

# TRANSACTION BROKERAGE - PARTIES DO NOT AGREE

Purpose: This bulletin describes the options for clients to consider when dual representation occurs, when they do not agree to transaction brokerage and the obligations of the industry professional.

**This bulletin applies to all real estate professionals.**

When a common law brokerage or a designated agent represents both a buyer and a seller, and the buyer is interested in buying the seller's property, this creates a conflict of interest. The brokerage or designated agent must resolve the conflict to the satisfaction of both clients. To facilitate the transaction, the buyer, the seller, and the brokerage or designated agent may enter into a written agreement for the brokerage or designated agent to represent both buyer and seller. If either client declines transaction brokerage, different options are available. The *Real Estate Act* Rules (Rules) and existing relationship agreements will guide the brokerage or designated agent.

## **If parties agree on representation**

When the parties do not agree to transaction brokerage, the buyer and the seller may reach an agreement on their respective representations for the purpose of a particular transaction. They will need to agree which party the brokerage or designated agent will continue to represent. If the clients fail to agree, the brokerage or designated agent should discuss the available options.

### **Option 1: Customer status (self-representation)**

One option for the client that the brokerage or designated agent will no longer represent is customer status or self-representation. The party that remains with a brokerage or designated agent will continue to have sole agency representation in the transaction. The party that agrees to customer status will represent themselves in the transaction.

The party that chooses to become a customer will need to sign a *Customer Acknowledgement* form to confirm the change in representation with the brokerage. Although the brokerage or designated agent will not represent that party or advocate on that party's behalf, they may give customer services. These services include assisting with real estate statistics and standard real estate forms, drafting offers and counter offers on the customer's direction, and inform the customer on the progress of the transaction.

### **Option 2: Representation by another brokerage**

Consumers are generally in a better position when they receive sole agency representation in their real estate transaction. If the client wishes to have another brokerage represent them, the original brokerage should make this accommodation. It is up to the client to decide which brokerage will represent their interests in the transaction.

In a designated agency brokerage, the broker can designate another associate in the same brokerage to represent the client for the purposes of the transaction, subject to the client's approval.

### **Option 3: Representation by another designated agent of the brokerage**

In a designated agency brokerage, both parties may continue to receive sole agency representation for that transaction. The designated agent would continue to represent the party who was a client of the designated agent first and another designated agent of the brokerage would represent the other party.

**Note:** If the brokerage or designated agent has an additional conflict within the dual representation situation, the party who was a client of the brokerage or designated agent first may not be the appropriate party to stay with the brokerage or agent. Examples may include; the brokerage or designated agent has a business relationship with the other party, related to the other party or has previous business dealings.

### **If parties do not agree on representation**

#### **Determine which party was a client first**

If both parties wish the brokerage or designated agent to represent them, the party who was a client of the brokerage or designated agent first will remain a client. In common law or designated agency, this is a question of fact and is a decision of the brokerage. If they both have a written service agreement, the client who entered into the service agreement first will remain a client.

A real estate professional trading in residential real estate or property management who establishes a client relationship must enter into a written service agreement.

If there is no written service agreement (commercial real estate), the broker may have more difficulty to determine when that agency relationship began. Factors to consider in establishing an agency relationship is whether it was through an oral conversation or implied by the brokerage's conduct.

### What happens if the transaction does not take place?

If the client chooses customer status or another brokerage to represent them, 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 a designated agency brokerage) as with the terms of the service agreement.

In a common law brokerage, if there is no written service agreement, there is no obligation for the client 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 clients understand the available choices. You should fully explain the implications of customer status (self-representation) versus representation by another brokerage. The client must approve any change in representation.

In some cases, transaction brokerage may not be an appropriate solution for the conflict of interest.

### Related information

#### Legislation

- *Real Estate Act* - section 1(1)(w.1)
- *Real Estate Act Rules* - sections 1(1)(g), s.41(d)(e)(f), s.43, s.59(3), s.59.1(3)

#### Information bulletins

- Customer – Real Estate Brokerage
- Transaction Brokerage – Not Always Appropriate