

*Official Statement of the
National Auctioneers Association
Concerning Proper Ethical
Conduct for Absolute Auctions
of Real Estate*

**NATIONAL AUCTIONEERS ASSOCIATION
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I. Introduction and Statement of Purpose

The National Auctioneers Association is a professional organization for practicing auctioneers, their associates, affiliated businesses and other related professionals. Membership in the NAA, although voluntary, demands a commitment to other professionals, clients, customers and the public at large that extends beyond minimum compliance with laws and professional regulations. Members of the NAA accept this obligation to conduct themselves and their businesses in a manner that serves the public interest, protects the public trust and furthers the goals of their profession.

In recent years, the National Auctioneers Association has become aware of increasing public complaints concerning certain tactics employed in absolute auctions of real estate. It has become apparent that some individuals and auction companies are employing ethically and legally questionable sale methods in conducting real estate auctions which are purportedly being held “without reserve”. The NAA thus realizes that these complaints have negatively impacted the public’s faith in the integrity of the absolute auction process.

In an effort to stem growing public sentiment questioning the integrity of the absolute auction method and to preserve the hard earned reputation of auctioneers throughout the country, the NAA has developed this Official Statement concerning proper ethical conduct for absolute auctions of real estate.

II. Ethical Standards for Conducting Absolute Auctions of Real Estate

The NAA demands that its members abide by certain obligations under law and the Association’s Code of Ethics and Standards of Practice. While the Code of Ethics establishes obligations which may go beyond those mandated by law, the NAA nevertheless requires that members conduct their profession according to the principles found in the Code of Ethics and Standards of Practice. Under the Code, members pledge to protect and promote the interests of their clients. This obligation of absolute fidelity to the client’s interests is primary, but does not relieve members of their obligation to treat all parties to the transaction fairly.

In all circumstances, the practice of encouraging a client to market a property as “absolute” when in actuality the member has promised to convert the sale to an auction with reserve, or alternatively to cancel the sale if the marketing campaign does not produce an opening bid sufficient to satisfy the intended reserve of the client, is strictly prohibited. Auctioneers must not circumvent a sale represented to the public as absolute by “canvassing” the crowd for opening bids prior to the auction with the preexisting intention of calling off the sale if the potential bids are not acceptable to the seller. In such a case, it is clear that there was no true intention to sell the real estate to the highest bidder regardless of price and the auctioneer would be perpetrating a fraud upon those in attendance.

Members of the NAA are duty bound to abide by the laws and regulations which govern the profession as well as those which, if violated, would negatively affect their ability to present to the public an image of behavior that appropriately represents the professionalism of our industry. Auctioneers must therefore present accurate information with regard to the nature of each sale in all advertisements and representations made to the public. “Shill” bidding (also referred to as “by-bidding”, “ghost bidding” and “puffing”) or any other schemes to inflate bids are not permitted under the NAA Code of Ethics. Auctioneers should never employ such tactics as a means to artificially inflate bids or circumvent the previously declared intention to sell the property to the highest good faith bidder. Beyond these ethical considerations, in virtually every jurisdiction an auctioneer is prohibited by law from knowingly receiving a bid on the seller's behalf or permitting the seller to make or procure such a bid unless notice has been given that liberty for such bidding has been reserved. In many jurisdictions, bidding by the auctioneer or seller is prohibited even where notice is given of the right to do so. The NAA therefore reminds members that the employment of shill bidding or any other scheme to artificially inflate bids is not an acceptable method for protecting the seller's property under established legal precedent and the Association's Code of Ethics.

No auction should be advertised “absolute” or “without reserve” unless there is a bona fide intent to transfer ownership at the time of advertising and at the time of the auction, regardless of the bid or bidder. The auction listing contract should clearly state that the auction is “absolute” or “without reserve” and contain an acknowledgment by the seller that the seller, or anyone on the seller's behalf, will not bid in any way. In addition, an absolute auction should not be held when there are liens or other encumbrances on the property, unless a financially responsible party signs a binding commitment to guarantee that all liens will be paid regardless of the high bid.

In an absolute sale the auctioneer has a vested interest in ensuring that the sale moves forward, as their commission often depends on the completion of the sale. This interest is inherently at odds with the seller's interest in seeking to avoid a catastrophe by withdrawing real estate from a sale before the opening of bids. If an auctioneer has reason to believe immediately prior to a scheduled sale that the public response to a marketing campaign has been unusually soft and there is a substantial risk that continuing with the absolute auction would result in a sacrifice of the property at a price far below its market value, the auctioneer has a fiduciary duty to discuss such concerns with the seller and advise the seller of his or her options for discontinuing the sale. Any withdrawal of property must, of course, be accomplished prior to the opening of bids. Auctioneers should also include provisions in their standard agreement for services that address situations where the seller wishes to withdraw property from the sale, particularly how the auctioneer will be compensated in such cases. In this way, the auctioneer will be afforded greater protection against claims that he or she breached their fiduciary duty and the seller will be able to more clearly evaluate his or her options.

Members of the NAA must take it upon themselves to adequately advise their clients of the inherent risks associated with absolute auctions before entering an agreement to sell real estate in an absolute sale. This obligation conforms with the

auctioneer's general fiduciary duty to act in the best interests, and for the benefit of, his or her clients. While there is no doubt that the absolute sale method has certain advantages, auctioneers should also discuss the inherent risks with each client prior to the execution of an agreement for auctioneering services, particularly the fact that no price can be guaranteed and the possibility that the real estate could be sold at a virtual sacrifice.

III. The Employment of "Questionable" Methods in Absolute Auction Sales of Real Estate and the Impact on the Auction Industry

In an absolute auction, or auction "without reserve", the seller has committed to selling the property to the highest bidder, without any minimum which must be realized at the sale. The words "absolute" and "without reserve" inform prospective bidders that the property will actually go to the bidder offering the highest price, and the seller may not nullify this purpose by bidding personally or through an agent, or by withdrawing the property from sale if they are not pleased with the bids.

The NAA is concerned that questionable conduct on the part of certain auctioneers has taken place at some "absolute" auctions. The Association has become aware that the absolute auction model is increasingly being used by some auctioneers as a means to attract interest in the sale, without the intention of necessarily selling the property to the highest good faith bidder. These less scrupulous individuals employ unethical methods to artificially inflate bids as a means to negate the advertised intention to sell the property at the highest price, without reserve.

The employment of questionable methods by some to artificially inflate bids as a means to protect the seller from a below market sale at absolute auction can have a decidedly negative effect on the public's perception of the auction industry as a whole. Such methods lead the public to question whether real estate advertised as an absolute sale will truly be sold to the highest good faith bidder, or if the auctioneer and seller have conspired to artificially inflate bids. Such a lack of trust by the public in the integrity of the absolute auction methods effectively limits the ability of responsible auctioneers to successfully market legitimate absolute auctions of real estate and damages the credibility of the auction methodology as a whole. In order to preserve the long-term viability of the absolute auction sale method in the marketplace, auctioneers must therefore commit themselves to the observance of the law and the NAA's ethical guidelines for conducting absolute auctions of real estate.

IV. Utilization of NAA Grievance Procedures

In order for any professional organization to earn and maintain the confidence of the constituencies it serves, it must demonstrate the ability to "police" its own. NAA members have the unique ability to observe and thereby assist in the stewardship of this trust. The National Auctioneers Association has therefore established standard

procedures for addressing grievances among our membership. Members who have personal knowledge of an act by another member that, in their opinion, is a material violation of the ethical principles found in the NAA's Code of Ethics should treat the matter in accordance with the procedures for filing a grievance. In fact, members have an affirmative obligation under the Code of Ethics to assist the NAA and its officers in all matters, including the investigation, censure, discipline, or dismissal of members who engage in violations of the Code of Ethics. The NAA therefore encourages its members to utilize the grievance procedures found in the Association's Code of Ethics as a means to monitor the profession. The NAA further hopes that members will always remain cognizant of the fact that questionable conduct by some auctioneers has a detrimental effect on the public's perception of all absolute auction sales and the auction industry in general.

V. Conclusion

Auctioneers must act responsibly in monitoring their own conduct and that of their colleagues. The profession must confront individuals who employ unethical methods in conducting absolute auctions of real estate. Otherwise, the entire industry will suffer as the public loses faith in the integrity and credibility of auctioneers and the auction sale method in general. It is therefore critically important that auctioneers observe the law and the NAA's established ethical guidelines with regard to the conduct of absolute auctions, while demanding the same from their colleagues. By doing so, members of the National Auctioneers Association can help ensure the future viability and continuing success of our profession.