

Advisory --

What Constitutes Engaging in Real Estate Licensed Activities "*Within this State*" Requiring a Real Estate Broker or Salesperson License?

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I. Introduction

The California Real Estate Law makes it "unlawful [and punishable as a crime] for any person to engage in the business, act in the capacity of, advertise, or assume to act as a real estate broker or a real estate sales[person] within this state without first obtaining a real estate license from the California Department of Real Estate"¹. Section 10130 of the California Business and Professions Code (Code) (emphasis added).

While the Real Estate Law, in Section of 10131 of the Code, then goes on to describe a broad range of acts and activities which require a real estate license, the statutory law does not define the meaning of "within this state", and questions continue to arise and are often posed regarding whether the words (1) require physical presence in the State of California, or (2) refer to the nature, scope and/or contacts within the State.

II. Analysis

Unfortunately, there is no reported case in which the phrase "within this state" -- in the context of the Real Estate Law -- has been analyzed and interpreted to determine if physical presence in California is required.

Therefore, the determination has been left to and made by the department based on its statutory and mission mandates, the purpose of California licensing requirements, and guidance from a California Supreme Court decision pertaining to lawyer licensing.

A. The Real Estate Law Mandates for Public Protection; the Mission of the Department to Safeguard and Promote the Public Interests in Real Estate Matters; and The Purpose of California's Real Estate Licensing Requirements.

A critical starting point for any guidance and analysis must be based on the Real Estate Law's command that the Real Estate Commissioner enforce that law in a manner which achieves the maximum protection for the purchasers of real property and those persons dealing with real estate licensees. Moreover, the Legislature has mandated that

¹ The California Department of Real Estate will become the California Bureau of Real Estate on or before July 1, 2013, pursuant to the Governor's Reorganization Plan.

"[p]rotection of the public shall be the highest priority for the Department of Real Estate in exercising its licensing, regulatory, and disciplinary functions". Section 10050.1 of the Code. Additionally, the department's mission directs that the department safeguard and promote the public interests in real estate matters through licensure, regulation and enforcement. Lastly, the purpose of the licensing requirements in California for real estate practitioners is to protect the public from unskilled, dishonest, and untrustworthy individuals.

B. The California Supreme Court Decision on What "In California" Means With Respect to Lawyer Licensing.

In *Birbrower, Montalbano, Condon & Frank v. Superior Court*, 17 Cal.4th 119 (1998), an important case which examined the meaning of "in California" in the context of attorney licensing, the California Supreme Court concluded that one can practice law in California without physically entering the geographic boundaries of the State.

The Court stated (at pages 128-129): "In our view, the practice of law 'in California' entails sufficient contact with the California client to render the nature of the legal service a clear legal representation. In addition to a quantitative analysis, we must consider the nature of the unlicensed lawyer's activities in the state. Mere fortuitous or attenuated contacts will not sustain a finding that the unlicensed lawyer practiced law 'in California'. The primary inquiry is whether the unlicensed lawyer engaged in sufficient activities in the state, or created a continuing relationship with the California client that included legal duties and obligations". (Emphasis added).

The Court went on to say: "Our definition does not necessarily depend on or require the unlicensed lawyer's physical presence in the state. Physical presence here is one factor we may consider..., but it is no means exclusive. For example, one may practice law in the state [in violation of California's lawyer licensing laws] although not physically present here by advising a California client on California law in connection with a California legal dispute by telephone, fax, computer, or other modern technological means. Conversely, although we decline to provide a comprehensive list of what activities constitute sufficient contact with the state, we do reject the notion that a person automatically practices law 'in California' whenever that person practices California law anywhere, or 'virtually' enters the state by telephone, fax, e-mail, or satellite [citations omitted] ...We must decide each case on its individual facts". (Emphasis added).

III. Discussion Relative to the Real Estate Law and What "Within the State" Means

Based on the statutory and mission mandates to provide the strongest protection for California consumers, as well as the purpose of the licensing requirements, and following the reasoning and the holding of the *Birbrower* decision of the California Supreme Court, the department has rejected the argument often advanced by "out-of-State" real estate practitioners that a person cannot perform real estate licensed activities "within this state" unless the person has (1) performed those activities while

physically present in California, (2) an actual business presence in the State, or has (3) entered into the geographic boundaries of the State to conduct real estate licensed activities.

Rather, the department has concluded that a person engaged in the activities set out in section 10131 of the Code² is conducting those activities in California ("within this state" under section 10130 of the Code) where that person's efforts are purposely and deliberately directed toward California residents and consumers (Californians).

The department's inquiries are and must be fact specific, since the line between what activities are and what are not "within this state" cannot be drawn with precision. In looking at cases, the department examines the facts and circumstances and focuses on the character and nature of the acts and activities.

And like the Supreme Court, the department will not provide a comprehensive list of what activities constitute sufficient contact with the State of California to rise to the level of being in the State.

However, the department will look at and assess the following to determine if a person (himself, itself, or through an agent) who has not physically entered into California has reached into California and has performed or is currently operating within California for purposes of the real estate licensing law:

1. Were Californians intentionally/purposely targeted, solicited, or contacted through media marketing, the mails, and/or the Internet?
2. Was real estate or real estate related business transacted with Californians?
3. Were the activities listed in section 10131 of the Code (for instance, solicitations, sales, listings, negotiations, offers to buy, leases, financing of real property, and the like) offered to be done for or actually done for Californians for or in expectation of compensation?

² Section 10131 of the Code requires the licensure in California of a person who, for a compensation or in expectation of compensation, regardless of the form or the time of payment, does or negotiates to do one or more of the following acts for another or others:

- 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.
- 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 a business opportunity.
- Assists or offers to assist in filing an application for the purchase or lease of, or in locating or entering upon, lands owned by the state or federal government.
- 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.
- Sells or offers to sell, buys or offers to buy, or exchanges or offers to exchange a real property sales contract, or a promissory note secured directly or collaterally by a lien on real property or on a business opportunity, and performs services for the holders thereof.

If the answer to any of the above questions is "yes", the department will look at the nature of the activities and contacts, and further assess whether the same were designed to serve the real estate needs of Californians, and if they were substantial, repeated, systematic, and substantive, or random, isolated, fortuitous or insignificant.

As was mentioned above, each matter is very fact driven.

The department understands the importance of electronic commerce and communications, and that in the context of cyberspace and the technology associated with the Internet there can be passive web sites which can post and provide and advertise information to interested viewers.

Commissioner's Regulation 2770 is a rule pertaining to advertising, electronic communications, and the dissemination of information via the Internet, and -- in addition to the directives and guidance of that regulation -- the department has published an FAQ piece titled "Doing Business on the Internet".

In the Internet realm, the department will look at the nature, extent, and quality of the real estate activities that an out-of-California person conducts over the Internet which reaches Californians. For instance, where a real estate licensee in Nevada -- who is unlicensed in California -- repeatedly and actively solicits (via intentional or knowing transmissions over the Internet) California timeshare owners for listings of those timeshares (even if the timeshare properties are located outside of California), the department would most assuredly conclude that the Nevadan was engaged in real estate licensed activities in violation of California law. Similarly, if an Illinois real estate broker were to seek and obtain a listing from a California homeowner through the Internet, and thereafter sell the property to a person in Chicago, the solicitation and listing activities would most certainly require a California real estate license³.

IV. Conclusion

Based on statutory and mission mandates for the protection of the California public, good public policy, and the excellent analysis of the *Birbrower* decision of the California Supreme Court in the area of attorney licensing, the California Department of Real Estate has concluded that a person can be performing real estate licensed activities in California (unlawfully if they do not have a California real estate license⁴) even where that person is not physically present in California, or has never stepped foot in the State.

The determinative facts and critical analysis will continue to revolve around the contacts with Californians respecting the performance of real estate related services made by the out-of-State person, and the nature, quality, quantity, and purpose of those contacts.

³ While exemptions from the California real estate licensing law exist, they are very limited, and narrowly drawn and construed. See section 10133 of the Code, et seq.

⁴ Please see footnote 3 above.