



Real Estate Bulletin

Real Estate **MATTERS!**

Governor Brown Appoints New Real Estate Commissioner




On February 13th, Governor Jerry Brown appointed Wayne Bell as the new Real Estate Commissioner.

Commissioner Bell is the 23rd Real Estate Commissioner. He is the Chief Officer of the California Department of Real Estate (DRE) and oversees the licensing and regulation of approximately 412,000 real estate licensees and is responsible for a staff of approximately 342. Commissioner Bell, who has a real estate broker license, is the first Commissioner appointed to DRE's top spot from the ranks of the department.

Commissioner Bell served as Chief Counsel and Assistant Commissioner for Legal Policy and Recovery at the Department of Real Estate since 2006, and was the department's Special Liaison to the Department of Justice from 2010 to 2013. Since joining the department, Commissioner Bell has been actively engaged in collaborative and inter-governmental efforts to combat foreclosure rescue, loan modification, short sale and other varieties of real estate and mortgage fraud.

Before commencing service at the Department of Real Estate, Commissioner Bell was Special Counsel and Director of Homeownership at the California Housing Finance Agency from 2003 to 2006, and Deputy Secretary and General Counsel at the California Business, Transportation and Housing Agency from 1999 to 2003. While at the Business, Transportation and Housing Agency, he served the Governor's Office as the Agency's provisional Undersecretary from 2001 to 2003. He was also a member of the San Francisco Bay Conservation and Development Commission from 2002 to 2005, and the Coordinating Committee of the California Lake Tahoe Interagency Council from 2001 to 2005, and participated as a member of other governmental bodies. He worked in multiple positions at Ralphs Grocery Company from 1989 to 1999, including vice president.

Commissioner Bell is a *magna cum laude*, Phi Beta Kappa graduate of the University of California, Los Angeles (1976), where he studied political science with an emphasis in public administration. He earned his juris doctor degree from Loyola Law School, Los Angeles (1979), where he was a co-winner of the school's Client Counseling Competition (1978), and the Chief Note and Comment Editor of the Law Review from 1978 to 1979. Additionally, he completed the Advanced Management Program at Rutgers University (1992), the Program for Senior Executives in State and Local Government at Harvard University (Kennedy School of Government – in collaboration with the Harvard Joint Center for Housing Studies) (2002), the Program of Instruction for Lawyers at Harvard Law School (1986), attended a Stanford Leadership Advancement Symposium (1994), a training on Public Problem Solving and Decision Making at the University of Texas at Austin (LBJ School of Public Affairs – Governor's Center for Management Development) (2001), and the Executive Development Seminar (on Organizational Management) at the University of Notre Dame (Mendoza College of Business – sponsored by the National Council of State Housing Agencies) (2004), and has done other postgraduate studies. In addition, he has authored, produced and/or edited consumer protection, legal and real estate-related articles and other publications.

Commissioner Bell's civic and community involvement has included: (a) service to the California State and Los Angeles County Bar Associations (including service as a Special Master through the State Bar's Special Master Program, the conducting of trainings for the State Bar regarding loan modification and mortgage relief fraud, membership on the Executive Committee of the Labor and Employment Law Section of the Los Angeles County Bar Association, and on the Standing Committee on Legal Problems of Aging for the Legal Services Section of The State Bar of California), (b) work for the homeless and the poor (through Westside Legal Services in Santa Monica, the Homeless Shelter Advocacy Project of the Los Angeles County Bar Association Barristers, and a home building project at a Habitat for Humanity site in South Central Los Angeles), (c) service to the courts as a Judge Pro Tem in the Los Angeles Superior Court and the former South Bay Municipal Court, and as a Settlement Officer, and (d) service on a number of non-profit boards (including those of The Foodbank of Southern California, and Programs for the Developmentally Handicapped, Inc.). 

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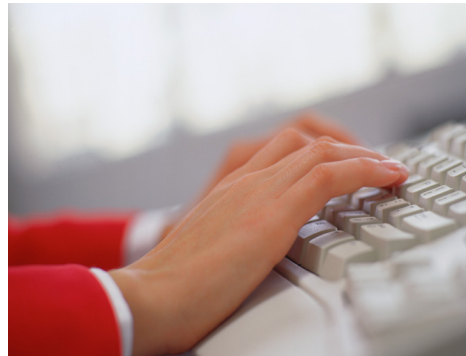
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Retention of Electronic Communications

Electronic Communications (EC), including emails, texts, tweets and the like, has become an indispensable tool for licensees in conveying vital information in real estate and mortgage transactions. EC is used by licensees to receive and send to various parties to the transaction copies of contracts, disclosures and other important documents and information. And like other documents and writings obtained or executed by a licensee in connection



with a transaction for which a license is required, EC associated with licensed acts must be maintained by the broker as part of the transaction file. However, maintaining EC goes beyond ensuring compliance with record keeping requirements. It is becoming more commonplace in the Department of Real Estate's investigations that licensees are unable to produce crucial EC that contain information that would demonstrate compliance with the Real Estate Law. The purpose of this article is to remind real estate brokers of the importance of maintaining and retaining transaction records, including EC.

The Real Estate Law clearly defines what records must be maintained. Specifically, Business and Professions Code Section 10148 reads, in part:

“...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 (emphasis added). The retention period shall run from the date of the closing of the transaction or from the date of the listing if the transaction is not consummated. After notice, the books, accounts, and records shall be made available for examination, inspection, and copying by the commissioner or his or her designated representative during regular business hours...”

As noted in the italicized wording above, all documents executed or obtained by a licensee in connection with licensed activity must be retained and maintained. To recognize what records must be maintained, a broker must understand what constitutes licensed activity. In general terms, licensed activity is defined as performing certain acts on behalf of another or others, for or in expectation of compensation. Those acts include (but are not limited to) the following:

- Sells or offers to sell, buys or offers to buy, solicits prospective sellers or purchasers of, solicits or obtains listings of, or negotiates the purchase, sale or exchange of real property or a business opportunity.

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The Department to Issue Fictitious Business Names that Include the Names of Salespersons and "Team Names"

by Jeff Oboyski, Licensing Manager

In the Fall of 2011, the Department of Real Estate (the Department) published an article which highlighted the laws and regulations that govern the issuance and use of fictitious business names. That article provided detailed instructions on how a real estate broker can obtain a fictitious business name. The article also included important steps applicants should take to avoid any unnecessary processing delays.

Recently, the Department has received inquiries from licensed real estate brokers and salespersons requesting both clarification and guidance as to the specific laws and policies that govern the usage of "team names" in advertisements and other forms of solicitations. This article is intended to offer licensees guidance on the use of "team names".


The use of "team names" in advertisements and marketing materials has become a popular and pervasive practice amongst real estate professionals. Throughout California "team names" such as "The Smith Team", "The Brown and Smith Team", or "The Robert Brown and Sarah Smith Team", "The John Doe Group, John Doe & Associates", for example, are often included on "For Sale" signs, billboards, business cards, promotional flyers, emails, and brochures. Although "team names" are commonly being used by licensees for real estate advertising and marketing purposes, it should be noted that team names are almost always a fictitious business name and therefore subject to the applicable state laws, rules and regulations, regarding the use of fictitious names.

The Department's approval of a fictitious business name is governed, in part, by Business and Professions Code (B&P) 10159.5 and Real Estate Commissioner's Regulation 2731. Based on Regulation 2731, in the past the Department generally would not issue a fictitious business name to a licensed broker that included the name of a salesperson employed by that broker unless that employing broker's name was also included in the fictitious business name. In response to the increased popularity of real estate licensees incorporating the use of "team names" in their advertising and marketing practices, as highlighted above, the Department will now generally approve fictitious business name requests, submitted by brokers, that include the name of salespersons (and which do not include the broker's name in the "team name"), under the following conditions:

1) The fictitious business name has been filed with the county clerk in which the broker's main office is located,

2) The salesperson whose name is included in the fictitious business name is currently employed by the broker applying for the fictitious business name, and

3) The fictitious business name submitted for issuance includes the terms "team", "associates", or "group" or any other term that implies an existence of a team, as deemed appropriate by the department.

If a fictitious business name that contains the name of a real estate salesperson, as provided above, and is represented or used in any advertising, advertisement in print or electronic media, "For Sale" sign, or first point of contact material as specified in Commissioner's Regulations 2773, there must be a prominent disclosure of the name and real estate license identification number of the employing broker, as well as the license identification number of the salesperson. 



Subdivisions – What You Should Know

by Chris Neri, Assistant Commissioner, Subdivisions

WHAT DO WE DO

Most subdivisions of land divided into five or more lots, units or interests for sale or lease are subject to state regulation for the purpose of protecting consumers. Protections are intended primarily for residential subdivisions as an exemption exists for commercial or industrial property. The principal statutory basis for this regulatory scheme is the Subdivided Lands Act (Business and Professions Code Sections 11000-11200). Additionally, the Subdivision Program regulates timeshares (Business and Professions Code Sections 11210-11288), out-of-state subdivisions marketed and sold in California, and addresses complaints related to subdivisions.

Unless a specific exemption applies, no person may offer to sell or lease interests in any subdivision without first applying to the Department and obtaining a public report for the subdivision. The public report is the primary means of accomplishing the regulation of subdivision offerings. Before issuing the public report, the Department examines all material aspects of the project and requires compliance with specified statutory and regulatory standards.

The public report serves two functions aimed at protecting buyers of subdivision interests: (1) requiring disclosure of material facts that relate to the subdivision, and (2) ensuring adherence to applicable standards for creating, operating, financing, and documenting the project. A copy of the public report must be provided to any prospective purchaser by the subdivider prior to the execution of a binding purchase contract for any lot or unit in the project.

The Subdivision Program's primary outcome is the issuance of public reports to persons or entities offering for sale or lease to the public land divided into five or more lots, units or interests (subdivision interests). A public report is not issued until the application and supporting documentation evidence compliance with statutory requirements covering the creation and marketing of the subdivision interests. The various parties which may be involved in the application process include the person or entity proposing to offer the subdivision interests for sale or lease to the public (subdivider), the subdivider's agent for preparing and filing the paperwork with the Department, the subdivider's attorney, the title company, escrow officer, and budget preparer. Therefore, Subdivision staff is in constant contact with industry representatives.

The public report application review consists of two related procedures. In all cases, the Subdivision Unit staff reviews the application for such issues as proper title, fire



protection, water and sewer systems, financial arrangements for completion of common area facilities (if any), utility arrangements, schools, flood problems, hazards, earthquake faults, escrow instructions, contracts, covenants, by-laws, etc. In cases where the subdivision is also a common interest development, the Budget Review Unit staff reviews homeowner association budgets to ensure that assessments are adequate to maintain common areas and facilities. This is an important task to ensure the association is not underfunded. Additionally, the Budget Review Unit confirms that completion, assessment and maintenance/subsidy bond amounts are sufficient.

WHAT YOU SHOULD KNOW REGARDING SUBDIVISIONS FORMED AS COMMON INTEREST DEVELOPMENTS

Common interest developments (CID's) have become popular in today's real estate market. As such, it is increasingly important that real estate brokers and salespersons become more knowledgeable about the management documents affecting the use, control and operation of units and the common area within a CID as well as applicable laws and regulations. Here are some suggestions to assist the public in completing a smooth transaction involving a CID:

Always be prepared for purchaser's questions. Purchasers are more knowledgeable than ever. Be familiar with the documents that are used with a CID. The buyer must receive a copy of the Covenants, Conditions and Restrictions (CC&R's), Bylaws, Articles of Incorporation (if applicable for that project), the Subdivision Public Report and the homeowners' association budget.

Be prepared to explain what an assessment or maintenance fee is and know what the homeowners' association must maintain. If the project has a subsidy arrangement, be able to explain the agreement. When will the subsidy expire? What

Non-Disclosure is Not an Option: The Mistake and Danger of Playing “Hide the Ball” With Respect to Criminal Convictions and Disciplinary Actions

In the world of real estate practice, full and complete up-front “disclosure” is essential. “Disclose, disclose, and then disclose” is a catchphrase and the practice in the transactional realm.

That same requirement for disclosure is called for by the questions in and instructions for the applications of the California Department of Real Estate (DRE) for salesperson and broker licenses, and salesperson and broker license renewals, as well as the application for a mortgage loan originator endorsement to a California real estate license (license endorsement).

But rather than requiring disclosures about properties and agency relationships, the applications require disclosures about criminal convictions, pending criminal charges, and disciplinary actions against the applicant, including pending matters and cases where discipline was imposed.

In addition to the disclosures regarding criminal convictions and disciplinary actions, including pending matters, mandated by the applications discussed above, there is a California statutory requirement (see Section 10186.2 of the California Business and Professions Code) for licensees of the DRE to self-report, in writing, to the Department any of the following:

- (a) The bringing of an indictment or information charging a felony against the licensee.
- (b) The conviction of the licensee, including any verdict of guilty, or plea of guilty or no contest, of any felony or misdemeanor.
- (c) Any disciplinary action taken by another licensing entity or authority of this state or of another state or an agency of the federal government.

Failure to report and disclose such matters in writing violates that statutory law and constitutes a cause for license discipline. For a more complete discussion of that self-reporting requirement, please see the Fall 2012 DRE Real Estate Bulletin, which can be located under the “Publications” menu at www.dre.ca.gov.

This article will concentrate its primary attention on the required DRE application disclosures regarding

criminal convictions and finalized disciplinary actions, and the negative consequences to those who play “hide and seek”, “hide the ball”, and/or who otherwise fail to honestly and completely answer the relevant questions and to disclose with full candor.

Mandatory License Application Disclosures

The forms in use by the DRE for “original” (non-renewal) broker and salesperson license applications contain the following questions:

“HAVE YOU EVER BEEN CONVICTED OF A MISDEMEANOR OR FELONY?” (Emphasis added)

A note following that question states that “Convictions expunged under Penal Code Section 1203.4 must be disclosed”, and adds that applicants “may omit traffic citations which do not constitute a misdemeanor or felony”.

“HAVE YOU EVER HAD A DENIED, SUSPENDED, RESTRICTED OR REVOKED BUSINESS OR PROFESSIONAL LICENSE (INCLUDING REAL ESTATE), IN CALIFORNIA OR ANY OTHER STATE?” (Emphasis added).

There are also questions pertaining to pending criminal charges and license disciplinary actions, although those questions are not the focus of this article.

The DRE applications for original licenses provide some further guidance on the issue of convictions to applicants for licensure under a section entitled “Conviction Details”. That section provides as follows: “Convicted” as used [in the application] includes a verdict of guilty, by judge or jury, a plea of guilty, a plea of nolo contendere (i.e., ‘no contest’), or a forfeiture of bail in the courts (including military courts) of any state, commonwealth, possession or country. All convictions must be disclosed, no matter how long ago they occurred, even if the plea of verdict was set aside, the conviction dismissed or expunged, or you have been pardoned. Convictions occurring while you were a minor (under 18 years of age) must be disclosed unless the record of the conviction has been sealed [under the Penal or Welfare and Institutions Code]”. (Emphasis added).



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Those DRE applications also provide direction and space to set forth detail and explanations regarding the convictions.

The applicants must certify (by their signatures) under penalty of perjury under the laws of the State of California that they have answered the questions regarding convictions and disciplinary actions correctly and truthfully.

In order to obtain an individual mortgage loan originator license endorsement, a licensed real estate salesperson, broker or licensed corporation broker/officer must submit an online application to the Nationwide Mortgage Licensing System and Registry (“NMLS”). That application, like the DRE applications, requires disclosures regarding criminal convictions and regulatory actions. The criminal convictions disclosure section of the NMLS application asks a few questions, including, “Have you ever been convicted of or pled guilty or nolo contendere (‘no contest’) in a domestic, foreign, or military court to any felony?” (Emphasis added). Another question asks about misdemeanor convictions. The online application requires applicants to assert that “the information and statements contained herein...are current, true, accurate and complete and are made under penalty of perjury...”

****It is critical and important to note and to understand that unlike DRE applications for the “renewal” of existing real estate licenses (which “renewal” applications currently have a six-year time limitation for the disclosure of criminal convictions and finalized disciplinary actions), there is no time limitation that applies to the disclosure of convictions or disciplinary actions in the original DRE applications for a real estate broker or salesperson license, or in the NMLS online application for a mortgage loan originator license endorsement.

The term “ever” as used in the original DRE applications and in the NMLS online application clearly means “at any time” and it does not matter how long ago the convictions or disciplinary actions occurred.

Clarity and Uncomplicated Nature of the Questions

The questions set forth above in the DRE and NMLS applications, and quoted above, are clear and not complicated, and they call for a “Yes” or “No” answer and full and truthful disclosure.

With regard to criminal convictions, individuals completing the DRE applications are called upon to and must disclose all of the relevant convictions, including drunk driving (DUI) convictions, and those where: (a) the applicants did not have to go to a court hearing (such as

where an attorney appeared for the applicant), (b) there was no jail or prison time – or the sentence involved only a fine or probation, and (c) the convictions have been “expunged”.

And just because a conviction no longer appears on an applicant’s public criminal record does not mean that there is no record of the conviction.

Consequences of a Failure to Disclose the Information Required by the Applications

Every question on the applications for licensure (and/or license endorsement) or renewal must be answered completely and honestly. This cannot be emphasized enough with regard to the questions pertaining to criminal convictions and disciplinary actions.

Applicants for a license, renewal and/or a license endorsement (“applicants”) are responsible for the accuracy and thoroughness of the answers and all of the required information provided.

The DRE conducts background reviews and the Department of Justice will provide criminal history information regarding all applicants.

A failure to fully disclose all of the required information may result in the denial of an application, the revocation of a license or license endorsement, or some other disciplinary sanction. That is because a failure to disclose the required information is deemed to be a crucial indicator of the poor character, lack of fitness and current dishonesty of applicants. Stated a bit differently, a failure to disclose is or may be viewed as evidence of current dishonesty, lack of candor, and lack of trustworthiness. And all applicants must be honest and truthful in order to receive a license or license endorsement from the DRE. See Section 10153 of the California Business and Professions Code (Code).

Even if a license or license endorsement is ultimately issued by the DRE, or a disciplinary or enforcement case successfully defended, when required information is not disclosed, there is a cost in terms of delay and the expenditure of time and effort in the investigatory and administrative process. Furthermore, disciplinary and other enforcement actions taken by the DRE are “public information” and are posted on the DRE Web site, become a public record, and are shared with other law enforcement and regulatory entities, and with public service partners.

Interestingly, applicants may believe that disclosure of criminal convictions and disciplinary actions will result in the automatic denial of an application or discipline against a license or license endorsement. But that is not necessarily the case, and each person’s conviction history, situation

Non-Disclosure Continued from page 6

and story is different. Further, each case is addressed and assessed on its own facts. For instance, where the criminal convictions are distant in time, are inconsequential in nature, are isolated, are not substantially related to the practice of real estate or mortgage loan brokerage, or where they occurred early in a person's life, and where an applicant can adequately explain the facts and circumstances surrounding the conviction(s) and show rehabilitative efforts, rehabilitation and/or positive change, growth and progress in ameliorating past bad conduct, and present fitness for licensure, a license or license endorsement may be granted, either with or without restrictions.

But a failure to disclose and to reveal that which is required in an application is the provision of a false statement of fact and misleading information by an applicant to the DRE, and most arguably an attempt by the applicant to procure a real estate license, renewal or license endorsement by fraud, misrepresentation or deceit. And those provide the grounds to deny an application or to discipline a licensee. Please see Sections 480 (c) and 10177 (a) of the Code.

Moreover, in *Norman I. Krug Real Estate Investments, Inc. v. Praszker*, 22 Cal.App. 4th 1814, 1821-1822 (1994), the Court expressly noted that one of the purposes of the California Real Estate Law is to insure, as far as possible, that persons holding real estate licenses will be honest and truthful in their dealings with the public. "Accordingly, the real estate commissioner may discipline a licensed broker for failure to disclose even if the broker was not intentionally fraudulent or dishonest (case citation omitted) and it is immaterial that he received no advantage from his failure to disclose".

Many Excuses Offered

Over the many years of the DRE's existence, applicants have offered myriad explanations for their non-disclosure of criminal convictions and disciplinary actions. The excuses could fill a large book, but only a few will be offered here.

Investigators and lawyers at the DRE, as well as Administrative Law Judges hearing DRE cases, have heard some of the following as reasons for the non-disclosure of required information:

My mother told me I didn't have to disclose that.

My broker filled out my application, and I just signed it.

My lawyer told me those convictions were too old to report.

I couldn't remember all of my convictions, and I knew you would find them in a background search... So I wasn't really concealing any information.

The questions on the application were confusing.

I thought my DUI was only a minor traffic offense, or a "small traffic issue".

I thought my convictions were dismissed some years ago.

I didn't read the application very carefully.

I was informed by my attorney that my convictions "would be removed from my record once the terms of my probation were complete".

I didn't know that I was disciplined by another State regulatory agency.

I talked with someone [who I cannot remember or identify] at the DRE and he/she told me I did not have to disclose my convictions.

Someone in my office told me I didn't have to disclose all of my convictions.

Needless to say, none of the foregoing explanations or justifications was given much, if any, credibility.

Disclose All Which is Asked for on the Applications – Non-Disclosure is Really Not an Option

The signature (and/or certification) on an application is a representation that the answers provided are honest, accurate, and complete.

Those applicants who fail to disclose all relevant criminal convictions and disciplinary actions, or fail to provide truthful, accurate and thorough information regarding the same, have acted in a manner which is inconsistent with the honesty and integrity the law requires from DRE licensees and license endorsees. Therefore, those applicants may be denied a license or license endorsement, or may be subject to disciplinary action with respect to a license or license endorsement that they hold.

So just as full and accurate disclosure is critical in the real estate and mortgage brokerage business and transactional world, it is absolutely essential when submitting an application to the DRE. 🏠

Endnotes

This article was written by Wayne Bell, Real Estate Commissioner, while he was Chief Counsel of the California Department of Real Estate. The author wishes to thank Sylvia Yrigollen for her careful review of and editorial recommendations for this article.

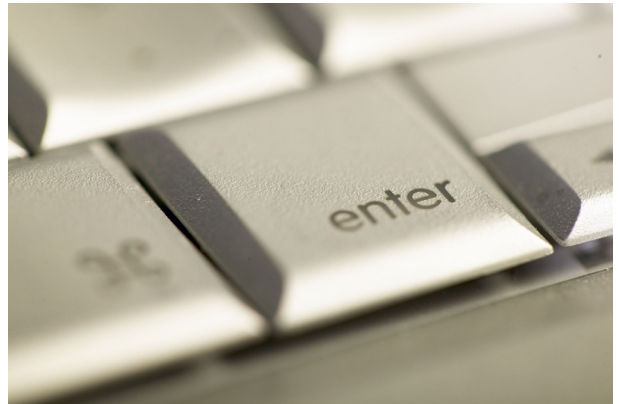
This article is based on the applications in use and the law in place as of the date of publication.

Electronic Communication Retention Continued from page 2

- Leases or rents or offers to lease or rent, or places for rent, or solicits listings of places for rent, or solicits for prospective tenants, or negotiates the sale, purchase or exchanges of leases on real property, or on a business opportunity, or collects rents from real property, or improvements thereon, or from business opportunities.
- Solicits borrowers or lenders for or negotiates loans or collects payments or performs services for borrowers or lenders or note owners in connection with loans secured directly or collaterally by liens on real property or on a business opportunity.

While the above list of "licensed acts" is not all-inclusive (see Business and Professions Code Section 10131 et. seq. for more information), it does illustrate how EC can be used in the furtherance of licensed activity. For example, EC is often employed in real property purchase and sale negotiations; as such texts, emails, tweets and the like created and sent or received by a licensee during the negotiation for the sale or purchase of the property must be maintained as part of the transaction file. Moreover, courts have found that electronically generated writings are "documents" and are discoverable under the same rules that pertain to written materials. Thus, it is the Department's position that failing to maintain EC's that are created as part of licensed activity is in violation of the record keeping provisions.

To ensure compliance in this electronic age, every licensed California real estate broker should have written office policies and procedures setting forth how EC that are created, sent or received in connection with an act for which a license is required will be maintained and made available for inspection. While a real estate broker's failure to have policies and procedures regarding the handling and retention of EC may increase a broker's chance of disciplinary action under Business and Profession Code Section 10148 (record keeping) and Commissioner Regulation's 2725 (failure to supervise), best practices dictate that the maintaining of EC goes well beyond simple record keeping compliance. As stated earlier, EC often holds the key to proving whether a licensee disclosed a material fact or provided a required disclosure, and retaining and maintaining these important communications may reduce a broker's need to defend against unwarranted allegations. 🏠



Subdivisions Continued from page 4

will the assessment be after the subsidy ends? If the project has an existing homeowners' association, be prepared to discuss the financial status of the project. Both purchasers and lenders request this type of information.

Review the CC&R's applicable to the project. Developers are including more information in the CC&R's, such as disclosures of soil conditions, building restrictions, and earthquake fault lines. Be familiar with the use restrictions in the CC&R's and the homeowners' association's rules implemented by the board of directors, such as the pool and clubhouse usage and hours, pet restrictions, parking requirements, etc.

Read the Subdivision Public Report. Be able to answer questions about the major sections of the report. Be prepared to explain what type of legal interest is being conveyed and be familiar with any material disclosures. Further information regarding CID's and the public report process is available on the DRE Web site www.dre.ca.gov. 🏠



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2013 Law Book

Each year, the Department's Real Estate Law book is updated to reflect changes in laws and regulations.


The 2013 Real Estate Law book is available online free of charge. The print version, which includes a CD copy, is available for purchase.

This important reference for licensees contains:

- The Real Estate Law (from the Business and Professions Code);
- The Real Estate Commissioner's Regulations (from the California Code of Regulations);



- Portions of the Administrative Procedure Act (from the Government Code); and
- Pertinent excerpts from various California Codes.

The cost will be \$25, plus tax. Use [RE 350 - Publications Request](#) form, which is available online at www.dre.ca.gov. 

Real Estate Bulletin

SPRING 2013

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