

## **ADVISORY RULING**

2017-01

Advisory Ruling Requested by: Maine Association of REALTORS®  
19 Community Drive  
Augusta, ME 04330

Topic: Providing a Copy of a Prospective Buyer's Offer to Another Prospective Buyer  
Whose Offer Contains an Escalation Clause

### **Request for Advisory Ruling**

By letter dated June 26, 2017, Mr. Donald Guild, on behalf of the Maine Association of REALTORS®, requests an advisory opinion as to whether Maine Real Estate Commission ("Commission") Rule Chapter 410, Section 12 ("Commission Rule") prohibits a listing agent from providing to a prospective buyer a copy of an offer from another prospective buyer after the seller has rejected the offer. Pursuant to the authority granted in 5 M.R.S. § 9001 and Commission Rule Chapter 310, the Commission considered the request at its July 20, 2017, September 21, 2017, and November 16, 2017 meetings and now issues the following advisory ruling.

### **Facts**

Seller and Listing Agent are working pursuant to an agency-client listing agreement for the sale of Seller's property. Seller receives multiple offers to purchase the property. Offer A includes an escalation clause, which reads: "The purchase price Buyer A is agreeing to pay will be increased to \$X over the highest offer received up to \$Y provided Buyer A receives a copy of the offer being used to escalate." Offer B is the highest offer received. Seller rejects Offer B in writing and immediately accepts Offer A at the escalated price. Listing Agent intends to provide a copy of Offer B to Buyer A, directly or through any licensee working with Buyer A, without obtaining any prior written permission from Buyer B.

### **Specific Issue Addressed**

Under the above stated facts, if Listing Agent, in fact, provides a copy of Offer B to Buyer A, directly or through any licensee working with Buyer A, does Listing Agent violate the Commission Rule?

### **Applicable Law**

The Commission Rule states: "During the pendency of the transaction, the real estate brokerage agency or affiliated licensee shall not disclose any terms of an offer, counteroffer or purchase and sale contract to anyone other than the buyer and seller without the prior written permission

of the buyer and seller, except said documents shall be made available to the director of the Commission upon request.” 02-039 C.M.R. ch. 410, § 12.

**Discussion and Ruling**

The Commission Rule prohibits a real estate brokerage agency or its affiliated licensee from disclosing any terms of an offer to anyone other than the buyer and seller during the pendency of the transaction. The terms “pendency” and “transaction” are not defined in the Commission’s rules. The Commission determines that, in this specific factual situation in which Offer A contains an escalation clause, the Seller’s rejection of Offer B in writing and acceptance of Offer A acts to relieve Listing Agent from the prohibition against disclosing the terms of Offer B to Buyer A or any licensee working with Buyer A. Thus, the Commission Rule does not prohibit a Listing Agent from providing a copy of Offer B to Buyer A or any licensee working with Buyer A under the specific factual situation described above, even though the Listing Agent has not obtained any prior written permission from Buyer B.

**Scope of Advisory Ruling**

Pursuant to 5 M.R.S. § 9001(3), this advisory ruling is not binding upon the Commission, but justifiable reliance upon this ruling in this specific factual situation shall be considered in mitigation of any penalties sought to be assessed in any subsequent enforcement action initiated by the Commission.

SIGNED Donald Plourde  
Donald Plourde, Commission Chair

Dated 12/14/17