



CONFLICT OF INTEREST – REPRESENTING BOTH SELLER AND BUYER

Summary: If a situation arises where a real estate broker represents a seller with whom it has an agency relationship and a buyer with whom it has an agency relationship is interested in the seller's property, the real estate broker is in a conflict of interest. Transaction brokerage offers a means to resolve this conflict of interest. It allows the real estate broker to facilitate the purchase and sale of a property between the seller and buyer. However, before the real estate broker can proceed in this role, the real estate broker, seller and buyer clients must enter into a written transaction brokerage agreement. The real estate broker must treat the interests of both parties in an even-handed, objective and impartial manner. [*Real Estate Act Rules, s.1(1)(g.1), s.41(f), s.44, s.59, s.59.1*]

Note: For the purposes of this Information Bulletin, "real estate broker" or "real estate brokers" refers to all three categories of estate licenses that may be held by an individual, i.e. broker, associate broker and associate and, where the context applies, to a real estate brokerage. The information provided applies to transaction brokerage when practiced by a common law brokerage or a designated agency brokerage.

Conflict of Interest and Disclosure

Generally, where a real estate broker represents a seller with whom it has an agency relationship and a buyer with whom it has an agency relationship is interested in purchasing the seller's property, the real estate broker is in a conflict of interest. The conflict results from the obligations of the real estate broker to act in the best interests of each client and at the same time, each client has a competing interest vis-a-vis each other and the potential sale of the property.

Under the common law brokerage model, this conflict of interest occurs when one associate registered to a brokerage represents the seller and a different associate registered with the same brokerage represents the buyer in the same transaction or potential transaction. The conflict can also occur when the same brokerage associate represents both the seller and the buyer in the same transaction or potential transaction.

Under the designated agency brokerage model, the conflict of interest only occurs when an associate is the designated agent for both the seller and the buyer in the transaction or potential transaction.

When such conflicts of interest arise, the industry member's obligation is to disclose the conflict of interest to both clients at the earliest practical opportunity and discuss options for conflict resolution before proceeding further on the transaction [*Real Estate Act Rules, s41(f)*]. See RECA Information Bulletin: *Disclose Conflicts of Interest*.

Resolving the Conflict of Interest - Transaction Brokerage and the Written Service Agreement

Transaction brokerage offers an effective means to resolve the conflict of interest arising from concurrent representation. It allows the real estate broker to facilitate the purchase and sale of a property between the seller and buyer.

There are specific Rules that must be followed by a real estate broker who is in this conflict situation. Before the real estate broker can proceed to act as a transaction facilitator and facilitate a transaction, the real estate broker must enter into a written transaction brokerage agreement, a type of written service agreement, with the clients.

The real estate broker must provide both the buyer and seller with the opportunity to review the transaction brokerage agreement and to request further information concerning the transaction brokerage agreement and transaction brokerage relationship described in it before signing the agreement. If the parties do not agree to enter into a transaction brokerage agreement, unless otherwise agreed to by the parties, the brokerage will continue to represent the party, be it the seller or the buyer, with whom it first entered into an agency relationship and the brokerage will offer the option either (a) to treat the other party as a customer; or (b) to recommend the other party to another brokerage.

For the purposes of this Information Bulletin, we will assume the seller and buyer, after full disclosure of the conflict of interest, have provided their informed consent to the real estate broker continuing to act as a transaction facilitator and have signed the transaction brokerage agreement.

Transaction Facilitator Must be Neutral

There are legislative obligations with which real estate brokers acting as transaction facilitators must comply [*Real Estate Act* Rules, Sections 59 and 59.1.] When acting as a transaction facilitator, the overriding obligation is to treat the interests of both the buyer and seller in an even-handed, objective and impartial manner. In other words, a transaction facilitator must remain neutral and must not favour one party over the other.

As a transaction facilitator, the real estate broker's role is that of a "middleman" who assists the clients in reaching a mutually acceptable agreement. The real estate broker does not advocate the interests of either client or assist either client in gaining an advantage over the other and does not interject themselves into the negotiations or direct the parties toward an agreement the industry member believes is "fair."

Using Discretion or Judgment

While a transaction facilitator will be required to use some discretion and judgment in the provision of facilitation services, the main principle is that a transaction facilitator must not use their discretion or judgment to favour one client over the other. When this occurs, it is the obligation of the transaction facilitator to share any information or advice provided to one party with the other party to the transaction.

The following list of examples is intended to illustrate situations where a transaction facilitator may properly exercise a degree of discretion or judgment, but it is not intended to be an exhaustive list:

- when a buyer asks for the most recent comparable sales in the neighbourhood for a home they are considering, the industry member will use discretion or judgment in choosing the comparable sales to show the buyer; if requested by the seller or you typically provide that information to the seller, the same information would be supplied to the seller.
- when a transaction facilitator is aware the buyer will need to obtain a mortgage, it is appropriate for the transaction facilitator to point out to the buyer that a condition related to obtaining financing may be included in the offer.
- if a buyer requires financing and asks how much time should be provided to obtain mortgage approval, it is appropriate for the transaction facilitator to indicate the time it typically takes in their community to arrange financing or a range of time based on previous experience working with buyers.
- if a property is occupied by a tenant, and a buyer intends to use the property for their personal residence, it is appropriate for the transaction facilitator to outline the requirements for notice under the *Residential Tenancies Act*.
- if a buyer is submitting an offer on a rural property and asks for a water quality test, the transaction facilitator can provide a list of companies they believe to be qualified to conduct the necessary tests based on previous experience

The following list of examples is intended to illustrate situations where a transaction facilitator should not exercise discretion or judgment in the course of providing facilitation services, but it is not intended to be an exhaustive list:

- providing advice or using negotiation techniques to convince a seller to sell for a lower price or the buyer to pay a higher price.
- suggesting or implying the other party would accept anything other than what is in the offer (without the permission of that party).
- recommending a course of action that would benefit one party over the other e.g. not including a condition in an offer that, as a result, benefits the buyer or seller.
- only providing information to a client to assist them in making the decision the industry member wants them to make.
- withholding relevant information to facilitate the transaction such as the extension of a Light Rail Transit line by the property. This could be negative or positive for the buyer.
- arranging for a property inspection without discussing the matter with the buyer.
- When the transaction facilitator is made aware the buyer is unable to secure financing from a particular lender and is already making arrangements to obtain the necessary funds from another lender, but the industry member fails to inform the seller of these activities.

Confidentiality of Client Information

Under the *Real Estate Act* Rules, s.1(1)(g.1), “confidential information” means “any information concerning the client including the client’s financial or personal situation, the client’s real estate and the transaction involving the client.” A real estate broker must not disclose confidential information, property or transaction information to another person unless authorized to do so by a client or required by law. The obligation to maintain

client confidentiality applies to all industry members in the course of conducting business (*Real Estate Act Rules*, s.44).

Further, transaction facilitators must not disclose, without the informed written consent of the buyer or seller, as the case may be, the following information:

- that the buyer may be prepared to offer a higher price or terms other than those contained in the offer to purchase or the exclusive buyer brokerage agreement.
- that the seller may be prepared to accept a lower price or terms other than those contained in the offer to purchase or the exclusive seller brokerage agreement.
- the motivation of the buyer or seller for wishing respectively to purchase or sell the property; and,
- subject to s.59(4)(e), personal information relating to the buyer or the seller and other information disclosed at any time in confidence by either to the brokerage.

In addition to the obligations outlined in the *Real Estate Act Rules*, real estate brokers should be aware of the requirements and obligations of the *Personal Information Protection Act of Alberta* (PIPA) and the federal government's privacy legislation, the *Personal Information Protection and Electronic Documents Act* (PIPEDA).

Examples of personal information that may be subject to the obligation of confidentiality and protection under privacy legislation include a client's address, phone number, employer, age, ID numbers, marital status, health, family, occupation, etc. The requirements of the *Real Estate Act Rules* and privacy legislation both apply to all industry members in the course of conducting business.

Generally, if a real estate broker was in sole agency with a seller or buyer before acting in the transaction brokerage role, all information received in confidence must remain confidential. It should be noted the residential relationship form contains a clause that states the buyer or seller, as the case may be, agrees: "*the brokerage cannot disclose to the seller or buyer as the case may be confidential information obtained through any other agency relationship to which the brokerage is or has been a party.*" This is subject to any legislative obligation to disclose or if the client has provided informed written consent.

Publicly available information may be both client information under the *Real Estate Act* and personal information under PIPA. However, given the public nature of the information, it is available to industry members at large (e.g. legal description, tax assessment). Before making use of information for the purposes of a transaction, ensuring the information is either in the public domain or is information the industry member's client consents to for collection, use and disclosure is the recommended course of action.

Obligation to Disclose Certain Information

In addition to the obligations already mentioned, transaction facilitators must disclose certain information to their respective clients. There is an obligation [*Real Estate Act Rules*, s.59(4)(e)] to (i) disclose to the buyer all material latent defects affecting the property known to the brokerage; and (ii) disclose to the seller all material facts relevant to the buyer's ability to purchase the property known to the brokerage

Facilitation Services

Transaction facilitators achieve a negotiated real estate transaction through provision of facilitation services to clients. These services are “services by which the interests of the buyer and seller are met in an even-handed, objective and impartial manner without providing confidential advice, advocating on behalf of either the buyer or seller, or using discretion or judgment that benefits the buyer or seller to the prejudice of the other.”

Facilitation services include:

- assisting the buyer and seller in negotiating a mutually acceptable agreement.
- providing real estate statistics and information on property including comparable property information.
- providing agreements of purchase and sale, lease or other relevant documents.
- preparing all necessary documents in accordance with the instructions of the buyer and seller.
- providing the names of real estate appraisers, mortgage brokers, surveyors, building inspectors, lenders, insurance agents, architects, engineers and the like (without recommending any particular professional).
- presenting in a timely manner, all offers and counter-offers to and from the buyer and seller.
- conveying to the buyer and seller in a timely manner all information that either wishes to have communicated to the other.
- keeping the buyer and seller fully informed regarding the progress of the transaction.

Practice Tip

Explaining the real estate broker’s role in the real estate transaction and the client’s preparation for different role possibilities will assist sellers and buyers with the transition to transaction brokerage. For more information on the practice of transaction brokerage, refer to the RECA’s *Transaction Brokerage Practice Guide for Industry Members* on RECA’s website at www.reca.ca.