II. TRADING SERVICES

1. PRACTICE STANDARDS

GENERAL REQUIREMENTS

Competency in Practice Areas

Real estate is a diverse and frequently complex industry. For that reason, licensees often specialize in a particular type of real estate and/or a specific market area. This allows them to remain current and familiar with the unique nature of that market segment.

The Council, and no doubt the public, expects a licensee to maintain a state of competency, on an ongoing basis, in all areas in which the licensee renders service. A licensee who demonstrates incompetence may be found to have committed professional misconduct.

Section 35 of RESA provides that a licensee commits ''professional misconduct'' if the licensee:

> (a) contravenes this Act [RESA], the regulations, or the rules;
>
> (b) breaches a restriction or condition of their licence;
>
> (c) does anything that constitutes wrongful taking or deceptive dealing;
>
> (d) demonstrates incompetence in performing any activity for which a licence is required;
>
> (e) fails or refuses to cooperate with an investigation under section 37 [investigations by council] or 48 [investigations by

> superintendent];
>
> (f) fails to comply with an order of the real estate council, a discipline committee or the superintendent;
>
> (g) makes or allows to be made any false or misleading statement in a document that is required or authorized to be produced or submitted under this Act [RESA].

When issues related to a particular transaction arise that are outside of a licensee's area of expertise, guidance should be sought from the licensee's managing broker. It may be that these matters should be referred to an appropriate independent expert (e.g., a lawyer, accountant, building inspector, etc.).

However, sometimes it is the very nature of the real estate transaction that is beyond the scope of a licensee's expertise. For example, a licensee whose licence allows rental property management activity, but who specializes in single-family home sales, may have no experience or knowledge in the area of rental property management. If the opportunity to provide rental property management services arises, and assuming the licensee's related brokerage has the necessary systems available to provide competent rental property management services, the licensee would be well advised to discuss the opportunity with the licensee's managing broker prior to offering to render service.

Similarly, while a real estate licence permits an individual to provide services related to trades in real estate throughout the province, that does not mean licensees are always competent to do so. The expertise necessary to market a waterfront home on Vancouver Island is not the same expertise necessary to assist in the purchase of a cattle ranch in the Cariboo. There are often situations where a prudent licensee should refer business to someone who is more knowledgeable in a particular market or to another licensee within the brokerage who has the knowledge and experience to assist.

The public relies on a licensee's expertise. Therefore, licensees should not act in situations where they are unable to render competent service.

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Section 43 of RESA provides for disciplinary action against a licensee who breaches section 35 by committing professional misconduct. As set out in section 35 of RESA, a licensee can commit professional misconduct in a variety of ways, including by demonstrating incompetence.

Standards of practice have been rising consistently and every licensee is expected to conform to the higher standards as they become the norm. In considering whether a licensee may have demonstrated incompetence and thereby committed professional misconduct, the accepted and normal standards of practice in the profession are taken into account by the Council. Although ''incompetence'' is not defined, in considering whether a licensee might have demonstrated incompetence, the normal standards of practice are taken into account.

As a general guide, it is suggested that licensees remember that they are paid remuneration for their expertise. Section 3-4 of the Council Rules requires them to act honestly and with reasonable skill and care.

A real estate licensee who extends or offers service or information, even at no charge, is required to comply with RESA and may be found to have committed professional misconduct, notwithstanding that the real estate services were provided for free.

The careless rendering of an opinion can be as damaging as a negligent or incompetent statement of fact, and the licensee who unknowingly leads the public into harm's way, risks much. The penalties imposed by the Council and the courts can be severe.

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Agency

Agency Disclosure

Section 5-10 of the Council Rules outlines the requirements regarding disclosure of the nature of a licensee's relationships with parties in a trade in real estate. Section 5-10 of the Council Rules provides that:

> Before providing trading services to or on behalf of a party to a trade in real estate, a licensee must disclose the following to the party:
>
> (a) the nature of the representation that the licensee will provide to the party,
>
> (b) as applicable,
>
> (i) that the licensee, or a related licensee, is or expects to be providing trading services to or on behalf of any other person, in any capacity, in relation to the same trade in real estate,
>
> (ii) that the licensee, or a related licensee, is or expects to be receiving remuneration relating to trading services referred to in subparagraph (i) from any other person, and
>
> (iii) the nature of the licensee's relationship or the relationship of the related licensee, with any person referred to in subparagraph (i) or (ii).

It is important to provide consumers with this information at the first reasonable opportunity. One way to do this is to provide potential sellers/landlords and buyers/tenants, at first substantial contact, with a copy of the *Working With a REALTOR®* brochure developed by the British Columbia Real Estate Association

(available through real estate boards/associations). This brochure explains the various types of relationships that consumers may have with a brokerage. The brochure also describes:

- the fiduciary duties that an agent owes to a client, be that client a seller/landlord or a buyer/tenant;
- limitations on these duties should an agent be given consent to act for more than one party; and
- the types of services a customer might normally expect to receive when there is no agency relationship.

This information will assist licensees in obtaining the seller's/landlord's or buyer's/tenant's informed consent to the relationship to be established.

It is important to stress that the seller's/landlord's or buyer's/tenant's informed consent is required before a brokerage acts on behalf of a seller/landlord or buyer/tenant. Obtaining such informed consent before acting is also necessary if a brokerage wishes to act as a limited dual agent.

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Nature of the Relationship

In a real estate transaction, the nature of the relationship that is created between the buyer/tenant or seller/landlord and the brokerage is important. The relationship may be either an agency relationship, limited dual agency, or no agency.

Before making the required disclosure regarding the nature of the representation, brokerages should consider what type of relationship they would like to create. In the majority of cases, the representation that is offered and agreed to is an agency representation, however, as discussed below, it is not necessary that in every case a brokerage must be the agent of the buyer/tenant or the seller/landlord. It is possible, with the agreement of the buyer/tenant or seller/landlord, as the case may be, to create a relationship that is not one of principal and agent. This is important for both the brokerage and the buyer/tenant or seller/landlord to consider, since the nature of the relationship that is established determines the duties and obligations of the brokerage and the licensees related to the brokerage.

Where a brokerage acts only for the buyer/tenant or the seller/landlord, an agency relationship is generally created. As indicated previously, the agreement that the brokerage will be the agent of the seller/landlord or buyer/tenant should occur early in the relationship and is often accomplished by using the *Working With a REALTOR*® brochure. In such cases, the seller/landlord or buyer/tenant is the principal and the brokerage is the agent. The Council Rules uses the term ''client'' when referring to a principal who has engaged a brokerage to provide real estate services on behalf of the principal.

As an agent, a brokerage and the licensees related to the brokerage have certain duties to their client. As explained in the *Working With a REALTOR*® brochure, the brokerage and the licensees related to the brokerage have:

- a duty of undivided loyalty to the principal;
- a duty to keep the confidences of the principal;
- a duty to obey all lawful instructions of the principal; and
- a duty to account for all money and property of the principal placed in the brokerage's hands while acting for the principal.

In cases where a brokerage acts for both the buyer/tenant and the seller/landlord, with their agreement, the nature of the relationship is one of limited dual agency. Limited dual agency can occur when the same licensee licensed in relation to the brokerage represents the buyer/tenant and seller/landlord, or where different licensees licensed under the same brokerage represent the buyer/tenant and the seller/landlord. Before a brokerage may represent both the buyer/tenant and the seller/landlord, the buyer/tenant and seller/landlord must consent to such a relationship. Before providing their consent, the buyer/tenant and seller/landlord must be fully informed regarding the limits that will be placed on the agent's (brokerage's) duties and obligations to the buyer/tenant and seller/landlord.

Where a limited dual agency relationship has been agreed to, it is not possible for the agent (brokerage) to fulfill all of its duties to both parties. As a result, the duties are limited to require the brokerage to deal with the buyer/tenant and seller/landlord impartially. The duty of full disclosure is limited so that the brokerage is not required to disclose what the buyer/tenant is willing to pay for the property or the motivation of the seller/landlord. The brokerage must also not disclose personal information about the parties, unless authorized to do so in writing.

A brokerage may also agree with a buyer/tenant or seller/landlord that it will not act as an agent on their behalf in a transaction. In other words, there will be no agency representation. In such a case, the buyer/tenant or the seller/landlord will be the customer of the brokerage, rather than the brokerage's client. The *Working With a REALTOR*® brochure explains the services that a brokerage can provide under a relationship that does not involve an agency. As noted above under the heading ''Agency Disclosure'', when a brokerage is acting as the agent of a buyer/tenant, the need to disclose remuneration received from the seller/landlord arises. When acting for a seller/landlord in an agency relationship, there is an obligation to disclose all referral fees. However, if there is no principal-agent relationship, there is no obligation to disclose to the customer the amount of remuneration that the brokerage will receive from the transaction or the amount of any referral fees that are received. Thus, it is always open to a brokerage, with the buyer's/tenant's or seller's/landlord's consent, to treat the buyer/tenant or seller/landlord as a '' customer'' and not create an agency relationship.

Additionally, rather than acting as a limited dual agent, a brokerage may choose to act as the agent of only one of the parties. The brokerage can treat the other party as a customer. The nature of the relationship does not affect the brokerage's ability to earn the remuneration to which it is entitled.

Similarly, a brokerage that enters into an agreement with a seller/landlord who is attempting to sell/lease his or her home on his or her own can choose the nature of the relationship the brokerage wishes to establish with the seller/landlord. If the seller/landlord agrees, the brokerage can enter into an agreement which does not create an agency relationship with the seller/landlord.

A brokerage, and the licensees related to the brokerage, should not simply assume that an agency relationship must be created, but should carefully consider the nature of the relationship it wishes to establish prior to explaining the *Working With a REALTOR®* brochure to a buyer/tenant or seller/landlord.

Adhering to the four ''D's'' can prove helpful in fulfilling the disclosure requirements of section 5-10 of the Council Rules:

1. Decide which party you wish to represent and the nature of the representation, and obtain the consent of that party to do so;
2. Disclose to all parties so they know who you are representing;
3. Document the decision and disclosure; and
4. Demonstrate actions that are consistent with what you have decided, disclosed and documented.

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How an Agency Relationship Is Created

An agency relationship may be created by means of a written agreement, orally or by conduct.

Where the client is the seller, typically the listing contract establishes the agency relationship. As indicated above, a brokerage has a duty of undivided loyalty to a client. However, it is not unusual for a brokerage to list more than one property at a time or to act for buyers at the same time that the seller's property is listed. Therefore, the duty of undivided loyalty must be limited in order to permit the brokerage to act on behalf of other buyers and sellers at the same time. The listing contract should therefore include the limitations on the duties that the brokerage will owe to its client. The BCREA standard form multiple listing contract contains the limitations that permit brokerages to conduct business without breaching their duties to their clients.

When representing buyers, some brokerages use an Exclusive Buyer's Agency Contract. Where such a contract is used, the contract sets out the terms of the agency relationship. If a written contract is not used, the party to the trade may orally agree that the brokerage is the party's agent. Where the agreement is oral, the brokerage should obtain the client's agreement that the brokerage be permitted to act for other buyers and sellers and that the brokerage will not disclose confidential information obtained through other agency relationships.

In some cases, however, the courts have found that an agency relationship has been created as a result of the conduct of the parties. Such agency relationships are often referred to as ''implied agency''. Brokerages acting on behalf of a person who is not otherwise represented may be found to be acting as the party's agent if the actions of the brokerage would lead the party to believe that the brokerage was acting as their advocate. An implied agency relationship may be found to exist, even where the brokerage did not intend to act as the party's agent. In any transaction which involves an unrepresented party, if the brokerage does not intend to act in an agency relationship, it is very important for the brokerage to confirm with that party that the brokerage is not acting as the party's agent. It is also important that the conduct of the brokerage and the licensees engaged by the brokerage are consistent with such statements.

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Documenting the Agency Relationship

As indicated above, while an exclusive agency agreement is normally created with a seller/landlord by way of a listing contract, the use of written buyer's agency agreements, particularly in residential real estate, has not been as common. A brokerage working with a buyer/tenant will often provide that buyer/tenant with a *Working With a REALTOR®* brochure, and acknowledgement of the agency relationship takes place on the Contract of Purchase and Sale. However, not confirming this relationship in writing prior to the Contract of Purchase and Sale is similar to working on behalf of a seller/landlord without a signed listing agreement. The brokerage may be taking on fiduciary duties without an agency/fee agreement. The buyer/tenant may be working with a number of agents at the same time. Prudent brokerages will want to confirm their relationship in writing with a buyer/tenant at the earliest opportunity by completing a written buyer's agency agreement.

Licensees are reminded that, in instances where the buyer is represented by an agent, the responsibility of the listing agent to the buyer remains the same; that is, not to mislead or deceive by withholding any material facts about the property. It is not acceptable for a listing brokerage, and the licensees engaged by that brokerage, to assume that the buyer's agent is solely responsible to discover any and all material facts about the property.

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Obligations Related to Various Licensee Service Relationships

The relationship between a brokerage and a buyer/tenant or seller/landlord can be one of agent and principal, no agency, or limited dual agency. The following chart outlines the various obligations that a brokerage and its related licensees have depending on the service relationship that is established. The reference to customer is a reference to a relationship in which there is no agency representation. The reference to client is a reference to the principal and agent relationship.

GENERAL OBLIGATIONS	TO CUSTOMER (no agency)	TO CLIENT (single agency)	AS LIMITED DUAL AGENT
1. Perform mandate	No	Yes	Yes
2. Obey instructions	No	Yes	*
3. Act in person	No	Yes	Yes

4. Honesty	Yes	Yes	Yes
5. Act in impartial, objective manner	No	No	Yes
6. Exercise care and skill	Yes	Yes	Yes
7. Disclose information concerning:			
7.1 Other party's maximum/minimum price or terms	No	Yes	No
7.2 Other party's motivation	No	Yes	No
7.3 Material defects in the seller's property	Yes	Yes	Yes
7.4 Buyer's financial ability to complete transaction	No	Yes	No
7.5 Other confidential information obtained from other party	No	Yes	No
8. Provide confidential advice on any or all relevant matters	No	Yes	No
9. Help negotiate and draft favourable terms	No	Yes	No
10. Recommend relevant ''experts'' (appraisers, surveyors, inspectors, etc.)	No	Yes	No
11. Present, in a timely manner, all offers, counter-offers, etc.	Yes	Yes	Yes
12. Convey in a timely manner all information that party wishes to have communicated	Yes	Yes	Yes
13. Keep fully informed regarding the progress of the transaction	Yes	Yes	Yes
FIDUCIARY OBLIGATIONS			
14. Loyalty	No	Yes	No
15. Avoid all conflicts of interest			
15.1 Not act for both parties	No	Yes	N/A
15.2 Not make secret profit	No	Yes	Yes
15.3 Not buy client's property	No	Yes	N/A
15.4 Not sell own property to client	No	Yes	N/A
15.5 Not act for parties whose interests conflict	No	Yes	N/A
16. Not misuse confidential information	No	Yes	Yes
17. Disclose all personal (brokerage's) conflicts of interest	No	Yes	Yes
STATUTORY DUTIES			
18. To account	Yes	Yes	Yes
19. Other miscellaneous statutory duties	Yes	Yes	Yes
VICARIOUS LIABILITY			
20. Client vicariously liable for misconduct of brokerage	No	Yes	**
NON-AGENCY SERVICES (May also be provided in agency relationships)			
21. Provide real estate statistics, comparable property information, etc.	Yes	Yes	Yes
22. Provide standard form agreements and other relevant documents	Yes	Yes	Yes
23. Act as a scribe in the preparation of standard form agreements, etc.	Yes	Yes	Yes
24. Provide the names of ''experts'' (appraisers, surveyors, inspectors, etc.)	Yes	Yes	Yes

* Yes if no conflict of interest

** Not known at the present time

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Agency Issues Related to Commercial Trading Services

There are many differences between residential and commercial trades in real estate, one of the more common being that the parties involved in a commercial trade are often thinking about the investment value of real estate more so than its value as shelter. They may have either in-house or independent professional advisers, such as accountants and lawyers assisting them in analyzing this investment value, and determining the best way to structure ownership and use to maximize that value. The relative sophistication of the parties may affect the types of services or level of advice expected from licensees. With this in mind, the nature of representation the brokerage and licensee are providing to the parties involved in a commercial trade in real estate, and what duties are owed to those parties by the brokerage and

licensee, can sometimes be misunderstood.

In providing trading services, whether those services are related to commercial or residential real estate, it is important for the brokerage and licensee and the party to whom the services are being provided, whether that is the seller/landlord/lessor (''seller''), or the buyer/tenant/lessee (''buyer''), or both, to understand the nature of the relation- ship between them because the duties and obligations of the brokerage and the licensee are determined by that relationship.

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Conflicts of Interest

When a brokerage is engaged by a client to provide real estate services, certain duties are owed to that client. Section 3-3(1)(a) of the Council Rules requires the brokerage and its related licensees to ''act in the best interests of the client''. Section 3-3(1)(i) requires the brokerage and its related licensees to ''take reasonable steps to avoid any conflict of interest''. Where a conflict of interest, which cannot be reasonably avoided, does exist, section 3-3(1)(j) requires the brokerage and its related licensees to ''promptly and fully disclose the conflict to the client''. A fully informed client may then choose to allow the licensee to continue to act in that conflict by modifying or disapplying the obligations which can't be fulfilled because of the conflict.

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Limited Dual Agency

Whenever a brokerage attempts to act for more than one party involved in the same trade, a potential conflict can arise. While the law does not prohibit acting for more than one party, brokerages wishing to act for more than one party must obtain the informed consent of both parties before acting on their behalf.

In this context, informed consent means that the brokerage must disclose to both parties, in a timely manner:

- the nature of the conflict of interest that would arise if the brokerage were to represent both parties; and
- what is being proposed by the brokerage and the implications of giving their consent.

The above disclosure must occur before the brokerage begins to act for both parties and before any potential conflict of interest has arisen.

The most common conflict that arises is where the listing brokerage is representing both the seller and the buyer in the same transaction (this may be because two different licensees engaged by the listing brokerage work with the seller and buyer respectively, or because one licensee engaged by the listing brokerage works with the seller/landlord and is the same licensee who brings the buyer to the trade, i.e., a double-ender). These situations are the ones that generally come to mind when the term ''limited dual agent'' is used. It is important to remember that under current agency practice, when a licensee engaged by a brokerage lists a property for sale, the brokerage is appointed as the agent of the seller, and all of the brokerage's related licensees also become agents of the seller. Similarly, when a licensee engaged by a brokerage acts as a buyer's agent, the brokerage is appointed as the agent of the buyer, and all of its related licensees also become agents of the buyer.

Licensees must also keep in mind that the definition of a ''trade in real estate'' includes a transaction for the leasing of real estate. If a brokerage acts for both the landlord and the tenant, particularly in the arranging of commercial leases, the brokerage may wish to act as a limited dual agent.

However, there are many other situations where a brokerage may be involved in more than one aspect of a trade in real estate and wishes to act as a limited dual agent. Whenever a brokerage is involved in more than one aspect of a trade in real estate, the situation can give rise to conflicts of interest. For example, a brokerage that provides strata management services to a strata corporation might be asked by the owner of a strata lot within that strata corporation to list the strata lot for sale. As an agent for the strata corporation, the strata manager may have access to information that is confidential to the strata corporation and is not intended to be shared with individual strata lot owners or potential buyers (e.g., specific details concerning current legal action, including settlement negotiations, hardship cases, or concerns regarding a rogue strata lot owner). The strata manager has an obligation to keep the confidence of the strata corporation. Yet, as an agent for the seller of the strata lot, that same brokerage would have a duty to disclose all known facts that may affect or influence the seller's decision.

Another example could be where a brokerage is acting as an agent for a seller and as a mortgage broker for a buyer in the same trade. That brokerage may become aware of personal, confidential information regarding the buyer that would be of interest to the seller.

Additionally, brokerages are occasionally in a position where they act as an agent for various buyers, all of whom wish to make an offer on the same property.

Whenever a brokerage attempts to act for more than one party in a trade as a limited dual agent, the brokerage is in a potential conflict of interest. In every case, the brokerage must disclose the limited dual agency relationship or the conflict to his or her clients and obtain the informed consent of its clients before acting or continuing to act on the client's behalf.

The disclosure must be timely, and, where possible, made before either client has disclosed confidential information to the agent.

All other agency disclosure requirements, as set out above under the heading ''Agency Disclosure'' continue to apply. In order to comply with the agency disclosure requirements of section 5-10 of the Council Rules, appropriate disclosure of the limited dual agency relationship must be made at the first reasonable opportunity and, where possible, made before either client has disclosed confidential information to the agent. Those agents not using the *Working With a REALTOR®* brochure for this purpose must ensure that they are using an appropriate alternative that provides complete and accurate disclosure of the relationships described above.

Both clients have to be fully aware of the existence of a limited dual agency. The courts are increasingly imposing an obligation on the limited dual agent to inform both clients of the ''full implications of representation by a limited dual agent''. In some recent cases, this obligation has been extended by the courts to disclosure of the implications and benefits of sole representation, and the parties' entitlement to choose sole representation. The courts have held that clients have the right to make a fully informed choice as to the nature of the representation they wish to receive.

Although, generally speaking, the informed consent of the client to a limited dual agency relationship is sufficient, there are some cases where a brokerage should not represent both parties in a trade. Where a licensee related to a brokerage is acquiring or disposing of property on his or her own account or when the licensee is providing real estate services to an associate (as defined in section 5-7 of the Council Rules), the licensee and his or her related brokerage should not also be acting for the other party. In such circumstances, a licensee could not remain objective or neutral.

Even though a licensee has complied with section 5-9 of the Council Rules, which requires disclosure of his or her interest in the trade, the licensee should also resist creating a conflict of interest by agreeing to have his related brokerage also represent the other party.

In such circumstances, the licensee and his or her related brokerage may wish to treat the other party as a customer and in that way can receive the total remuneration payable, as described above in the section entitled "Nature of the Relationship".

It is important for brokerages and their related licensees to keep in mind, however, that the determination of the relationship or a change in the relationship must be agreed to by the client. A brokerage that wishes to change from an agency relationship to one of limited dual agency or no agency, must first obtain the informed consent of its client. Making such a change is not simply a matter of the brokerage advising the client that the relationship has changed.

For more detailed information, please refer to the "Conflicts of Interest When Providing Trading Services" section below.

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Duty of Disclosure by a Limited Dual Agent

Limitations to an agent's usual duties and obligations have been developed to permit an agent to represent clients who have competing interests. When acting as a limited dual agent for a buyer and seller, the agent's duty of full disclosure is modified to allow the agent to keep information confidential from one side against the other in three areas:

- the price or other terms a client is willing to accept or pay (other than what is contained in the offer);
- the motivation of either client; and
- either client's personal information.

The agent is also required to deal impartially with both clients, including disclosing to the buyer any known defects about the physical condition of the property.

Brokerages entering into limited dual agency agreements with clients often do so by using the Limited Dual Agency Agreement made available by their real estate board. In order to avoid potential misunderstandings, and prior to acting as a limited dual agent, brokerages should review with each party the limitations placed on an agent's usual fiduciary duties by this agreement.

In cases where a brokerage is acting as a limited dual agent in a situation other than for a buyer and seller, the limitations with respect to disclosure by the agent will change. For example, where the brokerage is both the strata manager and the listing agent, the limitation may be that the agent will not disclose the personal or otherwise confidential information about either the strata corporation or a strata lot owner unless authorized in writing. Similarly, when a brokerage is both the agent for the seller and the mortgage broker, the limitation may be that the agent will not disclose any personal information to the seller about the buyer.

An important point for brokerages and their related licensees to keep in mind is that their clients must agree to the limitations placed on an agent's usual fiduciary duties before the brokerage acts as a limited dual agent.

Additionally, brokerages and their related licensees must keep in mind that the limited dual agent is still the agent of both parties and, subject to the limitations agreed to by the clients, must ensure that full disclosure respecting the subject matter of the contract is made to both clients. In addition, any action taken by the agent in regard to the trade must be consented to by both parties.

As a limited dual agent, a brokerage and its related licensee should remember the key elements to correct conduct:

- impartiality;
- disclosure; and
- consent.

Brokerages and their related licensees have a duty to treat the buyer and the seller impartially, and other than the exceptions set out in the Limited Dual Agency Agreement, licensees must make full disclosure to both the buyer and the seller.

Remember, the test of what is material is an objective one and if such information is not disclosed, the agent may face disciplinary and/or civil action.

One of the leading cases regarding disclosure is the decision of the B.C. Court of Appeal in *Ocean City Realty v. A&M Holdings Ltd*.

In that case, the Court of Appeal stated that:

> *The duty of disclosure is not confined to these instances where the agent has gained an advantage in the transaction or where the information might affect the value of the property or where a conflict of interest exists. The agent certainly has a duty of full disclosure in such circumstances, they are commonly occurring circumstances which require full disclosure by the agent. However, they are not exhaustive.*
>
> *The obligation of the agent to make full disclosure extends beyond these three categories and includes "everything known to him respecting the subject*

matter of the contract which would be likely to influence the conduct of his principal, or ... which would be likely to operate on a principal's judgment". In such cases, the agent's failure to inform the principal would be material non-disclosure.

The Court of Appeal emphasized that an agent cannot arbitrarily decide what would likely influence the conduct of his or her principal and thus avoid the consequence of non-disclosure. If the information pertains to the transaction with respect to which an agent is engaged, any concern or doubt that the agent may have can readily be resolved by disclosure of the facts to his or her principal.

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Conflicts of Interest Related to Licensees Buying and Selling Real Estate

Complications arise when a licensee attempts to act as a principal and as an agent for the other party in the same transaction. Not only can that licensee not be impartial and objective, but they are likely unable to meet another fundamental obligation of an agent: the duty to not allow their own personal interest to prejudice their client's interest. Whether a licensee is selling his or her own property to a client, or buying his or her client's property, there is a very significant risk that his or her own personal interest will be in conflict with, and therefore will prejudice, his or her client's interest. Where the client is a party to a Limited Dual Agency Agreement, it must be established, on the particular facts and circumstances of each case, that the client gave its informed consent to that relationship.

In the case of *D'Atri v. Chilcott*, the Court found that the following principles are applicable where a licensee is buying a client's property:

- that the relationship between a real estate agent and the person who has retained him or her to sell his or her property is a fiduciary and confidential one;
- that there is a duty upon such an agent to make full disclosure of all facts within the knowledge of the agent which might affect the value of the property;
- that not only must the price paid be adequate, but the transaction must be a righteous one, and the price obtained must be as advantageous to the principal as any other price that the agent could, by the exercise of diligence on his principal's behalf, have obtained from a third person; and
- that the onus is upon the agent to prove that those duties have been fully complied with.

Expanding on these principles, the Court referred to other cases involving the obligations of a fiduciary when transacting with its own clients. In *Brown et al. v. Premier Trust Co. et al.* it was found that ''the onus is cast on them to establish the perfect fairness and equity of the transaction''. They must show that Dr. Brown (the client) entered into the transaction, not through the operation of any acts on the part of Holmes (the fiduciary), but ''after full and sufficient deliberation, and with all the information which it was material for him to have in order to guide his conduct; and that he had either independent and disinterested advice, or as ample protection as such advice could have given him. In other words, they must show that they had given all reasonable advice against themselves that would have been given to Dr. Brown against a third party''.

In *Charles Baker Ltd. v. Baker and Baker*, the Court found that ''the onus is upon the agent to prove that the transaction was entered into after full and fair disclosure of all material circumstances and of everything known to him respecting the subject-matter of the contract which would be likely to influence the conduct of his principal. The burden of proof that the transaction was a righteous one rests upon the agent, who is bound to produce clear affirmative proof that the parties were at arm's length, that the principal had the fullest information upon all material facts, and that having this information he agreed to adopt what was done.''

Similar principles would apply where a licensee is selling his or her own property to a client.

If a licensee decides to take such a very significant professional risk, it would appear from the *Brown* case that one way to deal with this obligation that might reduce a licensee's risk is to ensure the other party has the opportunity and time to obtain any and all independent advice they desire. This may include advice about value, the legal effect of terms or conditions, tax considerations, or any other matter about which the other party has questions. This may also result in the client deciding it wants to be independently represented by a licensee engaged by another brokerage. Clients may choose to not allow a licensee or brokerage to continue to represent them when that licensee or brokerage is in a conflict of interest.

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Buying a Property Listed by Your Related Brokerage

If a licensee decides to take a substantial professional risk and make an offer to buy his or her own listing or any property listed with his or her brokerage, he or she is advised as follows:

- Before Negotiations

Prior to the commencement of any negotiations with the seller to purchase his or her property, advise his or her managing broker of his or her intentions. If his or her managing broker approves of proceeding with the proposed purchase, continue to involve the managing broker or his or her designate throughout the buying process.

- Full Disclosure

Promptly and fully disclose their conflict of interest position to the seller as summarized above and confirm such disclosure in writing.

- Option To Cancel Listing

Give the seller the option to cancel the service agreement (listing) and the opportunity to seek independent representation.

- Withdraw as Representative

If the seller chooses not to cancel the service agreement, fully withdraw as the brokerage representative acting for the seller, with the managing broker or his or her designate then undertaking to act as an alternate representative of the brokerage when dealing with the seller.

- Cease All Communication

Cease all direct communication with the seller. All contact with the seller should be indirectly through the managing broker or his or her designate.

- Disclosure of Interest in Trade

Ensure that a ''Disclosure of Interest in Trade'' form is fully completed and presented to the seller, prior to the presentation of their offer. A clause should be included in the contract confirming their delivery of the required disclosure, e.g., *The Seller acknowledges having received a signed ''Disclosure of Interest in Trade'' form which disclosed the licensee's interest in the transaction before the receipt of this offer*.

- Condition Requiring Independent Advice

Make their offer *subject to the Seller, on or before [a specific date which should ensure sufficient time is provided for the seller to obtain all required professional advice], receiving and being satisfied with, such professional advice as they deem appropriate, including but not limited to legal advice as to the terms and conditions of this Contract, appraisal advice as to the current fair market value of the Property and tax advice.*

Selling a Licensee's Real Estate Through His or Her Related Brokerage

If a licensee decides to take a substantial professional risk to sell his or her own property through his or her brokerage, he or she is advised as follows:

- Before Listing the Property

Prior listing their property through their brokerage, advise their managing broker of their intentions and continue to involve the managing broker or his or her designate throughout the selling process.

- Appoint Brokerage Listing Representative

Do not act as their brokerage representative for the listing, rather arrange for another licensee in their brokerage to act as the listing representative for the brokerage. The representative engaged should take all steps that are customary when taking a listing, including measuring the property, obtaining a site plan and survey, checking title, checking the municipal file, preparing the listing agreement, inputting property information into the multiple listing service, preparing all advertising and promotional material, etc.

- Do Not Act for Buyers

The brokerage should, where possible, not act as agent for a potential buyer of the related licensee's property. Should a buyer wish a brokerage licensee to act for them, such licensee should promptly and fully disclose the brokerage conflict of interest to the potential buyer as summarized above and confirm such disclosure in writing. It is preferable that the listing representative for the brokerage (along with all other brokerage representatives) act as agent for the seller only and no agency representation is provided to a buyer of the property. Any brokerage licensee who has entered into a buyer agency agreement with a buyer who becomes interested in buying the property should offer the buyer the option to cancel such agreement and give the buyer the opportunity to seek independent representation.

- Do Not Communicate Directly with Buyer

Do not at anytime communicate directly with the buyer. All communication with the buyer should be indirectly through the listing representative for the brokerage.

- Disclosure of Interest in Trade

Ensure that a ''Disclosure of Interest in Trade'' form is fully completed and presented to the buyer, prior to the presentation of the buyer's offer. If an offer is received prior to having made the required disclosure, the prospective buyer must be given the opportunity to rescind his or her offer prior to you accepting it. It is not sufficient to accept the offer subject to the disclosure. The disclosure is required to be made before any agreement is entered into. A clause should be included in the contract confirming your delivery of the required disclosure, e.g., *The Buyer acknowledges having received a signed ''Disclosure of Interest in Trade'' form which disclosed the licensee's interest in the transaction before the making of this offer.*

- Independent Advice

The buyer's offer should be made *subject to the Buyer, on or before [a specific date which should ensure sufficient time is provided for the buyer to obtain all required professional advice], receiving and being satisfied with, such professional advice as they deem appropriate, including but not limited to legal advice as to the terms and conditions of this Contract, appraisal advice as to the current fair market value of the Property and tax advice.*

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The Conflict of Representing Two Buyers Who Want To Buy the Same Property

A second example of a brokerage acting for two clients with potentially conflicting interests is where licensees engaged by a brokerage are representing two buyers who are interested in buying the same property. Again, bearing in mind that the brokerage and all of its related licensees are agents for the same clients, there is a conflict in licensees engaged by the same brokerage acting as agents for different buyers when those buyers become interested in buying the same property. This conflict is essentially the same whether it is one licensee trying to represent two competing buyers, or two licensees engaged by the same brokerage trying to represent two competing buyers. How can the brokerage, being the agent, act in the best interests of both buyers at the same time?

The situation may be a bit less complicated if the brokerage has entered into written buyer agency agreements, or some other form of buyer agency acknowledgment agreement, with each of these competing buyers.

In the ''standard'' exclusive buyer agency agreement, a buyer agrees that it is not a conflict for the brokerage to act as an agent for other buyers. There is similar wording in ''standard'' listing contracts vis-a`-vis the brokerage representing other sellers. There is also a clause that states the brokerage is not required to disclose confidential information obtained through any other agency relationship. The newly created Buyer Agency Acknowledgement form available through WebForms also addresses these issues.

If a brokerage has not entered into a written agreement with respect to these limitations of duties it would otherwise have, the safest approach may be for the brokerage to only act for one of these competing buyers, perhaps the one to whom it first showed the subject property, and suggest the second buyer seek representation from another brokerage. The brokerage still requires the agreement of the buyer, it will be representing that the brokerage is not required to disclose any confidential information it may have acquired as a result of acting for the competing buyer. This would avoid the conflict and allow the brokerage to continue to act in the best interests of the first buyer.

If that is not a reasonable step, the brokerage must promptly and fully disclose the conflict to both buyer clients. This would be a prudent thing to do, even if the brokerage has the written agreement, through an exclusive buyer agency agreement or otherwise, to represent other buyers.

Licensees must remember that it is the client's right to decide whether it is prepared to continue to allow the brokerage or any of its related licensees to represent it in this situation. If both buyers are prepared to allow the brokerage to represent them in their respective negotiations, and there is no written buyer agency agreement or acknowledgment, the brokerage and each buyer client should agree in writing how the duties under section 3-3 of the Council Rules are to be limited or disapplied. For example, the brokerage's duty of absolute loyalty would need to be modified. Presumably neither buyer would want the brokerage to disclose the terms of their offer to the other, which the brokerage would otherwise be obliged to do under its obligation to disclose everything it knows about the trade in real estate to each client.

While there is no ''limited dual agency'' agreement that details these limitations of duties for brokerages acting for two buyers, the need to do so is just as important in this situation as it is when a brokerage is acting for a seller and a buyer in the same trade. If it is not common practice for a brokerage and its related licensees to enter into written buyer agency agreements with their buyer clients, brokerages should obtain independent legal advice to assist in preparing an appropriate agreement respecting limitation of duties for use by its related licensees when they are working with competing buyers.

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Co-Listing Agency Obligations

What is the agency status of ABC Realty Ltd. and XYZ Realty Ltd. in the following scenario?

ABC Realty Ltd. is a small brokerage with only one licensee: Ms. Brown. They enter into a ''standard'' Multiple Listing Contract with Mr. Seller for the sale of his home. Ms. Brown is to go on vacation during the term of the listing. When the home has not been sold as Ms. Brown's vacation approaches, Mr. Seller and ABC Realty Ltd. agree that a co-listing agreement should be entered into with another brokerage so that marketing efforts would continue during Ms. Brown's vacation. A listing amendment is created adding XYZ Realty Ltd. as a co-listing agent. There is nothing in the amendment to suggest that XYZ Realty Ltd.'s obligations are in any way different than the obligations of the original listing brokerage, ABC Realty Ltd. During Ms. Brown's vacation, a licensee engaged by XYZ Realty Ltd. finds a buyer who is interested in making an offer to purchase Mr. Seller's home.

Paragraph 10 of the ''standard'' Multiple Listing Contract states in part that: *If the Listing Brokerage is also the agent of a prospective buyer who becomes interested in the Property, the Listing Brokerage will seek the written consent of the Seller and the prospective buyer to continue to act as their limited dual agent to facilitate a sale of the Property.*

Unless the listing amendment has expressly created different obligations, where two brokerages co-list a property for sale, they are acting in concert in marketing the property and would jointly owe all fiduciary and other obligations to the seller. It follows then that if one brokerage enters into a limited dual agency relationship with the seller and a buyer, the other brokerage should also be seen as being in limited dual agency.

To suggest otherwise would be to view the relationship of the two brokerages as simply being the equivalent of '' cooperating'' brokerages — a relationship already permitted under clause 4 of the ''standard'' Multiple Listing

Contract — and this arrangement would require no amendment to that contract. But the brokerages and the seller wished to create a closer relationship than this; they wished XYZ Realty Ltd. to market the property for sale during Ms. Brown's vacation. The two brokerages jointly agreed to act in concert representing the seller as their client, and this was reflected in the listing amendment.

One might ask whether, through the listing amendment, XYZ Realty Ltd. was being appointed as a ''sub-agent'' of ABC Realty Ltd., even though that term was not used in the amendment. The result would likely be the same as the initial agent and the sub-agent would owe the same duties to the seller.

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Continuing Duty of Confidentiality

William Foster, a noted authority on agency suggests:

> *The fiduciary relationship of broker and client persists until the **agency** agreement expires or the purpose of the **agency** has been accomplished (i.e., the transaction has completed). Therefore, where a broker has obtained an offer that has been accepted by the client the fiduciary relation- ship remains in effect until the transaction is completed or the **agency** agreement terminates.*

*However, even when an **agency** agreement and, thus, the fiduciary relationship between broker and client has been terminated, some fiduciary duties persist thereafter - thus, for example, on termination of an **agency** relationship, brokers cannot use confidential information acquired while representing a client for their own or a third party's benefit.*

Two licensees were reprimanded by the Council for breaching a continuing duty of confidentiality to a seller they represented in the listing of the seller's property.

The listing had expired and a party commenced a lawsuit against the seller which was related to the subject property. The lawyer acting for the plaintiff approached the licensees and requested that they provide affidavits containing information about the listing of the property.

The licensees claimed that the lawyer for the plaintiff made it clear to them that if they did not provide the affidavits voluntarily, he would either subpoena them as witnesses to give evidence before the judge, or he would obtain a court order pursuant to the Rules of Court compelling them to give their evidence.

The licensees provided the requested affidavits, as they believed that they had no choice in the matter.

The seller complained to the Council that the information in the affidavits was confidential. The Council found that there was a continuing duty of confidentiality on the part of the two licensees after the expiration of the agency relationship and that the licensees, by providing the affidavits, had breached their duty of confidentiality.

Licensees should be aware of the following guidelines with respect to the continuing duty of confidentiality:

1. Licensees should not volunteer to disclose confidential information about their clients at any time.

2. Before agreeing to provide any information to a lawyer or any other third party, licensees should advise the lawyer or third party that they intend to seek the consent of their clients to the disclosure of the information.

3. Licensees should obtain the consent of their clients in writing. If the client is not prepared to consent to the disclosure of the information, licensees should advise the lawyer or third party accordingly. The lawyer may then take legal steps to compel disclosure of the information either by issuing a subpoena to licensees to attend a proceeding as a witness or by obtaining a court order pursuant to the Rules of Court compelling the licensee to give their evidence.

4. Licensees may wish to obtain their own legal advice as to whether the disclosure of information consented to by their clients may result in a possible claim against licensees by another party.

5. Licensees should be aware that they are relieved from any duty of confidentiality owed to a client when communicating with the Council or the Real Estate Errors and Omissions Insurance Corporation in regard to a complaint or claim by virtue of section 123 of the *Real Estate Services Act*, which states as follows:

> Communications privileged
>
> 123. (1) Subject to (2), all information supplied and all records and things produced to the real estate council, a hearing committee, the superintendent, the insurance corporation or the compensation fund corporation with respect to a licensee, a former licensee or an applicant for a licence are privileged to the same extent as if they were supplied or produced in proceedings in a court, and no action may be brought against a person as a consequence of the person having supplied or produced them.
>
> (2) Subsection (1) does not apply to a person who supplied information or produced records or things maliciously.

6. Licensees should also be aware that when acting as a limited dual agent in a transaction where the parties to a contract have entered into a limited dual agency agreement, the agreement specifically modifies the duty of confidentiality and provides that licensees have a duty to disclose information to both parties in a transaction, subject to three exceptions as follows:

> (a) the brokerage will not disclose that the buyer/tenant is willing to pay a price or agree to terms other than those contained in the offer, or that the seller/landlord is willing to accept a price or terms other than those contained in the listing;
>
> (b) the brokerage will not disclose the motivation of the buyer/tenant to buy or lease or the seller/landlord to sell or lease unless authorized in writing by the buyer/tenant or the seller/landlord; and

7. the brokerage will not disclose personal information, not other wise necessarily disclosed in the transaction documentation, about the buyer/tenant or seller/landlord to the other party unless authorized in writing.

However, pursuant to the common law and section 5-13 of the Council Rules, a brokerage that is providing trading services to a client who is disposing of real estate must disclose to all other parties to the trade, promptly but in any case before any agreement for the acquisition or disposition of the real estate is entered into, any material latent defect in the real estate that is known to the brokerage. Section 5-13 of the Council Rules contains a definition for ''material latent defect''.

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Example of the Continuing Duty of Confidentiality

Scenario:

A seller has listed a property for sale with a brokerage and the seller advises a licensee related to the brokerage that there is a material latent defect affecting the property. The seller instructs the licensee not to disclose the latent defect to any potential buyer.

The licensee advises the seller of his obligation to disclose a material latent defect under section 5-13 of the Council Rules and that pursuant to section 3-3(1)(b) of the Council Rules he can only act in accordance with the lawful instructions of the client. The licensee's brokerage subsequently withdraws from its agency relationship with the seller as the seller refuses to change his instructions in this regard.

Sometime later the said licensee is approached by a potential buyer who is interested in buying the same property and wants the licensee's brokerage to become his or her buyer's agent to do so.

Can the licensee disclose this material latent defect to the buyer?

Licensees who withdraw services in this manner acknowledge that their professional obligations can override unreasonable client instructions, which is consistent with the requirements of section 5-13(3) of the Council Rules.

The answer to the question is ''No''. A licensee's responsibility to maintain his or her client's confidentiality continues beyond the termination of an agency relationship. The least risky course of action for the licensee may be to not represent this potential buyer; however, if the licensee wishes to provide agency representation he or she would first have to advise the buyer that he or she had previously represented the seller and that he or she cannot disclose confidential information obtained in that earlier relationship concerning such matters as:

- seller's motivation for selling;
- personal information concerning the seller; or
- the condition of the property,

and can only represent the potential buyer on the understanding that he or she will not disclose any such information.

Essentially, the licensee must place the buyer in the position to make a fully informed decision as to whether the buyer wishes to be represented by the licensee's brokerage in such circumstances.

The difficulty of reconciling the ongoing obligation of retaining a former client's confidentiality with the obligation of full disclosure to a current client can be problematic. Licensees who face situations such as this should consult with their managing brokers, and consider obtaining independent legal advice before acting in a way that could expose them to a claim for breach of duty.

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Trading Services Licensing Exemptions

Part 2 of the Real Estate Services Regulation under RESA establishes a number of exemptions in relation to trading services. It should be noted that under section 2 of RESA, a person who is licensed to provide real estate services is not able to act under any of these exemptions. This means that a licensee providing the services identified in any of these exemption sections must do so in the name of and on behalf of their related brokerage, and any remuneration received for providing these services must be paid to and received from that brokerage. The following are the exemptions that generate the most inquiries to the Real Estate Council.

Exemption for employees of principal (***Section 2.1 of the Real Estate Services Regulation***)

An individual is exempt from the requirement to be licensed under RESA in respect of real estate services if all of the following apply:

(a) the services are provided to or on behalf of a principal in relation to those services;

(b) the individual is the employee of the principal; and

(c) the individual is not providing real estate services to or on behalf of anyone other than this principal.

A principal in relation to trading services is a party to a trade in real estate, including a potential trade. An individual wishing to act under this exemption must be an employee, as that term would typically be applied for taxation and employment standards purposes.

This exemption does not apply in respect of the provision of trading services if those services are provided with respect to a development unit, as that term is defined in the *Real Estate Development Marketing Act*, and the principal is a developer, as defined in that legislation, of the development unit. See the exemption below.

Exemption for employees of developers (***Section 2.5 of the Real Estate Services Regulation***)

Individuals who are employees of developers are exempt from the requirement to be licensed in respect of trading services if a number of conditions are met. The services must be provided with respect to a development unit, as defined in the *Real Estate Development Marketing Act*, on behalf of one or more developers of that development unit. The individual must be an employee of one or more of these developers, or a holding corporation of one or more of the developers, and the individual may not provide real estate services to or on behalf of any other person. An individual acting under this exemption must disclose to other principals (i.e., potential buyers of the development unit) that the individual is not licensed under RESA, who the individual is employed by, and that the individual is acting on behalf of the developer(s) and not on behalf of the buyer. This disclosure must be in writing and separate from the Contract of Purchase and Sale and any disclosure statement required under the *Real Estate Development Marketing Act*, and must be made promptly but in any case before any sales agreement has been entered into. The *Real Estate Development Marketing Act* may be accessed through www.bclaws.ca.

Exemption for notaries (***Section 2.6* of the Real Estate Services Regulation**)

A person who is a member in good standing of the Society of Notaries Public of BC is exempt from the requirement to be licensed in respect of negotiating the price or terms of a trade in real estate and receiving deposit money paid in respect of the real estate. These services must be provided in the course of and as part of the provision of services permitted under section 18 of the *Notaries Act*.

Exemption for accountants in relation to purchase and sale of business (***Section 2.7* of the Real Estate Services Regulation**)

A Chartered Accountant, Certified General Accountant, or Certified Management Accountant who is authorized to practice public accounting is exempt from the requirement to be licensed in respect of trading services if the trading services relate to the purchase or sale of a business, the transaction arises in the course of the practice of public accounting, and the trading services are provided in the course of that practice.

Exemption for appraisers and property inspectors (***Section 2.8* of the Real Estate Services Regulation**)

A person who provides trading services only by providing an appraisal of value of real estate and consulting services relating to the value of real estate, or by inspecting and reporting on the condition of real estate, is exempt from the requirement to be licensed if those services are provided in the course of the person's business as an appraiser or real estate inspector.

Exemption for auctioneers (***Section 2.9* of the Real Estate Services Regulation**)

An auctioneer is exempt from the requirement to be licensed in relation to the provision of trading services respecting the auction of real estate if all of the following apply:

(a) the auctioneer does not show the real estate;

(b) the auctioneer does not engage in a discussion with or provide information to a potential buyer respecting any aspect of the real estate or any aspect concerning its disposition, other than to explain the auction procedure;

(c) advertising of the auction specifies, if there is no licensee acting on the seller's behalf, the name and contact information of the seller, or, if a licensee does act on behalf of the seller, the name and contact information of the licensee; and

(d) no deposit or other money related to the acquisition of the real estate is paid to the auctioneer by the buyer.

Exemption for person providing information only (***Section 2.10* of the Real Estate Services Regulation**)

A person who provides trading services by providing information only is exempt from being licensed. Examples include the provision of material and other information of a general nature that is produced to assist owners to dispose of their own real estate by themselves, and the publication of information contained in an advertisement of specific real estate. This exemption allows publishers, such as local newspapers, to advertise real estate for sale or rent, as well as to publish general real estate information articles, without the need to be licensed.

Exemption for persons providing referral services (***Section 2.11* of the Real Estate Services Regulation**)

A person who provides trading services only by referring a party to a trade in real estate to a licensee, or by referring a licensee to a party, for the purpose of the licensee providing trading services is exempt from the requirement to be licensed if

(a) the person does not engage in activities to solicit the names of persons who may be interested in acquiring or disposing of real estate; and

(b) the practice of making referrals and receiving referral fees is incidental to the main business of the person.

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Common Scenarios that Generate Licensing Questions

Scenario #1

Mr. Jones is an employee of ABC Investments Ltd. which owns an apartment block it is trying to sell. Mr. Jones acts on behalf of ABC by advertising for sale the apartment block, showing potential buyers the building, and eventually negotiating a Contract of Purchase and Sale between Mr. Chan and ABC for the purchase and sale of the building. During the negotiation, Mr. Chan asks Mr. Jones if he would assist Mr. Chan in marketing a vacant piece of land for sale on his behalf. Is Mr. Jones able to assist Mr. Chan in this way?

As an employee of ABC Investments Ltd., Mr. Jones is able to act on behalf of ABC under the exemption from licensing provided by section 2.1 of the Real Estate Services Regulation. However, under this exemption, Mr. Jones is not able to provide real estate services to or on behalf of any person other than ABC. He may not, therefore, assist Mr. Chan without becoming licensed.

Scenario #2

XYZ Real Estate Ltd. is a licensed brokerage. The company has also developed a new 50 unit townhouse project and it is beginning the marketing of the individual development units. It plans to hire unlicensed employees to assist in the marketing of this development.

Under section 2.5 of the Real Estate Services Regulation, a developer may have unlicensed employees who provide trading services to or on behalf of the developer. However, because XYZ is a licensed brokerage, section 2 of RESA applies, meaning that XYZ may not act under any of the exemptions available to those who are not

licensed. It may not, therefore, use unlicensed employees to market development units which it owns. It may list the units for sale with another brokerage or market the units through licensees engaged by XYZ, although it may wish to consider the real estate errors and omissions insurance ramifications of having its own licensees market these development units.

Scenario #3

Lakefront Development Ltd. has created a 20 unit waterfront strata title project in the Okanagan and is ready to commence marketing. Lakefront has been approached by an unlicensed marketing company which is offering to provide several marketing services to Lakefront, on an independent contractor basis, during the initial public awareness stages, then to bring in licensees engaged by a number of brokerages in the market area to assist in a gala opening marketing launch.

The exemption under section 2.5 of the Real Estate Services Regulation is only available for individuals who are employees of developers; therefore, the unlicensed marketing company is not able to act under this exemption both because it is not an ''individual'', and because the proposed relationship with the developer is that of an independent contractor rather than an employee. This means that the unlicensed marketing company is not able to provide any trading services to or on behalf of the developer. The company would only be able to provide related services that do not fall within the definition of trading services, e.g., assisting in the development of marketing material, etc. With respect to bringing in licensees engaged by a number of local brokerages to assist in the gala opening, licensees are only able to provide real estate services in the name of and on behalf of their related brokerage. Licensees are able to represent a developer in their marketing efforts, but these services must be provided in the name of and on behalf of their related brokerage. They are also required to provide their related brokerage with all of the usual documentation regarding any trades they are involved in negotiating. Their business cards and all other forms of advertising must include the name of their related brokerage in a prominent and easily identifiable manner.

Licensees cannot act as an exempt employee of a developer while they are licensed. If a licensee wishes to become an exempt employee of a developer, their licence must first be surrendered to the Council. Independent of their related brokerage, licensees would only be able to provide the developer with related services that do not fall within the definition of trading services.

Scenario #4

Ms. Brown is licensed with M&M Real Estate Ltd. to provide trading services. Ms. Brown is also an appraiser, providing appraisals on behalf of Pricepoint Appraisal Services Ltd., a company which is not licensed under RESA.

Fee-based appraisal services that are provided in relation to a trade in real estate are activities that require licensing if they include advising on the appropriate price for real estate, or making representations about the real estate. Both of these activities are included in the definition of trading services. Section 2.8 of the Real Estate Services Regulation does provide an exemption from the requirement to be licensed for those who provide trading services only by providing an appraisal of value of real estate and consulting services relating to the value of real estate. Therefore, many appraisers provide their services under this exemption and are not licensed under RESA. However, as noted in scenario #2 above, section 2 of RESA prohibits a licensee from acting under any of these exemptions which are available to unlicensed people. This means that Ms. Brown may only provide appraisal services in the name of and on behalf of her related brokerage, M&M Real Estate Ltd., not the unlicensed Pricepoint Appraisal Services Ltd. Therefore, so long as she is licensed under RESA, Ms. Brown must provide, and be paid for, her appraisal services through M&M.

Scenario #5

Mr. Good has written a book entitled ''How to Sell Your Own Home''. He also operates a website which provides general tips for people who wish to sell real estate they own without the assistance of a licensee. The website includes a section where property owners can advertise their home for sale and provide their contact information for follow- up enquiries.

Section 2.10 of the Real Estate Services Regulation provides an exemption for those who provide trading services by providing general information only. This includes providing material and information to assist owners to dispose of their own real estate by themselves, and the publication of information contained in an advertisement of specific real estate. The services that Mr. Good provides, including the advertising section of his website, fall within the parameters of this exemption.

Scenario #6

Data Mining Ltd. is an unlicensed company that operates a service which assists people, who want to buy or sell real estate, to find a real estate licensee in the particular market area in which they are interested. Data Mining operates a website which allows people to indicate the market areas of interest, if they are potential buyers, or the location of the real estate they are interested in selling. Once the person using these website services provides their contact information, this is forwarded to a real estate licensee in that particular market area, who pays Data Mining for these leads.

Section 2.11 of the Real Estate Services Regulation provides an exemption for a person who provides trading services by referring people to real estate licensees for the purposes of those licensees providing real estate services. A person may receive a referral fee for this if that person satisfies the requirements of this exemption section. Data Mining Ltd. does not meet these requirements for two reasons. Firstly, through its website, it is engaging in activities to solicit the names of persons who may be interested in acquiring or disposing of real estate. Secondly, the practice of making referrals and receiving referral fees is not incidental to Data Mining Ltd.'s main business. Data Mining Ltd. needs to be licensed to receive these referral fees. Any licensees paying Data Mining for these leads would be contravening section 6-1 of the Council Rules by paying remuneration to Data Mining in relation to real estate services when Data Mining is required to be licensed in relation to those services but is not.

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Licensee's Assistants

On a regular basis, the Council receives inquiries from licensees as to whether or not they can employ assistants. The answer, of course, is ''Yes'', but there are

restrictions on the activities the assistant may perform depending upon whether or not the assistant is licensed under RESA. As a licensed assistant is considered exactly the same as other licensed individuals, all remuneration for licensed activity must be paid to a licensed assistant by the brokerage and not by the assisted licensee. If a licensee is providing unlicensed assistance to another licensee, e.g., typing, bookkeeping, etc., the licensee performing the unlicensed activity may be paid directly by the assisted licensee for these unlicensed activities. If an unlicensed assistant is employed, this individual may be paid directly by the assisted licensee, however, extreme caution should be exercised to ensure that everyone involved complies with RESA; in particular, an unlicensed person's activities must be confined to those which do not require licensing.

With regard to Trading Services, an unlicensed assistant may:

- answer the telephone, take messages, and forward calls to a licensee;
- schedule appointments for the licensee (this does not include making telephone calls, telemarketing, or performing other activities to solicit business on behalf of the licensee);
- secure public information from a courthouse, municipality, regional district, or other source of public information;
- place or remove signs on property;
- submit listings and changes, as approved by a licensee, to a multiple listing service;
- have keys made for a brokerage's listing;
- unlock a property in order that it may be shown by a licensee;
- draft advertising copy, promotional materials, and correspondence for approval by a licensee (correspondence must be signed by the licensee);
- place advertising;
- prepare and distribute flyers and promotional information under the direction of and with approval by a licensee;
- act as a courier to deliver documents, pick up keys, etc.;
- be in attendance at a property during a licensee tour which is not open to the public so long as the unlicensed assistant does not answer any questions or offer any information beyond what has been provided, in writing, by the seller's brokerage;
- gather feedback from licensees on showings;
- complete contract forms with business and factual information at the direction of and with approval by a licensee;
- witness signatures;
- assemble documents for a closing;
- follow up on a trade in real estate after a contract has been signed by
    - arranging and/or allowing access to property for a property inspector or appraiser, or
    - providing other similar facilitation services that would not other wise require licensing;
- perform bookkeeping or office functions, including
    - record and deposit trust funds, including transaction deposits, security deposits and rents,
    - compute remuneration cheques and perform bookkeeping activities,
    - monitor licences and personnel files, and
    - office filing; or
- perform other administrative, clerical, and personal activities for which a licence under RESA is not required.

With regard to Trading Services, an unlicensed assistant may not:

- host open houses, kiosks, or home show booths;
- solicit buyers, sellers, landlords, or tenants;
- show property;
- respond to questions from anyone outside the related brokerage about information concerning listings or other contracts, titles, financial documents, closing documents, or other information relating to a transaction;
- explain or interpret a Contract of Purchase and Sale or any form of service agreement (e.g., listing contract) with or to anyone outside the related brokerage;

negotiate or agree to any commission, commission split, or referral fee on behalf of a licensee;

- present or negotiate an offer or any form of service agreement; or
- perform any other activity for which a licence under RESA is required.

These activities fall within the definition of trading services and require a licence before they may be performed on behalf of others in expectation of remuneration. A licensee who pays an unlicensed assistant to perform these activities breaches section 6-1 of the Council Rules, which prohibits a licensee from paying an unlicensed person who performs real estate services for which a licence is required.

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Solicitation of Listings and Conduct of Open Houses

The definition of trading services includes finding real estate for a party to acquire, finding a party to acquire real estate, and showing the real estate. As a result, only licensees may solicit listings and hold open houses.

Licensees handling a volume of listings and facing the heavier traffic of prospective buyers on evenings and weekends are tempted to use unlicensed persons to represent them at open houses. Similarly, there have been occasions where a licensee has sought such help in soliciting listings, notably by telephone.

An unlicensed assistant may be in attendance during a licensee tour, but only if the tour is not open to the public. An unlicensed assistant may not host open houses for the public. Additionally, an unlicensed assistant may not solicit buyers or sellers, by telephone, or in any other manner.

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Telemarketing

In some cases, individuals have attempted to establish telemarketing centres for the purpose of contacting members of the public. The individual may wish to set up an appointment for a particular licensee to provide a free market evaluation, gather statistics, or pass on leads to licensees.

The definition of trading services, which includes finding people to acquire real estate and finding real estate to be acquired, results in the need for a real estate licence before conducting such activities. Any attempt to contact the public for the specific purpose of making a referral would fall within the definition of trading services. The attempt to obtain a referral is the primary reason for the telephone call and cannot not be considered incidental to any other business or activity.

However, telemarketing by way of a tape recording can be conducted by an unlicensed person. In this case, a licensee hires an announcer to record information about the licensee's services. Various homes would be called and the tape played over the telephone. There is no opportunity for the person answering the telephone to talk to the caller. Where there is no opportunity for interaction between the caller and the person answering, the activity is considered to be another form of advertising similar to the distribution of personal brochures and flyers delivered door-to-door.

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Strata Document Review Services Required To Be Licensed

Licensees should be aware that any person who provides strata document review services is required to be licensed under RESA. Strata document review services include reviewing strata council meeting minutes, general meeting minutes, bylaws, insurance certificates, the ''Form B'', operating budget, financial statements, strata plans, unit entitlement, parking, limited common property and exclusive use areas, leasing or renting of units, pets, engineering reports, restrictive covenants, etc., and then providing buyers with opinions based on these documents.

The Council and the Office of the Superintendent of Real Estate have reviewed this matter and agree that strata document review services fall within the definition of trading services under RESA. As such, any individuals or companies that offer this kind of service must be licensed with the Real Estate Council.

The Council reminds any current licensees who may be providing this kind of service that all real estate services must be provided in the name of and on behalf of the licensee's related brokerage. It is not permissible to provide any licensed real estate services independent of a licensee's brokerage.

These types of strata document review services, which may have significant value for sellers and buyers of strata lots, require specialized expertise. Licensees intending to provide such services must ensure they are adequately qualified to do so. They should also discuss with their brokerage, in advance, the provision of these services.

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Paying and Receiving Referral Fees

Some licensees pay or receive referral fees. Typically, referral fees are paid by a licensee for receiving a ''lead'' which results in the licensee earning remuneration. A licensee might receive a referral fee for referring a client to another licensee or service provider if that client uses the services of that other person. The following are issues that licensees should be aware of related to the payment or receipt of referral fees.

Paying a referral fee to an unlicensed person

A licensee may pay an unlicensed person a referral fee as long as

the unlicensed person does not solicit, for the purposes of making a referral, the names of persons who may want to acquire or dispose of real estate;

- the practice of making referrals is not the main business of the unlicensed person making the referral; and
- the unlicensed person making the referral does nothing else that would require them to be licensed (refer to the definition of ''real estate services'' in section 1 of RESA).

Those who intend to pay a referral fee to an unlicensed person have an obligation to first ensure that person satisfies the above criteria. Section 6-1 of the Council Rules prohibits the payment of any remuneration to an unlicensed person in relation to real estate services if that person is required to be licensed. For this reason, it is important that a brokerage has clear policies, and advises its licensees accordingly, with respect to the payment of referral fees. It may also be useful to obtain independent accounting advice with respect to any tax implications that may be associated with the payment of referral fees to unlicensed persons.

Paying a referral fee to another licensee

Licensees must only receive remuneration related to the provision of real estate services from the brokerage with which they are engaged. Therefore, any form of remuneration, including referral fees, must be paid to the related brokerage for disbursement to the licensee. No remuneration may be paid directly to the licensee. The definition of ''remuneration'' is very broad and includes any commission, fee, gain, or reward.

Disclosure that a referral fee is to be paid

Section 3-3(1)(f) of the Council Rules requires a licensee to disclose to a client ''all known material information respecting the real estate services'' being provided. If a licensee has agreed to pay a referral fee, that is a material fact which must be disclosed to the client. This is true whether the referral fee is to be paid to a licensee or to an unlicensed person.

Example

Mr. Seller, who wants to sell his home, is referred to Licensee Good by Ms. Referrer. Licensee Good would like to pay Ms. Referrer a referral fee for the ''lead''. Licensee Good must disclose to Mr. Seller the intention to pay a referral fee to Ms. Referrer, and the amount of that referral fee.

Receiving referral fees

Section 5-11 of the Council Rules requires a licensee to disclose in writing to a client any remuneration the licensee anticipates receiving that is not to be paid directly by that client. Therefore, if a licensee is to receive a referral fee for referring a client to another service provider, be that another licensee or another person providing services related to real estate (e.g., a mortgage broker, appraiser, etc.), the licensee is required to disclose to the client the details of this referral. Those details include

- the source (who is paying the referral fee);
- the amount, or if the amount is unknown, the likely amount or method of calculation of the amount; and
- any other relevant facts related to the referral fee.

Again, remuneration is a very broadly defined term, and includes any form of benefit, whether it be money or otherwise (e.g., mortgage points). All referral fees, benefits, and other forms of remuneration must be received through the brokerage with which the licensee is engaged.

Example

Mr. Seller, a client of Licensee Good, wants to purchase a home in the market area worked by Licensee Best. Licensee Good refers Mr. Seller to Licensee Best on the understanding that Licensee Best agrees to pay Licensee Good a referral fee if Mr. Seller buys a home through Licensee Best. In order to comply with section 5-11 of the Council Rules, Licensee Good must disclose to Mr. Seller that he anticipates receiving a referral fee from Licensee Best if Mr. Seller buys a home through Licensee Best. He must also disclose the amount or the method of calculation of the amount.

Referring a person who is not a client

Kelowna licensee Betty Best receives a call from Sally Seller about a home Betty has listed for sale. This is the only time Betty and Sally talk. During the course of the discussion, Sally tells Betty that she wants to sell her home in Fernie before moving to Kelowna. Sally asks Betty if she knows a good real estate agent in the Fernie area. Betty tells Sally about Jim Lister, a licensee friend in Fernie. Betty calls Jim to advise him of this, and the two agree that Betty will receive a $2,000 referral fee if Sally lists her home with Jim, and it subsequently sells. Sally lists her home for sale with Jim, the home sells, and Jim sends a $2,000 referral fee to Betty's brokerage.

Must Betty disclose to Sally that she will receive a referral fee from Jim?

No. Both the common law and section 5-11 of the Council Rules require that a licensee must disclose to a client remuneration received as a result of providing real estate services to or on behalf of a client, whenever that remuneration is not paid directly by that client. ''Client'' is defined in section 1-1 of the Council Rules as *''Client'' means, in relation to a licensee, the principal who has engaged the licensee to provide real estate services to or on behalf of the principal*. In this scenario, Sally is not a client of Betty or her related brokerage. She has not engaged Betty or her related brokerage to provide any real estate services. During the course of a single conversation, she has asked Betty if she knows a good real estate agent in Fernie.

Under these circumstances, Betty's obligation to Sally is to act honestly and with reasonable care and skill (see section 3-4 of the Council Rules). Betty has no obligation to disclose to Sally that she will receive a referral fee from Jim if Sally lists her home for sale with Jim and the home sells.

Must Jim disclose to Sally that he intends to pay a referral fee to Betty?

Yes. Section 3-3(1)(f) of the Council Rules requires a licensee to disclose to a client all known material information respecting the real estate services being provided. By listing her home for sale with Jim and his related brokerage, Sally becomes a client who has engaged them to provide real estate services. Jim has agreed to pay a referral fee to Betty; that is material information which he must disclose to Sally. He must make this disclosure at a time when the information is relevant to Sally — that is before Sally agrees to enter into the listing contract. This timing is important because Sally does not have to agree to the payment of this referral fee. She may agree, or she may choose to list her home for sale with another licensee.

Receiving an unanticipated referral fee

Eileen Lots has a client, Dave Doer, who has just sold his home using Eileen and her related brokerage as his listing agent. Dave is interested in buying a property in White Rock, a market area that is not familiar to Eileen. He asks Eileen if she knows a good real estate agent in White Rock. Eileen refers Dave to Fred Finder and calls Fred to advise him of this referral. There is no discussion about a referral fee; Eileen neither requests nor expects to receive one. Several months later, a cheque from Fred's brokerage arrives at the office of Eileen's brokerage, accompanied by a note from Fred to Eileen saying ''Thanks for the lead on Dave. He bought two properties through me. I appreciate the referral''.

Must Fred disclose to Dave that he intends to pay a referral fee to Eileen?

Yes. Dave has engaged Fred and his related brokerage to provide real estate services to help him acquire properties in White Rock. Fred and his related brokerage have an obligation to disclose to Dave all known material information respecting the real estate services being provided. Therefore, Fred must disclose to Dave the fact that he intends to pay a referral fee to Eileen. He must do so before paying the referral fee. Dave may not agree, and may even suggest that if Fred is prepared to share his commission with someone, that someone should be Dave himself.

What, if anything, must Eileen disclose to Dave?

That depends. Assuming Dave has agreed to Fred's payment of the referral fee, the answer to this depends on two factors: whether Eileen knew, or should have known, she was going to receive the referral fee, and whether Dave is still considered Eileen's client when the referral is received. A licensee can only disclose what he or she knows, or reasonably ought to have known at the relevant time. For example, if Eileen regularly referred clients to Fred and received referral fees for doing so, even though she did not discuss a referral fee with Fred on this occasion, she could reasonably expect to receive one. She must disclose that to Dave at the time she provides him with Fred's name. However, if this was a ''one off'' referral to Fred, and, as the scenario suggests, Eileen had no reason to anticipate receiving a referral fee, there would be nothing to disclose at the time the referral was made. If a referral fee is unexpectedly received, whether disclosure is required at that time is dependent on whether Dave is still considered Eileen's client at the time of receipt. If the answer is ''no''; that is, neither Eileen nor her brokerage have been engaged to provide real estate services to Dave in the intervening period, nor is there an ongoing client relationship with Dave, then disclosing receipt of the unexpected referral fee is not required. However, if Eileen or her brokerage have been engaged by Dave to provide real estate services in the intervening period or they have an ongoing client relationship with Dave, disclosure of this referral fee, even though it was not expected, is required at the time of its receipt. If Fred has made the required disclosure, Dave will have already agreed to the payment of this referral fee to Eileen, regardless of whether Eileen is required to disclose having received it. Eileen's disclosure, if required, will verify information Dave has already been told by Fred. If the situation dictates that Eileen must also disclose, this may seem an example of ''too much disclosure''. Why should Dave receive the same information from two different licensees? It is important to realize that Fred and Eileen have to disclose for different reasons. Fred's obligation, both at common law and as described in section 3-3(1)(f) of the Council Rules, is to disclose to his client Dave everything material about the real estate services being provided. The fact that he intends to pay a referral fee to Eileen is material. Eileen's obligation, both at common law and as described in section 5-11(1) of the Council Rules, is to disclose to her client Dave remuneration she has received as a result of providing real estate services to or on behalf of him, when that remuneration has been paid by someone other than Dave.

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Directing Business to Other Professionals

Frequently, licensees are asked by the public to recommend other professionals. Making specific recommendations can put the licensees at risk for liability if something goes wrong (e.g., if the buyer or seller is not satisfied, or is even harmed, if the cost is inappropriate, or if other issues arise). Such professionals include, but are not restricted to, lawyers, notaries public, mortgage brokers, home inspectors, trades people, etc. The safest way to handle this situation is to provide a list, preferably of at least three professionals with whom the licensee or others he or she knows have dealt and have the buyer or seller call, interview and select them independently. Even though a licensee may provide the client with a list of referrals, if any of the professionals have agreed to pay the licensee a referral fee or other form of remuneration, section 5-11 of the Council Rules requires written disclosure.

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Relocation Companies

A relocation company typically performs a variety of activities and does not act as an agent on behalf of the homeowner. Its activities must be restricted to those areas which do not require a real estate licence under RESA. The relocation company may receive fees from an employer in order to provide relocation services to its employees, but only by referring the actual listing to a licensee (not marketing the property itself). In some cases, the relocation company may require that the licensee's related brokerage discount the commission payable on completion by a specified percentage, which becomes the fee payable to the relocation company. This is an acceptable practice under RESA. Similarly, the referral of a buyer to a licensee in another jurisdiction may precipitate a fee payable by the licensee's brokerage to the relocation company, as long as the only action by the relocation company is the referral itself. Since the referral is incidental to the relocation company's primary business activities, it does not require licensing.

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Inducements To Enter into a Real Estate Transaction

The use of any inducements for a party to acquire or dispose of real estate is addressed in section 5-6(1) of the Council Rules. This Rule provides that the licensee must deliver, in writing, any promise made to a person at the time of making the representation.

A licensee may not, except in writing, induce any person to acquire or dispose of real estate by promising or representing that the licensee or any other person will:

(a) acquire or re-sell, or other wise dispose of, the real estate or any other real estate;

(b) procure a lease or an extension of a lease;

(c) procure financing or an extension of financing; or

(d) purchase or sell rights under financing.

If a licensee makes such guarantees, the licensee can be held liable to fulfill such commitments.

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Lotteries

From time to time, licensees hold raffles or draws for marketing purposes. Raffles and draws are defined in the *Criminal Code* as a lottery and are illegal unless authorized and licensed. Gaming event licences must be obtained from the Gaming Policy and Enforcement Branch of the Ministry of Public Safety and Solicitor General in order to hold a lottery and are generally only issued to recognized charities.

The following three elements comprise to form a lottery:

- payment of consideration;
- chance, or mixed chance and skill; and
- prize or reward.

If a real estate licensee offered a chance to win a vacation trip to the first 100 purchasers of condominiums in a development the licensee was marketing, such a draw would be in contravention of section 206 of the *Criminal Code*. The requirement to purchase the condominium satisfies the need for the payment of consideration; the drawing of the winner's name would be the chance, and the awarding of the trip would be the prize or reward. To avoid contravening section 206 of the *Criminal Code*, the draw would have to be open to anyone who wished to enter.

Licensees should keep in mind that the body that will determine whether a licensee is in contravention of the Criminal Code is the Gaming Policy and Enforcement Branch. When considering offering a prize, a licensee should always confirm with the Gaming Policy and Enforcement Branch that the activities proposed do not require a gaming licence. For further information, visit www.hsd.gov.bc.ca/gaming.

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Inducements To Breach a Contract

A licensee is prohibited, by section 5-5 of the Council Rules, from inducing any party to a contract for the sale or rental of real estate to break a previous contract for the purpose of entering into a new contract with another principal. It is recommended that licensees take care not to induce a member of the public to breach an existing service agreement. In addition, licensees should take care not to induce a party to breach any contract as this could be grounds for a civil lawsuit.

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Trades

From time to time, licensees will have clients who indicate a willingness to think about alternative compensation for property. Land, time shares, vehicles, boats, and jewellery may be offered and considered. Licensees should treat such offers with the same precautions or qualifications as they would traditional transactions and with added considerations depending upon the nature of the property being offered in trade.

A primary concern must be the ownership of the property being offered in trade. It may be a simple thing to do a title search on land in BC but searching the title of a time share in Florida or the registration of a Harley-Davidson motorcycle may prove a challenge. Semi-precious gems, while looking like a million dollars, are usually of relatively low value, even by the handful. If the chattel is valuable and saleable, why not consider a clause that allows the buyer to sell the item in question?

Similar to clauses that permit the buyer to sell its property, a clause can be used that permits the buyer time to sell the chattel. Such a subject clause should include a time clause that permits the seller to force the decision of the buyer once a certain amount of time has passed or an acceptable offer has been received.

Tax on chattels is frequently ignored in the sale of property, but there may be an obligation for the parties to remit. If a property owner takes a car as partial proceeds, the question of responsibility for the tax, transfer costs, etc., must be clearly identified between the parties. The prudent licensee might suggest the agreement for the transfer of a chattel be separate from the Contract of Purchase and Sale. Whether a real estate licence and its attendant Errors and Omissions Insurance will allow a licensee to engage in the sale of property other than real estate is not a matter to consider lightly.

If land in BC is being offered in trade, then who will pay the cost of conveyance, including the Property Transfer Tax? Are there HST considerations for the party receiving the trade who will in effect be the buyer? Is a real estate remuneration payable on the trade property? If there is no cash, how will the commission be paid?

Should there be one Contract of Purchase and Sale or more? Is the property owned without financial encumbrances or will some debt be assumed?

Among many considerations, the value of the item being offered may be the most troublesome for the licensee. The licensee must not allow a client to accept a valuation put for ward by the person making the offer without strongly recommending that independent appraisal advice be sought.

When it comes time to draft a contract, the simplest way may be to treat a trade item other than land as though it were cash. In the case of real estate being offered in trade, it is strongly recommended that one Contract of Purchase and Sale be used for each property involved because of the preprinted aspects contained in the standard Contract of Purchase and Sale. Each contract would be written conditional upon the two transactions completing at the same time. Licensees must seek competent advice in drafting and always recommend in writing, if not as a ''subject to'' clause of the contract, that the parties seek independent legal and appraisal advice.

NOTE: The negotiation details for the purchase of the buyer's property must be set out in a separate Contract of Purchase and Sale.

Seller Taking Buyer's Property in Trade Clause

Subject to the Seller entering into an unconditional Contract of Purchase and Sale with the Buyer for the

purchase of the Buyer's property described as (describe property) *by* (date) .

This condition is for the benefit of both the Buyer and the Seller.

Ω If not using the standard form Contract of Purchase and Sale, refer to 'Contracts under Seal'.

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Foreclosures

NOTE: Licensees who have limited experience in foreclosure transactions should seek guidance from their managing broker. This is a complex area of real estate where unforeseen hurdles can cause serious problems for the licensees and the public.

Alert

In many cases, the party that has conduct of sale in the foreclosure requires that many of the standard clauses in a Contract of Purchase and Sale be amended. The amended clauses are generally contained in a Schedule to the contract. The Schedule may provide, for example, that the buyer is purchasing the property on an ''as is, where is'' basis as of the completion date. Licensees acting on behalf of buyers should review the Schedule of amendments carefully with the buyer to ensure that the buyer understands the implications of the amendments on their purchase.

Once a property is subject to foreclosure proceedings, any party who may be potentially affected by the foreclosure proceeding may apply to court for conduct of sale. Licensees need to be careful as the court can order any party it sees fit to have conduct of sale, with the right to list or sell the property in a certain manner. This type of order could have the effect of denying a registered owner from listing a property or, perhaps, voiding an existing listing agreement. This court appointment allows the party having conduct of sale to put the property up for sale and it may prevent anyone else from listing the property (even the owner).

It is important all licensees recognize that where they have a listing on a property that may be subject to foreclosure proceedings, their listing may be voided by a court order at any time. It is also important to note that the court process involving the manner in which offers are presented in court and the court's consideration of offers may differ considerably from the licensee's usual practice. Licensees are urged to be careful when acting for buyers and sellers to ensure that any offer, subject to court approval, is in acceptable form, including the manner in which the potential buyers wish to be shown on title (tenants in common or joint tenants). It is costly to have an Order Approving Sale amended after it has been pronounced. Licensees should also have their buyers and sellers consult their lawyers about dates — both as to court approval and completion — as the time required to have orders for sale approved may have increased as a result of changes to rules regarding foreclosure practice. Licensees should also be alerted to the fact that orders of the court could be appealed to a higher court.

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Duties of Disclosure under Court-Ordered Sales

Licensees should be aware that the Schedule ''A'', which typically forms part of Contracts of Purchase and Sale for court-ordered sales, often contains a clause that may read as follows:

> *The purchasers expressly agree that neither the seller nor its agents or representatives have any liability, responsibility, duty or obligation to disclose to the purchasers any information or knowledge that they have with respect to the condition of the lands and premises or any latent or patent defects thereto.*

The wording of this clause may change, depending on who has drafted the Schedule ''A'', however, the intent of the clause remains the same; to relieve the seller and the seller's agents and representatives from any liability or responsibility for disclosure to the purchaser, about defects that may exist in the property. Licensees are reminded that, despite any clause such as the example above, contained on a Schedule ''A'' or otherwise included in a Contract of Purchase and Sale, licensees are not able to contract out of their obligation of written disclosure of latent defects, as required under section 5-13 of the Council Rules. Section 5-13(2) of the Council

Rules sets out a licensee's positive obligation, when providing trading services to a client who is disposing of real estate to ''... disclose to all other parties to the trade, promptly but in any case before any agreement for the acquisition or disposition of the real estate is entered into, any material latent defect in the real estate that is known to the licensee''. Section 5-8 of the Council Rules requires that the disclosure be made in writing, prior to the acceptance of an offer.

Further, section 5-13(3) of the Council Rules requires that, in the event that a client instructs a licensee to withhold disclosure, the licensee must refuse to provide further trading services to or on behalf of the client, relating to the trade. It is important that licensees explain to all of their seller clients the licensee's obligation to disclose known material latent defects, to a buyer, prior to any agreement being entered into. This explanation to sellers is particularly crucial in court-ordered sales where a seller may be relying on a clause, like that set out in our example, to relieve the licensee of his or her obligation of disclosure. Licensees must ensure that their sellers are advised and fully understand that licensees cannot contract out of their obligations of disclosure under section 5-13 of the Council Rules, and if they are instructed by a seller not to disclose, they must withdraw and cease acting for that seller.

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Fictitious Sales

The Council warns licensees and their managing brokers that creating fictitious sales to earn MLS® points is unacceptable.

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Custody and Handling of Documents

It is preferable that each seller or buyer appears before his or her own lawyer or notary public for execution of conveyance documents. The notary public or lawyer will, at that time, give an undertaking as to the use of the documents and the disbursement of money after registration of the said documents.

A licensee may be required to take documents to a seller and/or buyer for execution under unusual circumstances and such documents must be taken to a seller and/or buyer accompanied by a letter of undertaking from the conveyancing notary public or lawyer confirming arrangements for registration and payment of money.

The documents must be returned to that lawyer or notary public after execution, but the letter of undertaking must be left with the title transfer.

NOTE: Under no circumstances should documents be given directly to a buyer after they have been executed by a seller.

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Remuneration

Provisions covering remuneration are dealt with in RESA and in the Council Rules. The provisions are summarized as follows:

(a) net remuneration agreements (i.e., remuneration based upon the difference between the listed price and the actual sale price) are prohibited and no licensee is entitled to receive remuneration computed on this basis (section 5-14 of the Council Rules);

(b) a licensee shall not accept remuneration in relation to real estate services from any person other than the brokerage to which they are licensed (Section 7(3)(b) of RESA); and

(c) no licensee shall pay remuneration to a person in relation to real estate services if the person is required to be licensed in relation to those services but is not licensed (section 6-1 of the Council Rules).

(See section on ''Referral Fees''.)

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Assignment of Licensee's Remuneration

A licensee may assign his or her remuneration to a third party, if so desired. A brokerage which, if so directed by a licensee, pays the licensee's earnings directly to a third party, would not be in breach of section 6-1 of the Council Rules.

The stipulation in assigning a licensee's remuneration is that the person to whom the remuneration is assigned must not be paid for acting as a licensee. In other words, the earnings cannot be assigned as a means of paying an unlicensed individual. Remuneration can be assigned to creditors for example. The brokerage's records must continue to show the remuneration as being earned by and paid to the licensee. It should be understood that there is no suggestion that any income tax advantage will result.

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Holiday Relief: Covering Another Licensee's Business

Section 7 of RESA requires that a managing broker may only be licensed to and engaged by a single brokerage, unless the brokerages are affiliated.

It is not acceptable for a managing broker seeking holiday relief coverage to invite a licensee from another brokerage to handle the brokerage's business unless co-listing documentation has been signed by both brokerages and the client.

This concept applies similarly to a mini-franchise operator whose office may be physically within a larger franchisee's office. Co-listing documentation is required if a

representative from another brokerage is going to handle the business during absences. The underlying concern is that, without authorization in writing from the client, the second brokerage has no contract with the client and, therefore, no right to provide real estate services to or handle trust money on behalf of that client.

Any co-listing agreements would, of course, require the signs of both brokerages to be displayed on the property for open houses, etc., to avoid any appearance of misleading the public, although double signage may contravene municipal or real estate board/association bylaws.

When a consumer attends an open house, that consumer is entitled to expect to deal with licensees from the brokerage whose sign is on the property. If a co-listing licensee is conducting an open house, the co-listing brokerage's sign should be on the property during that open house. Co-listing agreements permit that procedure.

The Council is of the opinion that a licensee may conduct an open house only if that licensee's brokerage's sign is on the property and only if authorization exists to which the owner, the listing brokerage, and the co-listing brokerage are parties.

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Proper Identification of Licensees on Contracts

It has come to the attention of the Council that some licensees are drafting listing agreements, Contracts of Purchase and Sale, and other contractual forms in the name of another licensee. For example, a licensed assistant prepares documents in the name of the team's lead licensee who has no real involvement in the transaction. Questions arise as to whether appropriate agency disclosure is being made, whose name ought to appear on such documents, particularly the Contract of Purchase and Sale, and which licensee is ultimately accountable, both in terms of the preparation of the document and the client/agent relationship.

Licensed assistants may believe that they are not accountable if they write a Contract of Purchase and Sale in the name of the lead licensee.

The duties and responsibilities of the licensed assistant are considered the same by the Council as the lead licensee.

Section 5-10 of the Council Rules requires that before providing trading services to or on behalf of a party, a licensee must disclose to that person the nature of the assistance or representation the licensee will provide to that person. If the ''licensed assistant'' is providing any assistance or representation such as writing up the Contract of Purchase and Sale, it should be clear on the contract as to who is providing this assistance or representation — the licensed assistant, the lead licensee, or both.

If the lead licensee has no involvement in the transaction, then the licensed assistant must only include his or her own name (name of licensed assistant) where it states ''prepared by:_____'' at the top of the Contract of Purchase and Sale. In addition, his or her name must also be included in the agency disclosure section of the contract along with the name of his or her related brokerage.

If both the lead licensee and the licensed assistant are providing assistance and/or representation to the buyer but the licensed assistant is writing up the contract on behalf of the lead licensee, then the licensed assistant should include his or her own name where it states ''prepared by:_____'' at the top of the contract and the words ''On behalf of (include the name of the lead licensee)''. In this circumstance, both the name of the licensed assistant and the name of the lead licensee must appear in the agency disclosure section of the contract along with the name of the employing agent.

In this way both the seller and the buyer will know who is providing the assistance and/or agency representation. It also protects licensees who have no involvement in the transaction.

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