The Code Is Your Business

Ethical dilemmas crop up daily. Here's how to avoid running afoul of five of the most common REALTORS® Code of Ethics complaints.

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Working in real estate comes with its fair share of irritations. Agents who don't return calls in a timely manner or clients who make inappropriate demands can be frustrating, to say the least. But discerning when difficult behavior crosses the ethical line can sometimes be tricky—whether it pertains to your dealings with other REALTORS®, clients, or the general public. To help you distinguish actual infractions from misunderstandings or simply poor manners, we look at five real-life business dilemmas and describe how the REALTORS® Code of Ethics applies.

Read more: About the Code of Ethics

Disclosing Multiple Offers

It's heartbreaking to tell buyer clients they've been outbid when you didn't even know there were other offers on the table. You may feel as if you've been wronged—but is it time to call your association's grievance committee? Not necessarily.

Karen, an agent in West Palm Beach, Fla., blamed the loss of a deal last year on a listing agent who didn't disclose competing offers until the eleventh hour. Karen, who asked not to be fully identified because of the sensitivity of the matter, submitted her buyer's offer and received a preliminary acceptance from the seller. (Such an acceptance is not binding in the way a signed purchase contract is.) The buyer even had a home inspection done. But when pressed to move forward on the deal, the listing agent said the seller was considering other offers.

"The listing agent had previously told me she was just waiting for the seller to sign the official paperwork [for the buyer's offer]," Karen says. "At no point did she say that we didn't have an executed offer. She never said anything about other offers."

Karen says she believes the listing agent's lack of candor cost her the deal because her client missed out on the opportunity to increase the offer. However, failure to disclose other offers isn't automatically a violation of the Code.

What the Code Says (Article 1, Standard of Practice 1-15 and SOP 1-13(5)): Two conditions must be met before a listing agent has any duty to disclose multiple offers: The seller must grant permission to disclose such information, and the buyer or cooperating agent must ask for the disclosure. The same applies to revealing who obtained the offers—whether they were obtained by the listing agent, another agent with the

listing agent's firm, or a cooperating broker. So if Karen didn't pose the question to the listing agent, or if the seller didn't grant the listing agent permission to disclose, the listing agent did nothing wrong.

The lesson is this: Cooperating agents should always ask the listing agent if other offers exist and, if so, who procured them. They should also inform buyers that their offer and its terms are not confidential and can be disclosed by a seller to other parties. The exception: A confidentiality agreement between a buyer and seller—entered into before presenting the buyer's offer—would obligate a seller not to disclose the buyer's offer. While rare in residential real estate, such agreements are common in commercial transactions.

Transparency in Advertising

Social media tools may appear to provide a more informal way of presenting listing data, but ads posted to Facebook are subject to the same advertising standards as those that appear in print. When putting listings on social platforms, REALTORS® have a responsibility to identify themselves as real estate professionals and to show their company affiliation.

Brian Brooker, broker-associate at Carrington Real Estate Services in Boca Raton, Fla., spotted some listing ads on Facebook that gave him pause. They were posted by an agent he had long known from another state. What troubled him wasn't the content but rather her failure to identify her brokerage. "I had just finished broker classes and passed my broker exam, so the advertisement without the company name stuck out like a sore thumb," Brooker says.

Many agents assume that displaying a picture of their brokerage on the backdrop of their Facebook business page takes care of Code compliance, Brooker adds. But that alone is not sufficient to meet the standard: Backdrop images don't show up in Facebook newsfeeds, so individual postings must include the brokerage name.

This wasn't the first time Brooker had seen this type of Code violation, but he chose not to get involved. "I didn't say anything [to the agent] because the last time I said something to someone, they asked me sarcastically if I was the 'real estate police,' " he says. "And I thought, you know what, I'm not."

What the Code Says (Article 12): REALTORS® must present a "true picture" in their advertising. No matter the medium, they must properly identify themselves as REALTORS®, licensees, and real estate professionals and identify their company name. Common posts such as "just listed, 123 Sunrise Drive" with a description of the listing do not alone make it clear that the person posting is a real estate professional.

SOP 12-5 requires that any advertisement of real estate services or of listed property must disclose the name of the REALTOR®'s firm "in a reasonable and readily apparent manner." Exceptions exist for media with "abbreviated" formats, such as thumbnails, text messages, and tweets. In these cases, the REALTOR® is not

required to include the company name in the actual abbreviated format, as long as there is a link back to a display of the REALTOR®'s full information, including company name.

Learn how state and local boards are making sure members adhere to the Code.

Disclosure of Property Defects

Sometimes, sellers would rather not disclose significant problems with a property, and it may seem that the responsibility to act in a client's best interest gives listing agents a reason to go along with the pretense. However, the Code prohibits REALTORS® from misleading buyers on the material facts about a home. If an agent knows about a property defect, disclosure is necessary regardless of the seller's wishes.

Sherry Hutchens, a sales associate with Dudum Real Estate Group in Walnut Creek, Calif., recognized this when one of her sellers tried to hide a termite problem with her home. Despite the termite rods—filled with chemicals—running from the foundation and along the stucco exterior of the house, the seller wanted to make it appear as though there was never a problem.

"[The seller] called me one day and asked me to come to the house with my digital camera," Hutchens recalls. "When I arrived, I found her on the side of the house wearing rubber gloves and scrubbing the termite rods with Brillo pads." The seller requested that Hutchens take photos of the cleaned rods to "prove that the termite inspector was wrong" about the home's current condition.

Hutchens rightfully refused—and the seller fired her.

The loss of the client was a small price to pay compared to the sanctions Hutchens could have faced had she done what the seller asked. That breach of the Code of Ethics would likely have violated the license law, too, and it could have put her real estate license in jeopardy and triggered legal action by a duped buyer.

What the Code Says (Article 2): "Avoid exaggeration, misrepresentation, and concealment" of "pertinent" facts about the property or the transaction, this Article says. Typical scenarios that come up under Article 2 involve a seller who does not want to disclose a matter of significance about the home. To avoid the risk of a Code violation and possible legal action that may result from a seller's failure to disclose, REALTORS® should err on the side of disclosure.

Similarly concerning is when a seller refuses to disclose an issue because it has been "fixed." The problem here is that there are many ways to define how something was fixed. The best thing to do is to ask the seller for documentation of the fix, including a paid receipt, and then discuss disclosing and providing evidence of the fix to a new buyer.

A seller's refusal to disclose a significant fix to a property can result in serious liability issues for an agent if the agent knows about it and the fix fails or was inadequate.

What's the penalty for a Code violation?
The maximum fine for an ethics violation is $15,000, but it's up to each association's hearing panel to decide what an appropriate sanction is for each case. In general, if the violation is considered to be relatively minor, such as an advertising mistake that did not cause significant harm and was mainly due to a lack of knowledge of the Code, a fine of $500 or less may be imposed. But if the violation is very serious, such as an escrow account problem that caused substantial harm and was knowingly committed, then a fine at the top end of the $15,000 maximum may be recommended by the panel.

Client Confidentiality

Certain client information is subject to confidentiality, even after the relationship ends between the client and agent. Most notably, a client's price position, negotiating position, and motivation to buy or sell cannot be shared with anyone else. Here's an example: Sellers tell the agent that they would lower their asking price from $245,000 to $210,000 if they had to. The agent is not free to disclose this, even if a deal falls through.

Linda Hobkirk has seen a number of agents break this rule. Her home state of Arkansas allows for dual agency, where an agent or brokerage can represent both the buyer and seller in a transaction. The agent or brokerage must keep the buyer's and seller's information confidential at all times.

But in cases where a deal goes bad and the house falls out of contract, many agents have "loose lips" and start carelessly revealing information about buyers and sellers to third parties, assuming their duty to keep quiet ends when the client relationship does, says Hobkirk, an associate with Coldwell Banker Harris McHaney & Faucette Real Estate in Rogers, Ark.

"We are very similar to doctors and lawyers in that we must protect confidential information unless ordered by a sitting judge to release it," she says.

Some information, however, is not subject to confidentiality. For example, since a seller cannot expect an agent to conceal significant property defects from a buyer, the seller likewise cannot demand that the agent keep that information confidential after their business relationship has ended. Therefore, an agent can disclose the existence of property defects to anyone, including another agent the seller decides to work with.

What the Code Says (Article 1, SOP 1-9): A client cannot require an agent to keep confidential any information that would be required to be disclosed to a buyer. Any other information defined as confidential may not be disclosed. But the question remains concerning how long the duty of confidentiality lasts. SOP 1-9 says the duty of confidentiality exists during and after the termination of the agency relationship. However, if there is a conflicting standard under state law as to how long confidentiality lasts, state law will rule.

Many states follow the SOP 1-9 standard of confidentiality, but one state that differs is North Carolina, where state law says the duty of confidentiality ends at the termination of the agency relationship.

Soliciting Another Agent's Listing or Buyer Agreement

The only time an agent may not solicit another agent's client is when that client is subject to an exclusive agreement with his or her agent. However, when a client has a nonexclusive agreement with an agent, the client is fair game to any other agent.

Exclusive agreements are in the best interest of the client, which is why the Code offers them protection. With nonexclusive agreements, sellers, for example, may work with several listing agents to list a property, but the agent who procures the buyer is the only one who gets paid. That offers little incentive for the listing agents to work hard for the seller when they know they may not receive compensation. In exclusive agreements, the client works with one agent, and that incentivizes the agent to do his or her best for the client.

Tammy O'Neill, an agent with RE/MAX Fine Homes in Newport Beach, Calif., had another agent go after her client despite their exclusive buyer agreement.

"I had an agent go to my client's house right after I showed that agent's listing and solicit my client to work with her in finding a home," O'Neill says. "Yes, she went right to the door and tried to steal my client. Needless to say, it didn't work, and my client and I closed on a beautiful house."

The offending agent's actions constituted a Code violation because she initiated contact with a client who was already subject to an exclusive buyer agreement. However, there are conditions where certain interactions between a client bound by exclusivity and another agent are fair.

What the Code Says (Article 16): On the seller side, sending mass mailings to groups that may incidentally include an owner who is exclusively listed with another agent doesn't violate Article 16. However, REALTORS® are prohibited from discussing listing a property with such an owner—unless the owner initiates the contact. On the buyer side, SOP 16-9 requires that before a REALTOR® enters into an exclusive buyer agreement, he or she must use reasonable efforts to determine whether the buyer is already subject to one. Should the REALTOR® find that the buyer is already subject to an exclusive buyer agreement, the REALTOR® must direct the buyer back to his or her exclusive broker unless the buyer directs them otherwise.

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