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Buyers may need to include a lawyer-review contingency

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(This is the 32nd in a series of articles about issues that sellers and buyers face when negotiating a purchase-offer contract.)

Buying property used to involve a buyer, a seller and a couple of pieces of paper. In the country, purchases were worked out orally and then the seller and the buyer went to a lawyer and asked him (there weren't any "hers" back then; well, there were plenty of hers, but they weren't lawyers) to "do us up a paper."

My wife -- who is a certifiable her and a dirt lawyer to boot -- still, occasionally, gets asked to do up papers, for which she was once paid in homemade horseradish and day-old Krispy Kremes. Those days are fading. I encourage her to work for cash.

The simplest property transaction now involves much paperwork to comply with local, state and federal regulations. Buyers need to understand these matters. Mortgage documents, which buyers rarely see prior to closing, are usually long, impenetrable and one-sided; their boilerplate is rarely subject to negotiation between borrower and lender. The purchase offer is typically a pre-printed form supplied to a buyer by either an agent representing the seller or the FSBO seller. I've seen FSBOs hand "contracts" to buyers that the seller himself had drafted. The seller and his agent may delete, amend or add language to the standard contract before handing it to the buyer.

I encourage buyers to become familiar with all of the documents involved in a purchase before submitting an offer to anyone for anything. These include the documents arising from regulations, financing, deed, title search/certificate, title insurance, survey, inspections and so on. Becoming familiar with these complicated documents should involve going through them with an experienced real-estate lawyer.

One type of "paper" -- the buyer's contract offer -- can be made subject to a contingency that allows the buyer's lawyer to approve it before it binds the buyer. In addition to protecting a buyer against adverse language, a lawyer's review can guard a buyer against making an offer that a seller's agent unduly shapes.

The job and responsibility of the seller's agent is to work to get the best deal for his client—the seller. Buyers have complained about (and sued) real-estate agents, because they believed they sustained harm from a lack of clarity and/or understanding of agency obligations in the buy-sell process. The buyers said they were not informed or did not understand that the agent working with them represented the seller, and, for that reason, one or more terms were included in the contract offer that worked against the buyer's best interests.

A just-released, free publication from the American Homeowners Foundation, Home Buyers' Guide to Real Estate Representation, explains agency from a buyer's perspective. (! HYPERLINK "<http://www.americanhomeowners.org/>")

¶ www.americanhomeowners.org¹ ; !! HYPERLINK
"mailto:AHF@AmericanHomeowners.org" ¶ AHF@AmericanHomeowners.org¹ .)
Possible confusion over buyer's agency, dual agency, exclusive buyer's agency and seller's agency is one reason why more buyers are using a lawyer-review contingency in their proposals.

Earlier columns have discussed the need for a buyer to understand the boilerplate in the pre-printed offer form, which turns into a binding contract between buyer and seller, upon the last required signature.

But sometimes a buyer has to move quickly and for whatever reason doesn't have the opportunity to read through the standard contract with his local lawyer's help before having to sign an offer.

In those circumstances, a buyer can add a contingency that reads something like one of these two options:

1. This offer is contingent on the review, possible modification and approval of this offer by the buyer's attorney to take place within 7 business days of its submission to the seller.
2. This offer is contingent on its review and approval by the buyer's attorney to take place within 7 business days of the last required signature being affixed to this proposed contract.

The first option allows a lawyer's review and alteration prior to submitting a final version to the seller. This is, in my opinion, a more straight-forward approach for a buyer to take, because it involves his lawyer as part of the offer-drafting process.

The second option allows a buyer to void an accepted offer if his lawyer objects to some provision (or, to be honest about it, if the buyer gets cold feet). Negotiation can take place to try to resolve the objections before the deal dies. But I think a seller would be miffed at a buyer taking a second bite out of his apple this far along in the process. If a buyer uses the second option, he should take care to explain his intentions and concerns to the seller just in case his lawyer finds a deal-killing problem.

Contingencies can be used either in good faith or as tactics to recast an offer's terms once the seller is invested in a deal. A lawyer-review contingency can function in both ways, but it ought to be limited to protecting a buyer's interests rather than advancing them at the last minute.