



# TRANSACTION BROKERAGE

## PRACTICE GUIDE FOR INDUSTRY MEMBERS



REAL ESTATE  
COUNCIL  
OF ALBERTA

Suite 350, 4954 Richard Road SW, Calgary, AB  
403-228-2954 • 1-888-425-2754 • Fax 403-228-3065

[www.reca.ca](http://www.reca.ca)

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## Transaction Brokerage: Practice Guide for Industry Members

### ***Purpose of Guide***

This guide will assist an industry member to facilitate an agreement between a buyer and seller in the same residential estate transaction. In this guide the term “client” or “clients” refers to parties to the same transaction.

### ***When is Transaction Brokerage an Option?***

Transaction brokerage is an option when a brokerage, in a common law relationship with clients, is in a conflict of interest as a result of representing two parties (clients) in the same potential transaction. In designated agency, this occurs when a designated agent is representing two parties (clients) in the same potential transaction. When this conflict occurs both parties are presented with options including transaction brokerage.

### ***What are the Key Elements of Transaction Brokerage?***

Transaction brokerage is a model of concurrent representation allowing industry members to work with a seller and buyer in the same transaction as outlined in the *Transaction Brokerage Agreement*. In transaction brokerage, a common law brokerage or designated agent, as the case may be, becomes a facilitator and treats the buyer and seller in an even handed, objective and impartial manner. The common law brokerage representatives or designated agent provide all necessary facilitation services to assist the parties to negotiate a mutually acceptable agreement. However, facilitation services must not include exercising discretion or judgment, or giving confidential advice, to advance the interests of one client over the other.

### ***What is the Role of the Transaction Facilitator?***

The transaction facilitator assists clients in the same transaction to reach a mutually acceptable agreement. During the negotiation, the transaction facilitator must treat both parties in an even handed, objective and impartial manner. This requires the facilitator to adopt a neutral position as a “middleman” and not advocate for the interests of any client or assist any client in gaining an advantage over the other client. The transaction facilitator must not interject himself or herself into the negotiations as an advocate for either client.

### ***What does “even handed, objective and impartial” mean?***

Whether a transaction facilitator has remained even handed, objective or impartial in a real estate transaction will always be a question of fact and can only be determined on a subsequent review of the facts of the case. Below are some typical questions one might ask. If you become a transaction facilitator, consider asking yourself these six questions.

- How did I conduct myself?
- Did I provide the same information to both clients?
- Did I treat all clients honestly and with reasonable care and skill?
- Did I demonstrate impartiality or did I show favour for one client over the other?
- Did I provide the same advice to both clients? Or did I provide confidential advice to one client that was not shared with the other?
- Would an outside observer conclude that I remained neutral throughout the process?

## ***How do Transaction Facilitators fulfill their Role?***

### **➔ Providing information in advance of any conflicts**

Industry members are responsible for preparing their clients for the transaction process. They need to provide clients with information on the practical aspects of the purchase process in advance of becoming a transaction facilitator. Prior to any representational conflict existing, industry members should provide clients with information that will prepare them for the possibility of transaction brokerage. Here are some resources that you can provide clients:

1. Agency Relationships Guide:  
Industry members should give the Guide to buyers and sellers and discuss it with them early in the relationship. The Guide, which is available on the RECA website ([www.reca.ca](http://www.reca.ca)), explains transaction brokerage in detail.
2. Agency Relationships Video:  
The video is available on the RECA website ([www.reca.ca](http://www.reca.ca)) for consumers, industry members, or brokerages for training purposes. It complements the Guide in explaining the representative relationships an industry member can have with clients, including transaction facilitation. The video can also be downloaded as a podcast.
3. Buyer Information and Seller Information Brochures:  
Industry members should give clients the *Buyer* or *Seller Information Brochures*. They have information on important topics, such as material latent defects, multiple offers, inspection reports, title searches, etc. The brochures can be downloaded or printed from the RECA website ([www.reca.ca](http://www.reca.ca)).
4. Real Estate Forms:  
Industry members provide blank forms for clients to review in advance. These include written service agreements, a *Purchase Contract*, and a *Property Inspection Request* form explaining the benefits of residential property inspection reports. It may also include a *Transaction Brokerage Agreement*. Common law brokerages should use the *Transaction Brokerage Agreement* for use with exclusive brokerage agreements, and designated agency brokerages should use the *Transaction Brokerage Agreement* for use with exclusive designated brokerage agreements.
5. Brokerage or Industry Member Resources:  
Brokerages or industry members may develop supplementary material. For example, brokerages may develop materials they want their industry members to provide their clients. Brokerages may also develop checklists for use by their industry members when working with buyers or sellers in transaction brokerage. Associates may develop materials that further focus on client needs or marketing properties. However, associates should ensure that any materials they develop are consistent with brokerage policies.

### ➤ What happens when transaction brokerage occurs?

The *Exclusive Brokerage Agreements* and the *Designated Agency Brokerage Agreements* outline the process for the change in representative capacity from sole agency to transaction brokerage. Flow charts outlining the transaction brokerage process are in the Appendices.

Transaction brokerage may become a possibility if a buyer takes an interest in a property listed by their representative's brokerage (in common law) or by their representative (in designated agency). A buyer simply viewing property listed with the same brokerage or same designated agent does not create transaction brokerage. If the buyer expresses interest in the property after the showing, this would trigger the need to discuss the client's options.

The industry member will present the buyer with the *Transaction Brokerage Agreement* and provide any relevant facts for his or her consideration. If the buyer gives informed consent to transaction brokerage, the industry member would confirm that consent in writing on the *Transaction Brokerage Agreement*. The industry member would then assist the buyer in completing the offer to purchase. The offer is written with the buyer's understanding that if the seller does not agree to transaction brokerage, then the offer will not be presented to the seller until such time as the respective client relationship(s) have been determined.

After preparing the offer, the industry member would advise the seller or seller's representative, as the case may be, and indicate that the buyer wishes to make an offer. The change in representative capacity must be dealt with before the buyer's offer is presented to the seller. Next, the seller would be advised of options, which include transaction brokerage, customer status or referral to another brokerage or designated agent, as the case may be. If the seller gives his or her informed consent to transaction brokerage, the buyer client's offer is presented to the seller and the industry member(s) becomes a transaction facilitator.

### ➤ How do we assist clients to reach an agreement?

A transaction facilitator can refer clients to information given them prior to any change in representative capacity. The transaction facilitator also provides "facilitation services" as outlined in the transaction brokerage agreement. This involves asking questions, communicating with all parties, and providing information on issues of mutual interest to both clients. However, these services must not provide advice to any client that will benefit one client over the other. This restriction ensures the transaction facilitator remains neutral at all times while facilitating the transaction.

#### 1. Provide Transaction Facilitation Services:

Facilitation Services are defined in the *Transaction Brokerage Agreement* as services needed to assist the buyer and seller to complete a transaction. These include:

- assist the buyer and seller in negotiating a mutually acceptable agreement
- the provision of real estate statistics, as comparable sold and active property data;
- provision of standard real estate forms,
- preparing all documents as instructed by the client(s);
- provision of real estate service providers without recommending any specific one;
- timely presentation of all offers and counter offers;
- conveying of information to one party at the request of the other;
- keeping all parties informed as to the progress of the negotiations;
- disclosing all material latent defects to the buyer(s);
- disclosing the buyer's financial ability to complete the transaction to the seller(s); and
- complying with the provisions of the *Real Estate Act* and Rules.

## 2. Refer Clients to Previous Information.

Subject to the *Personal Information Privacy Act* (PIPA), public domain information can be disclosed in transaction brokerage. Examples include the property title or an existing real property report provided by the seller. The brokerage or designated agent should conduct a title search on the property at the time of listing to confirm the ownership and reveal any easements, encroachments, caveats, or other restrictions. This valuable information may be shared with the buyer or buyer's representative as well.

## 3. Refer Clients to Current Information:

Any information a transaction facilitator provides one client must be provided to the other client. This demonstrates that each client has been treated in an even-handed, objective and impartial manner. Confidential information may not be shared.

- Material Latent Defects: All brokerages and all designated agents must disclose to the buyer any material latent defects about the property of which they are aware.
- Buyer's Ability to Complete the Transaction: The same principle of disclosure applies to the seller with respect to the buyer's ability to purchase the property. Any concerns regarding the buyer's ability to purchase the property will need to be disclosed.
- Marketing Information: Associates should refer their clients to the marketing information for the subject property. For example, property information may be found on industry member or brokerage web sites, features sheets found in the property, and any information provided by the seller's associate to the buyer's associate.

## 4. Provide Clients with Further Information:

Other available information may be important to your client's decision to buy or sell property. This is not an inclusive list, but provides some relevant examples.

- Public Domain Information: The public domain has a variety of general and specific property data that may be helpful to clients. SPIN ([www.spin.gov.ab.ca](http://www.spin.gov.ab.ca)) is an online source of various Alberta Registry documents, such as titles, condominium documents, surveys, etc. Municipalities often have community data, land use districts descriptions, building permit requirements, as well as individual property taxation and assessment. Alberta First ([www.albertafirst.com](http://www.albertafirst.com)) also has community data.
- Provide Information Sources: Your clients may have specific needs, such as schooling. They know their children's educational needs and school information is also subject to change. Clients should investigate this need themselves. However, you may provide them the contact information for schooling options in your area.
- Provide List of Experts: Your clients may have questions beyond your expertise to answer, such as the cost of renovations. You may provide clients with a list of appropriate professionals who may be able to address these questions or concerns. However, the client should choose the professional and contact them directly.

## 6. Ask Clients Probing Questions:

A transaction facilitator can ask clients probing questions to determine how to write an offer or counter offer on behalf of the client. Probing questions prompt clients to consider various issues and their options. Without giving advice to either client, a transaction facilitator can give general information and provide alternatives to address these issues. For example, the transaction facilitator can explain the difference between a term and condition in the purchase contract. Ultimately, the buyer and the seller must decide how these issues will be resolved between them.

### ➤ Completing the Buyer's Offer to Purchase (Purchase Contract)

Transaction facilitation skills are needed most in preparing and presenting the offer and any counter offers. The transaction facilitator must be careful in the wording used to prepare terms and conditions in the offer to not favour one client over the other. He or she should ask the buyer probing questions to determine how to write the offer, as the buyer ultimately decides the offer details and the information to include (e.g. price, conditions, possession, inclusions, etc.). As the buyer has the final say, the transaction facilitator must not insert him or herself between the buyer and seller. While a transaction facilitator must remain neutral, there will be mutual issues that both clients need to consider and resolve in reaching an acceptable agreement. The transaction facilitator is a facilitator for the mutual interests of both clients.

### ➤ Completing the Seller's Counter Offer

Transaction facilitation skills are also needed to draft and present any counter offers for the seller. Here, the seller has the final say. Again, the transaction facilitator must not insert him or herself between the buyer and seller. While a transaction facilitator must remain neutral, he or she is a facilitator for the mutual interests of the parties. There will be mutual issues that both the seller and buyer will need to consider and resolve in reaching an acceptable agreement.

### ➤ Temporary Change in Representation:

The need for a change in representative capacity is typically caused by a conflict of interest. That conflict arises when one common law brokerage represents two clients with competing interests in the same transaction, or when one designated agent represents two clients with competing interests in the same transaction. Clients are offered options to temporarily change representation in order to alleviate the conflicting representation created by a specific transaction. Should the specific transaction not come together, each client would return to full representation through their original agreement.

## ***How do Brokers Provide Advice to Associates in Transaction Brokerage?***

The broker may need to supervise the associate(s) when in transaction brokerage. In common law, all industry members in the same brokerage (including the broker) must act in an even handed, objective and impartial manner. The broker must remain neutral while still adequately supervising the associate(s).

If an associate asks the broker for assistance, it may be advisable for the broker to review the offer and go through a set of standard questions. A brokerage may develop a "due diligence" checklist and provide it to all associates to guide them when representing sellers or buyers. The broker could refer to this checklist and ask the appropriate questions to ensure the associate has covered all the issues. In addition, the broker may refer the associate(s) to prior information, such as the brokerage policy or procedures, brokerage checklists for writing offers or counter offers, or this *Transaction Brokerage Practice Guide*. The broker may also ask probing questions without giving advice to an associate that may be seen as using discretion or judgment for one client over the other. Samples of probing questions follow on the next page.

If the broker is part of the transaction in question, he or she will not be able to fulfill the usual supervisory role for the other industry member. In this case, another member of the brokerage would have to assume the broker's supervisory responsibilities in order to ensure brokerage due diligence. The most likely candidate for this temporary delegation of brokerage responsibilities would be an associate broker, sales manager or experienced associate.

## ***What 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 resolve the representational conflict.

- **Parties May Reach 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. 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 either common law or designated agency, this is a brokerage decision. If each party has a written service agreement, the date on the contract 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 a more difficult decision. This situation points out another benefit of written service agreements with clients. They describe the options, should either client decline to enter into a transaction brokerage agreement.

Industry members should be familiar with all written service agreement, as these agreements have provisions for a change in representative capacity:

- ⇒ *Exclusive Seller Brokerage Agreement* (clause 14) for common law brokerages,
- ⇒ *Exclusive Buyer Brokerage Agreement* (clause 13) for common law brokerages,
- ⇒ *Exclusive Designated Seller Brokerage Agreement* (clause 18) for designated agents,
- ⇒ *Exclusive Designated Buyer Brokerage Agreement* (clause 17) for designated agents.

- **If Client Chooses Customer Status:**

Another option is customer status. The party that remains as a brokerage client will continue to have full representation. However, the party that agrees to customer status will not. The party that becomes a customer will need to sign a *Customer Status Acknowledgement* to confirm their change in representation with the brokerage. Although the brokerage will not represent that party or advocate on its 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 customer level services. Should this transaction not come together, the customer would return to client status according to their written service agreement with the initial brokerage or designated agent.

- **If Client Chooses to be Referred:**

If customer status is not acceptable, the client may be referred to another brokerage for representation (common law solution) or to another associate in the same brokerage (designated agency solution). Should this transaction not come together, the client will return to the first brokerage or designated agent according to the written service agreement.

## ***Is Transaction Brokerage Always Appropriate?***

Transaction brokerage may not be suitable for some clients who may need full representation during the negotiation. In addition, it may not be suitable if the industry member's conflict of interest cannot be resolved to the satisfaction of the clients or the brokerage.

- ***Client May Need Representation:***

Transaction brokerage may not be suitable for all clients, such as those of advanced age or limited mobility. It may not be suitable for a new immigrant who is unfamiliar with Canadian business practices or private property ownership. Although they have the capacity to enter into a contract, a general level of acquired knowledge may not be present or their ability to access that knowledge may be limited. If continued representation is needed, then customer status would not be an option either.

The client needing full representation would remain with the brokerage if their written service agreement was established first, or the other client agreed to their remaining a client of the brokerage or designated agent, as the case may be. Otherwise, the client needing full representation may be referred to another brokerage or to another designated agent in the same brokerage. Transaction brokerage and customer status would not be appropriate options for clients needing representation. These situations should be discussed with the broker, who will decide on the appropriate options to offer such clients.

- ***Conflict of Interest May Not be Resolved:***

An industry member may have a personal conflict and a representational one. For example, the industry member may already be representing a family member, close friend, long term client, or business associate. He or she must disclose these conflicts to other clients and it may be unrealistic to expect the industry member to be neutral under these circumstances.

A personal conflict can arise when industry members are in personal real estate trades. For example, an associate has ownership in a property and the buyer client is represented by the same brokerage or the associate wants to buy a property listed by their brokerage. In designated agency, the conflict arises when a designated agent wants to sell a property he or she owns to a buyer client, or to buy a property owned by a seller client. The industry member is required to disclose these conflicts to their clients. It may be unrealistic for industry members to remain neutral under these circumstances.

The *Real Estate Act* Rule 62 requires brokerages to have a policy for personal trades by their associates. Brokerage policies must be adhered to by associates and may impact the options they offer their clients. For example, a brokerage may require full representation for clients in a personal trade with their associates. If so, transaction brokerage and customer status may not be suitable options. Common law brokerages might offer to refer the client to another brokerage for this transaction and designated agency brokerages might offer to refer the client to another designated agent or another brokerage.

## ***Writing Offers with Buyers as a Transaction Facilitator***

Writing offers (Purchase Contracts) with buyers is part of transaction facilitation. Numerous Purchase Contract clauses will require a discussion between the buyer and the transaction facilitator in order to write the offer and probing questions can be helpful here. The following questions are not all inclusive, but will give you an idea of the type of questions you might ask. The transaction facilitator must encourage the buyer to make informed decisions, but not advocate for a particular decision. Consider the following questions that relate to working with buyer clients in discussing an offer to purchase.

Below are some examples of relevant information about the buyer/industry member relationship that must be disclosed to and discussed with the buyer:

- ✓ Is any industry member involved (direct or indirect) in the transaction (e.g. personal trade)?
- ✓ If so, was the industry member's involvement disclosed to the buyer?
- ✓ Is there any strong relationship with the seller (relative, business associate, long time friend, other associate in the same brokerage, etc.)?
- ✓ If so, has this been disclosed to the buyer?
- ✓ Have all potential and actual conflicts been disclosed to the buyer?
- ✓ If so, how was this handled? What was the buyer's response?
- ✓ Has the buyer reviewed and signed the *Transaction Brokerage Agreement*?
- ✓ Was the appropriate *Transaction Brokerage Agreement* used for your brokerage (e.g. common law or designated agency)?

Below are some examples of relevant information about the property that may be known by the transaction facilitator and should be disclosed to the buyer:

- ✓ Have you disclosed all known material latent defects to the buyer?
- ✓ How have you documented these disclosures to the buyer?
- ✓ Is there a lack of appropriate municipal building permits or inspections (e.g. un-permitted home business, un-permitted building development, un-permitted or un-inspected plumbing and heating installations, etc.)?
- ✓ Are there any environmental issues with the building(s) or the land?
- ✓ Have you reviewed the marketing and property information with the buyer?
- ✓ Is the buyer concerned about property dimensions or measurements?
- ✓ Have you reviewed the property title with the buyer and answered any questions?
- ✓ Have you reviewed the Real Property Report with the buyer questions?
- ✓ Is the buyer aware of any easements, caveats and utility rights of way?
- ✓ Are there any encroachment issues? If so, how are those dealt with in the offer?
- ✓ Is there unauthorized land use or building use that does not conform to the land use district (zoning) for the property (e.g. unauthorized rental suite, etc.)?
- ✓ Are there any proposals to construct or expand existing roadways that might affect use or enjoyment of the subject property?
- ✓ Are there any proposals to amend land use that might affect use or enjoyment of the subject property?
- ✓ Are there potential expropriations that might affect use or enjoyment of the subject property?

### ***Buyers: Residential Real Estate Purchase Contract Clauses***

Writing an offer will require a discussion with the buyer. It is important to recall what information or materials you provided buyer clients in advance of becoming a transaction facilitator. You can use these materials to help the buyer make decisions during the offer process. The following is a review of some key discussion points in the offer and how to facilitate the completion of the offer on behalf of the buyer. The following clauses are in the same order in which they appear in the Purchase Contract.

#### **➡ *Clause 1: Buyer Identifies Chattels - Inclusions and Exclusions***

The buyer should identify the items which they want included with the purchase and items they want excluded from the purchase (e.g. items that may be removed by the seller).

- ✓ *What chattels does the buyer want included in the offer?*
- ✓ *What chattels does the buyer want excluded in the offer?*
- ✓ *Is the buyer aware of the inclusions/exclusions on property feature sheet?*
- ✓ *Are there items the buyer wants excluded in order that the seller will remove them?*

#### ➔ **Clause 2: Buyer's Purchase Price**

Buyers will know the listing price of the property from the marketing material. In writing an offer, it is the sole responsibility of the buyer to determine the price to offer. The transaction facilitator can provide statistical information on comparable sales and active listings and remind the buyer of comparable properties that they have viewed. The buyer will often determine the price to offer based on this information. Once the buyer decides on the price they wish to offer, the transaction facilitator can ask how the buyer proposes to come up with the necessary funds. By asking probing questions the transaction facilitator can draft the offer based on the information and instructions received from the buyer.

- ✓ *How will the buyer decide the price to offer? Was the price discussed with the buyer?*
- ✓ *Was the buyer provided any current statistics or recent comparables sales?*
- ✓ *How will the buyer pay for the property and does it equal the purchase price?*
- ✓ *Is the down payment currently available? Is some of it being borrowed?*
- ✓ *If financing is involved, is the buyer pre-approved for the amount and terms?*
- ✓ *When does the buyer's mortgage pre-approval expire?*
- ✓ *Are the necessary funds coming from the sale of the buyer's current home?*

#### ➔ **Clause 3: Buyer's Deposits**

The deposit amount must be decided by the buyer. The transaction facilitator can give general input on the purpose of deposits, how the deposit size may be viewed by a seller, and the advantages and disadvantages to both parties. The transaction facilitator must not provide advice to the buyer on the strategy to adopt or what deposit amount to include in an offer. They may talk in general terms from their experience.

- ✓ *How much of a deposit will the buyer provide?*
- ✓ *Do they have the funds necessary to provide a deposit with the offer?*
- ✓ *Is the buyer aware the cheque will be cashed and held in trust for the sale?*
- ✓ *Is the buyer aware that they may possibly receive interest on their deposit?*
- ✓ *Do you know if the seller's brokerage has a policy on deposit interest for buyers?*

#### ➔ **Clause 4: Buyer's Possession Date**

A possession date is part of an offer and the buyer should determine the best date for them. If they are currently renting, the transaction facilitator may use probing questions to determine the details of their tenancy. The lease they have, if any, will determine the time they need to give proper notice of tenancy termination to the landlord. On the other hand, if the buyer has a property to sell in order to proceed with the purchase of the subject property, then they must allow sufficient time for this possibility to occur? This scenario will have a direct bearing on the preferred possession date for the buyer. More on the "Sale of Buyer's Home" condition will be discussed shortly.

- ✓ *What is the best possession date for the buyer?*
- ✓ *How was the possession date determined by the buyer?*
- ✓ *If the buyer is currently a renter, is their lease periodic or fixed term?*
- ✓ *What is the time required for terminating the buyer's lease?*
- ✓ *Does their preferred possession date take this into consideration?*
- ✓ *Are their tenants currently occupying the subject property?*

- ✓ *Does the buyer want to use it as a revenue property or occupy it as a residence?*
- ✓ *Will the buyer (or seller) need time to terminate tenancies so the buyer can occupy?*
- ✓ *If the buyer is a homeowner, do they need to sell their current home in order to buy?*
- ✓ *If they need to sell their current home, how much time has been allowed for that?*

### ➔ **Clause 7: Buyer's Terms**

Terms are items of agreement between the buyer and seller. Although terms cannot impede the transaction, they include important information that has been agreed to by both parties. In addition to the check-boxes that link addenda and schedules to the offer, Clause 7 can include other buyer expectations of the seller. AREA's *Standard Clauses and Phrases* can assist you in writing the clauses that meet the needs of the buyer.

- ✓ *Is an Addendum required to include the buyer's expectations of the seller?*
- ✓ *If the buyer is assuming seller financing, has a Financing Schedule been included?*
- ✓ *If the seller is providing financing, has a Financing Schedule been included?*
- ✓ *If the property is currently rented, has a Property Schedule been included?*
- ✓ *If the property is a country residence, has a Property Schedule been included?*
- ✓ *For condominiums, has a Condominium Property Schedule been included?*
- ✓ *Have all Schedules been completed with the buyer according to their instruction?*

### ➔ **Clause 8: Buyer's Conditions**

Buyer conditions address items that might prevent completion of the sale, such as financing, inspections or other issues about purchasing the property. You should determine what issues the buyer needs to address to their satisfaction. The transaction facilitator may refer to prior information provided the buyer, such as the *Buyers' Information Brochure* and the *Property Inspection Report Request* form. Ask the buyer to identify any reports they want included in their offer. The form, available on the RECA website ([www.reca.ca](http://www.reca.ca)), is a buyer information tool and not a substitute for the applicable Schedule(s) intended to accompany the Purchase Contract.

#### **Clause 8.1.a: Financing**

The transaction facilitator will know the buyer's financial situation by writing the financial data in the offer. You may also know the buyer's financial situation from information they provided at the beginning of your relationship. Buyers should know if they have the necessary funds to purchase a property, if they are pre-approved for a mortgage and their budget limitations. If a buyer is unsure about the length of time it will take to obtain financing the transaction facilitator can indicate the typical time to obtain mortgage approval based on experience in their marketplace and draft a clause to that effect.

- ✓ *If financing is involved, is the buyer pre-approved for the amount and terms?*
- ✓ *How long does the buyer need for mortgage approval to be arranged?*
- ✓ *Which financial organization will be funding the buyer's home purchase?*
- ✓ *Does the buyer own a property that must be sold before they can proceed with the purchase of the seller client's property? How will this be addressed in the offer?*

#### **Clause 8.1.b:- Property Inspection**

The buyer should already have information on the types of inspections and reports that are available. The transaction facilitator should refer the buyer to this prior information and ask if they understood the information and answer any general questions concerning the available inspections and reports. The transaction facilitator can outline the advantages and disadvantages associated with including a property inspection condition.

The transaction facilitator can ask the buyer if they wish to include a property inspection and proceed to draft the offer according to the buyer's instructions. If the buyer chooses to have a property inspection, the transaction facilitator should provide the buyer with a *Property Inspection Schedule* and ask them to indicate which inspection report option they want reflected in the offer to purchase.

#### **Clause 8.1.c:- Condominium Document Review**

The transaction facilitator can outline the advantages and disadvantages of including a condominium document review condition in the offer. The transaction facilitator can ask the buyer if they wish to include this condition and draft the offer according to the buyer's instructions. If the buyer chooses to have this condition, the transaction facilitator should provide the buyer with a *Condominium Property Schedule* and review the form with them. Note: this is the same Schedule as discussed in the Terms section. However, if included in clause 8, it becomes a condition of the Purchase Contract and not just a term.

#### **Clause 8.1.d: Sale of the Buyer's Home**

If the buyer chooses to have their purchase subject to the sale of their home, the transaction facilitator may provide them with a *Sale of Buyer's Home Schedule* to indicate what arrangements for this condition they want reflected in the offer to purchase.

- ✓ *Does the buyer understand that the seller's home remains on the market?*
- ✓ *Does the buyer know that they gain a right of first refusal and not a conditional sale?*
- ✓ *Does the buyer understand that the subject property may get other offers?*
- ✓ *Does the buyer understand how their offer to purchase will be handled in that event?*
- ✓ *Does the buyer know they must proceed with marketing their home by a certain date?*
- ✓ *Does the buyer understand they must proceed with addressing all other conditions?*

#### **Clause 8.1.e: Other Buyer Conditions**

Buyers may have other issues that require a condition in the offer, as the ability to build a garage on the lot, or testing water or septic systems for rural property. Writing a buyer's condition may have a significantly different effect on the seller. If the transaction facilitator recommended or created the wording, the seller could perceive this as using discretion to the advantage of the buyer. You may use the *Clause and Phrases* on the AREA web site to help the buyer decide on their wording. The industry member may comment on the pros and cons of each clause, but may not advocate for any particular one.

#### **➡ Clause 13: Timing of Buyer's Offer**

The transaction facilitator should discuss the pros and cons associated with the duration of an offer to purchase and ensure the buyer has an understanding of the process and flow. The industry member's general understanding of the pace of the market at the time may also be shared (e.g. sellers', buyers' or balanced market). If the seller is temporarily away or has moved out of town, this information will help the buyer decide on the length of time to leave the offer open for the seller's consideration.

- ✓ *How long is the offer open for acceptance?*
- ✓ *Is the seller accessible? Are they on holidays or have they moved away?*
- ✓ *Does the buyer understand the offer/counter offer process and flow?*
- ✓ *Does the buyer know that you may need to reach them quickly?*
- ✓ *Can all of the buyers included in the contract be reached quickly?*

Before concluding your work in completing the offer with the buyer, consider doing a final review of the Purchase Contract with the buyer.

## ***Writing Counter Offers with Sellers as a Transaction Facilitator***

Writing counter offers (Purchase Contracts) with sellers is part of transaction facilitation. Numerous Purchase Contract clauses will require a discussion between the seller and the transaction facilitator in order to write the counter offer and probing questions can be helpful here. The following questions are not all inclusive, but will give you an idea of the type of questions you might ask. The transaction facilitator must encourage the seller to make informed decisions, but not advocate for a particular decision. Consider the following questions that relate to working with seller clients in discussing a counter offer or acceptance.

Below are some examples of relevant information about the seller/industry member relationship that must be shared with all parties (buyer and seller):

- ✓ Is any industry member involved in the transaction (e.g. personal trade)?
- ✓ If so, was the industry member's involvement disclosed to the seller?
- ✓ Is there any strong relationship with the buyer (relative, business associate, long time friend, other associate in the same brokerage, etc.)?
- ✓ If so, has this been disclosed to the seller?
- ✓ Has the seller reviewed and signed the *Transaction Brokerage Agreement*?
- ✓ Was the appropriate *Transaction Brokerage Agreement* used for your brokerage (e.g. common law or designated agency)?

Below are some examples of relevant information about the property that may be known by the transaction facilitator and should be shared with all parties (buyer and seller):

- ✓ Has the seller disclosed any material latent defects with the property to you?
- ✓ Did you disclose all material latent defects known to you for the subject property?
- ✓ If so, how has that disclosure been documented for the benefit of all parties?
- ✓ Is there a lack of appropriate municipal building permits or inspections (e.g. un-permitted home business, un-permitted building development, un-permitted or un-inspected plumbing and heating installations, etc.)?
- ✓ Are there any environmental issues with the building(s) or the land?
- ✓ Did you review the marketing and property information with the seller?
- ✓ Have you reviewed property title with the seller and dealt with any questions?
- ✓ Have all the sellers signed the Seller Brokerage Agreement?
- ✓ Is dower consent an issue? If so, can the missing signature(s) be secured?
- ✓ Are all of the sellers involved in reviewing of the offer to purchase?
- ✓ Have you reviewed the Real Property Report with the seller? Is it current?
- ✓ Are there easements, encroachments, caveats and utility rights of way?
- ✓ Will any items impact the sale (e.g. lis pendens)? Is this disclosed to the buyer?
- ✓ If there are encroachment issues, how will this be handled in the offer?
- ✓ Is there unauthorized land use or building use that does not conform to the land use district (zoning) for the property (e.g. unauthorized rental suite, etc.)?
- ✓ Are there any proposals to construct or expand existing roadways that might affect use or enjoyment of the subject property?
- ✓ Are there proposed land use changes that may affect property use or enjoyment?
- ✓ Are there potential expropriations that might affect property's use or enjoyment?
- ✓ If the property is a condominium, does the seller have all the documentation?
- ✓ If it is a condo, is it a conventional or bare land? If it is a bareland condo, does the seller have a current Real Property Report?
- ✓ Did you disclose to the seller any issues regarding the buyer's ability to complete the transaction?

## **Sellers: Residential Real Estate Purchase Contract Clauses**

Writing a counter offer will require a detailed discussion with the seller. It is important to recall what information or materials you provide seller clients in advance of becoming a transaction facilitator. You can use these materials to help the seller with decisions during the counter offer process. Below is a review of some key issues in the offer and how to facilitate the completion of the counter offer on the seller's behalf. The following clauses are in the same order in which they appear in the Purchase Contract.

### **➔ Clause 1: Seller Reviews Chattels – Inclusions and Exclusions**

Sellers should identify the chattels included in the sale and excluded from the sale. Sellers should also be aware that items they wish to keep, but that are attached to the property, must be specifically excluded in the offer. Inclusions and exclusions (including attached items to be removed) should be indicated in the offer.

- ✓ *What chattels does the seller want included in the offer?*
- ✓ *What chattels does the seller want excluded in the offer?*
- ✓ *Does the offer match the items excluded by the seller in the listing contract?*
- ✓ *Are any included chattels rented, leased to own, or financially encumbered?*
- ✓ *How will the seller deal with this in the offer?*
- ✓ *Are the included chattels in good working condition?*
- ✓ *If not, will the seller repair them or declare them sold "as is"?*
- ✓ *Whichever option the seller chooses, is it reflected in the offer?*

### **➔ Clause 2: Seller Reviews Offered Purchase Price**

It is the sole responsibility of the seller to determine the price to counter offer or accept. The seller will determine this based on a variety of things, including recent comparable sales. The seller may still have the comparative market analysis (CMA) done when the property was listed. The seller will need the CMA updated with the most recent comparable sales and active listings to assist them with their decision making. If the seller has decided to counter the price offered, you can ask where they want the additional funds reflected in the offer (e.g. deposit, balance owing, etc.). The transaction facilitator can ask probing questions to draft the counter offer based on the seller's instruction.

- ✓ *How will the seller decide the price to counter offer or accept?*
- ✓ *Was the counter offer price discussed with the seller?*
- ✓ *Was the seller provided any current market statistics and recent comparables sales?*
- ✓ *How does the seller want the additional funds to be reflected in the offer (e.g. more deposit, more financing, more down payment, or a combination thereof)?*
- ✓ *If financing the sale, is the buyer pre-approved for mortgage amount, rate, and term?*
- ✓ *Does the seller know the buyer's ability financially to complete the transaction?*
- ✓ *Are some of the buyer's funds coming from the sale of their current home?*

### **➔ Clause 3: Seller Reviews Buyer Deposit**

The transaction facilitator can give general input on the purpose of deposits, and the advantages and disadvantages of the deposit size to both parties. They may talk in general terms from their experience, but must not provide advice to the seller on which strategy to adopt or what deposit amount to require from the buyer.

- ✓ *How much of a deposit did the buyer provide?*
- ✓ *Is there a deposit accompanying the buyer's offer?*
- ✓ *Was the seller told about deposits practices for this type of property?*

#### ➡ **Clause 4: Seller's Possession Date**

The property marketing material has the seller's preferred possession date. Now the seller needs to decide if the buyer's date will work. If not, they will need to decide on a date that works for them and hopefully for the buyer. If the seller plans to build, re-buy, or rent, they should allow time for this to occur when selecting a possession date.

- ✓ *Which is the best possession date for the seller? How was it determined?*
- ✓ *Were the seller's future plans taken into consideration (e.g. build, buy or rent)?*
- ✓ *Has the seller already purchased another property?*
- ✓ *Is the buyer's preferred possession date workable for the seller?*
- ✓ *Are there tenants currently occupying the subject property?*
- ✓ *Will the seller (or buyer) need time to terminate tenancies so the buyer can occupy?*

#### ➡ **Clause 7: Seller's Review of Buyer Terms; Seller Terms**

Terms reflect items of agreement between buyers and sellers. Although they cannot impede the sale, terms do include important information for the benefit of both parties. The seller will need to review the buyer terms and may add terms describing their expectations (e.g. seller to remove swing set 30 days after possession, etc.).

- ✓ *If an Addendum is part of the offer, has the seller reviewed it?*
- ✓ *Does the seller require an Addendum to include their expectations of the buyer?*
- ✓ *If seller financing is being assumed, has the seller reviewed the Financing Schedule?*
- ✓ *If seller financing is being provided, has the seller reviewed Financing Schedule?*
- ✓ *If the property is currently rented, has the seller reviewed the Property Schedule?*
- ✓ *If the property is a country residence, has the seller reviewed the Property Schedule?*
- ✓ *If it is a condominium, has the seller reviewed the Condominium Property Schedule?*
- ✓ *Does the seller require any other Schedules be included with their counter offer?*
- ✓ *Have all the appropriate Schedules been reviewed with the seller and been changed or completed according to their instruction?*

#### ➡ **Clause 8: Seller Review of Buyer Conditions**

Buyer conditions deal with their issues of importance, such as financing or inspections. Review all buyer conditions with the seller. In determining the seller's response, you may refer to prior information you provided the seller, as the *Sellers' Information Brochure* and the *Property Report Request* form, which are from the RECA website ([www.reca.ca](http://www.reca.ca)). In addition, you need to determine if the seller has any conditions to add to the Purchase Contract, which will be discussed shortly.

##### **Clause 8.1.a: Financing**

The transaction facilitator will know the buyer's financial situation from completing the financial portion of the offer. The industry member must disclose to the seller any concerns regarding the buyer's ability to purchase the subject property.

- ✓ *If financing is involved, is the buyer pre-approved for the amount and terms?*
- ✓ *How long does the buyer need for mortgage approval to be arranged?*
- ✓ *Has the buyer's ability to purchase the property been discussed with the seller?*

##### **Clause 8.1.b: Property Inspection**

As a transaction facilitator, you can refer the seller to any information you already provided. This might include information on property inspection options at the start of the relationship. The transaction facilitator can answer any general questions about property

inspections, as well as outline the advantages and disadvantages of including a property inspection condition and the specific property inspection option the buyer has chosen.

#### **Clause 8.1.c: Condominium Document Review**

It is the responsibility of the seller to provide the condominium documents. Ideally the seller will have secured them at the time of listing and shared them with their industry member. The transaction facilitator should explain the condominium document review condition and go over the list of required documents in order that the seller understands the need to secure in a timely way any missing condominium documents.

#### **Clause 8.1.d: Sale of the Buyer's Home**

If the buyer chooses to have their purchase subject to the sale of their home, the transaction facilitator may provide them with a *Sale of Buyer's Home Schedule* to indicate what arrangements for this condition they want reflected in the offer to purchase.

- ✓ *Does the seller understand that their home remains on the market?*
- ✓ *Does the buyer understand that they may receive other offers on the property?*
- ✓ *Does the seller know that they give the buyer a right of first refusal?*
- ✓ *Does the seller understand how other offers will be handled in that event?*
- ✓ *Does the seller know that the buyer must proceed to address all other conditions?*

#### **Clause 8.1.e: Other Buyer Conditions**

There may be other buyer issues that require a condition in the offer. Sellers should also review these conditions to the same extent as those above with Schedules and determine how they may impact the transaction as well.

### ➡ **Clause 8.2: Seller's Condition**

Sellers may have a need for a condition as part of their counter offer, giving them the opportunity to address issues that might prevent them from proceeding with the transaction. A seller condition might deal with securing additional information, taking action or waiting for the action by others. For example, sellers may want to confirm their mortgage information, complete a purchase contract on another property or have a lawyer review the contract. Writing a seller condition may have a significantly different effect on the buyer. If the transaction facilitator recommended or created the wording, the buyer could perceive this as using discretion to the advantage of the buyer. You may use the *Clause and Phrases* bank on the AREA web site to assist the seller in their decisions. The industry member may comment on the pros and cons of each seller clause, but may not advocate for any particular one.

### ➡ **Clause 13: Counter Offer Timing**

The transaction facilitator should discuss the pros and cons associated with the length of time of a counter offer and ensure the seller has an understanding of the process and flow. The industry member's general understanding of the pace of the market at the time may also be shared (e.g. sellers', buyers' or balanced market).

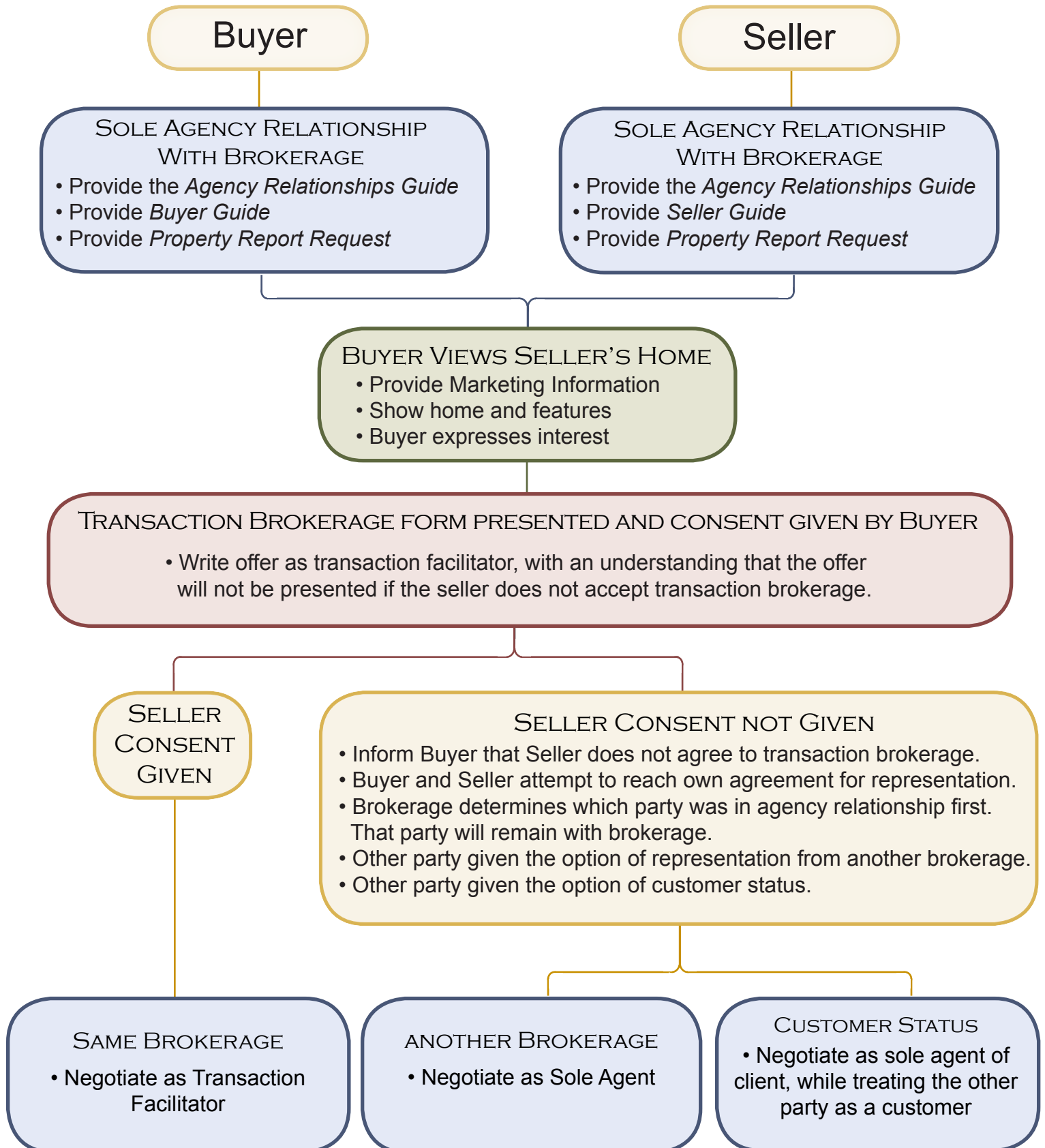
- ✓ *How long is the offer open for acceptance?*
- ✓ *Does the seller understand the offer/counter offer process and flow?*
- ✓ *Does the seller know that you may need to reach them quickly?*
- ✓ *Can all of the sellers be reached quickly?*

Before concluding your work in completing any counter offer with the seller, consider doing a final review of the Purchase Contract with the seller.

# How Do We Get to Transaction Brokerage?

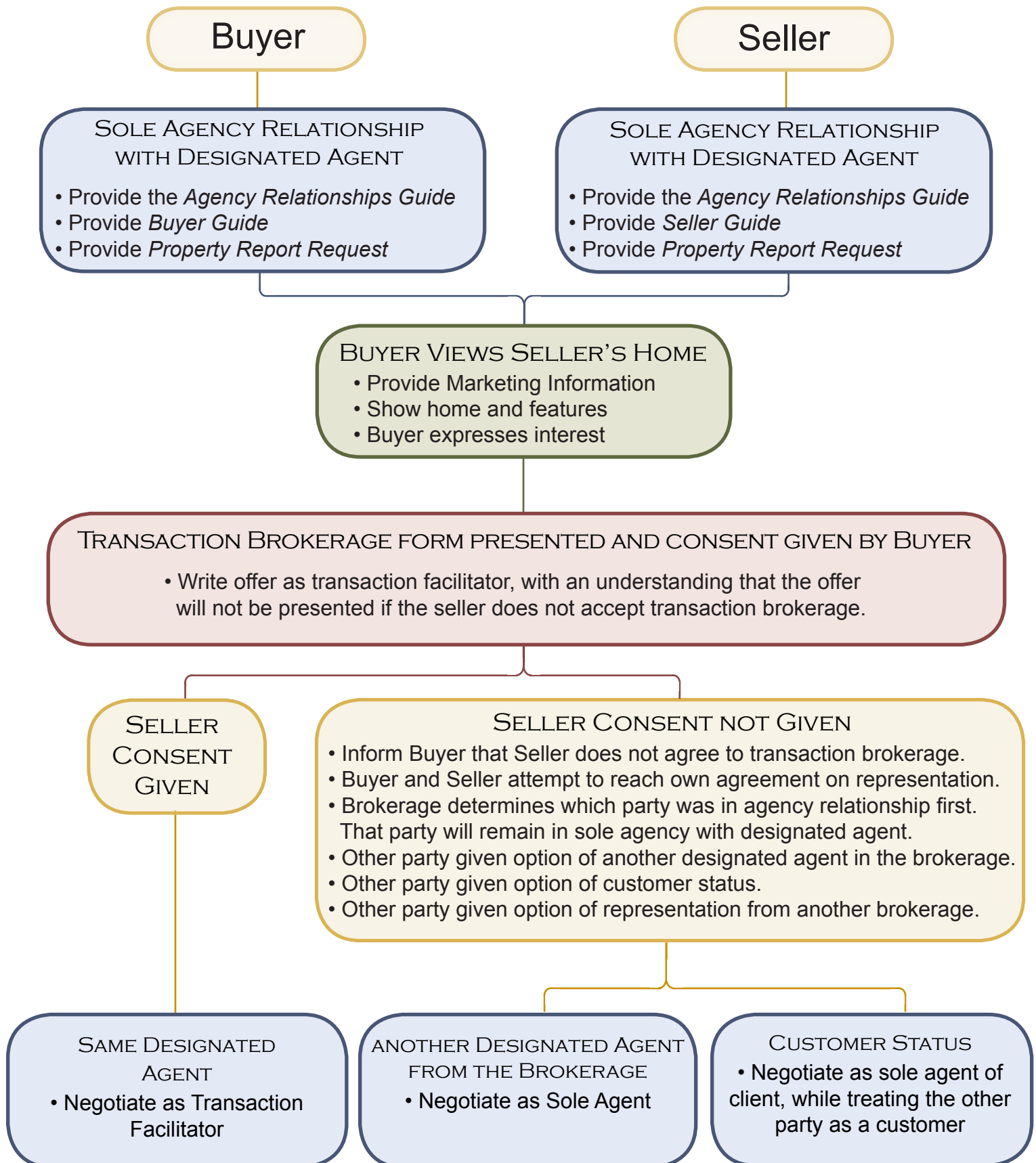
## COMMON LAW

(ONE OR MORE INDUSTRY MEMBERS IN SAME BROKERAGE)



# How Do We Get to Transaction Brokerage?

## DESIGNATED AGENCY



## Obligations of Sole Agents vs. Transaction Facilitators

<b>GENERAL OBLIGATIONS</b>	<b>Sole Agent</b>	<b>Transaction Facilitator</b>
Perform mandate	Yes	Yes
Exercise care and Skill	Yes	Yes
Obey lawful instructions	Yes	Yes*
Honesty	Yes	Yes
Write offers and counter offers	Yes	Yes
Promote the interests of the client	Yes	No
Provide confidential advice on relevant matters	Yes	No
Help negotiate and draft favourable terms	Yes	No
Recommend relevant experts	Yes	No
Disclose information concerning:		
• Other party's max/min price	Yes	No
• Other party's motivation	Yes	No
• Other confidential information obtained from other party (e.g. personal information)	Yes	No
• Material latent defects affecting the property	Yes	Yes
• Material facts relevant to buyer's inability to buy the seller's property	Yes	Yes
Present offers and counter-offers to and from the buyer and seller	Yes	Yes
Convey to buyer and seller information that either wishes communicated to the other	Yes	Yes
Keep buyer and seller informed regarding progress of the transaction.	Yes	Yes
<b>FIDUCIARY OBLIGATIONS</b>	<b>Sole Agent</b>	<b>Transaction Facilitator</b>
Undivided Loyalty (act in their best interests)	Yes	No
Avoid all conflicts of interest	Yes	Yes
Disclose all personal conflicts of interest	Yes	Yes
Not Misuse Confidential Information	Yes	Yes
No secret profits	Yes	Yes
Account for Funds (e.g. deposits)	Yes	Yes

*\* Note: A transaction facilitator cannot follow the lawful instruction of one client if complying with that brings them into conflict with a lawful instruction from the other client.*