2019 Real Estate Clean Up Law Changes

Member Legal Services
Tel (213) 739-8282
Fax (213) 480-7724
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Introduction

The C.A.R. sponsored "clean-up" legislation, signed by the Governor on September 29, 2018, updates many of the laws affecting agents and brokers. Among other changes, the clean-up law conforms the Real Estate Law to existing practice. It also eliminates antiquated or confusing laws, clarifies and reiterates existing law, and introduces plain language where appropriate.

The Clean-Up law was written in two bills, Assembly Bill 1289 and Assembly Bill 2884. Together they effect changes to the Civil Code and the Business and Professions Code. All of the changes in the clean-up law become effective on January 1, 2019.

I. Independent Contractor Relationship Confirmed

Q1. How does the Clean-up law reiterate and confirm the independent contractor status of salespersons and broker-associates?

A1. The Real Estate Law has for decades recognized that brokers and agents may choose to contract between themselves as either independent contractors or as employers and employees (B&P Code Section 10032). The clean-up law reiterates and confirms this right in three ways:

1. The words “employment,” and “employer” have been removed from the Real Estate Law. These words had been previously used in a generic sense to connote any business relationship between a broker and salesperson of either employment or independent contractor status.

2. The clean-up law substitutes the words “retain” and “retention” in place of prior references to “employment” “employers” and “employ.” Furthermore, the term "employing broker" has been replaced by "responsible broker." “Retain” and “retention” are defined to refer to the relationship between a responsible broker and licensee, which can be one of either independent contractor or employee.

3. Finally, the clean-up law clarifies that the broker has a duty to supervise salespersons and broker-associates *regardless* of employee or independent contractor status (B&P Code Section 10010.5(b)(1)). This effectively eliminates the “control” argument against independent contractor status. The current legal argument against categorizing an agent as an independent contractor is that since a broker has de jure supervisory control over an agent, that agent is necessarily an employee. This argument is based on case law stating that a worker is an employee when the principal has “control” over the work performed. The clean-up law addresses and dispatches this argument by stating that the relationship between a broker and agent may be one of independent contractor *regardless* of the broker’s duty to supervise and oversee the licensed acts of their agents.

II. Agency Form Changes (C.A.R. form AD “Disclosure Regarding Real Estate Agency Relationships")

Q2. Has the “third” agency form been eliminated in the clean-up law?

A2. Yes. The “third” agency form has been eliminated. Since the inception of the agency disclosure law in the 80’s, a non-dual agent for the buyer has had to provide an additional agency form with the offer to purchase for the seller to sign and return. That made sense in the 80’s when the “selling agent” (whom we would now refer to as a buyer’s agent) would typically represent the seller in a sub-agency relationship.

But that ship has long sailed. Today, the “selling agent” almost never represents the seller (with the exception of a dual agency). So, the delivery of the third agency form in a non-dual agency transaction just makes no sense. Thus, the new law has eliminated the obligation.

Q3. Will the agency form still use the phrase “selling agent” to refer to the buyer’s agent?

A3. No. Along with the third agency form, the phrase “selling agency” has been eliminated. Now this agent will be simply be called the “buyer’s agent.” This is just common sense. The change comports with existing practice and uses plain English in place of industry jargon.

The plain English changes on the agency and confirmation forms are as follows:

1. The “Selling Agent” is now the “Buyer’s Agent”
2. The “Listing Agent” is now the “Seller’s Agent” (on the agency confirmation form)
3. The “Purchaser” is now the “Buyer”
4. “Associate Licensees” are now “Salespersons and Broker Associates”

Q4. How does the clean-up law affect the handling of "confidential information" in a dual agency?

A4. Previously, the agency form gave little guidance on the handling of confidential information in a dual agency. It merely stated that a dual agent may not, without express consent, disclose to the other party that the seller would accept a price less than the listing price or that the Buyer would pay a price greater than the price offered. In many circumstances an agent was left with a the difficult choice of breaching their fiduciary duty to the seller if they disclosed seemingly confidential information or breaching their fiduciary duty to their buyer if they didn't (or visa-versa).

The new agency form adds that the agent will not disclose, without the express consent of the principal, confidential information including facts related to either the buyer's or seller's

- Financial position
- Motivations
- Bargaining position or
- Personal information that may impact price

This, in addition to the previous language concerning price disclosures, will allow dual agents to maintain confidences in appropriate circumstances with the assurance that they are acting within the law.

Q5. How does the clean-up law re-emphasize that the buyer has a duty to exercise reasonable care to protect themselves?

A5. The agency form has new language which reiterates existing law regarding the buyer's obligation to act reasonably and take basic precautions to learn the facts regarding the property he or she intends to purchase. It states:

> "If you are a Buyer, you have the duty to exercise reasonable care to protect yourself, including as to those facts about the property which are known to you or within your diligent attention and observation.
>
> Both Sellers and Buyers should strongly consider obtaining tax advice from a competent professional because the federal and state tax consequences of a transaction can be complex and subject to change."

Q6. Is the agency form required even on a residential 5+ properties?

A6. Yes. Previously there was an exemption for 5+ multi-unit residential properties (that were not vacation rentals). This exemption has been eliminated, and the agency form is required for all properties including 5+ residential properties. Moreover, the law now clearly indicates that the agency is required on vacant land, mobile homes and ground leases coupled with improvements.

III. Changes to the Agency Confirmation

Q7. How has the agency confirmation been changed?

A7. The most significant change is that under the clean-up law, both brokers and agents are identified. Previously, only brokers were identified. The new form will appear as follows:

CONFIRMATION: The following agency relationships are confirmed for this transaction:
Seller's Brokerage Firm ______________________________ License Number ____
Is the broker of (check one) ☐ the seller/landlord; or ☐ both the buyer/tenant and seller/landlord. (
Seller's Agent ______________________________ License Number ____
Is (check one) ☐ the Seller's/Landlord's Agent. (salesperson or broker associate) ☐ both the Buyer's/Tenant's and
Landlord's Agent (dual agent).

Buyer's Brokerage Firm ______________________________ License Number ____
Is the broker of (check one) ☐ the buyer/tenant; or ☐ both the buyer/tenant and seller/landlord (
Buyer's Agent ______________________________ License Number ____
Is (check one) ☐ the Buyer's/Tenant's Agent. (salesperson or broker associate) ☐ both the Buyer's/Tenant's and S
Landlord's Agent (dual agent).

In the above form the changes include:

- The phrase "dual agent" is added and the word "exclusively' has been deleted. This is intended to introduce plain language into the confirmation and help a buyer and seller more easily identify whether their agent is in fact a dual agent.
- The phrase "Agent" to mean "Broker" has been eliminated. Previously, the form relied on industry jargon in referencing "Agent" to mean "Broker." This is not how non-professionals understand the word "agent." Thus, the word "Brokerage" is now used in its place.
- Seller's and Buyer's Agents are now named. Previously, there was no reference to the Seller's or Buyer's agents in the confirmation. Additionally, the word "agent" is now being used in it is commonly understood by non-professionals.

Q8. I am a listing agent and our brokerage is representing both the buyer and seller. But I do not consider myself as a "dual agent." Am I still to check the box indicating "dual agent?"

A8. Yes. Even though you do not consider yourself as representing the buyer, you are in fact part of a dual agency. On the confirmation form, it should therefore indicate "dual agent" in the box under your name.

IV. Delivery of Copy of Listing

Q9. How has the clean-up law changed the rules regarding delivery of a copy of the listing agreement?

A9. Under the clean-up law, a copy of the listing must be provided to the seller "as soon as practicable" after the listing is signed. Moreover, a copy of the listing may be delivered electronically where the parties have agreed to conduct the transaction by electronic means.

Previously, the law required that a copy of the listing agreement had to be provided to the seller "at the time the signature was obtained." This requirement made sense when forms were typically filled out in duplicate on carbon paper and signatures were obtained in person. Nowadays, this requirement can be a practical impossibility, putting the agent in technical breach of the legal requirements.

Be Cognizant of the Code of Ethics! Even though the law has changed regarding delivery of a listing agreement, the Code of Ethics has not. Under Article 9 of the 2019 Code of Ethics & Standards of Practice, "A copy of each agreement shall be furnished to each party to such agreements upon their signing or initialing." This ethics requirement would of course encompass listing agreements.
Where the Code of Ethics sets a stricter standard than what would otherwise be legally required, as a REALTOR®, you are bound to follow the Code of Ethics.

V. Delivery of the TDS, NHD Statement, the agent's visual inspection, and the Buyer's Cancellation Rights

Q10. Under the clean-up law, how may the TDS, NHD Statement (The Natural Hazard Disclosure Statement) and the agent's visual inspection be delivered?

A10. The clean-up law allows delivery of these documents by electronic means where the parties have agreed to conduct the transaction by electronic means.

Previously, the law allowed only that these documents would be personally delivered or sent by mail. This reflected the methods of delivery during the 80's when the law first came into force but does not reflect the practical reality of how transactions are conducted today.

Q11. How has the right of the buyer to cancel been clarified by the clean-up law?

A11. Under existing law, a buyer has a right to cancel a purchase agreement at any time prior to delivery of the TDS, or within 3 days after it is personally delivered or within 5 days after it is delivered by mail. This law has been updated as follows:

1. The law is now clear that right to cancel can be based upon receipt of the agent's visual inspection. Previously, the law did not clearly state that the cancellation right could be based on receipt of the visual inspection even though the visual inspection is part of the TDS.
2. More importantly, it is only the *listing* agent's visual inspection which confers this right, as opposed to the buyer's agent. A buyer's agent cannot conjure up a cancellation right out of their own inactivity.
3. The law is now explicit that the TDS must be completed before a cancellation right commences. The C.A.R. purchase agreements provide more detail in this regard by requiring that seller "answer all questions" before a TDS is deemed "fully complete."
4. Electronic delivery can now be legally relied upon for delivery and to commence the cancellation period.

Practice Tip: Although the law contains a cancellation right based upon delivery of the TDS, this cancellation is seldom relied upon by buyers in cancelling a purchase agreement. Instead in the vast majority of transactions where a buyer wishes to cancel, they will rely upon the various contingency rights to cancel. The standard contingencies in C.A.R. purchase agreements include contingency for loan, appraisal, disclosures, investigations and title. Only in relatively unusual circumstances will a buyer attempt to cancel based upon delivery of the TDS.

VI. TDS Exemptions and Trust Sales

Q12. How has the TDS exemption for trust sales been changed?

A12. The TDS exemption for trust sales no longer allows co-trustees of a revocable trust to claim the exemption. The existing law generally grants the exemption to the successor trustee of an *irrevocable* trust (typically, after the trustee has passed away), and generally disallows the exemption to a trustee of a *revocable* when that person set up the trust (and typically is still alive). But inexplicably, it grants a further exemption for co-trustees of a revocable trust simply on the basis that there is more than one trustee.

The new law aligns the exemption with common sense. When the trustor or trustors (typically the person or persons who have set the trust up) are in fact the existing trustee(s), they are not eligible for the exemption and must complete and deliver a TDS. This is the case even when there are co-trustees.

To be clear, the exemption is fairly technical. The exact language of the new exemption is as follows: "This exemption shall not apply to a sale if the trustee is a natural person who is a trustee of a revocable trust and he or she is a former owner of the property or was an occupant in possession of the property within the preceding year." Some people interpret this language to mean that any person who has lived on the property within the preceding year is ineligible for the exemption. That is not what this means. A trustee of an irrevocable trust is still entitled to the exemption regardless of whether they have lived on the property. Mind you, they still have to disclose material facts affecting value of desirability. They just need not complete a TDS.

VII. Licenses and Notifications

Q13. Is the responsible broker still required to maintain physical possession of a salesperson's license?

A13. No. Under the clean-up law, the requirement that the responsible broker maintain physical possession of a salesperson's license has been eliminated.

Q14. Is the salesperson required to mark out the name of their old broker on their license and write in the name of their new one when they change brokerages?

A14. No. this requirement has been eliminated.

Q15. Is a licensee required to mark out their current business address and write in their new one when they change brokerages?

A15. No. This requirement has been eliminated.

Q16. How has the clean-up law changed regarding a broker's duty to notify the DRE of changes to a salesperson or broker-associate status?

A16. The clean-up law gives greater discretion to the DRE to specify how notification will be provided whenever a salesperson or broker-associate is terminated or retained.

Presently, under existing law, when a salesperson or broker associate is terminated or retained, the responsible broker must notify the DRE "immediately" and "in writing." Under the clean-up law notification by the broker will be "in a manner specified by the commissioner."

This change will likely have no immediate impact since a broker may presently notify the DRE of the retention or termination of a salesperson using the eLicensing system. And the DRE is presently in the process of adding broker associate affiliations to the eLicensing system. (As of right now, broker-associate retentions or terminations must be sent in by person or by mail using the DRE form RE 215). However, in

the future the clean-up law will allow the DRE to change as technology changes without concern that it lacks legal authority.

Q17. Under the clean-up law, how are licensees (whether salespersons, broker-associates or brokers) to notify the DRE of changes to their business addresses?

A17. The cleanup law gives greater discretion to the DRE to decide the "manner of notification."

Presently, licensees can change mailing and main office addresses on the eLicensing system, as well as update valid contact information such as phone numbers and email addresses. However, the DRE does not permit brokers to cancel a main office address and place their license in a "no business address" status using eLicensing. They would need to submit form RE 204 in order to complete that type of change. The clean-up law does not change that.

Salespersons can make changes of sponsoring brokers on eLicensing. However, The DRE does not permit a salesperson to terminate their affiliation from a broker and place their license on a "no broker affiliation" status using eLicensing. A salesperson would need to submit form RE 214 in order to complete that type of change. The clean-up law does not change that.

VIII. Corporate brokerages

Q18. How does the clean-up law allow a corporate brokerage to continue to conduct licensed activity in the event of death or incapacity of the designated broker?

A18. It will allow a new designated officer to continue operations as long as an application is filed within 10 days.

Presently, the law requires a corporate brokerage to act through a designated licensee at all times (Regulations of the Real Estate Commissioner 2740). The law contains no allowance for the continued functioning of the brokerage even in the event of death or incapacity of the designated broker. The practical result is that many corporate brokers will operate in technical breach of the licensing rules.

Under the clean-up law, a corporate brokerage may continue to operate as a licensee without interruption under its existing license as long as an application for a new designated officer is filed with the DRE within 10 days.

Q19. Can a designated broker of a corporation continue to act as the designated broker even if they let their individual broker's license lapse?

A19. Yes. The clean-up law clarifies the existing rule that a designated broker may work though a corporate brokerage without maintaining their individual broker's license as long as they are qualified to obtain a broker's license. That is, the designated broker must have either passed the broker license examination and be qualified to obtain a broker license or be currently licensed as a real estate broker. An officer of a corporation through whom it is licensed to act need not maintain an individual broker's license but is otherwise subject to all duties and responsibilities of a licensed broker.

IX. Other Issues

The clean-up legislation has clarified existing law across a range of issues both large and small. Here is a list

of other changes within the clean-up legislation:

- Salespersons may enter into agreements with other agents to share compensation. However, any such compensation must be paid "through the responsible broker." This clarifies the holding of the Sanowicz case by emphasizing that commissions must always be paid through the responsible broker even while recognizing that an agreement between agents to share commissions is legally enforceable. (See B&P Code 10137).
- An "installment land sale contract" is now termed a "real property sales contract."
- The "agency listing" in which the seller reserves the right to procure their own buyer is now renamed the "seller reserved listing agreement." This new name gives a much clearer description of how this type of listing functions.

X. Clarification and Confirmation of Existing Law

Q20. Was the clean-up legislation intended to change the law?

A20. No. The clean-up legislation is not intended to create new law, but merely clarify and confirm what the laws always were intended to be. Indeed, the clean-up law states explicitly that it is not intended to affect any of the following:

- A real estate broker's duties under existing statutory or common law as an agent of a person who retains that broker to perform acts for which a license is required under this division.

- Any fiduciary duties owed by a real estate broker to a person who retains that broker to perform acts for which a license is required under this division.
- Any duty of disclosure or any other duties or obligations of a real estate broker, which arise under this division or other existing, applicable California law, including common law.
- Any duties or obligations of a salesperson or a broker associate, which arise under the Real Estate Law or existing, applicable California law, including common law, and duties and obligations to the salesperson's or broker associate's responsible broker.
- A responsible broker's duty of supervision and oversight for the acts of retained salespersons or broker associates, which arise under the Real Estate Law or other existing, applicable California law, including common law.

Q21. Where can I get additional legal information?

A21. This legal article is just one of the many legal publications and services offered by C.A.R. to its members. For a complete listing of C.A.R.'s legal products and services, please visit **car.org/legal** .

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CALIFORNIA ASSOCIATION OF REALTORS®
Member Legal Services
525 South Virgil Avenue

Los Angeles, CA 90020

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