

Daytona Beach Area Association of REALTORS®



Best Practices

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Daytona Beach Area Association of REALTORS®

Best Practices

Practicing real estate is becoming more complicated, and some may argue, more difficult. In addition to adhering to the principles of the NAR Code of Ethics, REALTORS® must also obey the local MLS Rules. Add the Florida Statutes and Administrative Codes and the result is an intricate web of rules and laws to follow.

The DBAAR REALTOR®-Attorney Committee felt that a collection of "best practices" would be a valuable service both for newer and more seasoned members. Defining the concept was the first task.

Considered by some to be nothing more than a business buzzword, "best practices" in real estate has come to mean a set of behaviors proven over time to be effective in producing a more professional REALTOR®.

The idea is that by practicing these behaviors, REALTORS® can deliver professional service to their clients, customers, and fellow REALTORS® with fewer problems.

While "best practices" may be somewhat of a misnomer since this document references rules and laws, we think it sounds better than "Compilation of Suggested Practices, NAR Code of Ethics, MLS Rules, and Florida Laws."

Many thanks to the members of the REALTOR®-Attorney Committee for the creation of this manual, and appreciation to the members of the Professional Standards and Grievance Committees for their input.

Nancy Dance

Nancy Dance,
2008 President

Adopted by the Board of Directors August 27, 2008

Disclaimer: This information has been compiled to help members avoid controversies by establishing practical, recommended business practices. This manual references the National Association of REALTORS®' Code of Ethics, the Daytona Beach Area Association of REALTORS®' Multiple Listing Service Rules and Regulations, and the Florida Statutes and Administrative Code. This document is not to be construed as legal advice. Information contained herein is believed to be accurate but not warranted.

TABLE OF CONTENTS

Solicitation of Expired and Withdrawn Listings	1
Open House Guidelines	2
Guidelines for Handling and Submitting Offers	3
Article 1 Preamble	3
Article 2 Definitions	3
Article 3 Agency Disclosure	3
Article 4 Listing Firm Procedures	4
4.1 Showings.....	4
4.2 Listing Status Disclosure.....	4
Article 5 Submission and Presentation of Offer	4
5.1 Obligations.....	4
5.2 Receipt of Offer.....	5
5.3 Encourage Use of Attorney.....	5
5.4 Written Response.....	5
5.5 Status of Offer.....	5
Article 6 Cooperating Firm Procedures	5
6.1 Submission of Offer.....	5
6.2 Presentation to Seller.....	5
6.3 Notification to Listing Agent.....	5
6.4 Expiration of Offer.....	5
6.5 Response to Cooperating REALTOR®.....	6
6.6 Seller's Options.....	6
Article 7 Handling Multiple Offers	6
7.1 Order of Receipt of Offer Irrelevant.....	6
7.2 Notification to Seller.....	6
7.3 The Seller Ultimately Decides.....	7
7.4 Buyer's Response.....	7
7.5 Presentation of Multiple Offers.....	7
7.6 Responding to Multiple Offers.....	7
7.7 The Seller's Options.....	7
Article 8 Offers Received While Counteroffer is Pending	7
Article 9 Revocation of Offer	8
9.1 Communication of Revocation.....	8
9.2 Verbal Revocation.....	8
9.3 Written Notification.....	8
Article 10 Counteroffers	8
10.1 Definition.....	8
10.2 Expiration of Counter-offer.....	8
10.3 Notification to Cooperating Broker.....	8
10.4 Modification Constitutes Counter Offer.....	8
Article 11 Back-up Offers	8
Article 12 Acceptance	8
12.1 Notification.....	8
12.2 Communication of Acceptance.....	8
12.3 Continuance of Marketing.....	8
Article 13 Escrow	9
13.1 Governed by Law.....	9
13.2 Deposits of Escrow Funds.....	9
13.3 Disputes.....	9
13.4 Protection of Licensee.....	9
13.5 Exemptions from FREC Notification.....	9
Article 14 General Guidelines	9
14.1 Enforceability.....	9
14.2 Communication.....	9
14.3 Use of Contracts.....	9
Mediation	10
Arbitration Guidelines	10
Pathways to Professionalism	12
Revocation of Offer form.....	

Solicitation of Expired & Withdrawn Listings

Standard of Practice 16-2 states in part, “Article 16 is intended to recognize as unethical two basic types of solicitations:

First, telephone or personal solicitations of property Sellers who have been identified by a real estate sign, multiple listing compilation, or other information service as having exclusively listed their property with another REALTOR®; and

Second, mail or other forms of written solicitations of prospective clients whose properties are exclusively listed with another REALTOR® when such solicitations are not part of a general mailing but are directed specifically to property owners identified through compilations of current listings, “for sale” or “for rent” signs, or other sources of information required by Article 3 and Multiple Listing Service rules to be made available to other REALTORS® under offers of subagency or cooperation.

One of the benefits of a computerized MLS is in time efficiency: members can accomplish more in less time than ever before. But that same benefit has the potential of being abused. A case in point is using the MLS computer to solicit expired and/or withdrawn listings. Using the “Hotsheet” feature, or a standard search, some members generate a list of newly expired listings in order to immediately send out a mailer or letter soliciting the expired listing.

There is nothing inherently wrong with soliciting an expired listing. But agents must make sure that the listing is, in fact, expired. Even though the MLS may show that a listing has expired, the property may have been re-listed, and therefore appear in the system under a new MLS number, either with the same office or with another office.

Why is it necessary to check to make sure the listing is expired? All REALTORS® subscribe to the Code of Ethics, which makes it clear in Article 16 that “REALTORS® shall not engage in any practice or take any action inconsistent with the agency of other REALTORS®.”

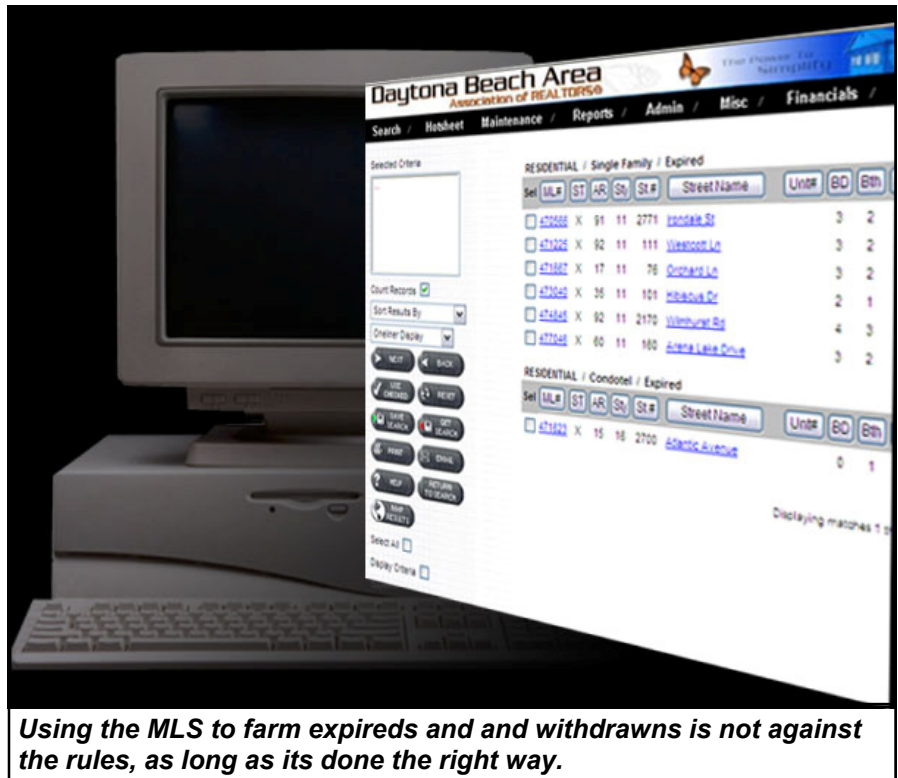
In simpler terms, using the MLS system to solicit what is assumed to be an expired listing is a no-no unless it has been checked to be sure it is, in fact, expired.

What You Should Do To Solicit Expired Listings

- 1) After running a list of expireds from the MLS system, you must conduct a search by address on each expired listing to determine if it has been re-listed. If so, you cannot solicit that listing. Or, you can click on the “Property History” link to determine if there is an active listing at that address.
- 2) Even if the search shows no active listing, it is a best practice to call the listing agent to determine if he or she has re-listed the property but not yet submitted it

to MLS.

- 3) If the agent refuses to disclose whether or not he or she has a valid listing, you may contact the property owner directly, per Standard of Practice 16-4: “REALTORS® shall not solicit a listing which is currently listed exclusively with another broker. However, if the listing broker, when asked by the



REALTOR®, refuses to disclose the expiration date and nature of such listing; i.e., an exclusive right to sell, an exclusive agency, open listing, or other form of contractual agreement between the listing broker and the client, the REALTOR® may contact the owner to secure such information and may discuss the terms upon which the REALTOR® might take a future listing, or alternately, may take a listing to become effective upon expiration of any existing exclusive listing.”

- 4) After making all reasonable attempts to determine if the listing has, in fact, expired, you may contact the seller directly. When contact is made with the Seller, you must ask, at that first contact, if the seller has a contractual listing agreement with any REALTOR®. If so, you must end the conversation and not solicit the listing. If not, you are free to solicit the listing.

Note that Standard of Practice 16-2 says that “Article 16 does not preclude REALTORS® from making general announcements to prospects describing their services and the terms of their availability even though some recipients may have entered into agency agreements or other exclusive relationships with another REALTOR®. A general telephone

canvass, general mailing or distribution addressed to all prospects in a given geographical area or in a given profession, business, club, or organization, or other classification or group is deemed “general” for purposes of this standard.”

In other words, sending a postcard to all homeowners in a given subdivision is OK. It's only when a REALTOR® targets properties that have been identified as listed that the Code is violated.

Remember, solicitations of expired listings which are not, in fact, expired, is a violation of Article 16 of the Code. Conversely, REALTORS® who are going to re-list properties should make every attempt to ensure their listings are re-listed prior to their expiration date. Keep in mind that unless you are entering your listings and changes directly into the computer, you may be relying on someone else to enter the information in a timely manner.

Soliciting Withdrawn Listings

The same Standard of Practice 16-2 governs sollicita-

tion of withdrawn listings when the withdrawn listing is still subject to a valid exclusive listing agreement. Remember that there are two types of withdrawn listings: one that has been simply withdrawn from the market and the MLS, but is still subject to a valid listing agreement; and one that has been withdrawn from the market and the MLS because the seller has been released from all the obligations of a listing agreement.

In the former case, the listing cannot be solicited because it is still listed. In the latter case, it may be solicited because it is no longer listed. **It is therefore the responsibility of the agent who wants to solicit a withdrawn listing to call the listing agent to determine whether or not it is still subject to a valid listing agreement.**

Remember that a listing agent has an obligation to disclose the status of a listing per Standard of Practice 16-4.



Disregard of the above guidelines could be a violation of both the Code of Ethics and the MLS Rules & Regulations.

Open House Guidelines

REALTORS® should recognize that the buying public may be unaware of, and unconcerned with REALTOR® professional courtesies, procedures and ethics. The prospective purchaser's interest is to find the most suitable property. Therefore, it is in the REALTOR®'s best interest to explain to the customer/client the practices and procedures REALTORS® use to avoid conflicts between agents. Many purchasers are willing to follow “the rules” if they are aware of them and understand that their actions can make it difficult or impossible for you to provide the service they desire. The REALTORS® who successfully sell their abilities to the purchasers, educate them to REALTORS®' customs and practices and ask for their loyalty will seldom find themselves in conflicts with other REALTORS® because of their customers' or clients' actions.

The following guidelines have been developed to assist the REALTOR® in maintaining proper professional courtesies as they apply to open house situations. They will also help in establishing and recognizing procuring cause in relation to the unaccompanied prospect.

What You Should Explain To The Prospective Purchaser

- 1) Prospective purchasers should be cautioned at the earliest opportunity not to view homes (listed or open) unless you accompany them, or unless you have made arrangements in advance with the host agent holding the open house.
- 2) If the prospects desire to attend open houses unaccompanied by you and you are unable to call ahead, you should instruct them to ask the host agent upon their arrival on the premises, prior to entry, if the agent will agree to honor you without your presence during the initial showing. If so, they should record your name and company, as well as their own on the guest register.

What You Should Do As An Agent Hosting An Open House

Standard of Practice 16-9 states: “REALTORS®, prior



to entering into a representation agreement, have an affirmative obligation to make reasonable efforts to determine whether the prospect is subject to a current, valid exclusive agreement to provide the same type of real estate service.”

Given this requirement, agents holding open houses should follow this procedure:

- 1) Each party entering the open house must be asked if they are “on their own” or “are they working with an agent or represented by a buyer's agent.” This should be done in a nonthreatening way as a part of your normal introduction and welcoming them to the property. This will also avoid any questions of “reasonable effort” if the agent holding the open house simply relies on the prospect filling out an Open House Guest Register.
- 2) The Daytona Beach Area Association of REALTORS® strongly encourages cooperation. However, if it is your policy not to honor other agents if they are not present, advise the prospects that should they choose to view the property at this time, they would negotiate the purchase through you. To avoid misunderstanding or possible controversy, encourage them to return later with their agent. Remember, your policy

must be discussed with the Seller in advance of the open house and may be enacted only with the Seller's agreement. It is the listing agent's or host agent's duty to market the home in the best interest of the Seller. Honoring a cooperating agent who is not present may be the event that leads to an offer for the Seller.

- 3) Ask prospects to "please sign our guest register" before touring the premises so that the owners may have a record of who has seen their property. This register should include their name, address, phone number, agent's name and company. Space for "comments" or "how did you become aware of this property?" may assist you in marketing property and evaluating your service and possibly establishing the procuring cause if another agent is named who later abandons the prospect. Just as it is every REALTOR®'s responsibility to notify another REALTOR® whom he or she represents, you are strongly encouraged to determine whether or not each prospect is being represented by or working with another REALTOR®.
- 4) If a prospect arrives at the open house unaccompanied and states that he or she is not working with another agent, utilize the opportunity to begin establishing yourself as procuring cause. This is also your opportunity to sell the home, yourself, your firm and the real estate industry. Agents who are honored without their presence should make special efforts to follow-up with the appropriate communications to the host agent. The professional courtesy extended to agents under these guidelines is for the initial showing only. If the prospect is interested, the honored agent should re-show the property at the earliest opportunity. All agents involved should be aware that the mere agreement to honor another agent by the host agent at the open house does not, in and of itself, entitle the cooperating agent to a commission. Procuring cause dictates that a series of events must be maintained without abandonment.

The failure to contact an interested prospect and follow-up with the appropriate activity in a timely fashion may be construed as abandonment. Depending on the circumstances, such abandonment may occur in any time frame. The extension of extraordinary professional courtesy from one agent to another should not be considered

a license for abuse of that courtesy.

It is recommended that every agent review and consider these guidelines, as well as the "Code of Ethics and Arbitration Manual," published by the National Association of REALTORS®, in an attempt to eliminate open house practices that are not in keeping



with the spirit of cooperation, fair play and the Golden Rule.

Procuring Cause

Agents should be aware that the "threshold theory," which held that the agent present at the first inside showing is the agent entitled to the commission, is **not consistent with the definition of procuring cause as it applies to commission entitlement.**

Procuring cause is the cause directly originating a series of events which, without a break in their continuity, directly results in the producing of a Buyer ready, willing and able to buy the real estate on the Seller's terms.

Guidelines for Handling & Submitting Offers

ARTICLE 1 - Preamble

The law of contracts, even the basic concept of offer and acceptance, is extremely complex and no simple rules can govern all factual situations. Therefore, these guidelines are to be considered general in nature and do not purport to be in lieu of, in addition to or an extension of the National Association of REALTORS® Code of Ethics. These rules are simply suggested methods of practice and are not binding.

ARTICLE 2 - Definitions

"Cooperating Firm" - That selling firm which earns a portion of the professional fee by bringing the buyer to the transaction, whether as a buyer's agent, a Transactional Broker or Non Representative Broker.

"Listing Firm" - The real estate firm retained on an

exclusive basis to represent the Seller.

"Listing Agent" - The agent at the listing firm who is responsible to carry out the obligations of the firm to the Sellers.

"Buyers Agent" - The agent of a real estate firm who represents only the buyer.

"Party or Parties" - The individuals, Purchaser and Seller who enter into the contract. A REALTOR® is not considered to be a party.

ARTICLE 3 - Agency Disclosure

Florida law, section 475.278(1)(b) stipulates: "It shall be presumed that all licensees are operating as transac-

tion brokers unless a single agent or no brokerage relationship is established, in writing, with a customer." The law that required a licensee who intends to represent a customer as a transaction broker to provide the Transaction Broker Notice expired July 1, 2008.

ARTICLE 4 - Listing Firm Procedures And Handling Offers

Section 1 - Showings

The listing firm's duty is to obtain the best price and terms acceptable to the Seller by making the property available for showing even during the negotiation of offers and counteroffers. But once an offer is accepted, that duty ends.

Standard of Practice 1-8 says "REALTORS®, acting as agents or brokers of buyers/tenants, shall submit to buyers/tenants all offers and counter-offers until acceptance but have no obligation to continue to show properties to their clients after an offer has been accepted unless otherwise agreed in writing."

So while an obligation to submit offers still exists after a contract has been accepted, a REALTOR® does not have to continue to market that property.

MLS Rules & Regulations say that "Appointments for showings and negotiations with the seller for the purchase of listed property filed with the Multiple Listing Service shall be conducted through the listing broker, except under the following circumstances:

- a) the listing broker gives the cooperating broker specific authority to show and/or negotiate directly, or
- b) after reasonable effort, the cooperating broker cannot contact the listing broker or his representative; however, the listing broker, at his option, may preclude such direct negotiations by cooperating brokers.

If the listing agent is unavailable, the listing firm should set appointments for cooperating firms unless otherwise restricted by terms of the listing agreement or seller's instructions.

And remember that **Standard of Practice 3-8** says that "REALTORS® shall not misrepresent the availability of access to show or inspect a listed property."

Section 2 - Listing Status Disclosure

Much misunderstanding exists about whether or not listing agents can or should disclose the existence and/or terms of an offer that has been presented to the Seller.

Clearly, **Standard of Practice 3-6** establishes a responsibility for disclosure: "REALTORS® shall disclose the existence of accepted offers, including offers with unresolved contingencies, to any broker seeking cooperation."

MLS Rules add a caveat and a twist:
Section 2.9 Disclosing the Existence of Offers
Listing brokers, in response to inquiries from buyers or cooperating brokers shall, with the seller's approval, disclose the existence of offers on the property. Where disclosure is authorized, the listing broker shall also disclose whether offers were obtained by the listing licensee, by another licensee in the list-

ing firm, or by a cooperating broker.

While the Code specifically addresses accepted offers, the MLS Rules extend the disclosure responsibility to the existence of offers, but only with the Seller's approval. Finally, the MLS Rules add a responsibility of disclosing where the offer came from.

The following table may help summarize:

Status	Disclosure
Pending Offer	Only with seller's approval, when approved, disclose source of offer
Accepted Offer	Must Disclose
Accepted Offer with Contingency	Must Disclose

On the flip side, so much misunderstanding surrounds the disclosure of the existence and/or terms of an offer that the Code was amended in 2006 to make sure that REALTORS® advise buyers that offers are not necessarily confidential:

"When entering into buyer/tenant agreements, REALTORS® must advise potential clients of:
5) the possibility that sellers or sellers' representatives may not treat the existence, terms, or conditions of offers as confidential unless confidentiality is required by law, regulation, or by any confidentiality agreement between the parties."

Sellers and their representatives have always been able to "shop" offers, but some agents (both seller's and buyer's) felt that the terms and/or the existence of an offer was confidential. Not true. And that lack of confidentiality impacts how REALTORS® and Sellers deal with multiple offers as well.



Article 5 - Submission & Presentation of Offers

Section 1 - Obligations

It is incumbent upon the cooperating agent to prepare the written offer and any accompanying addenda in a complete and legible manner. If using a pre-printed form such as a FAR or FAR-BAR purchase agreement, all of the blanks must be filled in and legible.

The Code and the MLS Rules are clear on the responsibilities of the both a selling and listing agent in presenting offers:

Standard of Practice 1-6

"REALTORS® shall submit offers and counter-offers objectively and as quickly as possible."

And the **MLS Rules, Section 2.1** add that “**The listing broker must make arrangements to present the offer as soon as possible, or give the cooperating broker a satisfactory reason for not doing so.**”

Standard of Practice 1-7 adds “**When acting as listing brokers, REALTORS® shall continue to submit to the seller/landlord all offers and counter-offers until closing or execution of a lease unless the seller/landlord has waived this obligation in writing. REALTORS® shall not be obligated to continue to market the property after an offer has been accepted by the seller/landlord. REALTORS® shall recommend that sellers/landlords obtain the advice of legal counsel prior to acceptance of a subsequent offer except where the acceptance is contingent on the termination of the pre-existing purchase contract or lease. (Amended 1/93)**”

And **Standard of Practice 1-8** says “**REALTORS®, acting as agents or brokers of buyers/tenants, shall submit to buyers/tenants all offers and counter-offers until acceptance but have no obligation to continue to show properties to their clients after an offer has been accepted unless otherwise agreed in writing. REALTORS®, acting as agents or brokers of buyers/tenants, shall recommend that buyers/tenants obtain the advice of legal counsel if there is a question as to whether a pre-existing contract has been terminated.**”

Of course the MLS Rules mirror the Code: **Section 2.2 – Submission of Written Offers and Counter-Offers: The listing broker shall submit to the seller all written offers until closing unless precluded by law, government rule, regulation, or agreed otherwise in writing between the seller and the listing broker. Unless the subsequent offer is contingent upon the termination of an existing contract, the listing broker shall recommend that seller obtain the advice of legal counsel prior to acceptance of subsequent offer.**

So the listing agent offers advice to the Seller, but the Seller has the sole right of final determination of the acceptability of an offer and only the Seller can legally accept an offer or initiate a counter-offer. In the absence of written authorization to an agent, only the Seller can sign a contract.

NOTE: If an agent is empowered with the authority to render decisions or sign on behalf of the Seller, that authority must be given under a written power of attorney. In order to sign a deed or mortgage on behalf of another, a Power of Attorney is required. An attorney should be consulted regarding the preparation of a power of attorney on behalf of a client.

Section 2 - Receipt of Offer

Upon receipt of a written offer, the listing firm shall immediately contact the Seller to arrange for prompt presentation of the offer to the Seller. Offers should be presented in person when possible with an explanation of the merits of the terms and conditions of the offer and information regarding the eligibility of the Purchaser.

Section 3 - Encourage Use of Attorney

Do not discourage the Seller from submitting the offer(s) to an attorney for review and approval. Encourage the use of an attorney to advise and counsel the Seller on terms which are complex or where the construction of other instruments such as mortgages, land contracts, etc., will be required. The agent is a real estate practitioner, not a legal advisor. Do not offer legal advice. Do not counsel any party that legal advice is unnecessary or that your services are an acceptable substitute for legal advice.

Section 4 - Written Response

The listing firm should obtain a written response from the Seller of acceptance, rejection or counteroffer within the time frame set forth in the contract. Should the Seller reject the offer, have the Seller sign the “Not accepted at this time” on the contract and indicate date as proof of presentation of the offer. A response by fax/telegram/mailgram or email may be appropriate, so long as it refers to the property address, parties involved, date of offer or counteroffer and action taken (e.g.: rejected, countered, accepted). It is strongly encouraged and good practice to have FAX'd or emailed copies of the contract replaced



with a fully executed original of the contract.

Section 5 - Status of Offer

Cooperating REALTORS® should keep each other well informed of the status of a pending offer and must remain aware of their fiduciary responsibility to their client which includes: Loyalty, Obedience, Disclosure, Confidentiality, Care and Diligence, and Accountability.

NOTE: Where an exclusive relationship exists, the listing firm shall be responsible for presentation of offers. Where the Seller has no agreement (FSBO, limited service listing or MLS entry-only listing), the agent preparing the offer may present the Buyer's contract to the Seller.

ARTICLE 6 - Cooperating Firm Procedures

Section 1 - Submission of Offer

The cooperating firm shall promptly deliver all offers to the listing firm. Offers shall be properly executed and should include an earnest money deposit.

Section 2 - Presentation to Seller

The MLS Rules spell out that the Cooperating Broker has a right to be present when an offer is presented: **Section 2.3 – Right of Cooperating Broker in Presentation of Offer: The cooperating broker (sub-agent or buyer agent) or his representative has the right to participate in the presentation to the seller or lessor of any offer he secures to purchase or lease. He does not have the right to be present at any discussion or evaluation of that offer by the seller or lessor and the listing broker. However, if the seller or lessor gives**

written instructions to the listing broker that the cooperating broker not be present when an offer the cooperating broker secured is presented, the cooperating broker has the right to a copy of the seller's written instructions. None of the foregoing diminishes the listing broker's right to control the establishment of appointments of such presentations.

What if it is impractical for the Cooperating Broker to be present, for example when the Seller is out of state? Clearly, the intent of the MLS rule is to allow the Cooperating Broker to *know* that an offer was presented to the Seller, so it is reasonable to expect the Listing Broker to provide some assurance that an offer was, in fact, presented to the Seller. Since it is good business practice for the Listing Broker to document that an offer was presented to the Seller, it is not unreasonable to provide a telex confirmation, U.S. mail confirmation such as a copy of the certified receipt, or email confirmation (or print-out from an electronic system such as Transaction-Desk) to the Cooperating Broker upon request.

The MLS Rules also give the same right to the Listing Broker in the presentation of a counter-offer: **Section 2.4 – Right of Listing Broker in Presentation of Counter-Offer: The listing broker or his representative has the right to participate in the presentation of any counter-offer made by the seller or lessor. He does not have the right to be present at any discussion or evaluation of a counter-offer by the purchaser or lessee (except when the cooperating broker is a subagent). However, if the purchaser or lessee gives written instructions to the cooperating broker that the listing broker not be present when a counter-offer is presented, the listing broker has the right to a copy of the purchaser's or lessee's written instructions.**

Where the Buyer is a client, the Buyer shall direct the buyer's agent as to what information shall be presented to the Seller. If the Buyer does not have an agency relationship, information regarding the Buyer's eligibility should be included as a courtesy to assist in the presentation of the offer. If requested by the Seller and agreeable to the Buyer, information such as employment history, source of down payment and qualification by a recognized lending institution should be provided to the Seller to assist in determining a Purchaser's financial ability to close the transaction. In a multiple offer situation, the agent should attempt to obtain as closely as possible, identical information regarding all Purchasers.

Section 3 - Notification to Listing Agent

The listing agent should be notified promptly when an offer is being delivered to the listing firm. Do not assume the listing firm will contact the listing agent.

Section 4 - Expiration of Offer

The offer must have a specific expiration time and date.

Section 5 - Response to Cooperating REALTOR®

Be certain that the listing agent knows how and where to reach the cooperating agent when a response has been

obtained. Timing may be very critical during negotiations, particularly if a multiple offer situation occurs. The cooperating REALTORS® should keep each other well informed of the status of an offer.

Section 6 - Seller's Options

Sellers have the right to do the following with an offer:

- 1) Accept it
- 2) Reject it
- 3) Counter it
- 4) Do nothing and let the offer expire

ARTICLE 7 - Handling Multiple Offers

Perhaps no situation routinely faced by REALTORS® can be more frustrating, fraught with potential for misunderstanding and missed opportunity, and elusive of a formulaic solution than presenting and negotiating multiple purchase or lease offers and/or counter-offers on the same property. Consider the competing dynamics. Listing brokers are charged with helping sellers get the highest price and the most favorable terms for their property while Buyers want to purchase property at the lowest price and on terms favorable to them. Balanced against the Code's mandate of honesty is the imperative to refrain from making disclosures that may not, in the final analysis, be in a client's interests.



Section 1 - Order of Receipt of Offer Irrelevant

A frequent misconception of Buyers is that a Seller must deal with offers in the order in which they are received. Not true — time or order of receipt of a written offer has no bearing on preferential consideration. Offers are to be considered on their own merits and the verifiable ability of the Purchaser to perform under the terms and conditions of the offer. A Listing Broker, in possession of a written offer and the knowledge that another offer may be coming in soon, will inform the Seller of the possibility of a multiple offer situation. The Seller is within his or her rights to direct the Listing Broker to deliver both offers at the same time. When more than one offer has been delivered to the listing firm, a multiple offer situation exists and the following shall take place:

Section 2 - Notification to Seller

The listing agent shall notify the Seller that he is in

receipt of more than one offer. It could be construed as adverse to the Seller's best interest to do otherwise. The Listing Broker should explain to the Seller the advantages and disadvantages of notifying both parties of the presence of another offer. Only with the consent of the Seller may the listing firm notify each agent of the existence and/or terms of another offer.



In some cases, "shopping" the offer may lead to a better offer, but in other cases, Buyers may not wish to participate in a bidding situation and simply walk away. Will disclosing the existence of one offer make a second potential purchaser more likely to sign a full price purchase offer—or to pursue a different opportunity? Will telling several potential purchasers that each will be given a final opportunity to make their best offer result in spirited competition for the seller's property—or in a table devoid of offers? The Listing Broker should explain that his or her advice is just that and that past experience cannot guarantee what a particular buyer may do.

Section 3 - The Seller Ultimately Decides

Remember that the decisions about how offers will be presented, how offers will be negotiated, whether counter-offers will be made and ultimately which offer, if any, will be accepted, are made by the Seller — not by the Listing Broker.

Section 4 - Buyer's Response

Upon notification of a multiple offer situation, the Buyer may

- 1) elect to amend his offer in writing
- 2) ask the Listing Broker to proceed with the presentation of the terms originally submitted
- 3) elect to revoke his offer from a competitive situation. (Offers may be revoked prior to the Seller's acceptance.)

Section 5 - Presentation of Multiple Offers

The listing agent should request a meeting with the Seller to take place as soon as the Listing Broker is assured that he or she is in possession of each Buyer's final terms and before the expiration of any offer. If it is impossible to meet with the Seller prior to expiration of an offer, a written extension should be secured.

Present offers to the Seller, along with information if possible, about the Purchaser's ability to perform. Re-

member that the contract with the best terms is without merit if the Purchaser cannot perform.

NOTE: If offer #1 is nearing expiration and Buyer #2 cannot be reached to be notified of the multiple offer situation, the Seller may elect to:

1. Request an extension of time from Buyer #1.
2. Consider all offers, amended or otherwise, prior to the expiration of offer #1.
3. Refuse in writing to accept offer #1 until Buyer #2 can be notified.

If Buyer #1's terms and qualifications have merit, be sure the Seller understands that Buyer #2 may elect not to amend his offer.

Consumer's Guide to Multiple Offers in a Real Estate Transaction



Section 6 - Responding To Multiple Offers

In a multiple offer situation, the Listing Broker shall advise the Seller that he or she should not, without advice of legal counsel:

- 1) Counter more than one offer at a time.
- 2) Accept more than one offer unconditionally.

NOTE:

DBAAR has produced a brochure called the "Consumer's Guide to Multiple Offers" which is available for download from the association's website.

Section 7 - The Seller's Options

The Seller may counter one offer requiring a response before the expiration of another offer ("time is of the essence" is suggested for such situations - to assure a timely response from the first party). In this situation the Seller awaits the response of the first party before acting upon offer of the second party.

NOTE: The Buyer who is awaiting a response may revoke his offer anytime prior to the Seller's acceptance. The Seller may reject one offer and either counter or accept the other offer.

The Seller may reject all offers.

The Seller may accept one offer unconditionally and accept another as a back-up offer contingent upon release from the first accepted offer by a specific date. The acceptance of a contract as a "backup" is a counteroffer which requires the Purchaser's acceptance to be binding.

ARTICLE 8 - Offers Received While A Counteroffer Is Pending

If at the time of receipt of a second offer, the Seller has an unexpired counteroffer in the hands of the first Buyer or the Cooperating Broker, the listing agent shall: Immediately notify the Seller of the presence of another offer and arrange for presentation in person of the terms and conditions thereof. The Seller may elect to:

- a. Revoke the counteroffer made to the first Buyer (assuming the Buyer has not yet accepted the counteroffer) in order to respond to the second offer with either acceptance or counteroffer. (This usually occurs when the

new offer is superior to the counter pending.)

b. The Seller may reject the second offer without affecting the pending counteroffer.

Should Buyer #1 submit a counter to the Seller's counter while an offer from Buyer #2 is awaiting the Seller's response, a multiple offer situation WOULD exist and all parties may be notified upon consent of the Seller.



The Seller should not accept or counter the second offer unconditionally until revocation of the first offer has occurred. Once an offer is accepted, it cannot be revoked.

ARTICLE 9 - Revocation of Offer

Section 1 - Communication of Revocation

Revocation of an offer or counteroffer is considered legal when the Seller's instructions are communicated to the Buyer (a message left on an answering device or with a person other than a party to the transaction, or an email may not suffice). Communication from the Listing Broker to the Cooperating Broker to the Buyer is preferable, but where time is of the essence, an agent of the cooperating firm or the listing agent may be called upon to complete the chain of communication.

Section 2 - Verbal Revocation

Prior to acceptance by the Seller, an offer or counteroffer may be revoked by a Buyer by verbal notification to an agent of the Seller. Verbal notification of revocation must be followed with written notification. A message left on an answering device or with a third party or an email may not be sufficient. Direct verbal instructions to an agent of the Seller should be followed up in written form.

Section 3 - Written Notification

A written notice of revocation should follow the verbal notification. A suggested format is presented at the end of this section.

ARTICLE 10 - Counteroffers

Section 1 - Definition

Any conditional acceptance or modification of terms constitutes a counteroffer. To help ensure that counteroffers are legally correct: include all changes in legible writing, have parties initial and date each change, sign, and include expiration date of counteroffer. The responsibility of the Listing Broker is then to deliver the counteroffer to the Buyer, or to the Cooperating Broker for delivery to the Buyer.

Section 2 - Expiration of Counter-Offer

All counteroffers must have an expiration date. Acceptance after that date will probably not be effective unless the parties have agreed to an extension of time in writing. Where a specific time and date are critical to performance, the term "time is of the essence" should accompany any specified time and/or date stated in the contract. In this case performance (be it acceptance, closing, inspection, etc.) must be within the framework of the time set forth without exception.

Section 3 - Notification to Cooperating Broker

When the Seller makes a counteroffer, the REALTOR® working with the Buyer has a professional responsibility to inform the Listing Broker, within the time limits of the contract, the Buyer's acceptance, rejection or re-counter.

Section 4 - Modification Constitutes Counter Offer

Point out to a Seller that any change to the language of the contract submitted nullifies that contract and constitutes a counteroffer which is only binding upon written acceptance of the Buyer.



NOTE:

The District Court of Appeal of Florida, Second District, has ruled that a counteroffer is a rejection of an earlier offer (Polk v. BHRGU Avon Properties, LLC, No. 2D06-2426, 2006 WL 3615166 (Fla. Dist. Ct. App. Dec. 13, 2006).

ARTICLE 11 - Back-Up Offers

The Listing Broker is obligated to present all offers up to the time of closing. If an offer is received while a contract is pending, the Listing Broker shall immediately contact the Seller to arrange for presentation of the offer. The Seller may accept, reject or counteroffer just as in any other negotiation, but acceptance or counteroffer must be contingent upon obtaining a written release from the pending contract.

ARTICLE 12 - Acceptance

Section 1 - Notification

Upon acceptance, immediately notify the parties to the transaction (through the appropriate agents).

Section 2 - Communication of Acceptance

The offer must be accepted in writing and the acceptance communicated to the parties. Delivery of a signed contract to the parties must be accomplished as soon as practical to avoid conflicts over the issue of acceptance.

Section 3 - Continuance of Marketing

Remember that **Standard of Practice 1-7** says that REALTORS® shall not be obligated to continue to market

the property after an offer has been accepted by the seller/landlord. So the Seller should determine if property is to be shown after the acceptance of an offer. It is advisable that the Seller provide written authority to discontinue showings after an offer has been accepted.

ARTICLE 13 - ESCROW

Section 1 - Governed by Law

Escrow funds are to be handled according to the language embodied in the purchase agreement, and in accordance with Florida law.

Section 2 - Deposits of Escrow Funds

61J2-14.009 of the Florida Administrative Code says that “**Every sales associate who receives any deposit, as defined in Rule 61J2-14.008, Florida Administrative Code, shall deliver the same to the broker or employer no later than the end of the next business day following receipt of the item to be deposited. Saturday, Sundays and legal holidays shall not be construed as business days. Receipt by a sales associate or any other representative of the brokerage firm constitutes receipt by the broker for purposes of paragraph 61J2-14.008(1)(d), Florida Administrative Code.**”

Likewise, **61J2-14.010** states that “**(1) Every broker who receives from sales associates, principals, prospects, or other persons interested in any real estate transaction, any deposit, fund, money, check, draft, personal property, or item of value shall immediately place the same in a bank, savings and loan association, trust company, credit union or title company having trust powers, in an insured escrow or trust account.**”

Section 3 - Disputes

When a transaction fails to be consummated, the parties may get into a dispute as to the disposition of the escrow. While both the FAR and FAR-BAR purchase agreements have specific sections related to the disposition of the Buyer's deposit, Florida law outlines the following procedure.

“However, if the licensee, in good faith, entertains doubt as to what person is entitled to the accounting and delivery of the escrowed property, or if conflicting demands have been made upon the licensee for the escrowed property, which property she or he still maintains in her or his escrow or trust account, the licensee shall promptly notify the commission of such doubts or conflicting demands and shall promptly:

- a. Request that the commission issue an escrow disbursement order determining who is entitled to the escrowed property;**
- b. With the consent of all parties, submit the matter to arbitration;**
- c. By interpleader or otherwise, seek adjudication of the matter by a court; or**

d. With the written consent of all parties, submit the matter to mediation.

Section 4 - Protection of Licensee

Florida law says that if the licensee promptly employs one of the previously outlined escape procedures and abides by the order or judgment from the Florida Real Estate Commission, a court of law, arbitration or mediation, no administrative complaint may be filed against the licensee for failure to account for, deliver, or maintain the escrowed property.

Section 5 - Exemptions From FREC Notification

Florida law says that under certain circumstances, a licensee may disburse property from the licensee's escrow account without notifying the commission or employing one of the previously outlined procedures. For example, Florida Statute 718.503 outlines the conditions under which a buyer of a residential condominium unit can cancel the contract for sale and purchase, and the licensee may return the escrowed property to the purchaser without notifying the commission. REALTORS® are encouraged to read Chapter 718 for additional details.

NOTE: The Florida Real Estate Commission approved Rule 61J2-14.008 of the Florida Administrative Code which requires licensees who prepare or present an offer to provide the name, address and telephone number of the attorney or title company that will serve as escrow agent. Within three business days after initial and subsequent deposits are due under the contract, the licensee's broker must make written request to the escrow agent for written verification that the deposit has been made. Within 10 business days after making the request for written verification from the escrow agent that the deposit has been made, the licensee's broker must provide the seller's broker, or the seller directly if the seller has no broker, with a copy of the written verification provided by the escrow agent or written notice that the licensee's broker did not receive verification from the escrow agent. All communication must be in writing.

ARTICLE 14 - General Guidelines

Section 1 - Enforceability

In Florida, contracts for the purchase and sale of real property must be in writing to be enforceable.

Section 2 - Communication

In order for a contract to be binding, the written acceptance must be communicated to the parties. The written acceptance must then be delivered to the parties. All parties should be provided with a legible copy of the agreement and accompanying addenda, if any.

NOTE: If you cannot personally reach a party to the transaction, a faxed, or telegraphic or email response stating the name of the Buyer/Seller, the property address, date of acceptance and offer amount should be included, along with acceptance language. The contract must be sent for signature immediately thereafter.

Facsimile (FAX) copies of contracts are considered

legally binding when fully executed and delivered to other party. It is good practice to have the FAX'ed copies of the contract replaced with a fully executed original of the contract.

Section 3 - Use of Contracts

If members choose to use forms approved by the Daytona Beach Area Association of REALTORS® or the Florida Association of REALTORS® (FAR or FAR-BAR),

they should make every attempt to use the most current forms available. Out of date forms may not contain language necessary to avoid legal liability and comply with Florida law. Members are advised they may encounter non-DBAAR or FAR-approved forms, including purchase agreements and addenda. Note that there are no rules or laws requiring the use of DBAAR or FAR-approved forms, and a non-DBAAR or FAR-approved purchase agreement is still a valid purchase agreement.

Mediation



The Daytona Beach Area Association of REALTORS® offers a Mediation service to members who wish to resolve a dispute before going to Arbitration. Board Mediators have been profes-

sionally trained in dispute resolution techniques.

Following filing an Arbitration request, the parties are notified that they may choose to mediate the dispute. The parties have one week to decide if they are willing to participate in mediation. If both parties agree, a mediation meeting is scheduled.

While mediation is voluntary, it can result in an outcome satisfactory to both parties. Mediation is a less formal procedure, and can be less time-consuming than an arbitration. In contrast to an arbitration, neither party is bound to accept the resolution presented in a mediation. If no agreement is reached, the dispute goes to Arbitration, following the guidelines set forth in the next section.

Arbitration Guidelines

The National Association of REALTORS®' Professional Standards Committee conducted an extensive study on "procuring cause" in order to simplify arbitration and in response to repeated requests for a simple definition. A special committee concluded that there was no all-encompassing rule that could be relied on in all instances, since the court decisions indicate that the factual circumstances in each case must be reviewed separately. Therefore, each arbitration must be heard and decided on its own merits. The following suggested factors which should be considered in all matters of arbitration presented to a Hearing Panel of the Professional Standards Committee of the Daytona Beach Area Association of REALTORS® include, but are not limited to:

No Predetermined Rule Or Regulation

The Hearing Panel will avoid any assumption or presumption of entitlement to any award on the basis of any predetermined rule or regulation of the Association of REALTORS®, and shall make its determination in each case on the merits of all ascertainable and relevant facts.

Arbitration Hearing And Award Separated From An Ethics Hearing

A hearing in arbitration as to the entitlement to any award shall be held separately from any ethics hearing. Any award in arbitration shall be granted on the basis of a decision by the Hearing Panel on the existence of "procuring cause" in a specific case. An award in arbitration shall not be made on the basis of an alleged or determined violation of the Code of Ethics and shall not cite violation of an Article of the Code of Ethics as a basis for its finding. Any alleged or suspected violation of ethics

shall be referred to the Grievance Committee by the arbitration panel.*



Award To Conform With State Law

An award in arbitration must not violate the law in the State of Florida.

Consideration of the Whole Course Of Conduct

In a dispute as to the entitlement of a commission, the Hearing Panel must weigh the whole course of conduct of the parties, their relationship, and their understandings in order to determine the extent to which the acts of each of the parties produced or contributed to the transaction from which the dispute arises. In making its determination, the Hearing Panel shall be entitled to make reasonable inferences from the evidence and the evidence shall be sufficient to support such inferences. The issue to be arbitrated shall be those framed by the complaint, answer, and other pleadings of the parties. No other issue shall be considered by the Hearing Panel in making its determina-

tion.

* The separation of arbitration proceedings from proceedings under the Code of Ethics should not be construed as precluding consideration by the Hearing Panel of all factors, including the propriety of the conduct of the parties, relevant to the dispute which is the subject of the arbitration.

EXPLANATION

An arbitration panel of a Member Board of REALTORS®, in the consideration of any controversy, shall avoid any preconceived or predetermined conclusions as to the appropriate award in arbitration that is to be made. Members of the panel will disregard, as required by Interpretation No. 31, Official Interpretations of Article I, Section 2, Bylaws of the National Association of REALTORS®, any Board rule or rule of a Multiple Listing Service owned, operated, or affiliated with a Board which establishes, limits, or restricts the REALTOR® in his relations with a potential purchaser, affecting recognition periods or purporting to predetermine entitlement to an award in arbitration. Each member of such panel shall be conscious of the obligation to fairly and impartially seek to ascertain and understand all pertinent facts or factors which are relevant to the dispute before the panel. The members will also be conscious that they are seeking to render a reasoned and reasonable peer judgment in a business dispute arising out of a real estate transaction, and that the purpose and function of the hearing in arbitration neither includes determination nor conclusion as to alleged or possible violation of the Code of Ethics. Rather, if in the course of the hearing, the panel discovers there is valid reason to believe that one or more parties to the arbitration may have violated the tenets of the Code of Ethics, the panel will refer such matter to the Secretary, who in turn will submit it to the Grievance Committee which shall, according to its regular procedures, determine whether the matter warrants a hearing before a panel of the Professional Standards Committee as an ethics proceeding. Thus, hearings in arbitration and hearings as to alleged or possible unethical conduct shall be conducted separately. However, this will not preclude the arbitration panel from continuing the arbitration hearing and rendering the appropriate award in arbitration or from considering the whole course of conduct of the parties to the arbitration in determining entitlement to an award in arbitration.

HEARING PANEL QUESTIONS

The arbitrators shall consider as a part of the whole course of conduct of the parties, the authorization for and faithful exercise of agency or subagency on behalf of the client, as well as fairness to all parties to the transaction including the client, customer, and the REALTORS® involved. The arbitrators may wish to consider but in no way are limited to the following type of questions or factors:

- Who is the listing agent?
- Was there a written listing agreement between the prop-

erty owner and the listing agent? Were both of the parties to the dispute authorized to act as agent of a principal or subagent of the listing broker?

- Who first introduced the customer to the property and how was such introduction made?
- Did the first or original introduction to the property actually originate an uninterrupted series of events leading to the sale (or objective of the transaction), or was the series of events originated by the first introduction to the property hindered or terminated at any point for cause such as abandonment or estrangement of the customer by the agent or subagent?
- Was there a faithful exercise of agency or subagency on the part of the individual making the first introduction of the property to the customer, or conversely, was there fault or deficiency on the part of said agent or subagent either in the interest of the client or in fairness to the customer?
- How did the second agent or subagent enter the transaction?
- Was the second agent or subagent to enter the transaction aware of the prior introduction of the property and/or negotiation on the property with the customer by the first agent or subagent, what did he do to serve the interest of the client and yet be fair to all parties, avoiding action inconsistent with the agency of the other agent or subagent?
- Was the entry of the second agent or subagent into the transaction an intrusion upon agency or was it innocent exercise of agency or subagency in the interest of the client and pursuit of a customer?
- Did the second agent or subagent, by the second introduction, start a second or separate series of events which were not dependent upon the first introduction and/or negotiation on the property, with said second introduction and series of events flowing therefrom, leading to the successful transaction?

The preceding questions or factors to be considered are typical of, but are not all inclusive of the questions or factors to be considered by the arbitration panel in its deliberations. As previously stated, the objective of the arbitration panel is to weigh carefully and impartially the whole course of conduct of the parties, and to render a reasoned and reasonable peer judgment as to a proper award in the arbitration.

Pathways to Professionalism

While the Code of Ethics and Standards of Practice of the National Association establishes objective, enforceable ethical standards governing the professional conduct of REALTORS®, it does not address issues of courtesy or etiquette. Based on input from many sources, the Professional Conduct Working Group of the Professional Standards Committee developed the following list of professional courtesies for use by REALTORS® on a voluntary basis. This list is not all-inclusive, and may be supplemented by local custom and practice.

I. Respect for the Public

1. Always follow the “Golden Rule”.
2. Always respond promptly to inquiries and requests for information.
3. Schedule appointments as far in advance as possible; call if you are delayed or must cancel an appointment.
4. Always schedule property showings in advance.
5. If a prospective buyer decides not to view an occupied home, promptly explain the situation to the listing broker or the owner.
6. Communicate with all parties in a timely fashion.
7. Enter listed property first to ensure that unexpected situations, such as pets, are handled appropriately.
8. Leave your business card if not prohibited by local rules.
9. Never criticize property in the presence of the owner.
10. Inform sellers that you are leaving after a showing.
11. When showing an occupied home, always ring the doorbell or knock before entering. Knock before entering any closed room.
12. Present a professional appearance at all times; dress appropriately and have a clean car.
13. If the seller is home during a showing, ask their permission before using the telephone or bathroom.
14. Advise the clients of other brokers to direct questions to their agent or representative.
15. Communicate clearly; don't use jargon not readily understood by the general public.
16. Be aware of and respect cultural differences.
17. Show courtesy and respect to the general public.
18. Be aware of and meet all deadlines.
19. Promise only what you can deliver and keep your promises.

II. Respect for Property

1. Be responsible for visitors to listed property; never allow buyers to enter property unaccompanied.
2. When the seller is absent, be sure to turn off lights, shut windows, and lock doors after a showing.
3. Tell buyers not to smoke in listed property.
4. Use sidewalks; if weather is bad, take off shoes and boots inside property.
5. When a property is vacant, check that heating and cooling controls are set correctly and check the outside of the property for damage or vandalism.

III. Respect for Peers

1. Call the listing broker to report the results of any showing.
2. Notify the listing broker immediately if anything appears wrong with the property.
3. Notify the listing broker if there appears to be inaccurate information on the listing.
4. Share important information about a property, including the presence of pets; security systems; and whether sellers will be present during the showing.
5. Show courtesy, trust and respect to other real estate professionals.

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Daytona Beach Area Association of REALTORS®

NOTICE OF REVOCATION

We hereby revoke the () offer () counteroffer dated _____
for the property located at _____ between
_____ (Owners) and _____ (Purchasers)

Revocation was communicated originally () in writing () verbally to

_____ on _____
(Name of Individual) (Date)

at _____ (a.m.) (p.m.) Eastern Standard Time.

We consider the terms of the proposed contract to be null and void and the parties thereto are there-
fore released from any obligations thereunder.

Signed _____ Signed _____

Date _____ Time _____