

Legal Hotline Q & A

From Get the Facts 04/04/17

QUESTION: A firm is promoting a "Certified Pre-Owned Property" program where they, as listing firm, have already had a property inspection completed. The inspection report and a copy of a contractors estimate of repairs is included in the MLS Associated Documents and the PACMLS listing "Agent Confidential Remarks" state the following:

"The Seller will not be accepting any offers at this time that include an Inspection Contingency Form 35."

Really? Seller will not be accepting any offers that include a Form 35? How many sellers come up with that restriction on their own? The firm representing these sellers has 21 active resale listings, of which 9 have the identical verbiage prohibiting a Form 35 from being included with an offer. With 9 out of 21 listings using the same language it could be found this dangerous practice is advocated by the listing firm. Is that firm oblivious to the many risks the Hotline Attorney has made abundantly clear to WA REALTORS® over the years and again very directly in the recent [3/24/17 Friday Legal Update video](#)?

I believe the listing firm is playing with fire, this practice places not only their firm, agents, and sellers at great danger of legal peril but also the selling agents and selling firms. Going further it concerns me there may be selling agents who do not properly represent their clients and do not educate their buyers on the risks of not including a Form 35.

What can our firm do to best educate our agents and their clients who wish to make an offer on one of this firm's Form 35 restricted listings? What sort of buyer signed disclosure and documentation should we retain that makes it clear to them this is an ill-advised practice and exposes them to risk?

ANSWER: All that buyer brokers can do is warn buyers of the risks associated with making offers that do not include a home inspection contingency, failure to conduct due diligence, reliance on an inspector selected by the seller, etc. Broker should also advise buyer to seek the advice of legal counsel if buyer wants to proceed with an offer that does not include an inspection contingency. Finally, if buyer ultimately chooses to make an offer that does not include an inspection contingency, broker should include a Form 35 in buyer's offer, with the box marked waiving the inspection contingency, so that buyer has to make an active and knowing waiver of the standardized inspection contingency language. All warnings and



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advice should be given in conversation and followed up in writing, with a copy of the written advice retained in the firm's transaction file.

If buyer chooses to make an offer including an inspection contingency, notwithstanding the listing agent remarks, and listing broker fails to present the offer, buyer and/or buyer's broker should consider filing a DOL complaint against the listing broker and/or listing firm. The Agency Law is very clear. All written offers must be timely presented. Certainly, listing broker has no discretion to withhold presentation of an offer because the offer includes an inspection contingency.

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