

**THE REAL PROPERTY SECTION  
SAN FRANCISCO COUNTY BAR ASSOCIATION**

**Presents**

**REAL ESTATE  
STANDARD OF CARE**

**Speakers**

**J. Timothy Nardell**

**Scott Kilpatrick**

**Moderator**

**Sean E. Ponist**

**September 21, 2022**

## PRESENTER BIOGRAPHIES

### SEAN E. PONIST

Sean Ponist is the founder of the Ponist Law Group, a firm specializing in real estate, construction defect and business litigation. Prior to founding his own firm, Sean was a prosecutor with the Marin County District Attorney's Office and in-house counsel for Marcus & Millichap Real Estate Investment Brokerage Company. He has successfully tried over 35 cases to verdict.

For the past 12 years, Sean has been recognized as a Super Lawyer, a distinction bestowed on less than 5% of attorneys, and has also been recognized as being one of the Best of the Bar by the San Diego Business Journal. Additionally, Sean is a fellow of the Litigation Counsel of America, a trial lawyer honorary society whose membership is limited to less than one-half of 1% of North American lawyers, judges and scholars.

Sean has also published numerous articles on real estate topics, including recent articles in The Daily Journal ("Recovering Lost Profits in Real Estate Transactions" and "Should Equitable Indemnity Apply Against Negligent Misrepresentation Claims?"), California Lawyer magazine ("The Nonrefundable Deposit – Not!") and Commercial Investment Real Estate ("Going to the Source: Minimize your liability by providing attributions").

He has further lectured on legal topics for various bar associations and other legal education providers, including "Deconstructing Commercial Leases," "Commercial Real Estate Brokerage Standard of Care," "Bringing Down the House: Assessing Damages in Real Estate Cases," "Best Use of Experts in Real Estate Cases," "The Rogue Agent: Agency Issues In Real Estate," "When Real Estate Deals Go Bad," "Agent-Principal Relationship," and "Direct and Cross-Examination for Civil Litigators."

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### J. TIMOTHY NARDELL

Mr. Nardell is a litigator with experience in cases involving real estate, business torts, breaches of contract, partnership and corporate disputes, intellectual property rights, unfair competition, and personal injury cases. Mr. Nardell represents clients in a variety of real estate matters, including construction defect, disclosure, partition, quiet title, lease disputes, easements, land use matters, and boundary disputes. His experience encompasses all stages of the litigation process, trial, and appeal, in both state and federal courts.

Mr. Nardell is a founding partner with the law firm of Nardell Chitsaz & Associates LLP. From 1998 to 2001, Mr. Nardell was a litigator for Cooley Godward LLP in San Francisco. In 2002, Mr. Nardell

worked in the Consumer and Environmental Protection Unit of the Marin County District Attorney's office, where he investigated and prosecuted civil law enforcement actions, involving claims of unfair and unlawful business practices, and criminal jury trials. From 2003 to 2006 Mr. Nardell was a litigator for Coblenz, Patch, Duffy & Bass LLP in San Francisco.

Mr. Nardell served as the President of the Marin County Bar Association in 2021 and has been a member of Board of Directors of the Marin County Bar Association since 2016. He is a current Board member and was the Board President of the Marin Childcare Council from 2011 to 2017. He previously served as volunteer legal counsel for the Marin Conservation League and has taught as an Adjunct Law Professor at Golden Gate University. Mr. Nardell has received numerous awards for his public service and pro bono legal work.

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### **SCOTT A. KILPATRICK**

Scott A. Kilpatrick is a Managing Director at Newmark based out of their Silicon Valley office. Mr. Kilpatrick specializes in the sales of apartment properties, raw and entitled land, mobile home parks in Santa Clara and San Mateo counties, 1031 exchanges, and NNN acquisitions across the country. Motivated and competitive Mr. Kilpatrick has closed sales in excess of \$800 million completing over 400 transactions over the last (22) years.

Prior to joining Newmark Mr. Kilpatrick was a Senior Vice President, and Director of the National Multi Housing Group with Cushman & Wakefield, while at Cushman & Wakefield Mr. Kilpatrick was ranked on several occasions among the highest producers amongst agents nationwide, and was honored with several National Sales Achievement awards during his tenure. His profound knowledge of the marketplace, his attention to detail and his well known negotiation skills have provided great benefits to his clients that have resulted in mutually beneficial long-term relationships. These outstanding characteristics make Mr. Kilpatrick a market leader in the commercial real estate industry. Mr. Kilpatrick joined Newmark in 2016 as a Managing Director.

Prior to joining Newmark Mr. Kilpatrick spent 8 years with Cushman & Wakefield, 8 years with Marcus & Millichap and 4 years working in property management with The Grupe Company managing over 3,000 apartment units in the San Joaquin Valley. He's also done entitlement and development of real estate throughout the state of Oregon. He personally owns and manages several mobile home parks in Oregon as well as apartments in Santa Clara.

Mr. Kilpatrick graduated with a B.S. in Business Administration with an emphasis in Real Estate Finance and a minor in Economics from the University of the Pacific. His hobbies include golf, traveling and scuba diving. Mr. Kilpatrick, a San Carlos Resident, is married and has three children.

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## REAL ESTATE STANDARD OF CARE

### I. DUTIES OF AGENTS AND BROKERS IN REAL ESTATE TRANSACTIONS

#### A. Duties to Client

##### 1. CACI 4107

“As a fiduciary, a real estate broker must disclose to his or her client all material information that the broker knows or could reasonably obtain regarding the property or relating to the transaction.

“The facts that a broker must learn, and the advice and counsel required of the broker, depend on the facts of the transaction, the knowledge and experience of the client, the questions asked by the client, the nature of the property, and the terms of sale. The broker must place himself or herself in the position of the client and consider the type of information required for the client to make a well-informed decision.

“[A real estate broker cannot accept information received from another person, such as the seller, as being true, and transmit it to his or her client without either verifying the information or disclosing to the client that the information has not been verified.]”

##### 2. Specific Common Law Duties

- Duty of loyalty and good faith (*Burch v. Argus Properties, Inc.* (1979) 92 Cal.App.3d 128, 131).
- Duty to be honest and truthful (*Ward v. Taggart* (1959) 51 Cal.2d 736, 741).
- Duty to disclose all material facts that might affect the principal’s decision (*Roberts v. Lomanto* (2003) 112 Cal.App.4th 1553, 1567).
- Duty to disclose relationship with other party (*Smith v. Zak* (1971) 20 CA3d 785, 794–795).
- Duty to disclose intent to purchase (*Batson v. Strehlow* (1968) 68 C2d 662, 675–676).
- Duty to disclose all offers (*Nguyen v. Scott* (1988) 206 Cal.App.3d 725, 736).
- Duty of care and diligence (*Wilson v. Hisey* (1957) 147 Cal.App.2d 433, 438).
- Duty to disclose profits (*Roberts v. Lomanto* (2003) 112 Cal.App.4th 1553, 1569–1570).
- Duty to account for monies (Bus. & Prof. Code § 10145; see also, 10 Cal.C.Reg. §§ 2830–2832, 2835).
- Duty not to discriminate (10 Cal.C.Reg. § 2780; see also 10 Cal.C.Reg. § 2725).
- Duty to investigate (*Field v. Century 21 Klowden–Forness Realty* (1998) 63 CA4th 18, 24)?
- Duty to review documents (10 Cal.C.Reg. § 2725(a))?

#### B. Duties to Others

Duty of honesty and fair dealing – Though not in an agency relationship with third parties, brokers/salespersons owe a broad obligation to act honestly and fairly in dealings with all parties to the transaction (e.g., no misrepresentations or false promises to influence, persuade or induce

third party conduct; see generally, Bus. & Prof. Code §§ 10176(a),(b),(i), 10177(j), ¶ 2:114–115). (*Ward v. Taggart* (1959) 51 Cal.2d 736, 741–742; *Nguyen v. Scott* (1988) 206 Cal.App.3d 725, 735–736.)

*Greif v. Sanin*, 74 Cal.App.5th 412 (2022) [new case]. Court finds that the buyer’s agent had no common law duty to inform an unrepresented seller that a proposed purchase price was lower than the fair market value of the property.

### C. *Easton v. Strassburger*

#### 1. *Easton*

Brokers have an affirmative obligation to conduct a “reasonably competent and diligent inspection” of residential property listed for sale and to “disclose to prospective purchasers all facts materially affecting the value or desirability of the property that such an investigation would reveal.” (*Easton v. Strassburger* (1984) 152 Cal.App.3d 90, 102.)

#### 2. No Extension of *Easton* to Commercial Property

*Easton* limited its holding to residential property, expressing “no opinion” whether a broker's obligation to conduct an inspection for defects for the buyer's benefit applies to the sale of commercial real estate. (*Easton*, 152 Cal.App.3d at 102 n. 8.)

- Nonetheless, in dictum, *Easton* suggests a comparable duty of inspection and disclosure does not extend to commercial property and that any common law negligence or fraud liability will be limited to the failure to disclose defects of which the broker had actual knowledge: “Unlike the residential home buyer who is often unrepresented by a broker, or is effectively unrepresented because of the problems of dual agency ... , a purchaser of commercial real estate is likely to be more experienced and sophisticated in his dealings in real estate and is usually represented by an agent who represents only the buyer's interests ... ” (*Ibid.*)
- Further, cases postdating *Easton*, construing the now-statutory duty of inspection and disclosure, have generally declined to extend the *Easton* obligation to the sale of commercial properties. (See e.g., *Smith v. Rickard* (1988) 205 Cal.App.3d 1354, 1360.)

### D. **Statutory Duties**

#### 1. Civil Code sections 1102 and 2079 (1-4 units only)

The common law duty of inspection and disclosure under *Easton* has been codified in Civil Code section 2079 et seq., again, apply to residential properties only (i.e., 1-4 units). (*William L. Lyon & Assocs., Inc. v. Henley* (2012) 204 Cal.App.4th 1294, 1304.)

The inspection disclosures required by Civil Code section 2079 are required to be made on the agent's portion of the Civil Code section 1102.6 real estate transfer disclosure statement.

Scope of duty – only a visual inspection is required. (CC § 2079(a); *Wilson v. Century 21 Great Western Realty* (1993) 15 Cal.App.4th 298, 308 (absence of steel reinforcement and “J” bolts in foundation not discernible by visual inspection and thus outside scope of § 2079 inspection duty); *Salahutdin v. Valley of Calif., Inc.* (1994) 24 Cal.App.4th 555, 562 n. 3 (absent “red flags” visible from reasonably diligent visual inspection indicating property was not the size represented, § 2079 would not encompass duty to survey property or make sure it was the size represented). Thus, the following is outside the scope of inspection:

- Inaccessible areas (Civ. Code § 2079.3; *Assilzadeh v. California Fed'l Bank, FSB* (2000) 82 Cal.App.4th 399, 413);
- Offsite areas and public records (*Ibid.*);
- More than the unit offered for sale in a planned development (*Ibid.*; see also, *Padgett v. Phariss* (1997) 54 Cal.App.4th 1270, 1282).

Residential disclosures required in “mixed use” properties (*Richman v. Hartley* (2014) 224 Cal.App.4th 1182).

## 2. Further Statutory Duties re Disclosure Concerning Condition of Property

- Structural Pest Control Report (Civ. Code § 1099);
- Hazardous Substance Notice (Health & Saf. Code § 25359.7(a));
- Asbestos Notice (Health & Saf. Code § 25915 et seq.);
- Hazardous Waste Property Designation (Health & Saf.C. § 25220 et seq.);
- Lead Based Paint in Residential Structures (42 USC §§ 3545, 4852d(b));
- Toxic Mold Disclosure (Health & Saf.C. § 26140(a));
- “Commercial Property Owner's Guide to Earthquake Safety” (Bus. & Prof. Code § 10147; Gov. Code § 8893.2).
  
- A new Restrictive Covenant Disclosure Law went into effect, as of July 2022, that requires real estate brokers or agents, who have actual knowledge of possible unlawfully restrictive covenants in a declaration, governing document or deed that is being directly delivered must notify the owner or buyer of such and the ability of the owner or buyer to have it removed through a Restrictive Covenant Modification process. (Govt. Code §§ 12956.1-.3, 27282, 27388.1 -.2.)

## 3. Statutory Duty to Ensure Accuracy of Listing in Multiple Listing Service

Statutory Duty – An agent who places a listing or other information in a multiple listing service “shall be responsible for the truth of all representations and statements” made by the agent of which the agent “had knowledge or reasonably should have had knowledge to anyone injured by their falseness or inaccuracy.” (Civ. Code § 1088.)

*Saffie v. Schmeling* (2014) 224 Cal.App.4th 563 – Statement by listing agent in MLS indicating, “This parcel is in an earthquake study zone but has had a Fault Hazard Investigation completed and has been declared buildable by the investigating licensed geologist. Report available for serious buyers,” not actionable, even though parcel not buildable.

## **E. Contractual Duties**

### **1. Duties May be Defined by Contract**

"Real estate brokers are subject to two sets of duties: those imposed by regulatory statutes, and those arising from the general law of agency." Where the plaintiff does not contend that a defendant failed to fulfill a duty imposed by law, the extent of the duties, if any, "are determined by the terms of the agreement between the parties." (*Carleton v. Tortosa* (1993) 14 Cal.App.4th 745, 755.)

**2. Limitations of duties and exculpatory provisions not dispositive**  
(*Manderville v. PCG&S Group, Inc.* (2007) 146 Cal.App.4th 1486).

### **3. Examples of Language in Commercial Contracts Limiting Duties and Protecting Agent/Broker**

**LIMITATION OF LIABILITY:** Except for Agent's gross negligence or willful misconduct, Agent's liability for any breach or negligence in its performance of this Agreement shall be limited to the greater of \$50,000 or the amount of compensation actually received by Agent in any transaction hereunder.

**SCOPE OF AGENT'S AUTHORITY AND RESPONSIBILITY:** Agent shall have no authority to bind either Buyer or Seller to any modification or amendment of this Agreement. Agent shall not be responsible for performing any due diligence or other investigation of the Property on behalf of either Buyer or Seller, or for providing either party with professional advice with respect to any legal, tax, engineering, construction or hazardous materials issues. Except for maintaining the confidentiality of any information regarding Buyer or Seller's financial condition and any future negotiations regarding the terms of this Purchase Agreement or as otherwise required by law, Buyer and Seller agree that their relationship with Agent is at arm's length and is neither confidential nor fiduciary in nature.

**BROKER DISCLAIMER:** Buyer and Seller acknowledge that, except as otherwise expressly stated herein, Agent has not made any investigation, determination, warranty or representation with respect to any of the following: (a) the financial condition or business prospects of any tenant, or such tenant's intent to continue or renew its tenancy in the Property; (b) the legality of the present or any possible future use of the Property under any federal, state or local law; (c) pending or possible future action by any governmental entity or agency which may affect the Property; (d) the physical condition of the Property, including but not limited to, soil conditions, the structural integrity of the improvements, and the presence or absence of fungi, mold or wood-destroying organisms; (e) the accuracy or completeness of income and expense information and projections, of square footage figures, and of the texts of leases, options, and other agreements affecting the Property; (f) the possibility that lease, options or other documents exist which affect or encumber the Property and which have not been provided or disclosed by Seller; or (g) the presence or location of any hazardous materials on or about the Property, including, but not limited to, asbestos, PCB's, or toxic, hazardous or contaminated substances, lead-based paint and underground storage tanks.

Buyer agrees that investigation and analysis of the foregoing matters is Buyer's sole responsibility and that Buyer shall not hold Agent responsible therefore. Buyer further agrees to reaffirm its acknowledgment of this disclaimer at close of escrow and to confirm that it has relied upon no representations of Agent in connection with its acquisition of the Property.

**NON-CONFIDENTIALITY OF OFFERS:** As a Buyer of real property, you are advised of the possibility that sellers or sellers' representatives may not treat the existence, terms or conditions of offers as confidential unless confidentiality is required by law, regulation, or a confidentiality agreement between the parties. In consultation with a real estate attorney, Buyer should carefully consider the relative need, value, advantage and disadvantage of requiring the execution of a confidentiality agreement as a precondition to submittal of Buyer's offer. Such consultation should take place early enough in time for Buyer's attorney to prepare a satisfactory confidentiality agreement (if any) and for it to be delivered to Agent prior to presentation of Buyer's offer.

**NO REPRESENTATION IS MADE BY AGENT AS TO THE LEGAL OR TAX EFFECT OR VALIDITY OF ANY PROVISION OF THIS PURCHASE AGREEMENT. A REAL ESTATE BROKER IS QUALIFIED TO GIVE ADVICE ON REAL ESTATE MATTERS. IF YOU DESIRE LEGAL, FINANCIAL OR TAX ADVICE, CONSULT YOUR ATTORNEY, ACCOUNTANT OR TAX ADVISOR.**

**F. Conduct**

1. Promotional Promises
2. Voluntarily Assumed Duties

**G. Misrepresentations: Statements of Financial Condition**

1. Typical items of financial condition include estoppel certificates, tax returns, profit and loss statements, balance statements.
2. Effect of Delivery of Financial Documents
3. Correcting Prior Statements
4. Confidential Financial Information (*Blickman Turkus v. MF Downtown Sunnyvale* (2008) 162 Cal.App.4th 858.)

**H. Common Pitfalls**

1. Purchaser Biographies/Statements

## NAR Code of Ethics

“REALTORS® having direct personal knowledge of conduct that may violate the Code of Ethics involving misappropriation of client or customer funds or property, willful discrimination, or fraud resulting in substantial economic harm, bring such matters to the attention of the appropriate Board or Association of REALTORS®.” (Preamble.)

“REALTORS® shall not deny equal professional services to any person for reasons of race, color, religion, sex, handicap, familial status, national origin, sexual orientation, or gender identity. REALTORS® shall not be parties to any plan or agreement to discriminate against a person or persons on the basis of race, color, religion, sex, handicap, familial status, national origin, sexual orientation, or gender identity.” (Article 10.)

“REALTORS®, in their real estate employment practices, shall not discriminate against any person or persons on the basis of race, color, religion, sex, handicap, familial status, national origin, sexual orientation, or gender identity.” (Article 10.)

“REALTORS® shall not print, display or circulate any statement or advertisement with respect to selling or renting of a property that indicates any preference, limitations or discrimination based on race, color, religion, sex, handicap, familial status, national origin, sexual orientation, or gender identity.” (Standard of Practice 10-3.)

### 2. Federal Fair Housing Act, Title VIII

Title VIII of the Civil Rights Act of 1968 (Fair Housing Act) prohibits discrimination in the sale, rental and financing of dwellings based on race, color, religion, sex or national origin. Additionally, per a 1988 amendment, it also prohibits discrimination based on disability or on familial status (children, pregnant women, etc.).

### 3. California Fair Employment and Housing Act, Gov’t Code § 12900 et seq.

Under § 12955 thereof, it is unlawful for an owner, lender, or other real estate professional to discriminate against any person because of or to inquire regarding the race, color, religion, sex, gender, gender identity, gender expression, sexual orientation, marital status, national origin, ancestry, familial status, source of income, disability, or genetic information of that person.

It is also unlawful for any person to make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental that indicates any preference, limitation, or discrimination based on race, color, religion, sex, gender, gender identity, gender expression, sexual orientation, marital status, national origin, ancestry, familial status, source of income, disability, or genetic information or an intention to make that preference, limitation, or discrimination.

4. Unruh Civil Rights Act, Civ. Code § 51 et seq.

“All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.” (Civ. Code § 51(b).)

5. Pocket Listings and Off-Market Sales

“Pocket Listings,” a ‘listing’ which the agent shares only within his or her office.

“Off-Market Sales,” any ‘listing’ in which the agent does not list on a multiple listing service, but rather shares only with limited agents / brokers, whether in or outside of his or her office.

NAR Standard of Practice 1-7: “When acting as listing brokers, REALTORS® shall continue to submit to the seller/landlord all offers and counter-offers until closing or execution of a lease unless the seller/landlord has waived this obligation in writing. REALTORS® shall not be obligated to continue to market the property after an offer has been accepted by the seller/landlord. REALTORS® shall recommend that sellers/landlords obtain the advice of legal counsel prior to acceptance of a subsequent offer except where the acceptance is contingent on the termination of the pre-existing purchase contract or lease.”

Article 3: “REALTORS® shall cooperate with other brokers except when cooperation is not in the client’s best interest. The obligation to cooperate does not include the obligation to share commissions, fees, or to otherwise compensate another broker.”

Standard of Practice 3-10: “The duty to cooperate established in Article 3 relates to the obligation to share information on listed property, and to make property available to other brokers for showing to prospective purchasers/tenants when it is in the best interests of sellers/landlords.”

*Marin County Board v. Palsson*: “When listings are restricted to only certain members of the community, the practice may constitute a group boycott and have serious anti-competitive effects without corresponding justifications.” (*Marin County Bd. of Realtors, Inc. v. Palsson* (1976) 16 Cal.3d 920.)

Fiduciary Considerations: Potential blowback of not exposing property to market as traditionally done.

**I. Questionable Conduct**

1. Gaming the transaction by using contingencies
2. Dragging out the transaction

3. Confidentiality agreements

4. Impact of principle of imputed knowledge, i.e., where the knowledge of an agent on transaction is imputed to the brokerage and, hence, each of the brokerage's agents in subsequent transactions.

## II. AGENCY LAW AND DUAL AGENCY PROBLEMS IN REAL ESTATE TRANSACTIONS

### A. Agency Law

#### 1. Agency Defined

An “agent” is “one who represents another” (the “principal”) in dealings with third persons. Representation by an agent on behalf of a principal is called an “agency.” (Civ. Code § 2295; *Lombardo v. Santa Monica Young Men's Christian Ass'n* (1985) 169 Cal.App.3d 529, 541; *Horiike v. Coldwell Banker Residential Brokerage Co.* (2014) 225 Cal.App.4<sup>th</sup> 427.)

#### 2. Fiduciary Relationship

Agents stand in a fiduciary relationship with their principals. Thus, real estate agents owe their principals the “same obligation of undivided service and loyalty” owed by trustees to their beneficiaries. (*Wyatt v. Union Mortgage Co.* (1979) 24 Cal.3d 773, 782; *Warren v. Merrill* (2006) 143 Cal.App.4<sup>th</sup> 96, 109–111.)

#### 3. Breach of Fiduciary Duty Impact on right to compensation

Under agency law, a real estate agent's breach of fiduciary duty may forfeit the right to a commission for even properly performed services—at least where the breach involves intentional disloyalty, bad faith or fraud. (*Ziswasser v. Cole & Cowan, Inc.* (1985) 164 Cal.App.3d 417, 424–425.)

#### 4. “Special agency”

Real estate brokers are “special agents” because they are authorized to represent the principal only in a particular transaction. (Civ. Code § 2297.)

### B. Dual Agency Problems

#### 1. Dual Agency Defined

A “dual agency” arises where the same agent or brokerage represents both buyer and seller. In such cases, the agent and/or broker is a fiduciary for both buyer and seller. (*Fragale v. Faulkner* (2003) 110 Cal.App.4<sup>th</sup> 229, 235.)

#### 2. Principals' Informed Consent Required

Written disclosure, signed by principals, on form set forth in Code of Civil Procedure § 2079.16 which includes a disclosure on dual agency.

A broker may properly act as “dual agent” for buyer and seller only with both parties' informed consent. (*McConnell v. Cowan* (1955) 44 Cal.2d 805, 809); *Brown v. FSR Brokerage, Inc.* (1998) 62 Cal.App.4th at 768–769.)

Timing—Disclosure should be made so that the principals have the optimum opportunity to make an informed decision whether to retain the broker as agent in the transaction before signing an agency agreement. (Civ. Code §2079.13(g); Civ. Code § 2079.14(d); *Huijers v. DeMarrais* (1992) 11 Cal.App.4th 676, 685.)

Refusal to sign disclosure—where principal refuses to sign, dual agent must execute a signed and dated written declaration of the facts of the refusal. (Civ. Code § 2079.15.)

Confirmation in sales contract—the agent’s relationship, dual or otherwise, must be confirmed in the purchase and sale agreement. (Civ. Code § 2079.17; see also, *Huijers v. DeMarrais* (1992) 11 Cal.App.4th 676, 685.)

### 3. Remedies for Nondisclosure of Dual Representation

Brokers violate the real estate licensing law, and risk discipline, damages liability and a loss of compensation, if they act for more than one party in a transaction without the knowledge and consent of all parties thereto.

- Failure to make the requisite dual agency disclosures violates the licensing law and the Real Estate Commissioner may suspend or revoke the agent's real estate license (Bus. & Prof. Code § 10176(d); see also Bus. & Prof. Code § 10176(a) & § 10177(o); *McConnell v. Cowan* (1955) 44 Cal.2d 805, 812–813.)
- Avoidance of the transaction. (*Huijers v. DeMarrais* (1992) 11 Cal.App.4th 676, 686, “The remedy for a real estate agent's breach of a duty to disclose a dual representation of both buyer and seller is that the principal is not liable to pay the agent's commission, and the principal may avoid the transaction ... It makes no difference that the principal was not in fact injured, or that the agent intended no wrong or that the other party acted in good faith ... ”)

### 4. *Horiike v. Coldwell Banker Residential Brokerage Co.*

All salespersons of a dual agent broker owe fiduciary duties to all principals represented in the dual agency. (*Horiike v. Coldwell Banker Residential Brokerage Company* (2014) 225 Cal.App.4th 427, rev. granted July 16, 2014.)

### III. LICENSING REQUIREMENTS – OUT-OF-STATE BROKERS AND OUT-OF-STATE PROPERTIES

#### A. Out-of-State Brokers and California Properties

1. An Out-of-State Broker Cannot Independently Conduct Business in California

A real estate broker licensed in another state must be licensed by the California Department of Real Estate in order to recover a commission in California in a transaction for which a license is required. (Bus & Prof. Code, §§ 10130, 10136.)

2. A California Broker Can Share Commissions with an Out-of-State Broker

By statute, a licensed California real estate broker lawfully may pay a commission to a broker of another state. (Bus & Prof. Code, § 10137.)

3. Location of Performance, Not Property, is determinative

Bus. & Prof. Code sections 10130 and 10136 only require a license for the recovery of compensation when a person acts as a real estate broker “within this state.”

- Thus, a California license is only required when licensed activities are performed within California.
- If the out-of-state broker does not perform any act that requires a California license, he or she may recover a commission for licensed services performed outside of California, provided that the broker has the appropriate license where the services were performed. (*Consul Ltd. v. Solide Enterprises, Inc.* (9th Cir. 1986) 802 F.2d 1143, 1149; *Hayter v. Fulmor* (1944) 66 Cal.App.2d 554, 558; *Silverberg v. Baum* (1928) 95 Cal.App. 535, 536.
- However, if an out-of-state broker performs acts in California that require a license, he or she cannot recover compensation whether or not the real property is located in California. (*Consul Ltd. v. Solide Enterprises, Inc.* (9th Cir. 1986) 802 F.2d 1143, 1149; *Hayter v. Fulmor* (1944) 66 Cal.App.2d 554, 558 (brokerage license statutes apply even if land situated outside California).

4. Finder's Fees and/or Referral Fees

California law does not require a license for a person to be compensated as a “finder,” “referrer” or “middleman.” Thus, an out-of-state broker may recover a finder's fee or other compensation where the person's activities do not require a license under California law. (*Tyrone v. Kelley* (1973) 9 Cal.3d 1, 8-9.)

## **B. California Broker and Out-of-State Properties**

Compensation for services performed outside of California may require a foreign license. Brokers licensed under California law run the risk of being denied compensation when they engage in transactions involving out-of-state land if the broker is not also licensed by the state where the property is located.

### **1. Recovery of Commission Where Services Performed in California**

If the forum state is California or it applies California law, and the action is for the recovery of compensation relating to brokerage services performed in California for the sale of land located outside of California, the broker may recover the compensation according to the brokerage agreement. However, if the brokerage services were performed outside of California, the broker who does not have a license in the state where the services were performed cannot recover compensation even if the contract was made, and the owner resides, in California. (*Consul Ltd. v. Solide Enterprises, Inc.* (9th Cir. 1986) 802 F.2d 1143, 1149-1151.)

### **2. The Law of the State Where the Contract was Made Applies**

A California broker who files suit in California for compensation arising out of the sale of foreign land will be entitled to recover a commission based primarily on the application of the conflict of laws theory of *lex loci contractus*, i.e., the law of the place of the making of the contract governs. California courts protect California licensees by applying California law and conclude that a broker licensed in California may recover compensation in a transaction involving out-of-state land. (*Cochran v. Ellsworth* (1954) 126 Cal.App.2d 429, 435-438 (California broker was allowed to recover a commission for the sale of Arizona land even though the broker was not licensed under Arizona law).)

## **IV. BUYER AND SELLER DUTIES**

### **A. Seller Duties**

A seller of single-family residential property has statutory disclosure obligations imposed under Civil Code section 1102 et seq. These include the Transfer Disclosure Statement in the form provided under Section 1102.6 and natural hazard disclosures under Section 1103.2.

Many of the statutory disclosure obligations are familiar to realtors and real estate attorneys, but the rules are continually being elaborated. Some new disclosure obligations to be aware of include the Home Hardening and Defensible Space Law. This law went into effect in January 2020, but regulations went in effect as of January 2021. The new disclosure rules are codified under Civil Code §§ 1102.6f and 1102.19. The new rules require delivery of a statutory disclosure regarding home hardening for homes in designated high fire areas built before 2010, and that seller list specified retrofits. They further require a seller of property located in designated high fire areas to provide a buyer with documentation stating that the property is in compliance with local laws pertaining to defensible spaces or local vegetation management laws.

A seller further has duty to disclose anything affecting the value or desirability home. (*Pagano v. Krohn* (1997) 60 Cal.App.4th 1, 8–9 [“It is now settled in California that where the seller knows of facts materially affecting the value or desirability of the property ... and also knows that such facts are not known to, or within the reach of the diligent attention and observation of the buyer, the seller is under a duty to disclose them to the buyer.”].)

“Where a seller fails to disclose a material fact, he may be subject to liability ‘for mere nondisclosure since his conduct in the transaction amounts to a representation of the nonexistence of the facts which he has failed to disclose.’” (*Calemine v. Samuelson* (2009) 171 Cal.App.4th 153, 161, citing *Lingsch v. Savage* (1963) 213 Cal.App.2d 729, 736.)

“Before execution of a sales contract, the seller is required to deliver a statutory Real Estate Transfer Disclosure Statement to the buyer, which contains a checklist to give notice of problems or potential problems with the property.” (*Robinson v. Grossman* (1997) 57 Cal.App.4th 634, 64.) Likewise, sellers are required to disclose material facts to “the prospective buyer,” including any written transfer disclosure statement “as soon as practicable.” (See, e.g., Civ. Code, §§ 1102.3, 1102.6.)

Where a party has made a statement believing it to be true, but later learns it to be false, it has an obligation to correct that misstatement. (See *Lunardi v. Great-West Life Assurance Co.* (1995) 37 Cal.App.4th 807, 820; see also Miller Starr, 1 Cal. Real Est. § 2:26 (4th ed. 2022) § 2:26 [“If information disclosed in the statement was accurate when made but is rendered inaccurate as a result of any act, occurrence, or agreement subsequent to the delivery of the statement, ... the seller would have a common law duty to inform the buyer of the changed circumstances and the inaccuracy of the prior information, at least if the inaccuracy resulted from an event that occurred before the close of escrow”], citing Civ. Code, §§ 1102.5, 1102.9, Miller Starr, supra, § 1:146 (partial disclosures).) Civil Code section 1102.9 provides that the process for doing so when the misstatement is contained in a seller’s statutory disclosures, indicating that “the amendment [of information] shall be subject to Section 1102.3 or 1102.3a.” Section 1102.3 provides that “If any disclosure, or any material amendment of any disclosure, required to be made by this article, is delivered after the execution of an offer to purchase, the prospective buyer shall have ... five days ... to terminate the offer by delivery of a written notice of termination to the seller or the seller’s agent.”

Civil Code section 1102.7 requires that “[e]ach disclosure required by this article and each act which may be performed in making the disclosure, shall be made in good faith. For purposes of this article, “good faith” means honesty in fact in the conduct of the transaction.” Likewise, there is a duty of good faith and fair dealing implicit in every contract and transaction. (*Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342, 371-372.)

Civil Code section 1102.3 allows a party, where there has been nondisclosure or disclosure of erroneous information, “to terminate his or her offer for any reason.” (Miller Starr, 1 Cal. Real Est. § 2:26 (4th ed. 2022) § 2:26 [“there is no requirement that the buyer specify a cause of termination, and a buyer may terminate even if no material matter is disclosed in the statement that was not known to the buyer. This requirement is not unreasonable because it is a strong

incentive to induce prompt disclosure, and the buyer should not be saddled with the burden and uncertainty of establishing whether a particular matter is ‘material’”].)

The case of *Jue v. Smiser* involved a full-priced, noncontingent offer on a home for sale advertised as an “Authenticated, Julia Morgan Design, built 1917.” (Julia Morgan is a renowned architect whose credits include the Hearst Castle.) After going under contract, concerns arose as to whether the home was, in fact, a Julia Morgan design. Thus, the sellers requested that the buyers sign disclosure indicating “That There Are No Plans Available at the Oakland City Hall Verifying Same,” which buyers did. (23 Cal.App.4th 312, 314 (1994).) Thereafter, additional facts were uncovered further undermining the claim that the home was, in fact, a Julia Morgan. (*Ibid.*) The court found that the prospective buyers had actionable claims against the sellers, irrespective of the noncontingent nature of the transaction. The court further admonished: “Our decision should encourage sellers and their representatives to investigate and learn the ‘true facts’ pertaining to real property before it is offered for sale. Possession and communication of such knowledge will be of benefit to all parties in the course of negotiations leading to execution of a sales agreement.” (*Id.* at p. 319 [emphasis added].)

## **B. Buyer Duties**

A buyer of real property has a statutory duty to exercise due diligence in the purchase.

Civil Code section 2079.5 provides: “Nothing in this article relieves a buyer or prospective buyer of the duty to exercise reasonable care to protect himself or herself, including those facts which are known to or within the diligent attention and observation of the buyer or prospective buyer.”

In *Pagano v. Krohn*, 60 Cal.App.4th 1 (1997), the Court cited Section 2079.5 in finding that once a seller disclosed the “essential facts” regarding a possible water intrusion problem by disclosing a letter from the homeowner association that mentioned the problem and stated that the association had filed a lawsuit “to preserve the statute of limitations,” the seller and agents were not required to disclose “additional facts” such as discussions of the progression of the problem in homeowner association newsletters, the sellers knowledge of water intrusion problems in other units, or a copy of the complaint. In the appeal, the Court found that the trial court correctly granted summary judgment to the seller and the seller’s agent. The Court noted that once the essential facts were disclosed, the agent was not “duty bound to elaborate on those facts by providing further details regarding the various manifestations of water intrusion throughout the development or the precise allegations in the Association’s complaint against the developer” and that “[c]onclusions as to how the legal or practical ramifications of disclosed facts adversely impact value are not ‘facts’ subject to an agent’s duty of disclosure.” (*Id.* at 10, 12.)

CAR disclosure forms place onus on buyers to protect themselves. Most evident by way of the Statewide Buyer and Seller Advisory:

### **BUYER RIGHTS AND DUTIES:**

- The physical condition of the land and improvements being purchased are not guaranteed by Seller or Brokers.

- You should conduct thorough investigations of the Property both personally and with appropriate professionals.
- If professionals recommend further inspections, you should contact qualified experts to conduct such inspections.
- You should retain your own professional even if Seller or Broker has provided you with existing reports.
- You should read all written reports given to you and discuss those reports with the persons who prepared them. It is possible that different reports provided to you contain conflicting information. If there are discrepancies between reports, disclosures or other information, you are responsible for contacting appropriate professionals to confirm the accuracy of correctness of the reports, disclosures or information.
- You are advised to seek legal, tax, and other assistance from appropriate professionals in order to fully understand the implications of any documents or actions during the transaction. If you are doing a 1031 exchange, you are advised to contact an exchange accommodator to discuss the proper method and timing of the exchange.

*Tsasu LLC v. U.S. Bank Trust, N.A.*, 62 Cal.App.5th 704 (2021) **[new case]**. Case involves irregularities in a quiet title judgment. As an ancillary issue, the Court notes that California real property rules place a duty on the buyer to inquire into the validity of their prospective ownership claim. The recording laws were not designed to protect those who deliberately ignore potential defects or irregularities in title.

### **C. Knowledge of Agent Charged to the Principal**

Under principals of agency law, the knowledge of the buyer's or the seller's agents, including the seller's attorneys, are charged to the principal, even where the agent does not communicate the agent's knowledge to the principal. It includes both the things that the agent knows with respect to the subject matter of the agency, but also matters that the agent should know by inquiry notice. This rule of imputed knowledge is rebuttable. (*Herman v. Los Angeles County Metropolitan Transportation Authority*, 71 Cal.App.4th 819, 828 (1999); *Roche v. Hyde*, 51 Cal.App.5th 757, 797-98 (2020) **[Recent Case]**.)