

# REAL ESTATE MATTERS

## SPILE, SIEGAL, LEFF & GOOR, LLP

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### FOR A HEALTHY REAL ESTATE PRACTICE CHECKLIST

#### TRANSFER DISCLOSURE STATEMENTS

- ✍ Recognize the critical importance of agents and their respective clients providing full and complete responses to all portions of the TDS. This document will go a long way toward avoiding exposure for a claim.
- ✍ Make sure to have the TDS prepared and delivered in a timely fashion.
- ✍ Do not limit your disclosures to the space provided in the form. Let your disclosures dictate your space...not your space dictate your disclosures.
- ✍ When providing disclosures, limit your statements to the identification of the defects. Do not express any opinion regarding the cause of the defects. Your job is to identify ... the diagnosis should be made by the appropriate experts.
- ✍ Similarly, do not quantify or otherwise describe the size, significance or degree of the defect.
- ✍ Never complete the seller's portion of the TDS. Require sellers to complete this in their own handwriting. If they are unable to do so, have them designate a friend or relative to do so on their behalf.
- ✍ Do not make any positive statement regarding the condition of the property. You have sold the property...the TDS is not a marketing device. Remember, anything positive you say may be used against you in the event of a claim.
- ✍ Always disclose everything, no matter how small. If you ask the question "should I disclose this," you have already answered that question.
- ✍ Remember, it is better to lose a bad deal than to make a bad deal.

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### ELECTRONIC SIGNATURES AND ELECTRONIC RECORD KEEPING

The real estate industry, like other industries, is riding a strong wave of technological advancement. This evolution was given momentum in 1999, when California law permitted electronic records and signatures to be treated as the legal equivalent to paper writings and manual signatures. While many embrace these changes, others find them foreign and intimidating. The accelerating proliferation of "paperless" transactions gives rise to a host of new concerns for real estate professionals.



First, all parties to a transaction must agree to utilize electronic means for creation, execution and maintenance of transaction documents. Absent such consent, the traditional paper file and manual signature is required.

Second, there is no substitute for human contact and interaction between real estate professionals and their clients. The same applies to the interaction between broker/managers and agents. Without this contact, there is little opportunity to verify that information has been received, understood and accepted.

With respect to electronic maintenance of transactional documents, there are further concerns

### A NOTE TO OUR READERS

For a number of years we published Real Estate Matters as a regular resource for members of the Real Estate Brokerage Community. After a lengthy hiatus, based upon many requests, we are delighted to once again offer this risk management tool.

Each edition will contain information impacting the Real Estate Brokerage Community, including a regular column in which we will discuss Estate Planning issues.

In addition, we will present our "Rx for a Healthy Real Estate Practice Checklist".

This newsletter will be forwarded to you by e-mail for your interest, as well as dissemination to others who will find it beneficial. All comments and feedback are welcome.

and considerations. The DRE permits electronic storage, but requires that: (1) the electronic image stored cannot be altered; (2) the document stored must be identifiable; and (3) the records must be maintained for three years. In meeting this obligation, it is important to have a dependable back-up procedure to protect against system malfunctions.

These are just a few of the concerns real estate professionals face in connection with electronic technology advancements. Staying current in connection with this constantly changing legal and logistical landscape is essential for all members of the real estate brokerage industry.

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### BRIEF REVIEW OF HOME EQUITY SALES CONTRACT ACT

The laws and regulations governing properties against which a Notice of Default has been recorded are very strict and consequential. As such, brokers and agents who deal with these properties should be familiar with the Home Equity Sales Contract Act of 1979, among other laws and regulations.

The entire scope of the Home Equity Sales Contract Act is far too extensive to cover in a short article. With this said, the following is intended to serve as a brief review of some of the key elements related to this Act.

For a property to be governed by this Act, the transaction must meet all of the following four conditions: 1) the property consists of one to four unit family dwellings; 2) the owner occupies one of the units as a principal residence; 3) there is an outstanding notice of default recorded; and 4) the buyer will not be using the property as a personal residence. A buyer of such a property is deemed an "Equity Purchaser." There are exceptions to the foregoing, but the existence of these four conditions should be a red flag to brokers and agents that the transaction may fall within the Act.

In the event a transaction is subject to the Act, then there are very rigid rules with which the parties must comply. These include the requirement that the contract be in ten point bold font and contain various provisions, including a right for the seller to cancel the transaction within five business days after signing the contract (or by 8 a.m. of the day of the trustee's sale, if that is sooner). The purchase agreement must include an attached notice of cancellation along with a conspicuous notice that until the right to cancel has ended the Equity Purchaser cannot ask the seller to sign a deed or any other documents.

A violation of the foregoing can result in substantial consequences to the Equity Purchaser. The Equity Purchaser can be convicted of a criminal act which may result in one year imprisonment and a \$25,000 fine. In addition, the seller can recover, among other things: 1) all actual damages; 2) exemplary damages in an amount equal to three times the actual damages suffered; 3) attorney fees; and 4) costs.

Closely related to the foregoing are rules related to "Foreclosure Consultants." This is also a very complicated area, the technical specifics of which are beyond the scope of this article. With this said, a Foreclosure Consultant is anyone who offers to perform services such as: 1) stopping or postponing a foreclosure sale; 2) providing financial counseling; and/or 3) contacting an owner's creditors.

While real estate brokers are generally exempt from the Foreclosure Consultant Laws, they can be caught in this difficult web if they: 1) acquire an interest in the property in foreclosure (other than certain direct loans); 2) receive any compensation before performing any real estate services; and/or 3) assist an owner to obtain the remaining proceeds from the foreclosure sale of the owner's residence.

Foreclosure Consultants are prohibited from engaging in a number of activities, including without limitations: 1) acquiring an interest in the property in foreclosure; 2) claiming compensation in excess of ten percent per annum of any loan they make; 3) claiming compensation before any services are performed; and 4) obtaining a power of attorney from the owner for any purpose other than to inspect documents as provided by law. In addition, the Foreclosure Consultant must provide written proof of a current real estate license and a bond from an admitted surety for twice the fair market value of the property, which is particularly problematic as the ability to purchase such a bond is virtually non-existent. Failure to meet these obligations can result in substantial criminal and civil penalties.

As previously mentioned, this article is not intended to serve as legal advice with respect to any specific transaction. Brokers and agents should consult with an attorney before taking part in any transaction which might fall into this area. Likewise, they should counsel their clients to seek independent legal advice.

Last, but not least, if services are to be provided in this area, it is highly recommended that the parties review and use the California Association of Realtors' standard forms designed for these transactions, including: 1) the Notice of Default Purchase Agreement; 2) the Home Equity Explanation and Agency Agreement; and 3) the Notice of Cancellation of Notice of Default Purchase Agreement.



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### ESTATE PLANNING CORNER

#### ESTATE PLANNING HITS CLOSE TO HOME

Estate planning deals with two of life's major anxieties - money and death - which explains why many people avoid the subject until it is too late.

Estate planning means deciding in advance who gets your assets and under what circumstances. Estate planning also involves decisions about your physical care in the event you become unable to make choices for yourself.

Proper estate planning is built upon informed and intelligent guidance. The lawyer providing estate planning services should recognize the various building blocks for a successful estate plan. The lack of any one of these building blocks is likely to lead to a collapse of your estate and a failure to meet your personal preferences.

The first building block is a clear identification of all of your assets. These assets can be currently in existence, or anticipated to be accrued over a course of time. When you add up all your assets, including your potential life insurance, retirement plan benefits, and appreciation in your home, you will be surprised to realize that your combined assets are greater than you believe.

The second building block is proper consideration of your vision, values and goals. Naturally this building block is comprised of many factors, including marital status, children, age, career path, religious beliefs and similar things. These considerations are as unique to each person as their

fingerprints. As such, each consideration should be examined to be sure your interests are properly met.

The third building block is the law, which is constantly changing. As a result, it is critical that you have an attorney who keeps up to date with the current status of the law, along with estate planning vehicles which are available under the law.

We have learned from working with clients over the past 25 years the importance of using these building blocks to construct an estate plan which will support their needs on every level. We go to great lengths to help our clients identify the composition of each of the building blocks so as to custom design an estate plan which meets the unique needs of that client. We assist our clients in understanding their options through the prism of their goals and objectives. This, in turn, gives our clients the peace of mind to know that their desires for themselves and their estate will be fulfilled.

Understanding the importance of this area, we will dedicate this "Corner" of each edition of Real Estate Matters" to examining the various issues which shape and effect a sound Estate Plan.

Readers are encouraged to contact us with requested topics, as well as their needs and concerns.

For additional information, please contact

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We offer this risk management newsletter as a courtesy to members of the Real Estate Brokerage Community. The information contained in this newsletter is general in nature. It is not intended to provide legal advice regarding any specific matter. Furthermore, the dissemination of this newsletter by third parties should not be interpreted as an endorsement of the content by those third parties. Readers should not rely on anything contained herein, but rather consult with an attorney of their own choice.

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### SSL&G WORD SEARCH

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R	I	A	P	E	R	M	I	T	S	E	E
M	L	S	I	Z	E	S	A	B	E	E	F
T	S	O	C	E	C	N	E	D	I	V	E
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Amortize	Disclose	MLS	Signs
Close	Discover	Pad	Size
Commercial	Duty	Permit	Soil
Cost	Evidence	Pest	Sold
Deed	Email	Repair	TDS
Defer	Feebase	Repay	Vest