



TRANSACTION BROKERAGE – PARTIES DO NOT AGREE

Summary: If either party declines to enter into a transaction brokerage agreement, the parties have a number of options to resolve the representational conflict. If the parties fail to reach an agreement, the brokerage must determine which party was a client of the brokerage first. The service agreements in place at the time of the conflict will assist the parties and the brokerage in determining which party was a client of the brokerage first and therefore will continue to be represented by the brokerage. The other party will have a choice to be represented by another brokerage or can opt for customer status (represent themselves). At all times, it is the client's decision as to how to resolve representational conflicts. [*Real Estate Act* s.1(1)(w.1); *Real Estate Act* Rules s.1(1)(g), s.41(d)(e)(f), s.43, s.59(3), s.59.1(3)]

If the situation arises where a brokerage 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, in order to facilitate the purchase and sale of the property, the buyer and the seller and the brokerage may enter into a written transaction brokerage agreement. However, what happens if transaction brokerage is not agreed to by both parties?

If either party declines to enter into a transaction brokerage agreement, the parties have a number of options to choose from to resolve the representational conflict. The brokerage is guided by the *Real Estate Act* Rules and service agreements that have been entered into with the clients.

Parties May Reach an Agreement on Representation

The buyer and the seller may reach an agreement on their respective representations for the purpose of a particular transaction. They will need to decide which party will continue to be represented by the brokerage [*Real Estate Act* Rules s.59(3) and s.59.1(3)]. If they fail to agree, the brokerage has a number of options to offer the clients, as described below.

Determine Which Party Was a Client of the Brokerage First

The brokerage must determine which party was the first to become a client. In common law or designated agency, this is a question of fact and is a decision of the brokerage. If each party has a written service agreement, the date on the agreements will be the determining factor. The client whose agreement pre-dates the other will remain a client of the brokerage.

If there is only one written service agreement, the broker may have difficulty determining when the other agency relationship began. Was it formed orally through conversations between the associate and the consumer or was it implied by the associate's conduct with the consumer (implied)? If there are no written service agreements for either party, the broker will have an even more difficult decision.

This situation points out another benefit of written service agreements with seller and buyer clients. Written service agreements set out the date the agreements were entered into and set out the options available to the parties should either client decline to enter into a transaction brokerage agreement.

Customer Status (Self-Representation)

One option for the client who will no longer be represented by the brokerage is customer status or self-representation. The party that remains as a brokerage client will continue to have sole agency representation with the brokerage. The party that agrees to customer status will not and will represent themselves in the transaction.

The party that becomes a customer will need to sign a *Customer Status Acknowledgement* to confirm the change in representation with the brokerage. Although the brokerage will not represent that party or advocate on that party's behalf, the brokerage can provide customer services, which include real estate statistics, standard real estate forms, drafting offers and counter offers, and being kept informed on the progress of the transaction. In a designated agency brokerage, it would be the associate who provides these customer services.

Representation by Another Brokerage

As a general rule, consumers are in a better position when they receive sole agency representation in their real estate transaction and are entitled to receive full agency representation, if that is their choice. If customer status is not acceptable, and the client wishes to be represented by another brokerage, the original brokerage should immediately recommend the party to another brokerage. Ultimately, it is up to the client to decide which brokerage will represent their interests in the transaction.

In a designated agency brokerage the brokerage can designate another associate in the same brokerage to represent the client in question for the purposes of the transaction in question.

What Happens if the Transaction Does Not Take Place?

In either situation, if the client chooses customer status or chooses to be represented by another brokerage, and the transaction does not take place, the client will return to the first brokerage (in a common law brokerage) or to the designated agent in question (in a designated agency brokerage) in accordance with the terms of the service agreement. This is the case assuming the client has entered into a written service agreement in accordance with the language mandated for residential transactions. In a common law brokerage, if there is no such written service agreement, the client is not obligated to return to the same brokerage.

Practice Tip

While transaction brokerage offers a solution to resolving the conflict of interest that occurs when a brokerage finds itself representing a seller and buyer in the same transaction, clients may prefer a different solution. The primary responsibility of the brokerage is to disclose the conflict of interest at the earliest practical opportunity and to ensure the client understands their choices. The implications of customer status (self-

representation) versus agency representation by another brokerage should be fully explained.

The brokerage does not “turn the client into a customer,” as some would suggest. It is the client that must make the decision, based on their preferences and their needs. While the interests of consumers are best served by sole agency representation, some consumers will choose to represent themselves (customer status) for a variety of reasons. Industry members must respect that choice.

In some cases, a brokerage or industry member may determine that transaction brokerage may not be an appropriate solution for this type of conflict of interest. For more information on this topic, please see RECA Information Bulletin: *Transaction Brokerage – Not Always Appropriate*