

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

Presents

COMMON REAL ESTATE PRACTICES AND THEIR PITFALLS

*An examination of common practices that
agents, brokers, attorneys and investors unthinkingly do as a
matter of course and the associated pitfalls of such practices*

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PRESENTER BIOGRAPHIES

SEAN E. PONIST, ESQ.

Sean Ponist is the owner of the Law Offices of Sean Ponist, P.C., a firm specializing in real estate, construction defect and business litigation. Prior to founding his own firm, Mr. Ponist 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 25 cases to verdict. For the past five years, Mr. Ponist has been recognized as a Northern California Super Lawyer.

Mr. Ponist 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 for the San Francisco Bar Association ("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," "Private Investigation and the Legal Community," and "Commercial Real Estate Brokerage Standard of Care"), the San Mateo County Bar Association ("When Real Estate Deals Go Bad," "Expert Witnesses at Trial," and the "Agent-Principal Relationship"), the San Diego County Bar Association ("Commercial Real Estate Brokerage Standard of Care") as well as for the National Business Institute ("Direct and Cross-Examination for Civil Litigators").

Mr. Ponist graduated from *UC Davis School of Law*, receiving his Juris Doctor degree in 1999. Prior to law school, Mr. Ponist attended *UCLA* where he earned a Bachelor of Arts in Philosophy in 1995 and was a Departmental Scholar.

HAROLD A. JUSTMAN, ESQ.

Harold Justman has litigated real estate disputes for thirty-five years and is also a licensed real estate broker. He also serves as an Academic Consultant and Faculty Advisor to the Real Estate Program at Menlo College where he is an Adjunct

Professor of real estate. He has also qualified as a trial expert witness regarding the standard of care of real estate brokers and other real property matters in Alameda Marin, Merced, Contra Costa, Fresno, Placer, Santa Barbara, Santa Clara, San Diego, San Mateo, San Francisco, San Joaquin and Sonoma Counties.

Mr. Justman's recently presented for the Bar Association of San Francisco on "Commercial Real Estate Brokerage Standard." He has also recently published the following articles: "Foreclosure Law in California," California Real Property Journal, volume 31, no.4 (2013); "Loan Modification Law in California," California Real Property Journal, volume 32, no.2 (2014), and "The Co-Evolution of the Mortgage Market and Mortgage Law," California Real Property Journal, volume 32, No. 1 (2015). He is also the Contributing Editor and past Editor of the California Real Estate Law Newsletter (a publication of the San Mateo County Community College District).

Mr. Justman graduated from Stanford University in 1972, and he graduated from Hastings Law School in 1975.

COMMON REAL ESTATE PRACTICES AND THEIR PITFALLS

I. DUAL AGENCY (“DOUBLE-ENDING TRANSACTIONS”)

The good, the bad and the ugly.

A. Background

1. Definition

A “dual agent” is one who represents both the buyer and the seller.

2. Duty

Dual agents have a fiduciary duty to both the buyer and the seller. (*Fragale v. Faulkner* (2003) 110 Cal.App.4th 229, 235, 239.)

3. Traditional Approach

Historically, the law has permitted dual agencies under the following circumstances:

- Dual agent receives the informed consent of both principals. (*Brown v. FSR Brokerage, Inc.* (1998) 62 Cal.App.4th 766, 777; *McConnell v. Cowan* (1955) 44 Cal.2d 805, 809.)
- Written disclosure, signed by principals, on form set forth in Code of Civil Procedure § 2079.16 which includes a disclosure on dual agency.

4. Particulars of the Disclosure

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.)

5. The (Only) Limits on Disclosure of Information

Unless the seller expressly consents, a dual agent “shall not” disclose to the buyer that the seller is willing to sell the property for an amount less than the listing price; and, conversely, unless the buyer expressly consents, the dual agent “shall not” disclose to the seller that the buyer is willing to pay more than the offering price. (Civ. Code § 2079.21.)

These limitations do “not alter in any way the duty or responsibility of a dual agent to any principal with respect to confidential information other than price.” (*Brown v. FSR Brokerage, Inc.* (1998) 62 Cal.App.4th 766, 777.)

6. Remedies for Nondisclosure

Professional discipline—violates licensing law. (Bus. & Prof. Code § 10176(d).)

Avoidance of transaction—“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.” (*Huijers v. DeMarrais* (1992) 11 Cal.App.4th 676, 686.)

B. *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.)

II. ELECTRONIC SIGNATURES

A. Uniform Electronic Transactions Act, Civil Code § 1633.1 et seq.

Civil Code § 1633.5(b) (Agreement to Transact Electronically)

“The act applies only to a transaction between parties each of which has agreed to conduct the transaction by electronic means. Whether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct. Except for a separate and optional agreement the primary purpose of which is to authorize a transaction to be conducted by electronic means, an agreement to conduct a transaction by electronic means may not be contained in a standard form contract that is not an electronic record. An agreement in such a standard form contract may not be conditioned upon an agreement to conduct transactions by electronic means. An agreement to conduct a transaction by electronic means may not be inferred solely from the fact that a party has used electronic means to pay an account or register a purchase or warranty.”

Civil Code § 1633.7 (Enforceability of Electronic Signature)

- (a) A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.
- (b) A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation.
- (c) If a law requires a record to be in writing, an electronic record satisfies the law.
- (d) If a law requires a signature, an electronic signature satisfies the law.

Civil Code § 1633.9 (Attribution of Electronic Signature)

- (a) An electronic record or electronic signature is attributable to a person if it was the act of the person. The act of the person may be shown in any manner, including a showing of the efficacy of any security procedure applied to determine the person to which the electronic record or electronic signature was attributable.
- (b) The effect of an electronic record or electronic signature attributed to a person under subdivision (a) is determined from the context and surrounding circumstances at the time of its creation, execution, or adoption, including the parties' agreement, if any, and otherwise as provided by law.

Civil Code § 1633.10 (Error in Electronic Record)

If a change or error in an electronic record occurs in a transmission between parties to a transaction, the following rules apply:

- (1) If the parties have agreed to use a security procedure to detect changes or errors and one party has conformed to the procedure, but the other party has not, and the

nonconforming party would have detected the change or error had that party also conformed, the conforming party may avoid the effect of the changed or erroneous electronic record.

(2) In an automated transaction involving an individual, the individual may avoid the effect of an electronic record that resulted from an error made by the individual in dealing with the electronic agent of another person if the electronic agent did not provide an opportunity for the prevention or correction of the error and, at the time the individual learns of the error, all of the following conditions are met:

(i) The individual promptly notifies the other person of the error and that the individual did not intend to be bound by the electronic record received by the other person.

(ii) The individual takes reasonable steps, including steps that conform to the other person's reasonable instructions, to return to the other person or, if instructed by the other person, to destroy the consideration received, if any, as a result of the erroneous electronic record.

(iii) The individual has not used or received any benefit or value from the consideration, if any, received from the other person.

(3) If neither paragraph (1) nor (2) applies, the change or error has the effect provided by other law, including the law of mistake, and the parties' contract, if any.

(4) Paragraphs (2) and (3) may not be varied by agreement.

B. NAR Code of Ethics, Standard of Practice 9-2

When assisting or enabling a client or customer in establishing a contractual relationship (e.g., listing and representation agreements, purchase agreements, leases, etc.) electronically, REALTORS® shall make reasonable efforts to explain the nature and disclose the specific terms of the contractual relationship being established prior to it being agreed to by a contracting party.

C. *J.B.B. Inv. Partners v. Fair*

Name printed at bottom of an email may, “under specific circumstances,” constitute an electronic signature. (*J.B.B. Investment Partners, Ltd. v. Fair* (2014) 232 Cal.App.4th 974, 988.)

Name printed must, however, be “executed or adopted by a person with the intent to sign the electronic record.” A name printed on a document is not a “signature,” unless the named person intended that the printing of the name constitute an execution of the document. (Civ. Code § 1633.2(h); *Fair* at 989 and 992.)

“The exchange of e-mail messages shows that the parties clearly agreed to negotiate the terms of the settlement by e-mail, but plaintiffs did not demonstrate, as they must [], that the parties ever agreed to conduct transactions by electronic means or that Fair intended with his printed name at the end of his e-mail to sign electronically the July 4 offer.” (*Id.* at 990.)

III. LETTERS OF INTENT (“LOI”)

A meaningless piece of paper or a legally, binding commitment?

E. Implied Covenant of Good Faith and Fair Dealing

Generally, in negotiations without an existing contract, there is no duty to the other side. But, when there is an LOI, there becomes an obligation to negotiate in good faith the terms of the ultimate purchase and sale agreement. (*Copeland v. Baskin Robbins* (2002) 96 Cal.App.4th 1251, 1260.)

F. Good Faith v. Bad Faith

Failure to agree, in and of itself, to a final agreement does not, of course constitute “bad faith.”

The following factors may constitute “bad faith”:

- (1) Refusal to negotiate;
- (2) Employing improper negotiation tactics;
- (3) Making unreasonable proposals;
- (4) Failing to disclose material facts;
- (5) Negotiating with third parties re same matter;
- (6) Reneging on prior terms;
- (7) Terminating negotiations without cause.

(Delmar G. Williams, Calif. Real Prop. Journal, *State of Faith: Making Sense of California Real Estate Good Faith Negotiations Agreements* (2015) p. 38, citing E.

Allan Farnsworth, *Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations* (1987) 87 Colum. L. Rev. 217, 217.)

G. Damages

Reliance damages, i.e., injury suffered by plaintiff in reliance on defendant to negotiate in good faith such as costs associated with review of title, environmental site assessments, architectural design, engineering, financing fees, land use entitlement applications and other related costs. (Williams at 39-40.)

Breach of contract and consequential damages? “Damages for breach of an [LOI] may be, although they are unlike to be, the same as the damages for breach of the final contract that the parties would have signed had it not been for the defendant’s bad faith.” (Williams at 39, citing *Venture Assocs. Corp. v. Zenith Data Sys. Corp.* (7th Cir. 1996) 96 F.3d 275, 278-79.)

H. Proper Drafting of LOIs to Avoid Litigation

- (1) State the intent to be bound to negotiate in good faith;
- (2) Define the scope of the good faith duties (see e.g., factors above);
- (3) Establish liquidated damages for breach of good faith obligation;
- (4) Carefully define the parties bound by the LOI;
- (5) Provide adequate consideration and describe same in the LOI;
- (6) Define the duration of the negotiation period;
- (7) Clearly state intention not to be bound until ultimate agreement;
- (8) Clarify whether negotiations are exclusive or whether parties may continue to negotiate with others.

(Williams at pp. 39-43.)

IV. PURCHASER BIOGRAPHIES/STATEMENTS

Acceptable marketing of buyers or a dog whistle for discriminatory practices?

A. 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.)

B. 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.).

C. 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.

D. 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).)

V. AUCTION PRICING

Auction Strategy versus Traditional Sales Strategy.

NAR Code of Ethics, Standard of Practice 12-4. “REALTORS® shall not offer for sale/lease or advertise property without authority. When acting as listing brokers or as subagents, REALTORS® shall not quote a price different from that agreed upon with the seller/landlord.”

VI. POCKET LISTINGS AND OFF-MARKET SALES

Acceptable Method of Market Matching or Illegal?

A. Terminology

“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.

B. NAR Code of Ethics

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.

C. *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.)

D. *Fiduciary Considerations*

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