

2023 Real Property Law Health & Wellness Retreat



March 24-26, 2023
Fairmont Sonoma Mission Inn
Sonoma, CA

Effective Legal Strategies In Hot, Cold and Cooling Markets

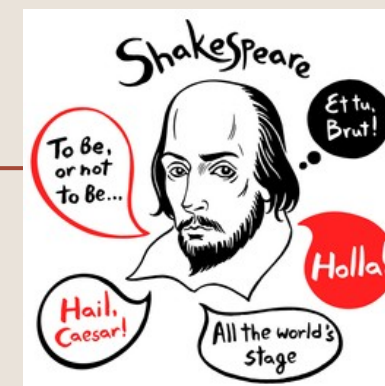
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AGENDA

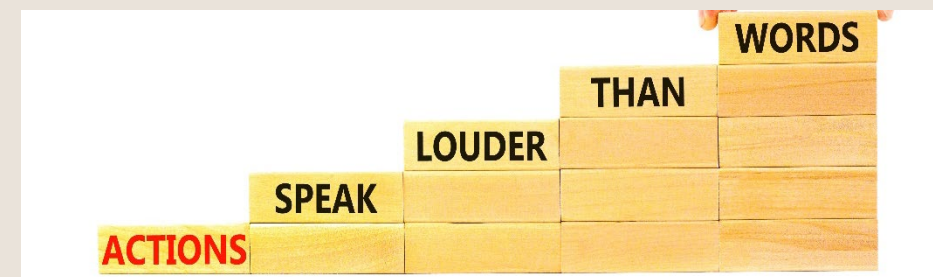
- What Agents/Buyers/Sellers Say Matters
 - Liquidated Damages: To initial or not? What about deposit?
 - Obtaining listings and keeping sales in low inventory. Elder issues.
 - Buyer and seller bullies.



- What Agents/Buyers/Sellers Write Matters
 - Disclosures, amending disclosures.
 - Contingency removal and non-contingent offers.
 - Discovery of emails and texts



- What Agents/Buyers/Sellers Do Matters
 - Non-sales licensed activity
 - Creative financing
 - Buyer representation agreements



What Agents/Buyers/Sellers Say Matters

Optional Contract Paragraphs: To initial or not?

Arbitration. C.A.R. Residential Purchase Agreement, 31.

Liquidated Damages. C.A.R. Residential Purchase Agreement, 29.

General rule or exception?

Appreciating or depreciating market?

What Agents/Buyers/Sellers Say Matters

Liquidated Damages: To initial or not? What about deposit?

Liquidated Damages. Civil Code §§ 1675-1681

1675(b). A provision in a contract to purchase and sell residential property that provides that all or any part of a payment made by the buyer shall constitute liquidated damages to the seller upon the buyer's failure to complete the purchase of the property is valid to the extent that payment in the form of cash or check, including a postdated check, is actually made if the provision satisfies the requirements of Sections 1677 and 1678 and either subdivision (c) or (d) of this section.

(c) If the amount actually paid pursuant to the liquidated damages provision does not exceed 3 percent of the purchase price, the provision is valid to the extent that payment is actually made unless the buyer establishes that the amount is unreasonable as liquidated damages.

(d) If the amount actually paid pursuant to the liquidated damages provision exceeds 3 percent of the purchase price, the provision is invalid unless the party seeking to uphold the provision establishes that the amount actually paid is reasonable as liquidated damages.

(e) For the purposes of subdivisions (c) and (d), the reasonableness of an amount actually paid as liquidated damages shall be determined by taking into account both of the following:

(1) The circumstances existing at the time the contract was made.

(2) The price and other terms and circumstances of any subsequent sale or contract to sell and purchase the same property if the sale or contract is made within six months of the buyer's default.

1678. If more than one payment made by the buyer is to constitute liquidated damages under Section 1675, the amount of any payment after the first payment is valid as liquidated damages only if (1) the total of all such payments satisfies the requirements of Section 1675 and (2) a separate liquidated damages provision satisfying the requirements of Section 1677 is separately signed or initialed by each party to the contract for each such subsequent payment.

What Agents/Buyers/Sellers Say Matters

Obtaining listings and keeping sales in low inventory

Elder issues

Effect of low inventory on off-market listings. (NAR Clear Cooperation Policy: Section 1.01 Model MLS Governing Documents found in the 2020 Handbook on Multiple Listing Policy)

Effect of low inventory on fiduciary duty.

Who owns property? 48%, Baby boomers (54-72). 15% silent generation (72 +) [2019 C.A.R. Housing Market Survey]

Legal Capacity. Use and understanding of technology? Probate Code § 811.

Welfare & Institutions Code § 15610.30

(a) "Financial abuse" of an elder or dependent adult occurs when a person or entity does any of the following:

(1) Takes, secretes, appropriates, obtains, or retains real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both.

(2) Assists in taking, secreting, appropriating, obtaining, or retaining real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both.

(3) Takes, secretes, appropriates, obtains, or retains, or assists in taking, secreting, appropriating, obtaining, or retaining, real or personal property of an elder or dependent adult by undue influence, as defined in Section 15610.70.

What Agents/Buyers/Sellers Say Matters

Buyer and seller bullies

Market power issues and abuses: Won't sell without using me/my agent/my vendor.

Hot market sellers: No inspections. No repairs. No discussion. No negotiation. Take it or leave it.

Slow market buyers: Threats to cancel.

What is conveyed regarding keeping with terms of contract? Does contract have contingencies? Have contingencies lapsed? Have statutory disclosures been made? Have statutory disclosures been amended?

Real estate agents: "Legal" claims and threats.

What Agents/Buyers/Sellers Write Matters

Disclosures, amending disclosures

Statutory Disclosures:

Real Estate Transfer Disclosure Statement: Civil Code 1102 et seq.
Requirements
Rescission
Group of “TDS” documents
Expiration of duty to disclose
Expiration of disclosures

What Agents/Buyers/Sellers Write Matters

Disclosures, amending disclosures

Statutory Disclosures:

Real Estate Transfer Disclosure Statement: Civil Code 1102 et seq.

1102.3.

The seller of any single-family real property subject to this article shall deliver to the prospective buyer the completed written statement required by this article, as follows:

(a) In the case of a sale, as soon as practicable before transfer of title. ...

If any disclosure, or any material amendment of any disclosure, required to be made by this article, is delivered after the execution of an offer to purchase, the prospective buyer shall have three days after delivery in person, five days after delivery by deposit in the mail, or five days after delivery of an electronic record in transactions where the parties have agreed to conduct the transaction by electronic means, pursuant to provisions of the Uniform Electronic Transactions Act (Title 2.5 (commencing with Section 1633.1) of Part 2 of Division 3), to terminate the offer by delivery of a written notice of termination to the seller or the seller's agent. The period of time the prospective buyer has in which to terminate the offer commences when Sections I and II, and, if the seller is represented by an agent in the transaction, then also Section III, in the form described in Section 1102.6, are completed and delivered to the buyer or buyer's agent. A real estate agent may complete their own portion of the required disclosure by providing all of the information on the agent's inspection disclosure set forth in Section 1102.6.

What Agents/Buyers/Sellers Write Matters

Contingency removal and non-contingent offers

Time to remove contingencies. Notice to remove contingencies.

Effect of failure to remove contingencies. C.A.R. Residential Purchase Agreement, 14B(4)

*Continuation of Contingency: Even after the end of the times specified in **paragraph 3L** and before Seller cancels, if at all, pursuant to **paragraph 14C**, Buyer retains the right, in writing, to either (i) remove remaining contingencies, or (ii) cancel this Agreement based on a remaining contingency. ...*

Effect of removal of contingencies. C.A.R. Residential Purchase Agreement, 14F(1)

REMOVAL OF BUYER CONTINGENCIES: If Buyer removes, in writing, any contingency or cancellation rights, unless Otherwise Agreed, Buyer shall conclusively be deemed to have: (i) completed all Buyer Investigations, and review of Reports and other applicable information and disclosures pertaining to that contingency or cancellation right; (ii) elected to proceed with the transaction; and (iii) assumed all liability, responsibility and expense for the non-delivery of any Reports, disclosures or information outside of Seller's control and for any Repairs or corrections pertaining to that contingency or cancellation right, not Otherwise Agreed, or for the inability to obtain financing.

Non-contingent offers: Risks (not getting property or getting bad property). Rewards (accepted offer)

What Agents/Buyers/Sellers Write Matters

Discovery of written material, emails and texts

If you would not say it face to face, probably best not to say it in a text.

Even if you would say it face to face, probably best not to say/repeat it in a text.

Acting against broker advice letters.

Buyer Love Letters

What Agents/Buyers/Sellers Do Matters

Non-sales licensed activity

Property Management Loan Brokerage

Business and Professions Code 10131.

A real estate broker within the meaning of this part is a person who, for a compensation or in expectation of a compensation, regardless of the form or time of payment, does or negotiates to do one or more of the following acts for another or others:

- (a) Sells or offers to sell, buys or offers to buy, solicits prospective sellers or buyers of, solicits or obtains listings of, or negotiates the purchase, sale, or exchange of real property or a business opportunity.
- (b) 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 business opportunities.
- (c) 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.
- (d) 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.
- (e) 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.

What Agents/Buyers/Sellers Do Matters

Creative financing & alternatives

Seller Financing. Seller financing disclosure. Civil Code 2956-2967. Buyer agent as arranger of credit. Not subject to usury because not a loan but an extension of credit. No MLO license required. TILA required with exceptions. Prepayment prohibitions. Seller first. Seller second - recorded or silent. All inclusive trust deed (wrap).

Seller paying buyer points. Buying down interest rate on loan.

Lease with option to buy. Options to buy. Are payments deposit or applied to down payment?

Including personal property.

Seller broker conditional compensation incentives

Life estate with remainder to Buyer

What Agents/Buyers/Sellers Do Matters

Buyer representation agreements

Why? Protect commission. Procuring Cause factor. Listing broker minimal or no offers. Transparency. Lawsuit avoidance.

C.A.R. form BRBC. Non-exclusive default. Cancellation default. Credit to buyer default. Broker involved property protection, if form provided timely.

Enforceability: *Schaffter v. Creative Capital Leasing Group*, 166 Cal.App.4th 745 (2008).
RC Royal Development v. Standard Pacific, 177 Cal.App.4th 1410 (2009).

QUESTIONS

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March 24-26, 2023
Fairmont Sonoma Mission Inn
Sonoma, CA

THANK YOU FOR JOINING US!