



August 2009

ANNOUNCEMENT:

This is the first newsletter under our firm's new banner – THE GIARDINELLI LAW GROUP, APC. Our new name is just one positive change that has occurred in the aftermath of a fire that destroyed our Canyon Lake law office. The attorneys and staff of the firm have renewed resolve to provide the highest standard of legal services to our REALTOR® Associations, litigation, business, real estate, employment and other clients. The firm's Orange County office is unaffected. The temporary Inland Empire office is at 31772 Casino Drive, Suite C, Lake Elsinore, CA 92530. We are rebuilding our beautiful Canyon Lake office. New contact phone numbers and email addresses are at the bottom of this article.

DRE License Number Now Required

On July 1, 2009, the new regulation recently adopted by the California Department of Real Estate (DRE) to clarify California Business & Professions Code section 10140.6 went into effect. Real estate licensees must now include their DRE license numbers on real property purchase agreements and all solicitation materials. The California Association of REALTORS® forms comply with this requirement.

“Solicitation materials” includes business cards, stationery, web sites, promotional and advertising fliers, brochures, email and regular mail, and all other solicitation materials intended to be a first point of contact with consumers. Excluded from the regulation are radio, cinema and TV ads, the opening section of streaming video and audio, print ads in a newspaper or periodical, and “For Sale” signs on a property.

Materials that name more than one licensee must include the license number of each individual. The employing broker's or corporate broker's license number does not need to be shown, even if the name, logos or trademark is on the material.

The license number must be no smaller than the smallest type size used in the material.

Checklist for Risk Management

To help manage all the issues facing real estate brokers and agents in the current market, here is a checklist of some key points to keep in mind. Review this and other checklists on every transaction.

Accurately state your expertise; don't exaggerate.

- Document your file accurately and completely.
- Do not give tax advice.
- Do not advise clients on how to take title.
- Before offering property management activities, check your insurance coverage.

- Understand the Code of Ethics and MLS Rules.
- Maintain adequate back-up of your transaction files offsite.
- Write like a professional (it could end up in front of a jury and embarrass you).
- Document key conversations with clients and agents for all parties.
- Send and keep written confirmation of verbal communications between you and any other party.
- When possible, use widely accepted contracts, such as C.A.R. forms.
- Keep the transaction as simple as possible.
- Use available and appropriate disclosure forms, including forms created for Short Sales and REO transactions.
- Document your efforts to obtain a disclosure if the party refuses to sign it.
- Document other agent's lack of cooperation (violates Code of Ethics, Article 3: "REALTOR® shall cooperate with other brokers except when cooperation is not in the client's best interest.")
- Take careful and accurate notes.
- Keep an adequate calendaring system with backup.
- Take time to carefully explain the process and forms to your client.
- Be sure your client understands the process and forms; consider language or cultural issues.
- Document your efforts to explain the process and forms to your client.
- Respond to all questions, complaints and inquiries promptly.
- Be careful about recommending service providers.
- Comply with referral disclosure requirements.
- Be honest; if you don't know the answer to a question, say so.
- Do not provide advice on matters you are not sure about.
- Explain your limitations.
- Ask for help from your broker, manager, or experts.
- Avoid situations that might lead to conflicts.
- Provide the best possible care you can to your client.
- Follow the "Golden Rule" – Treat the client the way you would expect to be treated.

Case of the Month – Employee Tenant Ousted Unfairly from Apartment

Lori Spinks had a written employment agreement with Mobile Medical Staffing that provided her with housing. The agreement stated she must vacate the apartment within 48 hours of the termination of her employment. Mobile leased the apartment from Equity Residential Briarwood Apartments. In October 2004, Lori moved into the apartment. In January 2005, she was seriously injured at work and was unable to return to full duty. When Lori returned home from the hospital on February 21, 2005, she found a letter from Mobile dated February 17, 2005, stating that her services were no longer needed and her housing, utilities, furniture, and automobile benefits were ending. The employer also notified the landlord that rent would no longer be paid. Mobile asked Equity to turn off the electricity. Equity refused, but did agree to change the locks to force Lori out of the apartment. The furniture was picked up on February 22, 2005, and the locks were changed that day, while the plaintiff was still packing.

Lori sued Equity as a third-party beneficiary of the lease between Mobile and Equity for violating California's landlord-tenant laws. In California, a person who is not a party to a contract (a "third party")

may enforce the contract if it was made by the contracting parties with the intention to confer a benefit on her or a class of persons of which she is a member. California law also prohibits turning off the electricity to force a tenant to vacate a rented property.

Equity argued that Lori was a licensee or a trespasser holding over after termination of her employment with Mobile and was not a tenant and was, therefore, not entitled to either quiet enjoyment of the premises or to eviction through the unlawful detainer process as a tenant would be. Equity asserted that the lease was intended to be housing for Mobile's staff which could change during the lease term.

The trial court found that Lori was not a third-party beneficiary of the lease, was not a tenant, and was not owed any legal duty by Equity. The Court of Appeal disagreed and found Lori was not a mere licensee and the evidence showed that no other person had the right to occupy the apartment during the lease term. In California a tenancy is distinguished from a mere license by the right to exclusive possession. The Appeal Court ruled that Lori may be a "third party beneficiary" of the rental agreement between the landlord and the employer. As a third-party beneficiary, Lori can enforce the contract between Mobile and Equity and have the rights of a tenant under the lease, and Equity may be liable for constructive eviction and other causes of action. In addition, the Appeal Court held that even if Lori was not a tenant or third-party beneficiary, she had a right to possession that could only be disturbed by the legal unlawful detainer process and not through "self help" measures such as changing the locks.

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