



Courtside *Newsletter*

Record Retention Re-Defined for Real Estate Professionals



BY: SYLVIA J. SIMMONS, ATTORNEY AT LAW
CASEY MCINTOSH, PARALEGAL

The California Bureau of Real Estate (CalBRE)

published an article in its Spring 2013 *Real Estate Bulletin* discussing the increasingly common-place use of electronic communications during real estate transactions. The *Bulletin* stated, “Electronic Communications (EC), including emails, texts, tweets and the like, has become an indispensable tool for licensees in conveying vital information in real estate and mortgage transactions.” Such “texts, emails, tweets and the like created and sent or received by a licensee during the negotiation for the sale or purchase of the property must be maintained as part of the transaction file.”

California Business & Professions Code (B&P) Section 10148(a), defines what records must be maintained and for how long. A licensed real estate broker must keep for three years copies of “all listings, deposit receipts, canceled checks, trust records, and other documents executed by him or her or obtained by him or her in connection with any transactions for which a real estate broker license is required.” “Licensed activity” is defined as performing certain acts on behalf of others for or in expectation of compensation, i.e. sales, offers to sell, leases, offers to lease, soliciting borrowers or lenders or negotiations loans or collecting payments.

Real estate professionals were understandably concerned about the scope of this requirement in light of the increased reliance on EC. Robust debates occurred at the local REALTOR® associations as well as the California Association of REALTORS®. There was great concern that the sheer volume of documentation that must be kept, including

short-lived electronic message such as texts, would be both daunting and burdensome. Production of such documentation in a legal proceeding or CalBRE investigation would also be difficult.

Fortunately, lawmakers understood the plight of real estate practitioners. Assembly Bill 2136, backed by C.A.R., was signed into law by Governor Brown and goes into effect on January 1, 2015. The new law distinguishes short lived, electronic communication (e.g., texts, tweets, and similar EC) from transaction documents that must be maintained in a REALTOR®’s transaction file. The new law provides that “an electronic message of an ephemeral nature ... is insufficient to constitute a contract to convey real property, in the absence of a written confirmation that conforms to a specified requirement of existing law.”

Accordingly, B&P Code Section 10148(a) will be changed to reflect that licensed real estate brokers will not be required “to retain electronic messages of an ephemeral nature...” Pursuant to California Civil Code 1624(d), an electronic message is of an “ephemeral nature” when it is not designed to be retained or to create a permanent record. This includes, but is not limited to, text or instant messages. However, it is important to understand that REALTORS® are still required to comply with B&P Section 10148(a), as quoted above, and that includes any email communications that constitute licensed activity.

Although the law does not go into effect until January 1st, CalBRE Commissioner Wayne Bell informed C.A.R. that, starting now, the Bureau will not require retention of “ephemeral” records referred to in the bill.

C.A.R. recommends that real estate brokers create a system to store emails that are material to a transaction and relate to licensed activity. The retention period runs from the date of the closing of the transaction or from the date of the listing if the transaction is not consummated. Brokers should establish written office policies and procedures, communicate them to their real estate agents, and enforce them.

Brokers and agents who have any questions about what records to retain and what records may be destroyed, should seek the advice of qualified legal counsel. Making the wrong choice could result in violation of law, real estate license restriction, suspension or revocation, administrative or civil court proceedings, and judgment for damages.

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Sylvia J. Simmons is an associate attorney at The Giardinelli Law Group, APC. Her practice primarily involves helping clients avoid and resolve contract disputes in order to avoid costly litigation.

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Notice of Errata

In our July *Courtside Newsletter* “Listing Agent’s Duty to Disclose Further Clarified in California Courts” there were three instances where “fiduciary duty” should have read “statutory duty.” We apologize for any confusion. A revised version of the article can be found at www.glawgroupapc.com under the “News/Blog” tab.

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