

## New State Law Requires Commercial Real Estate Brokers And Agents to Disclose Dual Agency Representation

SB 1171 (the "Act") became effective January 1, 2015 and requires commercial real estate brokers and agents to obtain client consent to engage in a dual agency relationship, and prohibits brokers and agents from engaging in certain activities that potentially create conflicts of interest. The Act, also known as the Real Estate Broker Agency Disclosure Bill, may also be used to set a standard of care that principals may seek to rely on in establishing negligent and intentional misrepresentation claims against brokers and agents. Brokers and agents in larger brokerage houses where dual agency relationships are more common should take note of this new legal requirement.

### **SB 1171 Extends Existing Obligations of Residential Real Estate Brokers and Agents to Brokers and Agents Who Deal With "Commercial Real Property"**

Under the Act, the existing broker and agent disclosure requirements for residential property sales will also apply to commercial transactions. Commercial real estate brokers and agents will now need to disclose in writing to prospective clients their exact proposed agency role in a transaction, i.e., whether the listing or selling agent is representing the buyer exclusively, the seller exclusively, or acting as a dual agent representing both the buyer and the seller. As in residential transactions, this disclosure must be signed by the potential client prior to moving forward with any representation.

In addition to the required agency disclosure, the Act prohibits dual agents in commercial transactions from engaging in certain activities that create a potential conflict of interest. Specifically, a dual agent is prohibited from informing a buyer that a seller would accept a price lower than the listing price, and conversely, is prohibited from informing a seller that a buyer would accept a price higher than the offering price, unless that agent receives express written consent from each side first. Although prospective clients may still accept dual representation, these affirmative obligations may heighten the need for the use of ethical "walls" among agents and/or brokers, especially within larger brokerage houses where joint representation is more common.



by *David C. Longinotti*

## Failure to Disclose May Result in Loss of Right to Compensation and More

Under the Act, the failure to properly disclose a dual agency may result in the forfeiture of any commission due to the broker or agent at closing, a rescission of the pending transaction, and may subject the licensee involved to discipline by the Bureau of Real Estate. There is a two year limitation for the commencement of legal action for failing to disclose the appropriate agency relationship between a broker or agent and his or her client. However, this limitation does not apply to a breach of fiduciary duties relating to loyalty and confidentiality involved in the negotiation of a transaction.

The agency relationship requires a broker and agent to devote undivided loyalty to his or her client, learn material facts that might affect the client's decision, and give advice regarding the price and terms that are in the client's best interests. It would be relatively easy to argue that a broker or agent who fails to disclose an exclusive or dual agency relationship as required by the Act will have breached his or her fiduciary duties to the client. Such a breach could be fertile grounds for fraud and misrepresentation claims against the broker or agent in a court of law.

## Historical Background of New Law

Modern law defining the ethical obligations owed by real estate brokers and agents to their clients has been a work in progress since the 1980s. In 1984 the California Court of Appeal, in *Easton v. Strassburger*, held that real estate licensees owed certain duties of care to residential property buyers, but refrained from extending those duties to commercial property transactions. The Easton court reasoned that commercial real estate participants were likely to be more experienced and sophisticated as compared to residential home buyers, and in need of less protection. In 1995 the California Legislature, in SB 467, effectively codified the *Easton* decision by requiring real estate listing and selling agents of residential property to provide agency disclosures to buyers and sellers, without addressing the nature of these obligations to commercial transactions. Nineteen years later, the legislature has closed the loop through adoption of the Act.

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