

WEBINAR

DISCLOSE

Disclosure Requirements & Disputes in California



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PETER N. BREWER
Real Estate Law - From the Ground Up®

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ATTORNEY

**ADAM L.
PEDERSEN**



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Disclosures & Real Estate

CONTRACTS

WHY IS THE INTEGRITY OF REAL ESTATE SALES IMPORTANT?



Economics....

- Largest Purchase Most Will Ever Make
- Largest Source of Individual Wealth

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“BUYER BEWARE” NO MORE

PREVIOUS LAW FAILED

- Buyers had to do all investigation
- Active concealment
- Created distaste for real estate and real estate professionals



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LEGAL AUTHORITIES

BOTH SELLERS & REAL ESTATE AGENTS HAVE AN OBLIGATION TO DISCLOSE

- Homeowners: Civil Code 1102
- Agents: Civil Code 2079

STATUTORY DEFINITION

- “Material Facts That Affect Desirability or Value of the Property”



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REPORTING INSTRUMENTS

TRANSFER DISCLOSURE STATEMENT (TDS)

SELLER PROPERTY QUESTIONNAIRE (SPQ)

AGENT VISUAL INSPECTION DISCLOSURE (AVID)

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**INSPECTION
CONTINGENCY**

**SELLER MAKES
DISCLOSURES**

**17
DAYS**

**CANCEL
CONTRACT**

**BUYER ASK FOR
PRICE CHANGE**

**BUYER ASK
FOR REPAIRS**

**BUYER EVALUTES
DISCLOSURE**

**MOVE AHEAD,
WAIVE CONTINGENCY**

A dramatic photograph of a white house on a boat, tilted precariously in the middle of a stormy sea. The sky is filled with dark, heavy clouds, and the water is turbulent with white-capped waves crashing against the vessel. The house has a balcony and a window with blinds. The overall mood is one of danger and instability.

TYPES *of Disclosures*

GENERAL RULE: FULL DISCLOSURE

CURRENT LAW MANDATES FULL AND COMPLETE DISCLOSURE: DON'T "SOFT-PEDAL"



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“MATERIAL” FACTS

IMPACT ON VALUE AND DESIRABILITY

- “any fact materially affecting the value and desirability of the property”

COURT DECIDES WHAT IS MATERIAL

- A question of fact for the Judge or Jury
- Typically anything the buyer is likely to rely upon in making the purchase



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EXAMPLES OF "MATERIAL FACTS"

DECIDED ON A CASE-BY-CASE BASIS

- Physical Condition of Property
- Liens Affecting Property
- Market Value
- Consequences of Financing
- Buyer's Financial Strength
- Pending Litigation
- Anything about the property that the Seller/Agents know the buyer relying upon



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TYPES OF DISCLOSURES

CONDITION OF MAJOR PHYSICAL SYSTEMS

- Sewer
- Roofing
- Windows & Doors
- Plumbing
- Electrical
- Foundation
- Water Intrusion

Even if something may seem obvious, or you aren't sure if it is "material", you should

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EXAMPLE SCENARIO

REGULAR PLUMBING MAINTENANCE

- Multiple calls to plumber in past 2 years
- Plumber fixed, but cause never identified
- Unknown to seller, clay pipes failing
- Buyer later discovers cause

If don't know the cause of
problem, but know have had
issues, you should

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TYPES OF DISCLOSURES

ENVIRONMENTAL FACTORS

- All Noise (Airplane, Train, etc.)
- Street Traffic
- Annoying Neighbors
- Known Criminal Activity
- Schools & Churches
- Fire Zone, Earthquake, Flood
 - **Natural Hazard Disclosure**



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TYPES OF DISCLOSURES

PRIOR MAINTENANCE AND REPAIRS

- Repairs ("repaired" vs "repairs done")
- Death
- Infestations
- Remodel Work (Permitted & Unpermitted)

GENERAL RULE:

If substantial repair, or impacts critical system, the repair should be

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TYPES OF DISCLOSURES

LITTLE KNOWN PITFALLS

- Permits
- Square Footage
- “As-is” Contracts
- New Laws
- Non-Contingent Offers

11TH HOUR DISCLOSURES



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The background of the image features a blurred bookshelf filled with books. In the foreground, a pair of wooden scales of justice is positioned on the right, with a wooden gavel resting on a stack of books in the center. The gavel's handle lies across the books, and its head is placed on a dark wooden block. The scales are partially visible, with their pans hanging from a central beam.

Non-Disclosure Dispute
PROCESS

DISPUTE TIMELINE

DISCOVER DEFECT

INITIATE INVESTIGATION

MEDIATION DEMAND

- Contract Requires Buyer & Seller to Mediate
- **DO NOT REJECT MEDIATION DEMAND**
 - If Don't Mediate, Cannot Obtain Attorney Fees

ARBITRATION OR LITIGATION

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WHEN TO ACT

BEFORE CLOSE

- Plan to close, then sue for damages
- Get out of contract through mediation

AFTER CLOSE

- Sue for damages
- Rescission of contract

STATUTE OF LIMITATIONS:

2—4 YEARS

From the closing date

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POTENTIAL CLAIMS

ACCIDENTAL

- Breach of Contract
- Negligent Misrepresentation

INTENTIONAL

- Fraud/Misrepresentation

PRACTICE TIP:

Be clear about what you are saying about a property, and provide sources when possible. If you aren't qualified to make representation about status or issue, then don't – use experts!



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WHO ARE THE PARTIES

BUYER/SELLER MUST MEDIATE

- As Per Contract
- If Ignore, Lose Attorney Fee Claim

BUYER SUES SELLER (MOST COMMON)

- Seller Can Then Sue Seller's Agent
 - Fiduciary – Direct Claim
- Seller Can Then Sue Buyer's Agent
 - Indemnity – Indirect Claim

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DEFENDING AGAINST

PUT INSURANCE ON NOTICE

- Agents: E&O Insurance
- Homeowners: Homeowners Insurance
- Insurance Could Pay for Attorney, Save \$\$\$

SALESPERSONS: LET BROKER KNOW

DECIDE IF WANT TO PARTICIPATE IN MEDIATION

- Almost always a "Yes"

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AM I RESPONSIBLE?

POTENTIAL LIABILITY

- Violate Duty to Disclose?

POTENTIAL DEFENSES

- Open & Obvious Defect
- Disclosure From Another Source
- Lack of Knowledge
- No Damages

DID YOU KNOW:

Damages are PART of a CLAIM, not the result. If there are no damages, then there is no claim.



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EVALUATING CLAIM

VALUE OF DAMAGES (CIV 3343)

- Diminution in Market Value Had Buyer Known
 - Often cost of repair, but not always

PUNITIVE DAMAGES

- Only if Deemed Intentional

ATTORNEY FEES

- Yes, But Don't Bank On It
 - After You Win, ONLY If You Win
 - Factor Attorney Fees into Settlement

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EVALUATING CLAIM

COSTS IN EVALUATING CLAIM

- Competent Expert to Evaluate Defect
- Competent Expert to Appraise Market Value Difference
- Competent Expert to Identify Repair Cost

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ROLE OF LAYWERS

EXPERTLY SKILLED IN MEDIATION

- See Issues All the Time

QUICKLY DETERMINE IF ISSUE IS MATERIAL

- Save Time & Money

ADVISE WHEN AT RISK OF LAWSUIT, OR HAVE CLAIM

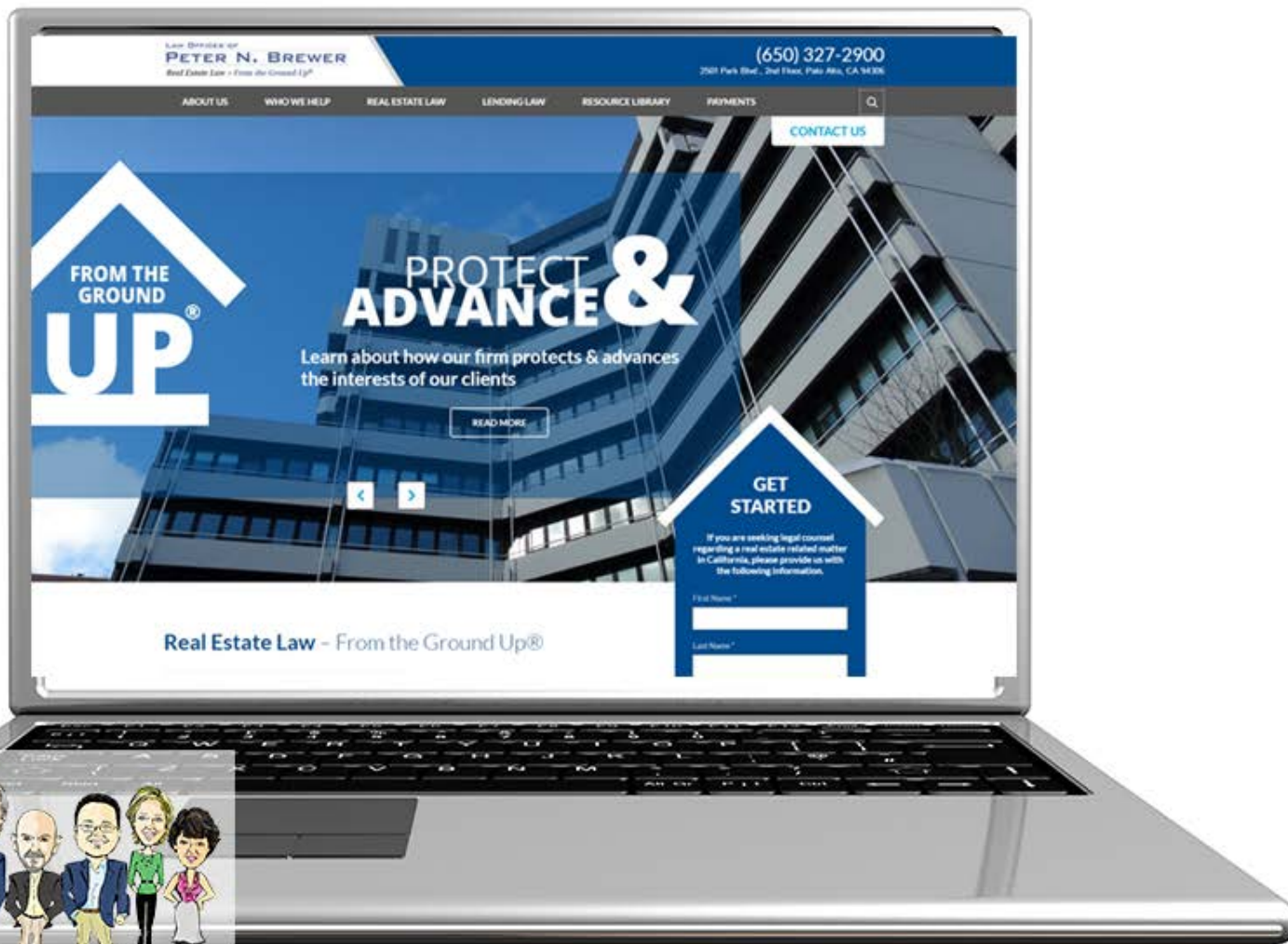
AVOID CLAIM IN FIRST INSTANCE!!



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