

Hot Markets, Cool Practices

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Hot housing markets create a frenzy that can lead to bad decisions by buyers, sellers, and their agents. As a professional in the industry and a fiduciary, a real estate agent should keep a cool composure and be a reality check sounding-board against a buyer's attempts to win a house at any cost or a seller's focus only on price in a multiple-offer situation.

Some hot market practices are ripe with risk. Here are some cool practice pointers for agents to reduce the likelihood of needing an attorney to defend them in a future civil suit or administrative action at the Texas Real Estate Commission (TREC).

Listing Agent Practices

Not respecting offer deadlines. One way agents handle the barrage of competing offers in a hot market is to set a deadline for offers so they can present all offers to the seller at one time. There is nothing wrong with this practice, with two caveats.

The Takeaway

In a highly competitive housing market, agents might be tempted to cut corners to close a sale. However, doing so can result in administrative action by TREC or even a civil suit.

First, discuss the pros and cons of this strategy with the seller, and make sure he wants offers presented in this fashion.

Second, and most importantly, respect the stated offer deadlines. Do not allow your client to accept an offer before the deadline, and make sure all offers received by the deadline are presented. Failure to do this can put the agent and the client at risk of claims of unfair treatment or deceptive practices. The agent can also be subject to discipline by the local board/association of Realtors and TREC.

Bonus practice note: Agents are required by law to present all offers, even if they are received after a stated deadline or a contract has been signed [Tex. Occ. Code §1101.557], unless the seller has stated in writing to the agent that the seller no longer wants to receive offers after a contract for their property has been signed [TREC Rule §535.156].

Not allowing inspections. If the offer guideline sheet stipulates or if the seller suggests that the buyer waive professional inspections, press pause. While this may help reduce the short-term likelihood that the buyer will come back with an amendment offer to decrease the sales price due to items found in an inspection, it is a bad idea. Preventing a buyer from using the right to inspect the property set out in Paragraph 7 of the contract (whether or not an option period is purchased) increases the seller's and the agent's risk of a lawsuit claiming the seller or agent withheld material information about the property's condition.

Discuss this reality with the seller and remind him that allowing a buyer to inspect the property does not obligate the seller to agree to repairs in any proposed amendment.

Not allowing option periods. For the reasons stated previously, it is better to allow the buyer to have an option period to make any independent inspections and assessments of the property the buyer deems necessary. In a hot market, it is okay for the seller to ask for more option money and a shorter option period, but an agent should caution the seller against shortening the option period to the point where it is not likely the buyer can get inspections completed. Again, this could lead to a future lawsuit claiming the seller was trying to hide a condition of the property.

Disclosing information only to some buyers or focusing only on price for multiple offers. Although the listing agent is a fiduciary to the seller, TREC rules require the agent treat all parties to a transaction fairly and honestly [TREC Rule §531.1 and §535.156]. Telling just some agents or parties that have submitted offers what the current highest offer is in order to create a bidding war is a clear violation of TREC rules. A best practice is to let all parties know that there are multiple offers and to submit their highest and best offer by a stated deadline. Texas Realtors has a form for this situation for members.

Multiple offers can present a problem for listing agents when presenting the offers to their sellers. Be careful not to allow sellers to compare just sales prices when

discussing multiple offers. Other important factors that can affect whether the contract will actually close that a seller may want to consider include other costs assigned to seller, the number of days in an option period, the number of days to get financing approved, appraisal contingency provisions, and proof of funds, especially when offers are over market price.

Remember all offers need to be presented. A best practice would be to prepare a spreadsheet with all of these terms set out and discuss with your seller which they find most salient. In reality, it might be a combination of factors that leads them to choose one offer over another.

Bonus practice note: Consider using a spreadsheet without identifying names of buyers, and using agent names or numbers instead. This method will help protect a seller from any claims of discrimination based on race or national origin when choosing between multiple offers.

Not tracking earnest and option money deposits. Beginning April 1, 2021, TREC promulgated contracts require option fees to be delivered to the escrow agent (generally the title company) along with the earnest money within three days after the effective date of the contract. Understand that it is not the job of the escrow agent to determine whether or not the option fee or earnest money was timely delivered. Rather, their job is to mark the date and time that it is received on the appropriate space on the contract. The listing agent should calculate the due date and track whether one or both are not delivered by midnight on that date. To do this, the listing agent will need to call or email the title company and find out the status of delivery. The agent cannot rely on the title company to proactively notify them each time funds are received or not received timely. This is important to the seller since the seller has contractual rights when the funds are not delivered timely.

Revised Paragraph 5 provides that funds received from the buyer are first applied to the option fee and then to the earnest money. If either are deposited late with the title company, or if the total amount is less than the required sum for both the earnest money and the option fee, the listing agent needs to notify the seller about their choices under the contract. Paragraph 5 permits the seller to notify the buyer that the seller is terminating the contract if the seller gets that notice to the buyer after the due date of the earnest money but before the buyer delivers the full amount due to the escrow agent. In a hot market, the seller may want to do this right away, especially if a better back-up contract is waiting in the wings.

If the option fee is not paid timely, no option period is created, and the buyer cannot terminate the contract using that provision of Paragraph 5. When the option fee is late, the listing agent should discuss it with the seller and let the seller decide whether to accept a late option fee payment and allow the buyer to retain an option period under the contract or hold firm to the contract terms.

Buyer's Agent Practices

Bidding over asking price. Paying over the listed price for a property is not uncommon in a hot market where demand outstrips supply. A buyer's agent can play a big role in making sure his client understands how much he is overpaying for a home and the risks associated with it. First, a buyer's agent should discuss the reality of a hot market with buyers, preparing them for the multiple-offer situation, the necessity of acting quickly, and the likelihood of an offer over the asking price winning the contract.

In addition, the agent should know the buyer's motivation for buying a home and the buyer's financial capabilities. That means the buyer should have a prequalifying letter from a lender before looking at homes and should discuss with the agent how much extra cash is at his disposal if he wants to bid over the asking price. Is now the best time for the buyer to be making a purchase? The agent should prepare a comparative market analysis for a property the buyer is interested in and discuss what happens if the lender's appraisal comes in lower than the contract sales price. This could be reality check time for the buyer. Remember, an agent cannot predict what the value of the property will be in the future.

Using the appraisal addendum incorrectly. A buyer's agent should understand and be able to explain how each section of TREC's Addendum Concerning the Right to Terminate Due to Lender's Appraisal affects the buyer's financial obligations. If Box 1 is checked, the buyer is agreeing to bring whatever cash is necessary to close the deal at the contract price, no matter what value is given in the lender's appraisal and subsequent amounts the lender is willing to loan on the property. Box 2 is similar to Box 1, but the buyer has control over the amount he will pay over the appraised value. This option allows the buyer to set a limit on how much above the appraised value he would be willing to bring to closing. Box 3 gives the buyer an additional right to terminate, over and above the right to terminate in the Third Party Financing Addendum, if the appraised value is less than the amount inserted in the addendum.

Remember, the addendum is for use only with conventional financing where a Third Party Financing Addendum is attached to the contract. It is not for use with FHA-insured or VA-guaranteed financing. Using the addendum for the latter is contrary to federal law.

Making earnest money nonrefundable. Suggesting making earnest money nonrefundable to gain an advantage over other offers not only alters many remedies for the buyer under the contract, but it is the unauthorized practice of law by a license holder. The contract provides many places where the earnest money is returned to the buyer other than termination under the option period (for instance, when there is a casualty loss, or the seller does not provide the seller's disclosure, or any other default by seller). A better alternative is to either increase the option fee (which is never refundable) or add additional earnest money to the contract to be paid after the option period is over.

Eliminating option periods or inspections. A buyer's agent should not recommend eliminating the option period or inspections. While this may make an offer more attractive in a multiple offer situation, the buyer is committing to a buying a home that may have significant and expensive unforeseen problems, like with the foundation. When these problems are discovered after the buyer purchases the home, the likelihood of the buyer's agent (who recommended eliminating the option period) being sued or having a complaint filed at TREC greatly increases. Remember, the buyer does not have to ask for any concessions from the seller after the inspections are completed, but at least the buyer will know exactly what he is purchasing.

Not suggesting a back-up contract. A back-up contract is a good strategy for a buyer who really wants a property but is not willing to bid as high over the asking price as another buyer. Many times, the buyer in first place will realize he bid too much over, either during the option period or after the appraisal is received, and terminate the contract. If a back-up contract is signed and in place, the back-up buyer automatically becomes the new buyer.

Buyers' agents should understand how the back-up process works and explain it to their buyers. TREC's Addendum for "Back-Up" Contract is added to a TREC promulgated contract form to create the back-up contract. Earnest money and any option fee need to be paid within three days after the effective date of the back-up contract. The buyer gets an option to back out from the time they pay the option fee until the buyer either

terminates the back-up contract or after the number of days set out in Paragraph 5 once the back-up contract switches into first place. This means a buyer can keep looking for something else while in a back-up position. 🍀

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