



Real Estate Bulletin

DEPARTMENT OF REAL ESTATE

Spring 2022

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P.4 Broker Supervision in Advertising | P.5 Dual Agency: What You Need to Know!



**Real Estate Commissioner
Douglas R. McCauley**

Commissioner's Update

In this competitive real estate market, buyers are always looking for an edge. “Love letters” are an increasingly popular strategy to attempt to make an offer more attractive. Love letters are a written message from potential buyers to sellers explaining why they are interested in the property. In these letters, buyers often share details about their family and why the home is a great fit. The note might also convey personal information about the potential buyers, such as their intended involvement in the community, their connection to local religious communities, their kids’ activities, etc. Love letters are designed to help distinguish buyers from others who are also interested in the property.

However, because the communication might also include details about a person’s race, religion, sexual orientation, etc., love letters open the door to unconscious bias and/or discrimination. Using such characteristics as the basis to either accept or reject an offer, as opposed to using price and terms, violates state and federal fair housing laws. While buyers are always looking for an advantage, DRE encourages licensees to be aware of the potential legal and ethical risks of love letters.

In 2020, the National Association of Realtors (NAR) released the following advice about love letters: 1) educate your clients about the fair housing laws and the pitfalls of buyer love letters; 2) inform your clients that you will not deliver love letters and advise others that no love letters will be accepted as part of the MLS listing; 3) remind your clients that their decision to accept or reject an offer should be based on objective criteria only; 4) if clients insist on writing a love letter, do not help them to either draft or deliver it; 5) avoid reading any love letter drafted or received by your client; and 6) document all offers received and the seller’s objective reason for accepting an offer.

(CONTINUED ON PAGE 3)

Changes Coming to Continuing Education Requirements in January 2023

In September 2021, the Legislature passed and Governor Gavin Newsom signed [Senate Bill \(SB\) 263 \(Rubio\)](#), which amended the continuing education requirements for real estate licensees. SB 263 added new requirements to existing continuing education (CE) and takes effect on January 1, 2023.

In addition to existing CE courses for license renewal, beginning January 1, 2023, all eligible real estate licensees with licenses expiring on or after January 1, 2023, will need to complete DRE-approved courses on: 1) implicit bias training; and 2) fair housing, which includes an interactive component. These new requirements also apply to those who file a late renewal application (past their four-year license expiration date and within their two-year renewal rights) on or after January 1, 2023. SB 263 does not increase the total 45 hours of CE needed for license renewal.

Below are summaries of all CE requirements for both real estate

brokers/officers and real estate salespersons effective January 1, 2023. All courses must be approved by DRE.

Brokers/Officers—First Time Renewal

- Five separate three-hour courses in ethics, agency, trust fund handling, risk management, and management and supervision; and
- A three-hour course in fair housing that includes an interactive participatory component during which the licensee will role-play as both a consumer and a real estate professional; and
- A two-hour course in implicit bias training; and
- A minimum of 18 hours of consumer protection courses; the remaining hours required to complete 45 hours of CE may be related to either consumer service or consumer protection courses.

(CONTINUED ON PAGE 10)



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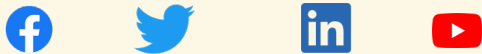
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COMMISSIONER'S UPDATE (CONTINUED FROM PAGE 1)

The California Association of Realtors (CAR) goes a step further and recommends including specific language with the listing information: "Per seller instruction, buyer letters that accompany an offer will not be presented to seller. If a buyer letter cannot be separated from the offer, the entire offer shall be returned to buyer or buyer's agent."

As you can imagine, the practice of providing love letters has elicited controversy. Oregon was the first and only state to explicitly ban love letters in real estate transactions. A property rights-friendly nonprofit filed a lawsuit challenging Oregon's law before it was scheduled to take effect on January 1, 2022. In February, the court granted the plaintiff's motion for preliminary injunction and barred the state from enforcing the state law during the pendency of the lawsuit. The court ruled that the law violates the free speech rights of real estate agents and is overbroad in that it will have the effect of banning other innocuous information contained in love letters that sellers may find useful. DRE continues to closely monitor this case for its implications for California Real Estate Law. Whatever the resolution, DRE advises licensees to consider the recommendations from NAR and CAR, and urges caution when clients express an interest in including a love letter with an offer to purchase property. ■  @DougMcCauleyDRE

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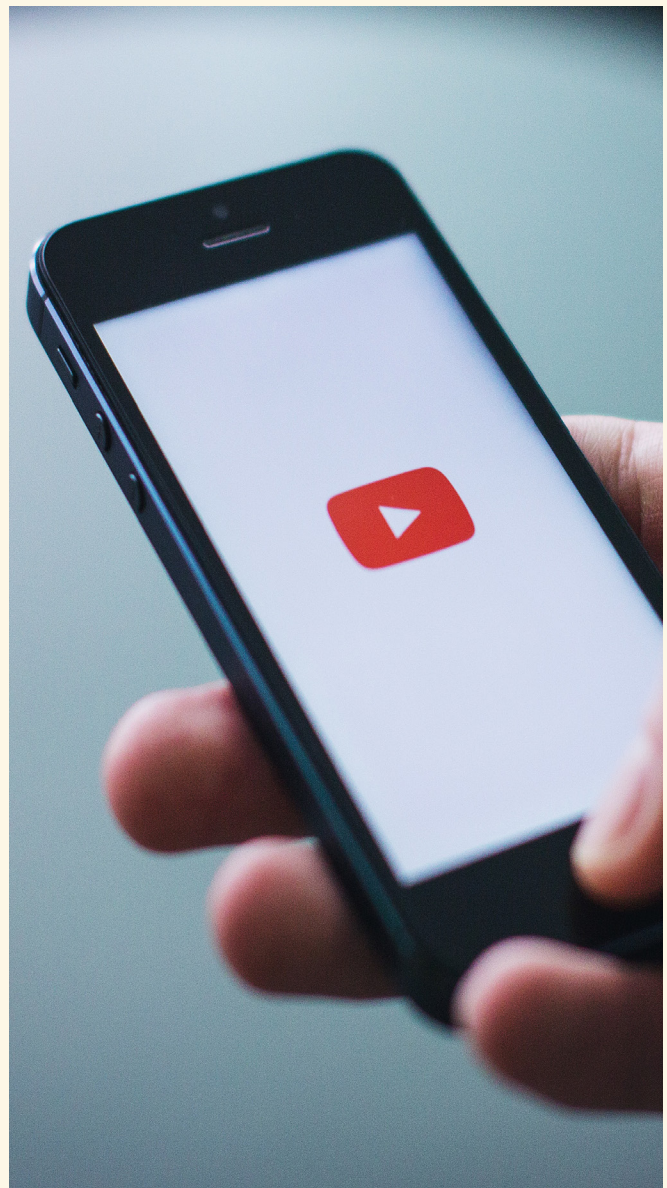


As part of fulfilling DRE's mission to safeguard and promote the public interests in real estate matters we are actively expanding the video content available on our YouTube channel!

From educational tutorials to frequently asked questions and answers, you can find a number of videos on a range of topics, including:

- Foreclosure Information for Homeowners
- What to Expect on Exam Day
- Materials to Gather Before You Apply for Your CA Real Estate License
- FAQs - Scheduling Your Exam
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Broker Supervision in Advertising

The Department of Real Estate wants to remind licensees about the importance of following advertising requirements. It is especially important for brokers to know that, while a salesperson or broker associate who distributes or publishes noncompliant advertising is subject to discipline, a broker can also be subject to discipline for both the advertising-related violation as well as for a lack of reasonable broker supervision.

In this article “advertising” means any solicitation, including first point of contact solicitation materials and advertisements, and all media, from printed business cards and classified advertisements to social media and virtual advertising.

What is the broker’s role in ensuring their affiliate licensees comply with the Real Estate Law related to advertising?

First and foremost, remember that all advertising as licensed activity is conducted under the broker’s license. Affiliate salespersons and broker associates are acting on the broker’s behalf when advertising or engaging in the business of a real estate licensee.

Commissioner’s Regulation 2725(e) specifies that reasonable broker supervision includes the establishment of policies, rules, procedures, and systems to review, oversee, inspect, and manage advertising of any service for which a license is required.

What does reasonable supervision related to advertising look like?

Answering the following questions can help brokers to determine if there is reasonable supervision over the advertising of affiliate licensees:

- Does the broker have brokerage or brand advertising standards and requirements?
- Are affiliate licensees provided information or resources that can help them prepare advertising?
- Who reviews and approves the advertising of affiliate licensees before it is published, printed, or distributed?
- If an unlicensed employee prepares the advertising, is it done under the direction of a licensee and subject to broker supervision?

- Does the broker have systems in place to ensure sufficient advertising review and approval?
- How often does the broker, or designated manager, spot check their affiliate licensees’ advertising materials?
- Are all affiliate licensees properly licensed under the broker?
- Are all fictitious business names listed on the broker’s public license information on the Department of Real Estate’s website?
- If compliance issues are found, what action does the broker take to correct the advertising?
- What happens if an affiliate licensee violates the broker’s policy, rules, or procedures?
- Do the broker’s policies, rules, and procedures include the preceding bullet points?

While the list above is not comprehensive, considering answers to these questions can help ensure that brokers appropriately supervise affiliate licensees who advertise their services.

For additional information, see the [Department of Real Estate’s Real Estate Advertising Guidelines](#). ■



Dual Agency: What You Need to Know!

California's recent record breaking residential market has created tremendous opportunity for real estate licensees; but old pitfalls remain. High prices and limited inventory are driving California home buyers to pursue every advantage as they compete for their new homes. In this environment, buyers are willing to consider dual agency to secure the seller's attention while also saving money, and sellers may find it an attractive option if the listing agent is willing to reduce their commission.

Dual agency, where the seller's real estate broker represents both the buyer and seller in a transaction, may be seen as advantageous not only for the buyer, but for the broker as well since they will not have to split a commission with another brokerage. Dual agency may also streamline the transaction process. However, the perceived benefits can be quickly overwhelmed by the responsibilities and liability assumed by the broker.

Understanding the development of dual agency and current law surrounding the practice is critical to making it a successful arrangement for buyers, sellers, and brokers.

Development of Dual Agency

For most of the past century, traditional residential real estate transactions were conducted by a broker retained by the seller to list the home on a multiple listing service (MLS). Other "cooperating" agents then showed the property to potential buyers and were often considered subagents of the seller. Commonly, the listing broker and the "cooperating" agent also assisted the buyer in the purchase of the property.

This model was fraught with problems. First, it was not always clear to the buyer that the "cooperating" agent was an agent for the seller and, therefore, not acting in the buyer's best interest. Second, the traditional model created an inconsistency between case law and real estate practice. As early as the 1940s, California courts held that listing brokers and "cooperating" agents were, in fact, undisclosed dual agents who owed fiduciary duties to both the buyer and the seller in a transaction. However, the practice in the real estate community was for "cooperating" agents to act as subagents of the seller. This discrepancy created uncertainty among agents as to whom they owed fiduciary duties.

In the early 1980s, the agency relationship in traditional residential real estate transactions became the subject of nationwide attention and, in 1986, California became the first state to enact laws to address the practice of dual agency. California lawmakers focused on disclosing and educating consumers about dual agency. While some states banned dual agency altogether, California codified it into law (Civil Code 2079).

As it stands, a broker can act as a dual agent only when both parties to the transaction are aware and consent to dual agency. The law mandates that every agent provide their client with a "Disclosure Regarding Real Estate Agency Relationship" form that describes an agent's duties to a buyer, seller, or both the buyer and the seller. The form further states that, with dual agency, the agent owes "a fiduciary duty of utmost care, integrity, honesty

(CONTINUED ON PAGE 6)



**DUAL AGENCY: WHAT YOU NEED TO KNOW (CONTINUED FROM PAGE 5)**

and loyalty” to both the seller and the buyer. The law also requires the agent to disclose if they are acting exclusively for the buyer, exclusively for the seller, or as a dual agent representing both the buyer and the seller.

When is Dual Agency Applicable?

Dual agency arises when a real estate broker, including a corporate broker, represents both the buyer and the seller in a transaction. Dual agency also exists when the buyer and seller are represented by different salespersons, but who themselves are both affiliated with the same broker. In most of these cases, each party to the transaction interacts exclusively with their own salesperson, rather than the responsible broker. Nevertheless, California law considers that the client’s relationship is with the broker, who acts through the licensed salesperson. This means that the broker is the dual agent and must fulfill fiduciary duties to both parties in the transaction, and that the salespersons – by extension – owe equivalent fiduciary duties to both parties in the transaction.

The California Supreme Court reiterated the legal definition of dual agency in the landmark case *Horiike v. Coldwell Banker Residential Brokerage Co.* (2016) 1 Cal. 5th 1024. The Court held that, since the salespeople representing both the seller and the buyer worked for the same corporate broker (Coldwell Banker), dual agency was in effect and that the seller’s agent owed equivalent fiduciary duties to both parties in the transaction. The seller’s agent was required to disclose facts material to the property’s price and desirability that might reasonably be discovered by the buyer.

The Horiike case acknowledged the potential, and sometimes unavoidable, conflict of interest in a dual agency relationship and encouraged the California Legislature to protect consumers by directly addressing “the significant concerns ... inherent in dual agency, whether at the salesperson or at the broker level.”

Concerns with Dual Agency

The potential pitfalls of dual agency distinguish it from situations where an agent represents only one party to a transaction. In an exclusive agent situation, representing a client means the real estate agent becomes the fiduciary of

the client and any action related to that transaction must be in the client’s best interest. This includes counseling the client on price, negotiating for the client’s best interest, and advising the client on various decisions. It also means placing the client’s interest above the agent’s own interest.

Concerns with dual agency center on the inherent conflict when representing both parties (i.e., the buyer and seller) in a transaction. This is especially important when it comes to price. The agent of the buyer is obligated to negotiate the lowest possible price, while the seller’s agent is obligated to negotiate the highest possible price.



Understanding the development of dual agency and current law surrounding the practice is critical to making it a successful arrangement for buyers, sellers, and brokers.



California lawmakers attempted to address this problem by placing limitations on dual agents. Civil Code section 2079.21 states that a dual agent “may not disclose to the buyer that the seller is willing to sell the property at a price less than the listing price, without the express written consent of the seller,” nor may the dual agent “disclose to the seller that the buyer is willing to pay a price greater than the offering price, without the express written consent of the buyer.” However, this provision does not change in any way “the duty or responsibility of a dual agent to any principal with respect to confidential information other than price.”

Another potential pitfall with dual agency is that the agent may be unethically influenced by the double commission.

(CONTINUED ON PAGE 10)

Subdivision Public Reports

It is important that licensees, especially those planning to work in new subdivisions, are familiar with the mandatory public reports issued by the Department of Real Estate. Intended to provide potential buyers essential information about the development, public reports are required for any new subdivision that consists of five or more lots units, or parcels.

JURISDICTION

Before someone can offer subdivision property for sale or leases in excess of one year, the Subdivided Lands Law requires that DRE issue a public report that includes information about the property. DRE has jurisdiction over all common interest developments with five or more subdivision interests, standard subdivisions located in unincorporated areas with five or more lots, time-share projects located within California, and multi-location time-share projects.

Exemptions to the public report requirement include the following:

- Subdivisions that consist of fewer than five lots, units or parcels;
- Standard subdivisions located entirely within the limits of a city that will be sold with completed residential structures (please note that even if exempt from the public report requirement, the subdivider must still escrow purchase and option monies or have a purchase money bond on file with DRE in order to retain such funds);
- Subdivisions expressly zoned for commercial or industrial purposes (a mixed-use project where the number of commercial and residential interests is five or more falls within DRE's jurisdiction);
- Subdivided land offered for sale or lease by a state, local, or public agency; or
- Bulk sales, i.e., builder-to-builder transactions of five or more lots, units, or parcels.

If a subdivider's project fails to meet any of the foregoing exemptions or if they otherwise sell interests without a required public report, DRE can take action not only against the subdivider but also against the real estate licensees representing the subdivider in such transactions. It is the responsibility of licensees on either side of a transaction (representing seller (subdivider) or buyer) to know if it requires issuance of a public report. While most sales will be for new housing or vacant lots, public reports also apply to condominium conversions and undivided interest subdivisions, such as tenancies-in common.

SUBDIVIDER/AGENT RESPONSIBILITIES

A subdivider or their agent must post a copy of the public report in a conspicuous place in any office where sales of subdivision interests are conducted and provide one to any member of the public who asks for a copy. Further, a copy of the report must be given to each prospective buyer and a signed receipt obtained that they received and had an opportunity to read the report prior to entering into a contract to purchase. The subdivider must keep the receipt for three years.

Subdividers must use the version of the homebuyer purchase contract (and escrow instructions, if any) approved in connection with DRE's issuance of the public report for the subdivision. A substitute contract may not be used unless approved by DRE.

If you have questions about DRE's subdivision public report requirements, please visit [DRE's website](#) or contact Subdivisions in either Sacramento (916-576-3374) or Los Angeles (213-576-6983). ■

The Important Role of Enforcement in Regulating California's Real Estate Industry

As a licensing and regulatory agency with consumer protection as its primary mission, the Department of Real Estate is responsible for enforcing California's Real Estate Law and Subdivided Lands Law.

With this authority, DRE has a number of valuable tools to protect consumers. DRE can deny a license to an applicant if they do not meet the full requirements for licensure and discipline a license for proven violations of California law. DRE also can revoke a license for more serious violations, and issue Citations and Desist and Refrain Orders to stop activities that violate Real Estate Law or Subdivided Lands Law, and Bar Orders for the most serious offenses to prohibit a person or entity from engaging in real estate activities for up to three years.

DRE enforces these laws to achieve maximum protection for real estate consumers, while exercising impartiality and fairness toward both the consumer and the industry. Many of DRE's enforcement actions originate as consumer complaints.

DRE posts on its website [summaries of the most serious enforcement actions](#) taken against licensees, as well as [other disciplinary actions](#). ■



Help Your Clients by Recommending Licensed Contractors

Real estate agents often suggest that their clients make safety and cosmetic improvements to a property before it is put on the market or during escrow. When doing so, agents should be aware of California contracting laws and always recommend contractors licensed by the Contractors State License Board (CSLB) for jobs that are \$500 or more.

Under California law, all construction that costs \$500 or more in combined labor and materials must be performed by a contractor licensed by CSLB in the correct classification. For example, plumbing repairs will require a plumbing license and painting will require a painting license. CSLB issues licenses in [45 classifications](#) that encompass all types of construction and home improvement.

The new B-2 Residential Remodeling classification may be of particular interest to real estate agents. B-2 licensees can work on bathroom and kitchen remodels, cabinet replacement, flooring, plumbing and electrical fixtures, and other home improvement projects. However, the work can't involve structural changes on loadbearing walls. [Learn more about the B-2 license here.](#)

CSLB recommends that agents check to make sure a contractor's license is active and in good standing before recommending them to a client. This can be done in seconds using [CSLB's License Check](#), an online feature that shows possible complaint information and if the contractor carries workers' compensation insurance. Workers' compensation is required if the contractor has employees and protects the homeowner from liability if those employees are hurt on their property. Please note that roofing contractors must have workers' compensation whether or not they have employees. You can also check a license by calling (800) 321-CSLB (2752).

Hiring unlicensed contractors puts clients at risk by exposing them to legal liabilities, preventing them from pulling any required building permits, and reducing the consumer protections available to them if a problem arises.

Clients and real estate agents can begin their search for a licensed contractor using CSLB's [Find My Licensed Contractor](#) feature, which allows searches for licensed contractors in a certain zip code by classification.

Other tips to share with clients include:

- Get at least three written bids to compare cost.
- Make sure the contractor provides a detailed written contract signed by both the homeowner and the contractor. Be wary of signing electronic devices; if you do sign one, ask for a paper copy immediately.
- Confirm that the contractor pulls all required building permits.
- Never pay more than 10% down or \$1,000, whichever is less (except in cases where the licensee has a blanket performance and payment bond on file with CSLB).
- Don't pay in cash. Pay with a check and save copies of the check in a project file.
- Don't let payments get ahead of the work.
- Make sure the building department inspects the completed work.
- Don't make the final payment until you're satisfied with the job and the building department has completed its inspection.

Real estate agents should protect themselves and their clients by encouraging the hiring of licensed contractors and by following CSLB's consumer tips.

For more information, please visit [CSLB's website](#). ■



CHANGES COMING TO CONTINUING EDUCATION REQUIREMENTS (CONTINUED FROM PAGE 1)

Salespersons—First Time Renewal

- Four separate three-hour courses in ethics, agency, trust fund handling, and risk management, and a three-hour course in fair housing, which must include an interactive participatory component during which the licensee will role-play as both a consumer and a real estate professional; and
- A two-hour course in implicit bias training; and
- A minimum of 18 hours of consumer protection courses; the remaining courses to complete the 45 hours of CE may relate to either consumer service or consumer protection.

Subsequent Renewals

Beginning January 1, 2023, subsequent renewals for brokers, officers, and salespersons whose license expires on or after January 1, 2023, or who file a renewal application on a late basis after January 1, 2023, will need to complete either a nine-hour CE survey course that covers the mandatory subjects, or individual courses in all of those mandatory subjects. All licensees will still need to complete a minimum of 18 hours of CE courses in the category of consumer protection.

DRE staff have begun to work with private course providers to ensure that licensees will have sufficient time to complete the new approved CE requirements prior to January 1, 2023, and expects to post updated information on the DRE website in July 2022. ■

DUAL AGENCY: WHAT YOU NEED TO KNOW (CONTINUED FROM PAGE 6)

Since the dual agent receives commission from both the buyer and the seller, the agent may be motivated to close the deal at all costs, even if it is not in the best interest of one or both clients. For instance, a dual agent may be tempted to conceal a material fact about the property for fear of losing out on the double commission.

An agent can also be unfairly influenced by a longstanding relationship with one of the clients. In this case the parties to the transaction and the agent may be better served by not entering into a dual agency agreement to avoid the perception that the agent is more dedicated to one party than another.

Final Recap

Despite the passage of legislation and guidance from the California Supreme Court, real estate licensees should exercise caution when undertaking dual agency representations. Dual agency carries risks for both the agent and the client, and both should carefully weigh its pros and cons based on the specifics of the transaction and their individual level of comfort. If a broker is interested in serving as a dual agent, the Department of Real Estate reminds them about their fiduciary duties to each client, the dangers of representing both the buyer and seller, and recommends disclosing more (rather than less) information to their clients. Given the potential for consumer harm from these transactions, DRE aggressively investigates complaints that involve dual agency to uncover instances where there is a breach of fiduciary duty on the part of licensees. ■



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INSIDE THIS ISSUE

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Page

- 1 – Commissioner’s Update
- 1 – Changes Coming to Continuing Education Requirements in January 2023
- 4 – Broker Supervision in Advertising
- 5 – Dual Agency: What You Need to Know!
- 7 – Subdivision Public Reports
- 8 – The Important Role of Enforcement in Regulating California’s Real Estate Industry
- 9 – Help Your Clients by Recommending Licensed Contractors

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