

DISCLOSE CONFLICTS OF INTEREST

Summary: An industry member must disclose to their clients, at the earliest practical opportunity, any conflict of interest they may have in the course of providing services to, or in their dealings, with a client. The disclosure must be a full disclosure, that is, all of the details known to the industry member must be given to the client. The client should receive independent advice and it is the client's decision as to how to proceed in the face of the conflict. [Real Estate Act Rules, s.1(1)(h), s.41(d)(f), s.54(3)]

Note: For the purposes of this Information Bulletin, where the context permits "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.

Obligation to Avoid & Disclose Conflicts of Interest

The obligations of industry members to avoid conflicts of interest, and to disclose conflicts of interest when they arise in the course of providing services to clients, have been in existence for some time now. In addition to the common law and the regulatory obligations that apply, industry members who are also members of professional associations and real estate boards may also be subject to codes of conduct or standards of business practice that place restrictions on their conduct when they are in a conflict of interest.

The *Real Estate Act* Rules, s.41(d) and (f), are clearly stated and apply to all industry members. Section 41 states industry members must fulfill their fiduciary obligations to their clients and disclose to their clients at the earliest practical opportunity, any conflict of interest they may have in the course of providing services to, or in their dealings with, a client.

When an industry member is in any agency relationship (e.g. representing a seller in a real estate transaction or a lender in a deal in mortgages) they have significant fiduciary duties to their clients. These include the duty of undivided loyalty and acting in the best interests of their client at all times, and, the duty to avoid all conflicts of interest. As a general rule, any industry member who is providing professional services to a client has the same obligations to avoid placing themselves in a situation where they are in a conflict of interest.

What is a Conflict of Interest?

What is a conflict of interest? For the purposes of the *Real Estate Act* Rules [s.1(1)(h)] the following definition applies:

"conflict of interest" means a real or apparent incompatibility between an industry member's interests and the interests of the client or potential client.

In order to avoid conflicts of interest, industry members need to understand the circumstances in which conflicts arise. For example, as a principal in the transaction

(e.g. personal deal), a real estate broker cannot act as a transaction broker. It would be impossible for the real estate broker to act impartially to the other party in the transaction. Similarly, a real estate broker could not avoid a conflict of interest where his or her relative was a principal in the transaction because such circumstances would likely adversely affect the real estate broker's judgment on behalf of, advice to or loyalty to the other party in the transaction brokerage relationship. The same principle would apply if a real estate appraiser was requested by a lender to conduct an appraisal on a property being purchased by a family member.

It is important to recognize the determination of whether a conflict of interest exists or not is done objectively not subjectively. In other words, it does not matter whether the industry member feels there is a conflict of interest or whether the industry member feels he or she can act impartially. The test is whether a reasonable person would conclude the circumstances are such that the industry member's judgment on behalf of, advice to, or loyalty to, the client could be adversely affected.

Conflicts May Not Be Readily Apparent

Some conflicts of interest may not be readily apparent. Consider the situation where a real estate broker had acted as a seller's agent in listing a property. The property did not sell and the listing expired. The seller chose to relist with another real estate broker. During the course of that second listing, the first real estate broker is approached by a potential buyer who wishes to retain them as the buyer's agent in respect to purchasing the seller's property. Would the real estate broker be in a conflict of interest in acting for the potential buyer?

One of the fiduciary obligations of an agent is they cannot use confidential information acquired while representing a client for their own benefit or the benefit of a third party. This fiduciary obligation continues after termination of the agency relationship. In this example, the potential buyer is a third party with respect to the agency relationship previously established between the real estate broker and seller of the property in question. Therefore, the real estate broker cannot share any confidential information he or she may have received from the seller. This principle of agency is reinforced in the wording mandated by the Real Estate Council of Alberta in the exclusive seller brokerage (listing) and exclusive buyer brokerage agreements.

The question remains regarding the conflict of interest. Is the real estate broker in a conflict of interest? If so, what steps must he or she take?

The Supreme Court of Canada has provided some guidance on this question. The court has established a two-fold test in determining whether a conflict exists in circumstances where a lawyer is acting against a former client. The first part of the test involves a determination of whether or not the lawyer received confidential information attributable to his former relationship with the client. In respect to this part of the test, a Court will infer that confidential information was imparted unless the lawyer can satisfy the Court that no information was given that could be relevant. The Court stated that this would be a difficult burden to discharge. The second part of the test addresses the question of whether there is a risk that information will be used to the prejudice of the former client.

In this example, we assume the real estate broker received confidential information from the seller during the time the real estate broker represented the seller under the seller brokerage agreement (listing contract). It is reasonable to conclude the real estate

broker would be in a conflict of interest because he or she, by acting for the potential buyer, would be acting for a party adverse in interest to the real estate broker's former client, i.e. the seller. This situation is similar to a lawyer acting against a former client.

Accordingly, while there are obligations on the real estate broker preventing disclosure of confidential information received from a previous agency relationship, the conflict of interest exists, it must be disclosed and the consent of both clients to proceed must be obtained before the real estate broker proceeds to represent the potential buyer. The Real Estate Council of Alberta recommends this consent be provided to the real estate broker by both parties in writing.

Disclosure at the Earliest Opportunity

Section 41(f) of the *Real Estate Act* Rules requires an industry member to disclose any conflict of interest "at the earliest practical opportunity." This should be taken to mean immediately, or the first opportunity, upon learning of the existence of the conflict. Disclosure of the conflict of interest means full disclosure; that is, all of the details known to the industry member must be given to the client. The industry member should fully explain why they believe they are in a conflict of interest and how this affects their client.

It's the Client's Decision as to How to Proceed

Once this information has been provided, it is the client's decision as to how to proceed in the face of the conflict. The client should be advised to obtain independent advice concerning the conflict. This independent advice may come from another industry member (not associated with the same firm or brokerage) or a lawyer. Section 54(3) of the *Real Estate Act* Rules requires that an industry member not provide any services to the client in a conflict of interest situation without first receiving the informed written consent of the client.

Practice Tip

To assist industry members, the Real Estate Council of Alberta has published other Information Bulletins on the topic of conflict of interest. See RECA Information Bulletins: *Conflict of Interest – Representing a Seller and Buyer (Transaction Brokerage)*, *Conflict of Interest – Buying a Client's Property*, and *Conflict of Interest – Representing Competing Buyers*.

A prudent industry member will take time to review the Real Estate Council of Alberta Information Bulletins mentioned above and will be aware of the nature of conflicts of interest and what to do in circumstances where a conflict arises. Any uncertainty about a potential conflict should be discussed immediately with the broker, in the case of a real estate or mortgage broker. The advice of trusted colleagues should also be considered; however, ultimately the responsibility remains with the individual industry member. If necessary, industry members are encouraged to obtain independent legal advice to guide them in their conduct in these situations.