Newly Amended Dual Agency Disclosure Law: Much Ado About Nothing [VIDEO]

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As of January 1, 2015, the duty of a real estate agent to disclose in writing his or her representation of a buyer, seller, tenant and/or landlord, including any dual agency relationship, in residential real property transactions extended to transactions involving commercial real property. By its supporters, the amended disclosure law has been touted as "significant," "putting teeth in a new protection," and no less than "changing the face of commercial realty in California." For those who read the law and know the industry, however, all of the ballyhoo over the additional disclosures is enough to leave an agent scratching his or her head.

For three decades, California real estate agents involved in residential real property transactions, including leasehold transactions with lease terms exceeding one year, have been required to disclose whether they are acting as a buyer/tenant agent exclusively, a seller/landlord agent exclusively, or as a dual agent representing both sides of a transaction. To make these disclosures, the agents use a simple check-the-box form that has become routine in the industry. In addition, many agents at full service firms involved in the sale or lease of commercial real property have also been making these written disclosures (the disclosures have been included on AIR forms for nearly 25 years). Now these commercial agents are required to do so by law.

To be clear, the amended law does not provide a separate statutory scheme or special requirement for commercial transactions. The additional disclosures for commercial real estate agents simply piggyback on existing disclosure requirements for residential real estate agents. They were added to existing statutory law with the amendment of Civil Code § 2079.13, by including the term "commercial real property" within the definition of "real property." Therefore, the added disclosures for commercial agents are the very same disclosures that have existed for decades for residential agents.

The amended law arguably promotes certain safeguards for agents and extends the routine nature of the disclosures. Although many established full service brokerage firms already disclose in writing their commercial agency relationships, other agents may benefit from the protection of having their disclosures documented, and the use of a check-the-box form (whether it be the existing AIR form or a new form) will make it easier for them to
do so. The disclosures might also increase awareness of possible dual agency issues, which can help both agents and the parties to a transaction keep those issues in mind and proactively manage any potential conflicts.

However, the amended law will not revolutionize the industry as some claim. It neither bans dual agency representation nor addresses the substantive law regarding conflicts of interest. Because the amended law requires written disclosures that many commercial agents already provide, the law will not change daily broker-client dealings. As noted above, the disclosures have been on AIR forms for nearly 25 years, and those forms have been widely used by major commercial real estate firms. Undoubtedly, there are agents who have not been providing these disclosures in writing, but the amended law does nothing more than generate additional paperwork for them.

Further, there is no reason to believe that the written disclosures will reduce the use of full service brokerage firms as some tenant-only agents have predicted. The benefits, perceived and real, of working with a full service firm will keep buyers, sellers, tenants and landlords using those firms. Many of the agents at full service firms who provide both buyer/seller and tenant/landlord representation have deep market knowledge because their firms invest heavily in market research, trend analysis and industry reports, which provide real-time lease comparisons and up-to-date market intelligence that parties to a transaction can use to make strategic and tactical decisions. Those full service firms also provide enterprise-wide services such as lease review, audit services, workspace strategies, labor analytics and on-site facilities management, which are services that are rarely provided by agents who focus solely on the negotiation of a commercial sale or lease. In addition, many tenants and buyers recognize the comfort that they and landlords and sellers have with established full service firms, which promotes increased opportunity to get a deal done.

While there may be a benefit to encouraging commercial agents to document their disclosures (to the extent they were not already doing so), the written disclosures required by the newly amended law are a far cry from generating the industry-shattering transformation that some would have us believe. Instead, expect agents to continue the decades-old practice of providing their clients with the same written disclosures they have provided for years.

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