MANNING & KASS
ELLROD, RAMIREZ, TRESTER LLP

REAL ESTATE LEGAL UPDATE

Winter 2015

BROKERS SHOULD SAVE THEIR SOCIAL MEDIA EVEN IF NOT REQUIRED BY LAW

By Victor Rocha

Photo: Texting, Wiki Commons

All real estate brokers are required to keep their transaction files for a period of three years (California Business & Professions Code Section 10148). If the Bureau opens an audit, and the broker is unable to produce a transaction file, the Bureau can impose various sanctions, including suspension or revocation of a license. As of January 1, 2015, the statute was amended so that it expressly states that brokers are not required to keep texts or tweets, or other forms of short-lived social media. Although keeping social media communications is not required, brokers should nonetheless keep them as part of their transaction file. Also, brokers should create other writings (such as letters, emails, faxes, notes) that document important communications that occurred through social media. If brokers adopt these practices, they will give themselves added protection against, and may altogether avoid, BRE disciplinary complaints and costly civil lawsuits.

In the Spring 2013 edition of the BRE's Real Estate Bulletin, the Bureau addressed the emergence of texts and tweets in the industry as follows:

ALSO IN THIS ISSUE

FIRM NEWS

Against a $5.2 million fraud claim over an $8.25 million property, Los Angeles Manning & Kass partner **David Gorney** has achieved a defense verdict on behalf of real estate agent and broker clients. The three month jury trial consumed 49 actual trial days.

Rinat Erlich recently prevailed on a real estate broker non-disclosure case. The claim arose out of a real estate agent being involved in the remodeling of a home purchased from foreclosure. Plaintiffs alleged the remodeling was inferior and that the agent failed to disclose lack of permits. The broker and agent prevailed after a four week trial.

> "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 licensed is required, EC associated with licensed acts must be maintained by the broker as part of the transaction file."[1]

The mandate was clear that all electronic communications, whether emails, texts and tweets, that related to a real estate transaction should be retained. In response, the California Association of Realtors sponsored Assembly Bill No. 2136, which sought to amend the law by adding language that a broker is not required to keep texts or tweets. The legislative history for the bill reads as follows:

> "[T]his bill responds to the increasing tendency of realtors and clients to use text messages, instant messaging, or social media postings to communicate about things that once were communicated orally, either by telephone or face-to-face. The bill would not say that such communications would never be material, but only that, like oral communications, they would need to be memorialized in writing and subscribed by the appropriate party before they could constitute an enforceable part of the contract. For similar reasons, such messages would not be among the 'other documents' that licensed realtors must maintain for a period of three years, unless the messages are confirmed in writing in a manner prescribed by existing law."[2]

> "Current law pertaining to the retention of documents is out-of-date and thus problematic for real estate brokers. Short-lived communications such as texts, tweets, etc. are not designed or formatted for long time retention. Current law fails to reflect modern technology and does not include real estate conversations or transactions taking place via social media. Absent an updating of the law, real estate brokers will be required to preserve printouts of entire conversations via social media, as official records."[3]

The reasoning behind the change appears to be the belief that people generally do not communicate "material" information by text or tweet. The burdens of saving and printing social media would seem, under this reasoning, to outweigh the benefits.

In any business, doing the bare minimum is not a recipe for success. A sure way of hurting a business is to open itself up to unfounded claims and accusations which can lead to disciplinary complaints and civil lawsuits. A good way to protect against unfounded claims is to document your file. This would include not only keeping copies of fully executed documents and relevant emails, but also social media, even if they are not required by law. All too often a client will file a complaint with the BRE or in state court over issues that were unforeseen during the transaction. So imagine a situation where, after a successful transaction, you dispose of texts and tweets that at the moment you believe are not "material." However, six months after the transaction, your client makes a claim based on the very issues discussed in texts and tweets that you failed to keep as part of your file. What was immaterial six months ago, has now become very "material."

The best practice is to start producing hard copies of texts and tweets for your file. You can take a screen shot of each text, and then email to yourself or you can download an "app" that can facilitate printing your social media. To some, this may seem excessive. However, the BRE's Spring 2013 *Real Estate Bulletin* was accurate when it stated that brokers should keep social media because electronic communications "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."[4]

1 California Department of Real Estate, *Real Estate Bulletin*, Vol. 73, No. 1, Spring 2013.
2 Assem. Bill No. 2136 (2013-2014 Reg. Sess.), Assembly Committee On Judiciary, As Amended March 24, 2014.
3 Assem. Bill No. 2136 (2013-2014 Reg. Sess.), Senate Judiciary Committee, As Amended March 24, 2014.
4 California Department of Real Estate, *Real Estate Bulletin*, Vol. 73, No. 1, Spring 2013.

BROKER ADVISORY REGARDING THE CALBRE'S BROKER OFFICE SURVEY PROGRAM AND ITS AUDITING OF PROPERTY MANAGEMENT ACTIVITIES

By Mary E. Work

Over the last few years, there has been a marked increase in the number of Bureau of Real Estate (CalBRE) Broker Office Surveys and Audits of Broker Property Management activities. Based on current trends in both of these areas, all brokerages are well advised to be prepared to receive a request from the CalBRE asking to conduct a Broker Office Survey or an Audit of its property management activities in the near future.

What is a Broker Office Survey?

A Broker Office Survey (BOS) is conducted by a member of the CalBRE's Enforcement Section who holds the title special investigator. The BOS is designed to test for compliance with CalBRE laws and regulations.

Typically, the BOS will be initiated by either a letter or phone call from a Special Investigator. The request will be directed to the Broker of Record for the brokerage. The amount of time that the broker will need to set aside for the BOS depends upon the size of the brokerage. The broker can assist the process by having the items discussed below ready for the special investigator at the beginning of the BOS. The broker of record (not a designee) must participate in the BOS.

The BOS will begin with a review of basic background information. The special investigator will ask about the business entity, as it appears on the license held by the brokerage, as well as the status of the broker of record. Specifically, the CalBRE will ask about the titled officer and director positions that the broker holds with the corporation.

As an aside, note that the CalBRE does **NOT** license LLCs to conduct real estate brokerage activities in this state.

What records will be requested that pertain to the brokerage's business operation?

After covering information regarding the broker, the Special Investigator will verify that the brokerage's main office address is the same address that is on file with the CalBRE. The special investigator will ask to see a current list of all real estate salespersons who are working under the brokerage's license. This list will be compared with the information that the brokerage has on file with the CalBRE. The special investigator will also ask about all broker-associates who work for the brokerage. The broker must have current broker-salesperson agreements on file for each real estate salesperson and broker-associate who works for the brokerage. The list of active salespersons will be compared to the records maintained by the CalBRE to make sure that the broker has all current information on file with the CalBRE regarding those licensed to work under the brokerage. The broker is not required to notify the CalBRE when bringing broker associates on board but the broker is required to maintain a written contract verifying the arrangement.

The special investigator will ask the broker a series of questions designed to provide an overview of the brokerage's activities.

Typical questions cover the following areas of real estate practice:

1. Does the broker have a *Broker Escrow Division* and if so, how many escrows are currently open?
2. If the broker maintains branch offices, is each location CalBRE licensed?
3. Are branch managers appointed pursuant to B & P Code Section 10164 (SEE CalBRE Form RE 242)?
4. Does the broker perform property management?[1]
5. Does the broker negotiate, sell, or service trust deeds?
6. Does the broker make or arrange loans secured by real property? If so, does the brokerage have a MLO endorsement on its license? Do all others working for the brokerage and engaged in MLO activity hold MLO endorsements?
7. Does the broker collect loan payments from borrowers for lenders/note owners or on behalf of obligors of promissory notes?
8. Is the broker a selling agent for subdivision?
9. Does the broker use any DBA's (pertaining to fictitious business names) not on CalBRE record? (Reg. 2731)

1 A broker who reports conducting property management activities is likely to receive an audit request from the CalBRE Audit Section. Such requests can also be triggered when the broker renews the corporate broker license and reports property management activity as part of the license renewal process.

Changes regarding the use of *fictitious business names* and *team names* in advertising:

As of January 1, 2015, Section 10159.5 of the B & P Code has been amended and Sections 10159.6 and 10159.7 have been added to the Code. SEE BRE *Advisory and Guidance to Licensees Regarding Assembly Bill 2018, Effective January 1, 2015, Pertaining to Fictitious Business Names & "Team Names,"* posted on the CalBRE website.

The law describes that a team name is not a fictitious business name if the name is used by two or more real estate licensees, the name includes a licensee's surname in conjunction with the term "associates," "group," or "team," and the name does not include any term or terms that imply or suggest the existence of a real estate entity independent of a responsible broker. Advertising that contains a team name, including print or electronic media and "for sale" signage, must include certain identifying information in a conspicuous manner.

See the CalBRE advisory described above for more information on the issue of fictitious business names.

Another important area that the BOS will cover pertains to *broker trust accounts*.

This is one of the most significant areas for broker violations of real estate law and the Regulations of the Real Estate Commissioner. The CalBRE publishes an advisory on its website that is entitled: *"Ten Most Common Violations Found in [BRE] Audits."* All ten of the violations discussed in the advisory pertain to trust fund-related violations. Audits of brokerages engaged in property management activities commonly result in a determination of trust fund handling violations by the broker.

During a BOS the special investigator will ask questions regarding the broker's use of a trust fund account. There will also be a request to see records pertaining to any trust accounts maintained by the broker.

Among the questions that a broker can expect in the BOS include: How is the trust account titled? (Regarding this issue, review the CalBRE's advisory "OPENING A REAL ESTATE BROKER TRUST ACCOUNT," available on the CalBRE's website.) Do any non-licensees sign trust account checks? Is there a fidelity bond for any non-licensed signatory?

The special investigator will ask whether monthly reconciliations of trust accounts are performed and ask to review three months' worth of bank statements and cancelled checks pertaining to any trust accounts maintained by the broker.

The special investigator will ask to sample transaction files.

The special investigator will ask to sample several transaction files. This will include a review listing agreements, offers, deposit receipts, counter offers and other documentation that pertaining to the transaction files (including email communications but not texts and tweets) that were requested for review.[2]

The other major area of inquiry will pertain to broker supervision of the brokerage.

Questions will cover the type of system the broker uses to review transactions/documents (REG. 2725); file maintenance and storage; type of salesperson training provided by the broker; whether the broker has established policies and procedures in place?

A "best practice" is to have an independent compliance audit conducted once every twelve to eighteen months to make sure the brokerage is in regulatory compliance.

2 10148. (a) 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. 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; and shall, upon the appearance of sufficient cause, be subject to audit without further notice, except that the audit shall not be harassing in nature. This subdivision shall not be construed to require a licensed real estate broker to retain electronic messages of an ephemeral nature, as described in subdivision (d) of Section 1624 of the Civil Code.

WHAT TO DO ABOUT TERMITES UNDER THE NOVEMBER 2014 CALIFORNIA ASSOCIATION OF REALTOR RESIDENTIAL PURCHASE AGREEMENT

By Thomas R. Wagner

Photo: Termite damage, home exterior, Wiki Commons

The new California Association of Realtors ("CAR") November 2014 Residential Purchase Agreement and Joint Escrow Instructions ("2014 RPA") provides new options for buyers and sellers of residential property regarding the inspection, report, corrective work, and certification of wood destroying pests and organisms (commonly referred to as "termites" but which includes dry rot and funguses as well as termites).

Previously, unless covered by homeowner associations, these actions typically were contract requirements for the seller to perform and almost all residential buyers included a request in their purchase offers for the sellers to arrange and pay for the termite inspection, report, corrective work, and certification.

Now, CAR describes the termite inspection and report as part of the recommended buyer's investigations (2014 RPA paragraph 12A) and anticipates the buyer will pay for the inspection and report and include the cost of repair work and certification in a request to the seller for repairs, usually ten to fifteen days after the contract is formed. This creates options and issues for buyers and sellers.

Buyers should keep in mind that termite inspections can create collateral damage to the property and termite work can be very expensive, inconvenient for people living in the property, and expand in cost because of new discoveries while the repairs are performed. Also the buyer's lender, particularly for VA loans, may require a termite certification before funding, and the CAR approach may result in the buyer waiting two or three weeks into the purchase to find if he/she can get the certification.

Under the 2014 RPA, buyers have the following options:

1. BUYER INSPECTS AND REQUESTS SELLER MAKE REPAIRS

   After opening escrow, the buyer can get the report and request the seller perform and pay for the corrective work and certification using CAR Form RR. But the buyer may not have as much negotiating power approximately two weeks into the contract and the seller may refuse to pay for and/or perform the work. The buyer can agree to pay for some or all of the repairs and ask the seller to allow the buyer to have the work done before close of escrow. The buyer does not own the property, however, which may involve issues regarding insurance and responsibility for damages. More important, what happens if the buyer pays for the repairs, but while performing the work the contractor finds significantly more damage? The buyer may not want the property or be able to afford the extra work at that point, but he/she has already paid for the initial work.

2. BUYER INSPECTS AND REQUESTS A CREDIT

   The buyer can request a credit from the seller, but the buyer's lender probably will limit the total amount of the credits the buyer can get (2014 RPA paragraph 3j(5)), which may result in the buyer absorbing part or all of the cost of repairs. Moreover,

the buyer's lender may require the buyer do the work financed by the credit before the transaction closes.

3. BUYER REQUESTS SELLER PROVIDE CERTIFICATION IN OFFER

   The buyer can resort to the old approach and request in the purchase offer that the seller take responsibility for the inspection, report, corrective work, and certification, but CAR has eliminated the Form WPA that explained how this contract requirement would be implemented. Nevertheless, the buyer may well choose this approach because of the concern about non-obvious damage, the need to satisfy lender certification requirements, and/or lender credit limitations.

4. BUYER IGNORES TERMITE ISSUES

   Buyer may resist all of these options and ignore the termite process if the buyer's lender does not require a certification, but real estate agents need to advise buyers to not ignore the termite process because it can involve significant future costs.

The seller must keep in mind that the termite negotiation weeks into the contract may result in the loss of the deal and therefore the loss of time in selling the property. Also, there is the infuriating possibility that a savvy buyer will find an expensive termite company, negotiate a substantial credit, and then find a cheap way of getting the work done.

Therefore the seller should consider:

1. SELLER GETS REPORT

   The seller can get a termite inspection and report before getting an offer or even when escrow is first opened to help with the negotiations when the Request For Repairs is received.

2. SELLER GETS CERTIFICATION AHEAD OF SALE

   If he/she has enough money, the seller can do the work, get the certification, and include the cost in the list price. This would remove a good deal of uncertainty and possibly hard feelings over negotiations.

COURT OF APPEAL CONTINUES TO GIVE TENANTS LATITUDE TO SUE FORMER LANDLORDS AFTER EVICTION

By Christopher A. Kanjo

When a plaintiff sues over any expression that is considered an exercise of the defendant's rights of free speech, a special law in California, commonly referred to as the "anti-SLAPP" statute, allows the defendant to ask the court to dismiss the plaintiff's lawsuit at the outset. (SLAPPP stands for "Strategic Lawsuits Against Public Participation.") A defendant's own prior legal action against the plaintiff is considered an exercise of free speech, so if the defendant can show, in his or her anti-SLAPP motion, that the plaintiff's current lawsuit really "arises out of" the defendant's prior lawsuit, the court will dismiss the plaintiff's suit.

In the case of *Ben-Shahar v. Pickart*, certified for publication on November 24, 2014, the defendant Pickart, who owned an apartment building, had previously sued the plaintiff Ben-Shahar, who was one of his tenants, for unlawful detainer after refusing to comply with a notice to quit. Pickart was seeking have the rental unit vacated so one of his relatives could move in, which was allowed under the local rent control ordinance. The unlawful detainer was settled, with Ben-Shahar agreeing to move out so Pickart's relative could move in.

When the relative did not move in by the deadline required under the rent control ordinance due to delays in renovation, Ben Shahar filed a lawsuit, seeking to move back in. Pickart filed an anti-SLAPP motion, arguing that the new lawsuit really arose out of the prior notice to quit and the unlawful detainer. The Court of Appeal disagreed. "Plaintiff's complaint is not directed at the act of defendants' filing the unlawful detainer proceedings or the parties' act of settling the matter. Rather, it is directed at the Pickarts' acts constituting a purported breach of the settlement agreements based on their conduct in failing to occupy plaintiff's apartment."

This decision follows a line of cases holding that landlords cannot rely on the anti-SLAPP statute when tenants sue following an unlawful detainer if any other wrongful conduct is alleged.