Are RPI (Realty Publications, Inc.) forms legal to use professionally?

Yes! All 400 RPI (Realty Publications, Inc.) forms are 100% legal for use in California. (RPI forms were previously branded as first tuesday forms.)

Many brokers erroneously believe they need to use forms published by their trade union. However, the California Department of Real Estate (DRE) clearly states that agents, to fulfill their fiduciary duty to the sellers they represent, must present all offers received regardless of the form on which the offer is written. [See the DRE Fall 2013 Real Estate Bulletin]

It is a reportable offense to fail to submit all offers. Click here for the full digest of the DRE Fall 2013 Real Estate Bulletin.
Which government agency or trade union approves forms?

No one approves forms; not the State Bar, the DRE, or trade unions such as the California Association of Realtors (CAR).

Each publisher is responsible for its own forms. All published disclosure forms are either:

1) mandated for use by dictate of the state legislature or the DRE, such as the Agency Law Disclosure [See RPI Form 305], Condition of Property Disclosure – Transfer Disclosure Statement (TDS) [See RPI Form 304] and the Natural Hazard Disclosure Statement [See RPI Form 314]; or

2) generic forms, such as purchase agreements, net sheets, costs sheets, etc. Each form mandated for use by the state must have the same content – no matter who publishes it.

Is it true my broker has to use CAR forms?

No! A broker may use any form they choose. Other brokers, associations, and the MLS may not and do not require a broker to use a particular form.

If my broker says I must use the CAR/WIN form purchase agreement, how can I use RPI forms?

Use the CAR form required by your broker as they are your employer. Build the rest of your listing or acceptance package using RPI forms. They provide better protection for your fee.

Why are RPI forms generally shorter than their CAR form equivalent?

RPI forms are deliberately engineered simple. By eliminating the lengthy and obtuse language and publisher self-promotion which clutter other forms, RPI forms are concise, complete and easily understood.

How are RPI forms distinguishably better than the forms offered by other publishers?

RPI forms are drafted to provide maximum loss reduction protection for brokers and their agents. As a matter of policy, our forms do not contain clauses which tend to increase the risk of litigation or generally work against the best long-term interests of the buyer, seller and broker.
Deliberately excluded provisions include:

- an attorney fee provision, which tends to promote litigation and inhibit resolution [See the July 2013 article, Brokerage Reminder: The risks created by an attorney fees provision];

- a time-essence clause, since future performance (closing) dates are, at best, estimates by the broker and their agents of the time needed to close and are too often improperly used by sellers in rising markets to cancel the transaction before the buyer or broker can reasonably comply with the terms of the contract [See the Time to perform Chapter 45 in Real Estate Practice]; and

- a liquidated damages provision, since they create wrongful expectations of windfall profits for sellers and are nearly always forfeitures and unenforceable [See the Liquidated damages provisions Chapter 49 in Real Estate Practice]; and

- an arbitration provision, since arbitration decisions are final and unappealable, without any judicial oversight to assure the arbitrator’s award will be fair or correct. [See the June 2015 article, The problem with the arbitration provision]

RPI forms include a mandatory mediation provision to mitigate the risk of a long and costly legal battle. Mediation of any dispute needs to be undertaken as a precursor to filing an action, be it arbitration or litigation, to bring about a mutually agreeable solution. Mediation is a quick process and is the most cost effective method of dispute resolution. [See the August 2008 article, Mediation: best, faster dispute resolution]

Mediation works and is good public policy: the LA Superior court system reports that 63% of cases ordered into mediation are resolved. Nationwide, the mediation success rate ranges from around 60% to 90% and upwards. [See the Final Report of Colorado Governor’s Task Force on Civil Justice Reform, Exhibit 7]

Head out of the clouds, feet on the ground

CAR/WINforms are stored remotely on the cloud, requiring you to save documents remotely. To engage with your files, you need to log in online and pay the hefty annual dues to maintain your access. If their online servers go down or you stop paying your dues, you are left empty handed, without access to forms.

Just as there’s a superior alternative when it comes to form content, you don’t have to subscribe to the cloud method of document storage. The greatest way to mitigate the risk of outages is to have a local copy of the forms you use perpetually available to you.

With RPI forms, you have access of all forms online from our website and are encouraged to save all of them directly to your hard drive. Your locally saved forms are fully functional, enabling you to digitally fill, email, print and save them.

You do not need to log in and verify your credentials prior to using an individual form saved to your hard drive. They are your forms and you are able to save them wherever you like, save as many copies as you like – and retrieve them on your terms. Flexibility, not rigidity. [See the August 2013 article, Crash-proof connectivity with RPI forms]

What does the DRE have to say?

The seller’s agent has a duty to present every offer to purchase they receive to their seller, regardless of content or presentation.

RPI frequently receives questions on this matter. In response to numerous reader queries, we reached out to the DRE for clarification. In the Fall 2013 Real Estate Bulletin, DRE recapitulated these obligations by giving the failure-to-present issue top billing. Click here for the full digest of the Bulletin, Complaints prompt DRE to stress: present every offer.
Complaints prompt DRE to stress: present every offer

The California Department of Real Estate (DRE) reports a surge in complaints from buyers suspicious their offers were not submitted to the seller for consideration. A recent DRE publication highlights in great detail a licensee’s duty to promptly submit all offers to their principal. Period.

For more information on what to do if you suspect your buyer’s offers are not being presented to a seller, see the March 2014 article, Present every offer and avoid DRE scrutiny.

Omission becomes deceit

Consider a seller who lists their property for sale with a broker. The seller’s broker and their agent are employed to locate a qualified buyer who will make the most attractive offer for the seller to consider.

While marketing the property, the seller’s agent receives an offer to purchase the property from a buyer at a price substantially lower than the listing price sought by the seller.

Shortly after receiving the first offer, the seller’s agent receives another offer to purchase the property. This second offer is for a price greater than the listed price. The seller’s agent has previously dealt with this second buyer and believes the buyer is less financially qualified than the buyer who submitted the first offer. The agent, sensing the second buyer will have difficulty securing purchase-assist financing called for as a contingency in the purchase offer, doesn’t submit the second offer to the seller.

Despite the inadequate price, the seller believes the first offer is the only available option and accepts this offer by entering into the purchase agreement. The seller closes escrow on the first offer.

Later, the seller discovers the existence of the second offer and its superior terms. The seller seeks to recoup their money losses from the broker in court for the difference between the amount received and the amount of the second offer.

The seller’s agent claims they did not believe the second offer was credible and discarded it in service to the seller, who had already received a bona fide offer to purchase.

Is the seller’s agent liable for the seller’s losses?
Yes! The seller’s agent breached their fiduciary duty to care for and protect the seller’s best interests.

Regardless of the seller’s agent’s intentions, their failure to present the second offer to the seller is tantamount to an outright denial the offer ever existed. This raises the seller’s agent’s actions to the level of deceit by omission.

Not only did the seller’s agent breach the fiduciary duty owed their seller, they also acted fraudulently. The agent’s fraudulent behavior entitles the seller to collect their losses from the agent, as well as punitive damages. Further, the seller’s agent is subject to disciplinary action from the California Department of Real Estate (DRE), including suspension or revocation of their license.

[Simone v. McKee (1956) 142 CA2d 307]

Repeating the refrain: an offer is an offer

This is well-trod ground. We’ve restated again and again the seller’s agent has a duty to present every offer to purchase they receive to their seller, regardless of content or presentation, forever and always, amen. It’s the law. [California Civil Code §2709]

We frequently receives questions on this matter. Usually the inquiry is presented in conjunction with the myth that California Association of Realtor (CAR)-produced forms are “required” by DRE, errors & omissions (E&O) insurance carriers or other parties.

In response to numerous reader queries, we reached out to the DRE for clarification on this highly visible issue. In the very next issue of the Real Estate Bulletin, DRE recapitulated these obligations by giving the failure-to-present issue top billing in the Fall 2013 issue. The lengthy and, at times, sternly-worded article notes a recent surge in complaints from buyers suspicious their offers were not submitted to the seller. The agency takes this premise as an opportunity to wag the proverbial finger.

DRE’s article reveals most failure-to-present complaints come from buyers submitting full- or over-asking price cash offers, which the buyer thinks are too good for any rational seller to ignore.

This makes sense, given that crazed cash-flush speculators were afoot throughout 2013. They jostled to outbid one another and accumulate a vast inventory of property, destined for release back into the resale market (speculator shadow inventory, if you will).

It also usefully illustrates the asymmetry of knowledge between speculators and end user buyers. With a better understanding of the law and transaction process than ordinary homebuyers, savvy speculators thus know how to spot red flags—like an absent response to a seemingly lucrative offer.

The end user homebuyer — without the guidance of their agent in navigating the transaction process — is not so fortunate, which explains DRE’s focus on cash buyers.

Rationalizing the breach of duty

Although a seller’s agent’s failure to present may go unnoticed and thus unreported by an unskilled end user buyer, that doesn’t mean it happens less frequently.

Numerous (improper) reasons exist to explain a seller’s agent failure to transmit an offer to their seller. None of these excuses make the conduct appropriate. The Bulletin article suggests brokers “cherry pick” offers which yield the highest commission, which is a serious misdeed of placing the agent’s interests ahead of the client’s.

Other reasons for this bad seller’s agent behavior include:
• pre-screening offers and submitting only those the agent believes the seller is most likely to accept (in essence, making unauthorized decisions on the client’s behalf);
• dismissal without presentation of offers submitted on an unfamiliar form (a conflict of interest arising from a broker’s bias toward or against a publisher);
• discarding an offer based on a belief the offer isn’t likely to gain a short sale lender’s approval; or
• rejection of offers presented on non-trade union forms in the mistaken belief their E&O insurance policy will not cover claims arising from a dispute.

How standard is “standard”?

This last rationale stems from a persistent, widespread misunderstanding of how E&O insurance works. E&O insurance protects licensees from the full cost of defending against a negligence claim made by a client or others with the payment of premiums. Providers manage the risk involved in this type of coverage by, among other things, encouraging the use of “industry standard” agreement and disclosure forms.
Many brokers, and thus their agents, misunderstand what is truly meant by the expression “industry standard.” Standard simply means a document created with boilerplate provisions conforming to local, state and federal laws and regulations, and general brokerage practice.

What E&O providers seek to avoid with standard forms is the use of homebrewed forms created independently by the broker. “Standard” means using published forms which conform to law. Standard does not mean only those forms published by trade unions such as CAR. [See the March 2014 article, Brokerage reminder: E&O insurance and the preferred forms standard]

Duty to present

What experienced flippers understand and most homebuyers do not: the agency relationship and a licensee’s fiduciary duty mandate the disclosure of any fact which potentially affects their principal’s interests in a transaction, known as a material fact.

An offer to purchase is material to the seller’s decision-making process regardless of its content or form of presentation – oral included. It’s a critical factor in the seller’s evaluation of the desirability of their property and negotiation in its price and terms of sale. [CC §2279(a)]

Failure to present an offer denies the seller the opportunity to weigh all offers their agent receives and to better understand buyer demand. Failure to present any offer, oral or written in any form, is essentially an affirmative representation to the seller the offer does not exist. [Miller & Starr §3:27]

It’s possible to look at this duty as not just a benefit to the seller, but to the buyer as well. Effectively, it means a buyer has an implicit right to have their offer at the very least looked at by a seller when a broker is involved in the transaction. Otherwise, how can the seller consider it?

Presenting all offers further serves a critical public purpose: enhanced perception of fairness and transparency in the real estate marketplace, fortified by the conduct of the agent – the Gatekeeper to real estate ownership for both the buyer and the seller.

No duty to respond

It is important to remember that neither the seller nor their agent has any legal duty to respond to an offer. Failure to respond to an offer does not necessarily mean that offer was not presented. And if a seller instructs their agent (preferably evidenced in writing) not to present offers which fail to meet agreed-upon criteria, the seller’s agent is excused from handing those offers over. [Stevens v. Hutton (1945) 71 CA2d 676; CC §2079]

The Bulletin article suggests a considerable portion of failure-to-present complaints stem from the initial misconception that a response of some kind is required. It’s not hard to imagine that DRE initiates a number of investigations on this matter only to discover a breach of the seller’s agent’s duties did not occur.

A possible reason for that is DRE’s investigative protocol. If a complaint is filed and an investigation begun, the burden of proof of presentation falls on the seller’s agent. The investigators require the seller’s agent produce documentary evidence they fulfilled their fiduciary duty and presented every offer received to their seller.

That’s why the seller’s agent is best served leaving a paper trail — that signed rejection of an offer in the space provided on purchase agreement forms, whether or not returned to the buyer making the offer. Although not legally required, we encourage a seller’s agent’s use of a formal rejection or written acknowledgement of unsuitable offers. [See RPI Form 150 and 184]

Are you concerned a seller’s agent is not presenting your buyer’s offers to the seller? You have options. [See the March 2014 article, Present every offer and avoid DRE scrutiny]