

AVOID MISREPRESENTATIONS

Summary: When an industry member makes a claim or puts forward any fact or information, the industry member is required to make certain that it is correct and accurate. An industry member must not make representations or carry on conduct that is reckless or intentional and that misleads or deceives any person or is likely to do so. [See: *Real Estate Act* Rules, s.1(1)(t), s.41(j), s.42(a)]

The area of misrepresentation, either intentional or reckless, is an area of concern. One of the fundamentals of industry member integrity relates to trust. The public must be prepared to trust the industry. Therefore, when an industry member makes a claim or puts forward any fact, the industry member is required to make certain that it is correct and accurate. If unsure, the industry member should not proceed and must indicate to the client that efforts will be made to verify facts or circumstances.

False or Misleading Advertising

An industry member must not knowingly or recklessly make any representations in the course of advertising or marketing properties or mortgages that are untrue in any material respect.

As with industry members' general accountability for things they do and say, there must be accountability in regards to advertising and marketing as well. Industry members must ensure that the information provided is accurate in all respects. This, in turn, creates public trust in these activities. The need to attract customers can lead to temptation for industry members to mislead and exaggerate. However, such conduct is to the detriment of the professional standing of the industry.

Industry members will be held responsible for intentional misrepresentations as well as those they make without regard to the consequences of their actions, i.e. in cases where they have acted recklessly.

Whether a representation is material can be determined on the basis of whether the representation could influence a person to buy an advertised product and includes matters relating to property, commissions, incentives and so on. It should also be recognized that omitting information in advertisements and marketing plans might also lead to a misrepresentation.

Due to the nature of their work, industry members make statements that are, by nature, material, essential and of substantial importance to their clients and the public. Therefore, in advertisements and other marketing materials, industry members must be sure that the specifics of the advertisements are accurate, including those key matters such as property value, property specifications, location and so on.

For a more detailed discussion on this topic, see RECA Information Bulletin: *Advertising – False or Misleading*.

Marketing a Property Without the Owner's Consent

Advertising a property for sale, or conducting marketing activities designed to sell a property, without the consent of the owner is a misrepresentation and a breach of the *Real Estate Act* Rules, s.42(a).

A property cannot be advertised for sale or marketed in any way without the owner's consent and knowledge. This should be done by way of a written seller brokerage agreement (listing) that outlines the authority of the industry member to advertise the owner's property and the services to be provided by the industry member.

The most common method of obtaining consent to market a property is to enter into an exclusive or a non-exclusive seller brokerage agreement with the owner. The latter does not prevent the owner from utilizing the services of other industry members or seeking a buyer on their own.

If the owner is not prepared to enter into any type of seller brokerage agreement, the industry member should proceed cautiously as the terms of the service agreement will not be documented. At a minimum, the industry member must obtain written consent before proceeding with any marketing or advertising activity related to the owner's property, together with an agreement as to the remuneration to be paid in the event the industry member secures a buyer for the property.

The consent to market a property for sale must be given by all owners on title. Therefore, it is the responsibility of the industry member to confirm the legal owners of the property and obtain the written consent of each owner. In some cases, the *Dower Act* will apply and, in these situations, even though a spouse may not appear on title, he or she will need to give their written consent before any marketing or advertising occurs. It is the responsibility of the industry member to obtain the necessary consent from all owners of the property in question.

Concealing Property or Mortgage Information

An industry member must not lie or be a party to any agreement or conspiracy to conceal any material latent defects or pertinent facts in relation to any property or mortgage.

A seller cannot conceal defects and cannot mislead buyers about the condition or other attributes of their properties; they must answer honestly any questions that are asked by potential buyers or third parties. In addition, sellers must disclose to buyers any "material latent defects" known to them that affect their properties.

Industry members have the same obligations of honesty and disclosure as their seller client. Industry members are obligated to disclose to the buyer or the buyer's industry member representative any material latent defects known to the brokerage respecting the seller's property. Industry members not participate in hiding or disguising known defects.

The formal definition of material latent defect found in the *Real Estate Act* Rules [s.1(1)(t)] will assist industry members in determining the type of issues that must be disclosed. Material latent defects may be more than a physical defect in the property,

such as a property that is unfit for the purpose for which the buyer is acquiring it, if the industry member has become or been made aware of this purpose.

From time to time, industry members may be concerned with whether something is a material latent defect in regard to a particular piece of property or a pertinent fact in regard to a mortgage or property. They may find it desirable to take up these issues with their broker or independent legal counsel. In all cases, industry members should discuss these issues with their client and communicate their obligation to disclose such defects and the industry member's obligation as their agent to do the same.

If an industry member is instructed by a client not to disclose such matters, he or she must indicate to the client they are duty bound to make such disclosure and refuse to provide further services to them unless such instructions are withdrawn [see *Real Estate Act* Rules, s.41(j)].

In a mortgage brokerage environment, a similar situation may arise when an industry member has information regarding the inability of a client to make mortgage payments, or has financial difficulties, and he or she is requested not to provide this information to a lender.

Examples

1. An industry member has been advised by the seller that every spring the basement will flood. The seller is aware that he may have difficulties selling because of this material latent defect, and therefore decides to try to sell in the winter. Additionally, he makes superficial repairs to the basement. The seller asks the industry member not to reveal this information to anyone. The industry member is prohibited from conspiring with the seller to conceal these facts. He must therefore advise the seller that he cannot act for him under these circumstances and should further consider advising the seller of the consequences of concealing the material latent defect.
2. A first-time buyer seeking financing from a mortgage broker tells the mortgage broker that he has \$20,000 in student loans and a job with a small salary. The mortgage broker believes that without disclosing the student loans, the client might obtain the required financing. The mortgage broker decides not to disclose the student loan on financial information submitted to lending institutions. This conduct is a misrepresentation and prohibited.
3. A misrepresentation may result from deliberately withholding information that is known to be relevant to the transaction, i.e. an industry member has knowledge of a material latent defect in a property and chooses not to disclose this information to a potential buyer.
4. A real estate broker rents a residential premises located in an adult-only condominium to a family with small children.

False or Misleading Contracts, Documents & Communications

An industry member must not participate in the creation of any contract, document or form of communication that the member knows or ought to know is false or misleading.

Industry members must not be party to any discussions or agreements intended to mislead other parties or to circumvent any law. This includes, but is not limited to, the falsification of documents, inflating the purchase price of properties with a kickback to

the buyer to allow for easier financing, using multiple or interim contracts for a deceitful purpose, or conspiring with an appraiser to increase the appraised value of the property. It also includes false "gift" letters, where a document is created with a buyer indicating that money is a gift with no repayment, and then another document is generated stating the terms of the repayment of the money. Similarly, an industry member must never create two purchase contracts, one showing a higher price for the property than what it actually sold for to gain a higher appraisal value for the lender. These situations would be evidence of fraud. Mortgage brokers must not knowingly negotiate mortgage transactions where the mortgage funds were obtained through unlawful purposes.

Examples

1. A mortgage broker makes two mortgage applications for two different properties for the same borrower where the mortgages applied for are high-ratio mortgages.
2. A real estate brokerage conducting property management provides a termination notice to a tenant alleging that the landlord or a relative of the landlord intends to occupy the residential premises of the tenant when the landlord does not have such an intention.
3. A mortgage broker makes underwriting representations to a lender client obtained from the borrower without disclosing that mortgage broker has not verified or conducted the underwriting process.
4. A real estate appraiser represents to a lender client the existence of recent sales without any explanation or qualification, and uses the sales as comparables when the sales are conditional, do not appear in a public forum such as MLS and were provided to the appraiser by one of the parties to the transaction.
5. A real estate appraiser represents that there are no recent sales in a complex when there are recent historical sales.

Misrepresenting Market Value, Revenue Potential or Mortgage Benefits

An industry member must not knowingly or recklessly misrepresent the potential market value, the revenue potential of properties or mortgage benefits.

This section once again addresses intentional or reckless conduct. However, when industry members work toward the provision of clear and accurate information to the public, the industry member will minimize difficulties.

It is a breach of the *Real Estate Act* Rules s.42(a) to knowingly or without due caution provide the public with unsubstantiated and unverified information upon which the public may rely. Therefore, industry members must research and substantiate revenue-generating figures and conduct reliable market valuations. In the same way, mortgage brokers must be careful to advise clients of investment returns and must ensure that risks are fully explained. As well, industry members must have sufficient knowledge of the industry sector in which they work to enable them to provide accurate information and advice.

Certainly, situations have occurred where, in an effort to sell a property, actual property market values and actual revenue potential have been knowingly inflated or benefits knowingly overstated. The consequence is twofold. A member of the public who dealt with and trusted an industry member is misled and suffers a financial loss. Also, as a direct result of these types of experiences by the public, a negative image of the industry as a whole is created.

Care must also be taken when discussing future growth potential of either property or mortgages. If there is discussion over subdivision possibilities upon which a buyer relies, and if the information is subsequently proven to be inaccurate, a breach of this section may have occurred.