undeveloped – back portion may be in a flood zone

Condition: Moderately maintained.

 Not updated in years.

 May be inspection issues relating to HVAC, roof and basement moisture.

**Offer 1 – Co-op Agent**

Buyers Mr. and Mrs. Smith – relocation – Pre-approved local lender

Purchase Price $272,000

Earnest Money $2,500 refundable

Closing Date In 30 days

Possession Date Day of closing

Type of Loan Conventional – 25% down - 4.5% interest rate – 30 year fixed

Final Loan Approval Five days before closing

Inspections 10-day inspection period – whole house, radon, lead paint and termite

Other Seller to pay $7,500 towards closing costs, pre-paids and points to offset the need to replace the roof.

**Offer 2 – In-House Agent (Dual Agency)**

Buyers Mr. Elwin – military officer recent civilian

Purchase Price $275,000 or $250 higher than the highest offer not to exceed $280,000.

Earnest Money $1,000 refundable

Closing Date In 45 days

Possession Date 2 Days after closing (to allow Seller to move out)

Type of Loan VA – 5% down - 4.5% interest rate – 30 year fixed

Final Loan Approval Three days before closing

Inspections 10-day inspection period waived – will rely on VA appraisal

Other Seller to agree to pay up to $5,000 for VA appraisal requirements because of some condition issues.

**Offer 3 – Listing Agent (Dual Agent)**

Buyers Ms. Cooper, single person who owns a horse

Purchase Price $275,000

Earnest Money $3,000 non-refundable

Closing Date In 20 days

Possession Date Day of closing

Type of Loan Cash

Final Loan Approval N/A

Inspections 5-day inspection period – whole house, radon, lead paint, termite.

Other 10 days to procure an updated property survey to be paid by Seller to confirm perimeters and where the flood zone is.

 5 days for Buyer to procure written confirmation from the city that a new dwelling can be built on the lot. The original dwelling will be torn down and made into a horse arena.

 NOTE: Buyer plans on living in the existing home until the new one is built.

**Presentation Worksheet**

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**Appendix**

**Session Evaluation**

Session Title: Building a Real Estate Career – Part 4 Date: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Presenter:

1. How did you find out about this program? (Select all that apply)

\_\_\_ Calendar handout \_\_\_ College Bulletin \_\_\_ E-Mail \_\_\_ Fax

\_\_\_ Internet \_\_\_ Mail \_\_\_ MLS \_\_\_ Newsletter

\_\_\_ Word of mouth \_\_\_ Workplace \_\_\_ Other

**Session Evaluation Very**

 **Excellent Good Good Fair Poor**

1. Session content (worth time and money invested) 5 4 3 2 1
2. Contribution to overall career knowledge 5 4 3 2 1
3. Likelihood of actual use of session material 5 4 3 2 1

**Presenter Evaluation**

1. Demonstrated material and subject knowledge 5 4 3 2 1
2. Use of visual aids and technology 5 4 3 2 1
3. Encouraged student involvement & participation 5 4 3 2 1
4. Handout organization & ease of use 5 4 3 2 1
5. Handling of student questions & feedback 5 4 3 2 1
6. Overall presentation style 5 4 3 2 1
7. What could be done to improve the session? (Please use the back if you need more room)

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1. If you felt the session was worthwhile and beneficial, please write down your comments for the meeting planner. (Please use the back if you need more room).

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