

## Questions and Answers on the AVI: AGENT'S VISUAL INSPECTION CHECKLIST

The Agent's Visual Inspection Checklist (AVI) was designed to help real estate agents meet their legal duty to conduct a reasonably competent and diligent visual inspection of the property, and at the same time reduce their risk of exposure to lawsuits. The form also demonstrates and documents the agent's compliance with the legal duties. The following address some of the most frequently asked questions about the Agent's Visual Inspection Checklist.

**Q** What are the legal duties of an agent's responsibility to conduct inspections?

**A** The legal duty found in California Civil Code Section 2079, *et seq.*, states in relevant part, "It is the duty of a real estate broker or salesperson... to conduct a reasonably competent and diligent visual inspection of the property offered for sale and to disclose to that prospective purchaser all facts materially affecting the value or desirability of the property that an investigation would reveal..."

**Q** What is the standard of care required of an agent in conducting the inspection?

**A** The standard of care owed by a broker under CC2079 is the degree of care that a reasonably prudent real estate licensee would exercise and is measured by the degree of knowledge through education, experience and examination, required to obtain a real estate license (CC2709.2).

**Q** What areas are included and not included in the inspection?

**A** The inspection does not include or involve an inspection of areas that are reasonably and normally inaccessible to such an inspection. Nor is there an affirmative duty to inspect areas off the site of the property, nor an affirmative duty to inspect public records or permits (CC2709.3).

**Q** Does a buyer's agent have extra inspection duties?

**A** Recent case law would seem to suggest that an exclusively buyer's agent may have additional fiduciary duties in connection with inspections that go beyond the limitations set forth in the previous question. The Checklist helps to clarify the expectations demanded of the agent.

**Q** Is the AVI Checklist required by statute?

**A** No. Unlike certain disclosure requirements, such as the Transfer Disclosure form (TDS), there is no legislatively mandated form to use to conduct the inspection or report results of the inspection. The AVI

Checklist is intended to assist agents in demonstrating and documenting the fulfillment of their legal duties.

**Q** Which parties should be at the inspection?

**A** Civil Code Section 2079.5 states that the buyer also has a "duty to exercise reasonable care to protect himself or herself including those facts which are known to or within the diligent attention and observation of the buyer or prospective buyer." Numerous brokers believe it is prudent for the agent to have the client with him when conducting the inspection. This procedure has multiple benefits:

- It verifies that the agent performed the inspection;
- It helps to fulfill the agent's fiduciary duty to the client (as well as the client's own duty) to protect the client's interests;
- Certainly, four eyes are potentially better than two;
- It allows some basis to ask questions or point out areas of concern before the "qualified professional" inspection;
- It helps avoid cases such as an unscrupulous buyer who several years later alleges that the agent missed obvious stains on the ceiling ("You were with me—you didn't see them either!?").

**Q** What about the presence of the seller, if the agent represents the seller?

**A** Some brokers believe that sellers often become inured to the idiosyncrasies of their own homes. For many of the same reasons stated above, many brokers suggest you have the client present when you conduct the inspection.

**Q** Doesn't this detailed form raise the level of expectation of the agent's expertise (i.e., raise the standard of care)?

**A** No. Each of the areas listed for inspection are part of the "diligence" demanded under CC2079. The degree of expertise of the inspection has not been raised, only the level of performance within the existing requirements. Courts and judges do not expect a professional inspection, but they do expect the agent to at least take more than a cursory glance at the property.

*(continued)*

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**Q Don't the cited examples provide the unscrupulous buyer or buyer's attorney ammunition to claim that the agent missed items that should have been observed and noted?**

**A** No. Reasonable minds can differ. However, if an agent misses a reasonably accessible and readily observable red flag, the buyer and/or his attorney will raise the issue, whether or not it is listed as an example. Therefore, by listing some examples, the agent's exposure is *not* increased. Rather, it is intended that the examples will serve as a reminder to the agent to look at certain items, note observations, and thereby *reduce* the agent's risk.

**Q Should the agent check each box, or only those for which he has made observations or comments?**

**A** The agent should check each box to indicate that he inspected the item that is checked. If the property does not have an item (e.g., a chimney), then obviously the box should not be checked.

**Q Should each item have comments next to it?**

**A** Not necessarily. Only those items for which the agent notes red flags or areas for further inspection need be commented on.

**Q What type of comments should the agent make?**

**A** Agents should avoid making positive or qualitative analyses of items noted (e.g., "kitchen appears in *excellent* condition," "*cosmetic cracks* in counter top"). For red flags noted, the agent should advise the buyer to have the matter inspected further by a qualified professional. The agent is not a doctor of structural integrity and therefore should leave the diagnoses to qualified professionals.

**Q Are the "Limitations" on page three necessary in light of the "Buyer's Advisory"?**

**A** Yes. Experience in real estate cases seems to indicate that the Buyer's Advisory by itself is rarely sufficient

to exculpate the agent entirely against matters contained therein. The plaintiff (buyer) often will claim that the agent never reviewed or explained the "Buyer's Advisory" and merely told the client, "This document tells you to get inspections. Please sign here." Under the case *Field v. Century 21 Klowden-Forness*, a buyer's agent may be required to perform some of the items contained in the "Buyer's Advisory," unless it is clearly understood and agreed which items the agent will not undertake. C.A.R. form BR, Buyer Representation Agreement, is excellent for this purpose. These limitations should be pointed out to the buyer at each step of the transaction process.

**Q Regarding verifications, many buyers believe that it is the duty of the buyer's agent to verify matters raised in the TDS or inspections. Isn't that part of the agent's responsibility?**

**A** No. The contract, the "Buyer's Advisory," and this Agent's Visual Inspection Checklist emphatically state that the agent has not and will not verify the representations made by others. Generally speaking, the agent lacks the expertise and/or knowledge to independently verify certain matters (such as red flags noted in the inspection). Therefore, the agent should advise the buyer to have qualified persons inspect and/or verify matters that are of concern. Recent case law supports the notion that it is not the agent's responsibility to verify representations of others, or to explain the legal ramifications of red flags noted. Agents who undertake to perform these responsibilities themselves do so at their own peril.

**Q Is it recommended that the buyer sign and acknowledge the AVI, or can agents merely transcribe their findings into the comment section of the TDS?**

**A** It is not legally required that the buyers sign the AVI Checklist. However, it is good practice, in order to provide full disclosure to a buyer and reduce risk to the seller and agent, to incorporate the AVI into the agent's statement on the TDS, and therefore to have the buyer sign the AVI itself. ☞



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