

Questions and Answers on the BA: BUYER ADVISORY REGARDING OFFERING PRICE, NON-CONTINGENT OFFERS AND CONTINGENCY REMOVALS

With a finite amount of inventory, and often multiple offers on each transaction, buyers are willing to pull out all the stops to get their dream home, and they don't always understand what that means. But a good REALTOR® does. It is part of the REALTOR®'s job to guide buyers through this hectic process and let them know exactly what to expect. The problem is, in the heat of the moment in a hot market, a REALTOR®'s cautious advice to a buyer might be lost. So how does the conscientious REALTOR® advise the buyer in a timely and thorough manner and with a written record? The Buyer Advisory form is the solution.

Q What is the Buyer Advisory form all about?

A The San Diego housing demand frequently exceeds housing supply, often resulting in "multiple offer" situations when two or more sets of prospective buyers compete for the same property and must consider whether, and to what extent, they are prepared to proceed with aggressive offers. In order to secure the winning bid, a buyer may offer a price substantially over the list price, or offer non-contingent terms, or include other terms favorable to the seller. Each one of these situations is fraught with potential risks to a buyer.

Q What are the real estate agent's responsibilities and duties in these situations?

A Under California Civil Code, Section 2079 et seq., the buyer's agent has "...A Fiduciary duty of utmost care, integrity, honesty, and loyalty in dealings with the Buyer." The Real Estate Law (California Business and Professions Code, Sections 10000-10581) proscribes any act of the broker that would constitute a breach of this fiduciary duty under general agency law and subjects the broker to discipline for certain activities, even though they might not result in civil liability.

Q How are these duties interpreted in relation to aggressive offers?

A In the case *Field v. Century 21 Klowden-Forness Realty* (1998, 63 Cal.App.4th 18), the Appellate Court of California ruled that the buyer's agent should "...know those important matters that will affect the principal's decision, and he has a duty to counsel and advise the principal regarding the propriety and ramifications of the decision." Clearly then, the buyer's agent needs to counsel the buyer on the propriety and ramifications of the aggressive actions discussed in the Buyer Advisory form.

Q Why the need for this Advisory?

A As discussed in the previous paragraph, the fiduciary obligations imposed on the buyer's real estate agent include counseling the client as to potential risks and potential problems of the buyer's aggressive actions. The buyer is relying on the agent for guidance through all aspects of the transaction. This written Advisory discloses the risks and ramifications to the buyer, and it provides written documentation that the agent has fulfilled the fiduciary obligations of counseling the buyer as required by law.

Q What is the Standard of Practice, and how do I use the Buyer Advisory?

A The fiduciary duties of buyer's agents requires that they properly counsel their clients. It is always advisable to document the advice and counsel given to one's client. The agent should discuss this Advisory with the buyer and obtain the buyer's signature on it prior to taking risky and aggressive action. For example, if the buyer is making an offer over the list price, or if the buyer is offering non-contingent terms, then the Advisory form should be executed prior to the writing of the offer. Once the Purchase Agreement is in effect, a buyer may be required to remove significant contingencies, thereby putting the deposit at risk, or incurring other possible damages. For example, when removing a financing contingency prior to receiving final, unconditional loan approval, this Advisory should be executed prior to the removal of the financing (or other appropriate) contingency. ♦

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