

DISCLOSE CONFLICTS OF INTEREST

Purpose: To explain and recognize a conflict of interest and disclose the conflict.

This bulletin applies to all real estate professionals.

Obligation to avoid & disclose conflicts of interest

Real Estate professionals have an obligation to their clients to avoid and disclose conflicts of interest when they arise in the course of the business of an real estate professional. Real estate professionals owe fiduciary, general and regulatory obligations to their client. Real estate professionals who are members of an associations or real estate boards may have to comply with codes of conduct or standards of business practice that address conflict of interest.

The *Real Estate Act* Rules (Rules) state real estate professionals 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 giving services to, or in their dealings with, a client.

A real estate professional in any agency relationship has significant fiduciary duties to their clients. These include the duty of undivided loyalty, acting in the best interests of their client at all times, and the duty to avoid and disclose all conflicts of interest. Any real estate professional dealing with clients must avoid placing themselves in a situation where they are in a conflict of interest.

What is a conflict of interest?

The Rules provide the following definition:

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

Real estate professionals need to understand the circumstances in which conflicts arise in order to avoid conflicts of interest. For example:

- if an real estate professional is a principal in the transaction, it is impossible to act impartially towards the other party
- if a relative of the real estate professional is a principal in the transaction, it is difficult, if not impossible, to act impartially towards the other party
- if a long term client of the real estate professional is a principal in the transaction, it would be a conflict of interest for the real estate professional dealing with the other party

Such circumstances would likely adversely affect the real estate professional's judgment on behalf of, advice to, or loyalty to, the other party in the transaction brokerage relationship.

Determination of whether a conflict of interest exists is objective, not subjective. Whether the real estate professional feels there is a conflict of interest or feels they can act in an impartial manner does not matter. The test is whether a reasonable person would conclude if there were an adverse effect on the real estate professional's judgment, advice, or loyalty to the client.

Recognize conflicts

Conflicts may not be apparent. Consider the situation where a real estate professional acts as a seller's agent in listing a property. The property did not sell and the listing expires. The seller chose to list with another real estate brokerage. A potential buyer retains the first industry professional to act as their agent to purchase the seller's property. Is the real estate professional in a conflict of interest?

You must not use confidential information from one agency relationship for your benefit or the benefit of a third party without written consent. This fiduciary obligation continues after termination of the agency relationship. In this example, the potential buyer is a third party. An agency relationship previously existed between the real estate professional and seller of the property in question. Therefore, the real estate professional must not share confidential information they receive without the client's written consent.

The mandatory content of RECA's buyer and seller representation agreements includes a clause that prohibits industry professionals to use confidential information from a client without their consent or if it is a requirement of law.

The question remains, is the real estate professional in a conflict of interest?

The Supreme Court of Canada (Court) gives some guidance on this question. The Court established a two-part test to determine whether a conflict exists in circumstances where a lawyer is acting against a former client:

- did the agent receive confidential information as a result of their former relationship with the client.

Unless the agent can satisfy the court that the client did not give relevant confidential information, the Court will decide that the client did give the agent confidential information. The Court states that this would be a difficult burden to discharge.

- is there a risk the use of the information will prejudice the former client.

In the above real estate example, we assume the broker receives confidential information during the time they represented the seller. By acting for the potential buyer, they would be acting for a party with competing interests. This is a conflict of interest.

An agent cannot disclose confidential information they receive during a previous agency relationship. The real estate professional must disclose the conflict of interest and get written consent from both buyer and seller before proceeding to represent the potential buyer.

Immediate and full disclosure in writing

The Rules require a real estate professional to disclose any conflict of interest at the earliest practical opportunity. This means immediately or the first opportunity upon learning of the existence of the conflict.

Disclosure of the conflict of interest means full disclosure: You must give all the details you know to the client in writing. You must explain the conflict of interest and the affect on the clients.

The client decides how to proceed

Clients decide how to proceed in the face of any conflict. Real estate professionals should advise the client to obtain independent advice concerning the conflict. This independent advice may best come from a lawyer.

A real estate professional must first receive informed written consent from the client prior to providing services.

You must be aware of potential and real conflicts of interest and the appropriate steps to take to deal with the conflict. When in doubt seek advice from your broker or other industry professionals. You are the individual who is ultimately responsible.

Related information

Legislation

- *Real Estate Act* Rules – section 1(1)(h), s.41(d)(f), s.54(3)

Information bulletins

- Conflict of Interest – Representing a Seller and Buyer (Transaction Brokerage)
- Conflict of Interest – Buying a Client's Property
- Conflict of Interest – Representing Competing Buyers

INFORMATION
BULLETINS

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