

**THE WOMEN'S COUNCIL OF REALTORS
SAN MATEO COUNTY CHAPTER**

Presents

50 SHADES OF ... LEGAL

Speaker

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I. GENERAL DUTIES

A. Duties

1. Statutory duties

- “Reasonably competent and diligent visual inspection of the property” and “disclose all facts materially affecting value or desirability of the property” (CC 2079)

2. Common law duties

- All material facts must be disclosed
- A fact is “material” if it would have a significant and measurable effect on the property’s market value (*Calemine v. Samuelson* (2009) 171 CA4th 153, 161.)

B. Limits on Duties

1. No duty to inspect public records or verify certain information

- “Buyer and Seller acknowledge and agree that Broker ... shall not be responsible for inspecting public records or permits concerning the title or use of Property” (Statewide Buyer and Seller Advisory, p. 10; see also, Buyer’s Inspection Advisory, p. 2)

2. Limited duty to disclose prior lawsuits

- Statutory Requirements – “Any lawsuits by or against the Seller threatening to or affecting this real property, including any lawsuits alleging a defect or deficiency in this real property or “common areas” (RTDS/CC 1102.6)
- Case law – Duty to disclose lawsuit (*Calemine v. Samulson* (2009) 171 Cal.App.4th 153; *Assilzadeh v. California Federal Bank* (2000) 82 Cal.App.4th 399); but disclosure need not be exhaustive (*Pagano v. Krohn* (1997) 60 Cal.App.4th 1)

3. Limited duty to disclose comments of nousey neighbor

- Duty to disclose actual problems, not possible or even probable problems (*Wilson v. Century 21 Great Western Realty* (1993) 15 Cal.App.4th 298)

C. Memorializing Limited Duties/Role

- Letter/Email Example (see p. 4)

II. TRADITIONAL LEGAL ISSUES

A. Problems during escrow

1. Problems of a rising market

- Specific performance (Civ. Code §§ 3384-3395)
- Monetary damages (Civ. Code § 3306 – difference between purchase price and value of land, at time of breach, plus consequential damages and interest)

2. Problems of a late material disclosure

- Buyer back out (Civ. Code § 1102.3)
- Close escrow and sue (*Jue v. Smiser* (1994) 23 CA4th 312, 318)

B. Problems after close of escrow

1. Construction Defects Issues
2. Permitting Issues
3. Property Boundary/Size Issues

III. NOVEL LEGAL ISSUES

A. Agent as Property Manager

- “A defendant cannot be held liable for the defective or dangerous condition of property which it [does] not own, possess, or control” (*Alcaraz v. Vece* (1997) 14 Cal.4th 1149, 1162); mere maintenance does not establish control (*Id.* at 1170)

B. Housing Discrimination

1. Housing Laws – various federal and state laws prevent housing discrimination (see pp. 5-6 for a non-exhaustive list of laws)
2. Potential Penalties
 - Actual damages, including humiliation, pain and suffering
 - Injunctive or other equitable relief
 - Civil penalty to vindicate the public interest
 - Reasonable attorney's fees and costs

C. Retention of Transaction files (and imputed knowledge of contents thereof)

1. Requirements for State Audits and Investigations

- “A licensed real estate broker shall retain for three years copies of all listings, deposit receipts, canceled checks, trust records, and other documents executed by him or her or obtained by him or her in connection with any transactions for which a real estate broker license is required.” (Bus. & Prof. Code § 10148(a))

2. Statute of Limitations

Time to Bring Action*	Cause of Action
2 years	Breach of realtors duty to inspect or disclose under CC 2079 (CC 2079.4)
3 years	Negligence – injury to real property (CCP 338(b))
3 years	Fraud or mistake (CCP 338(d))
4 years	Breach of contract (CCP 337)
4 years	Breach of fiduciary duty (CCP 343; <i>Stalberg v. Western Title Ins. Co.</i> (1991) 230 CA3d 1223; <i>Thompson v. Canyon</i> (2011) 198 CA4th 594)

*Discovery rule, however, extends time

IV. ROGUE AGENT ISSUES

A. Agent taking an interest in the real estate

B. Agent being too helpful (signing documents for client)

C. Agent competing with (former) client

- “After termination of the agency relationship, the agent may compete with the principal, but the agent remains under a duty not to take advantage of a still subsisting confidential relationship created during the prior agency relationship” (6 Witkin, Summary of Law (10th ed. 2005) Agency and Employment, §100, p. 147)

* * * *

May 15, 2013

San Francisco Bar Association

The Rogue Agent: Agency Issues in Real Estate

Sample Letter/Email Memorializing Limited Duties/Role

Dear _____ ,

It was good seeing you yesterday and [going over the preliminary title report]. As discussed, the report indicated various [encumbrances] on the property. As also discussed, I am not a [title] expert. Should you have any questions or concerns about the report or otherwise wish to learn more about the [encumbrances], I would encourage you to speak with a [title] professional and I'd be happy to put to you in touch the appropriate [title] professionals.

Sincerely,

FEDERAL AUTHORITY PROHIBITING HOUSING DISCRIMINATION
(Note that many states, including California, have civil rights laws of their own which mirror those at the federal level)

Fair Housing Act

Title VIII of the Civil Rights Act of 1968 (Fair Housing Act), as amended, prohibits discrimination in the sale, rental, and financing of dwellings, and in other housing-related transactions, based on race, color, national origin, religion, sex, familial status (including children under the age of 18 living with parents of legal custodians, pregnant women, and people securing custody of children under the age of 18), and handicap (disability).

Title VI of the Civil Rights Act of 1964

Title VI prohibits discrimination on the basis of race, color, or national origin in programs and activities receiving federal financial assistance.

Section 504 of the Rehabilitation Act of 1973

Section 504 prohibits discrimination based on disability in any program or activity receiving federal financial assistance.

Section 109 of Title I of the Housing and Community Development Act of 1974

Section 109 prohibits discrimination on the basis of race, color, national origin, sex or religion in programs and activities receiving financial assistance from HUD's Community Development and Block Grant Program.

Title II of the Americans with Disabilities Act of 1990

Title II prohibits discrimination based on disability in programs, services, and activities provided or made available by public entities. HUD enforces Title II when it relates to state and local public housing, housing assistance and housing referrals.

Architectural Barriers Act of 1968

The Architectural Barriers Act requires that buildings and facilities designed, constructed, altered, or leased with certain federal funds after September 1969 must be accessible to and useable by handicapped persons.

Age Discrimination Act of 1975

The Age Discrimination Act prohibits discrimination on the basis of age in programs or activities receiving federal financial assistance.

Title IX of the Education Amendments Act of 1972

Title IX prohibits discrimination on the basis of sex in education programs or activities that receive federal financial assistance.

Executive Order 11063

Executive Order 11063 prohibits discrimination in the sale, leasing, rental, or other disposition of properties and facilities owned or operated by the federal government or provided with federal funds.

Executive Order 11246

Executive Order 11246, as amended, bars discrimination in federal employment because of race, color, religion, sex, or national origin.

Executive Order 12892

Executive Order 12892, as amended, requires federal agencies to affirmatively further fair housing in their programs and activities, and provides that the Secretary of HUD will be responsible for coordinating the effort. The Order also establishes the President's Fair Housing Council, which will be chaired by the Secretary of HUD.

Executive Order 12898

Executive Order 12898 requires that each federal agency conduct its program, policies, and activities that substantially affect human health or the environment in a manner that does not exclude persons based on race, color, or national origin.

Executive Order 13166

Executive Order 13166 eliminates, to the extent possible, limited English proficiency as a barrier to full and meaningful participation by beneficiaries in all federally-assisted and federally conducted programs and activities.

Executive Order 13217

Executive Order 13217 requires federal agencies to evaluate their policies and programs to determine if any can be revised or modified to improve the availability of community-based living arrangements for persons with disabilities.