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# Disclosing Personal Data in Real Estate Deals

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## Disclosing Personal Data in Real Estate Deals

*ROGER BERNHARDT*

Megan's Law has now worked its way into the real estate field. Civil Code §2079.10a, enacted this year, requires inclusion of a large-print notice about registered sex offenders in every new residential sales contract or lease. So now, in addition to transfer disclosure statements, agency disclosure statements, and disclosure requirements for earthquake fault zones, earthquake hazards, flood zones, fire hazards, home environmental hazards, Mello-Roos financing, lead-based paint, and home energy, every residential landlord, seller, and broker must supply this form as well. (In this article, for brevity, references to brokers are also intended to include sellers and landlords.)

As is often the case in this field, however, the brave posture taken by the legislature is more smoke than fire, smoke that both camouflages any real purpose the statute might have had and blinds practitioners as to the direction the legislature wants us to take.

### **The New Statutory Notice**

The statutory disclosure required is a notice advising tenants and purchasers that they can get information about registered sex offenders in the neighborhood from various government agencies; the notice itself does not disclose any such danger. That sounds to me like mandating a notice on all foods: "Warning! Some foods may be bad for your health; see your doctor." No one sufficiently concerned about neighborhood safety needs to be told to check with the police (or to ask his broker how to find out about safety issues). Perhaps there is a homebuyer somewhere who will worry about this and act on it only after reading the notice, but I doubt it. It is unlikely that the legislature really wanted to waste everybody's time on this notice just to convey such trivial information to indifferent readers.

The real point of the statute is probably in the next section of the bill, which provides that this notice fully satisfies the broker's duty to inform buyers. The notice is deemed "adequate to inform" and "shall not give rise to any cause of action against the disclosing party by a registered sex offender." As frequently happens, however, when the legislature is not too clear on what it is doing, the section then adds that nothing in the statute "alter[s] any existing duty . . . under any other statute or decisional law." So, if there is a rule somewhere that imposes different duties, this new statutory duty yields to it. Boiled down to its essentials, this statute seems to say that if a broker gives a prospective buyer or tenant a notice about how to find out about sex offenders, no sex offender can sue the broker, unless there is a law somewhere else that says otherwise.

### **Contrary Nondisclosure Policies**

Do we have any other rules sanctioning brokers for disclosing too much? Most of our disclosure statutes are aimed the other way, compelling more rather than less disclosure. In the field of discrimination, however, the Real Estate Commissioner has many rules that in effect prohibit brokers from giving too much information about the racial nature of the neighborhood or the house next door. Title 10 Cal Code Regs §2780 states—in 30 different ways—the Commissioner's disapproval of revealing information about the race, color, sex, religion, ancestry, physical handicap, marital status, or national origin of anyone connected with the transaction (including the neighbors, although that proscription is offset somewhat by the reference to "neighborhood noise problems or other nuisances" in the statutory Transfer Disclosure Statement form (CC §1102.6(C)(11))). Apart from those rules, we all know that the nondisclosure of a fact that materially affects value may be actionable even though it has nothing to do with the physical condition of the property.

There has always been a tension between protecting buyers by giving them as much information as possible, while still being sensitive to the harms other persons would suffer if their situations were exposed. “Objectively,” neither a past murder nor a present neighbor of a different race should have any influence on a rational purchaser, but subjectively some purchasers are deterred by prior murders, and others by different skin color. Reconciling these conflicts is no easy task, and the legislature often appears to favor a cop-out over a compromise.

### **What Kind of Protection Under the New Statute?**

The first thing to note about new CC §2079.10a is that it protects the broker only against actions filed by the sex offender, not by others. (And even that is qualified: If, rather than furnishing the vanilla notice, the broker merely tells her buyer, “There is a sex offender and he lives right next door to you,” it looks as though the sex offender may have a cause of action, unless prior law says he doesn’t.) This protection is easy to offer, because nobody sympathizes with the civil rights of sex offenders anyway. The real questions the brokers were asking, however, concerned the nature of their obligations to buyers, and this statute entirely avoids that issue.

If the broker has actual knowledge of the next door sex offender and is asked about that by the buyer, can she lie? An earlier draft of the statute disclaimed reducing liability for nondisclosure or actual or personal knowledge, but that provision was left out of the final version. Can the broker say she doesn’t know if she does know? Can she say that she refuses to answer, even though she does know? Can she say that the law prohibits her from saying more? Are those issues already covered by “other statute or decisional law”? (If so, what are the answers?)

Even if the buyers don’t ask, can the broker keep silent if she knows about the neighbor? If she also knows that it might matter to the buyers as parents of a teenage daughter? Is her knowledge of nearby offenders different from her knowledge of nearby noisemakers and nuisances? If the nearby presence of sex offenders reduces value, does the fact that the broker’s existing duties are unaltered, as stated in subsection (c), trump the fact that subsection (b) eliminates any requirement of additional information? If, in these cases, the broker is under a greater duty to disclose, does the new general statutory notice provide anything other than false comfort?

### **The Impact of Fiduciary Relationships**

What is the position of a buyer’s agent who owes special fiduciary duties to her clients? Can she withhold information based on a statute that deals generally with all brokers and says nothing about fiduciary issues? Are her fiduciary obligations satisfied by giving the general notice? Should she urge her clients to go to the police station to get the information, or offer to go there for them? Should she ask the seller what he knows? If she is told that there are no offenders in the neighborhood, should she verify it before repeating it to the buyers? Should she also find out whether there is a high incidence of crime—especially rape—in the neighborhood?

As an attorney, I would not want to have to advise a broker client about which of these duties she has and doesn’t have. The statute helps not at all.

### **Disclosing AIDS**

A similar statute, CC §1710.2, covers disclosures of AIDS. The privacy of AIDS victims seems more important to us than the privacy of sex offenders, so this statute is even more daunting. Furthermore, it compounds its own internal confusion by lumping three-year-old non-AIDS deaths and current AIDS conditions together. With respect to both, the statute eliminates any cause of action for nondisclosure. As with CC §2079.10a, however, the statute’s reservations dilute its effect. First, they disclaim any attempt to reduce “any obligation to disclose the

physical condition of the premises.” CC §1710.2(c). Do “physical conditions” not include old deaths or current illnesses, *i.e.*, situations in which the obligation is intended to be reduced?

Second, the section also disclaims any intent to protect against liability for “making an intentional representation in response to a direct inquiry.” CC §1710.2(d). But since this exemption is limited to death cases, does the statute thus imply that one can safely lie about whether the seller (or roommates) have AIDS, as long as the person is still alive?

This statute leaves a similar slippery slope for brokers to maneuver. What if the buyer asks whether anyone in the house had or has AIDS? Can the broker refuse to answer? Must she refuse to answer? The statute says only that she cannot lie. Can she suggest that the buyers inquire about that matter? Does she have a fiduciary duty to sensitize her buyers to the fact that an AIDS patient has lived in the house if that is known to affect market values or if the buyers are fundamentalist Christians and might have religious objections? How can she respond if asked whether the neighborhood is gay? Since she is supposed to be familiar with the territory she farms, shouldn't she be expected to volunteer that information to her fiduciary clients? But if so, should she also tell them that the house next door is a halfway house for autistic children? If she does tell them, do the neighbors have a claim against her? Can the Real Estate Commissioner go after her license?

Regardless of how attorneys stand on the underlying issues involved, we all should recognize that CC §§1710.2 and 2079.10a are models of legislative obfuscation that give us little or no guidance in advising our clients.