

Questions and Answers on the BEI: BUYER'S ELECTION OF INSPECTION

In recent court decisions, inspections and related advisories have become a focal point in the courtroom. The Buyer's Election of Inspection (BEI) form was created to assist buyers in many inspection choices and to document that the agent discussed the option of each inspection with the buyer. The following address some of the most frequently asked questions about the Buyer's Election of Inspection (BEI).

Q What is the Buyer's Election of Inspection form all about?

A The Buyer's Election of Inspections (BEI) was created to assist buyers to more fully understand the many inspection options available, and to assist the buyer in making informed decisions about those options. The form serves to document that it was the buyer who made the election whether to obtain, or not obtain, various inspections or insurance coverage. Finally, the form also serves to document that the real estate agent fulfilled all fiduciary obligations in counseling the buyer.

Q Is this form required by California or Federal statutes? Why the necessity for this form?

A No, it is not required by statute. This form is, in large part, a response to the holding in the recent decision by the California Appellate Court case of *Field v. Century 21 Klowden-Forness Realty* (1998, 63 Cal. App. 4th 18). Unless overturned or otherwise modified, the published opinion is the law in California relating to fiduciary duties and obligations of the exclusive buyer's real estate agent. Some of the direct holdings include:

- "The broker as a fiduciary has a duty to learn the material facts that may affect the principal's decision." (*Field*, page 25)
- "...he is expected to perform the necessary research and investigation in order to know those important matters that will affect the principal's decision..." (*ibid*)
- "...and he has a duty to counsel and advise the principal regarding the propriety and ramifications of the decision." (*ibid*)
- "The duty to disclose material information to the principal includes the duty to disclose reasonably obtainable material information." (*ibid*)
- "The broker must place himself in the position of the principal and ask himself the type of information required for the principal to make a well-informed decision. This obligation requires investigation of facts not know to the agent and disclosure of all material facts that might reasonably be discovered." (*ibid*, 25-26)

Q Is this a California Association of REALTORS® (C.A.R.) form?

A No. This form was developed by SDAR's Risk Management Committee, which is comprised of representatives from various local associations in the San Diego area, under the auspices of the San Diego Association of REALTORS®.

Q Isn't C.A.R.'s Buyer's Inspection Advisory enough?

A The mere signature on C.A.R.'s Buyer's Inspection Advisory does not insure that the agent can convince a judge that he satisfied his duties set forth in the *Field* case. In light of the language of this case, the Risk Management Committee strongly felt that the agent in the field needed to be able to document the fulfillment of his duty to "counsel and advise the principal," and to be able to document that the agent provided "the type of information required for the principal to make a well-informed decision." Not only does the Buyer's Election of Inspections provide documentation that that the buyer was properly counseled, it documents that it was the buyer's informed decision to forego various inspections.

Q When should the agent present and review this form with the buyers?

A The form can be reviewed with your clients at any time. If the agent's practice is to counsel his clients prior to the submission of any offer, then the form can be presented and reviewed at any time.

A logical time would be after the final offer has been accepted. A meeting with the client is definitely in order to discuss the next stage in the transaction, namely the investigation of the condition of the property stage. This is the perfect time to discuss and review the investigative options, and to make elections regarding the options.

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Q How do the buyers indicate their choices on this form?

A The buyers indicate their choices by placing their initials in either the "yes" or the "no" column, with a "yes" indicating that they do wish to have that inspection performed on the property. Each inspection must have an initial indicating either "yes" or "no."

Q Oftentimes the buyer will only want the physical inspection at the time they write the offer, or when first presented with the BEI. Should the buyer wait to initial the other inspection options until he is ready to decide?

A No. Even though the buyer at first only elects a physical inspection, the buyer should initial at "No" for each other inspection on the form to demonstrate that he has read and reviewed each option. Provided that contractual time limits are followed, the form is very clear that that a buyer can always elect to have additional inspections that were at first initialed "No."

Q Should the sellers also receive a copy of this form?

A Preferably, yes. This form is intended to be a documentation of discussions on inspections between the buyers and the buyer's agent. Although not required, it would be to the sellers' (and listing agent's) advantage to have a copy of the executed BEI to assure themselves that the buyer has been properly counseled.

Q Should the BEI be used as an Addendum to the Purchase Agreement?

A No. The BEI is not intended to be an Addendum to the Purchase Agreement any more than the Real Estate Transfer Disclosure Statement is intended to be part of the Purchase Agreement. However, a buyer who makes informed decisions is less likely to claim after-the-fact that she didn't receive full disclosure. Many sellers (by way of counter offer) require that the buyer execute the BEI and provide a copy to sellers. This is treated much like a disclosure or receipt of a report, but it is not intended to be an Addendum.

Q Is it the responsibility of buyer's agent to order the inspections that the buyers request?

A No. The BEI indicates on page 5 that although the agent may provide names of various inspection services, it is the buyer's responsibility to select the inspectors. On page 1, the form indicates that the buyers are responsible for arranging for the inspections within the timeframes specified in the Residential Purchase Agreement (RPA-CA).

Q What should the agent do if the buyers have indicated "yes" on an inspection, but have not ordered the inspection?

A The agent should inform the buyers they have requested certain inspections, but have not yet had those inspections performed. If the buyers then indicate they have decided not to have that particular inspection performed, the agent should document in writing the buyer's change. •



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