



## CONFLICT OF INTEREST – REPRESENTING COMPETING BUYERS

**Summary: Industry members must disclose to their clients, at the earliest practical opportunity, any conflict of interest they may have in the course of providing services to, or in their dealings with a client. It is a conflict of interest when a real estate brokerage acts as a buyer's agent for different buyers when those buyers become interested in buying the same property. The disclosure must be a full disclosure i.e. all of the details known to the brokerage must be given to the client. The client should be given the opportunity to receive independent advice and it is the client's decision as to how to proceed in the face of the conflict. If both buyers allow the brokerage to represent them, the consent of both buyers and the agreement outlining the nature of the relationship and how services will be provided to both clients, must be made in writing. [Real Estate Act Rules, s.1(1)(f), s.41(d)(f), s.43(1)]**

**It is the duty of all industry members to protect and keep confidential their client's information. [Real Estate Act Rules, s.1(1)(g.1), s.44, s.57(e), s.58(e)]**

*Note: For the purposes of this Information Bulletin, and where the context permits, "real estate broker" or "real estate brokers" refers to all three categories of estate licenses that may be held by an individual, i.e. broker, associate broker and associate.*

An agreement to become an agent for another person carries with it significant duties and obligations. A real estate broker acting in an agency capacity is responsible for carrying out the duties delineated in the agency agreement, as well as fulfilling fiduciary and regulatory obligations to the client.

The duties and obligations of a real estate broker engaged by a client (seller or buyer) in a sole agency relationship are contained within the *Real Estate Act Rules* s.57 and s.58. These include, but are not limited to, the duty and obligation to:

- perform the mandate
- exercise reasonable care and skill
- obey all lawful instructions of the client
- confidentiality
- fulfill all fiduciary duties owed to the client
  - undivided loyalty
  - avoid conflicts of interest
  - disclose conflicts of interest
  - not misuse confidential information
  - not make a secret profit
- assist in negotiating favourable terms and conditions for the client
- disclose all relevant facts affecting the transaction to the client

In a sole agency relationship (i.e. a seller or buyer brokerage relationship) a real estate broker must act in the best interests of their client at all times. This requires the brokerage and its real estate brokers to take reasonable steps to avoid any conflict of interest. However, when in the course of providing services to a client a conflict of

interest arises, the real estate broker must disclose the existence and nature of the conflict of interest to his or her client at the earliest practical opportunity. This is both a common law (fiduciary) and regulatory obligation all real estate brokers must fulfill [*Real Estate Act* Rules, s.41(f), s.57(e), s.58(e)].

It is important to remember in a common law brokerage, when a real estate broker enters into a seller brokerage agreement (listing) they do so as a representative of the brokerage. The brokerage, therefore, is appointed as the agent of the seller, and all the real estate brokers associated with the brokerage also become agents of the seller. Similarly, if a real estate broker enters into a buyer brokerage agreement and acts as a buyer's agent, all the real estate brokers associated with the brokerage also become agents of the buyer.

However, in designated agency, there is only a conflict of interest if both buyers are being represented by the same designated agent. If there are two designated agents within the brokerage, with each designated agent representing a different competing buyer, there is no conflict of interest.

One of the common types of conflict of interest occurs when a brokerage, through its real estate brokers, is acting as agent for two clients whose interests are in conflict.

Again, bearing in mind the brokerage and all of its real estate brokers are agents for the same clients, there is a conflict when real estate brokers employed by the same brokerage act as buyer's agents for different buyers when those buyers become interested in buying the same property. This conflict is essentially the same whether it is one real estate broker trying to represent two competing buyers, or two real estate brokers employed by the same brokerage trying to represent two competing buyers.

All real estate brokers who establish a client relationship should enter into a written service agreement with that client, unless declined by the client [*Real Estate Act* Rules, s.43(1)]. This rule applies to buyer brokerage (agency) agreements. An exclusive buyer brokerage between a real estate broker and a client must be set out in writing [*Real Estate Act* Rules, s.43(1)]. In residential real estate, the mandated wording of the exclusive buyer brokerage agreement [*Real Estate Act* Rules, Schedule 1, Form 3, clause 9.1] states "the Brokerage may represent sellers and other buyers." However, it is important to recognize that by virtue of this clause, the buyer does not give consent to any conflicts of interest that might arise as a result of the brokerage representing another buyer interested in buying the same property.

How can the brokerage, being the agent, act in the best interests of both buyers at the same time?

Whether or not a buyer has entered into a written buyer brokerage agreement, the conflict of interest in this situation must be disclosed to both buyers represented by the brokerage at the earliest opportunity.

The buyers must be given an opportunity to obtain independent legal advice and written consent to proceed must be obtained. Real estate brokers must remember it is the buyer's right to decide whether they are prepared to continue to allow the brokerage or any of its registered real estate brokers to represent them in this situation.

If both buyers are prepared to allow the brokerage to represent them in their respective negotiations, the brokerage and each buyer client should agree in writing how the duties and obligations outlined in the *Real Estate Act* Rules s.57 and s.58 are to be changed, limited or not applied.

For example, consideration should be given to how the brokerage may, if at all, use the confidential information of the competing buyer clients? Are mechanisms in place to disclose one buyer's confidential information to the other? How will the brokerage manage the information or facts it has gathered with respect to the property and its market value? Will that information be shared with both buyers? How will the brokerage address its obligation to assist both buyers in negotiating terms and conditions that are favourable to each buyer? These questions illustrate the nature of the conflict that exists in representing two buyers who are interested in buying the same property.

In residential real estate, the mandated wording of the exclusive buyer brokerage agreement [*Real Estate Act* Rules, Schedule 1, Form 3, clause 9.1] addresses the issue of client confidentiality. It states "the Brokerage cannot disclose to the Buyer confidential information obtained through any other agency relationships to which the Brokerage is or has been a party."

Therefore, in a situation where a brokerage has entered into an exclusive buyer brokerage agreement with two buyers who are interested in buying the same property, the client information obtained from each buyer must be kept confidential. Likewise, in the absence of a written buyer agency agreement with each buyer, presumably, neither buyer would want the brokerage to disclose their confidential information to the other buyer or disclose the terms of their offer to the other. Such confidential information must not be disclosed without the buyer's consent.

When representing two competing buyers, the brokerage is unable to exercise its fiduciary duty of undivided loyalty to each buyer client. There would need to be a change to reflect the impartial role of the brokerage in the negotiation process. Neither buyer would want the brokerage to act as an advocate for one buyer to the detriment of the other buyer.

While there is no "standard" agreement within the industry that details the limitations of duties when a brokerage is acting for two buyers, the need to document how the relationship will work is just as important in this situation as it is when a brokerage is acting for a seller and a buyer in the same trade.

### **Practice Tip**

Brokerages should obtain independent legal advice to assist in preparing an appropriate agreement respecting limitation of the brokerage's duties for use when the real estate brokers it employs are working with competing buyers.

To assist real estate brokers, the Real Estate Council of Alberta has published other Information Bulletins on the topics of conflict of interest and protection of client information. See RECA Information Bulletins: *Disclose Conflicts of Interest, Conflict of Interest – Representing a Seller and Buyer, Conflict of Interest – Buying a Client's Property and Protection of Client Information.*

A prudent real estate broker will take time to review the Real Estate Council of Alberta Information Bulletins mentioned above and will be aware of the nature of conflicts of interest and what to do when a conflict arises. Any uncertainty about a potential conflict should be discussed immediately with the broker, in the case of a real estate broker or mortgage broker. The advice of trusted colleagues should also be considered; however, ultimately the responsibility remains with the individual real estate broker. If necessary, real estate brokers are encouraged to obtain independent legal advice to guide them in their conduct in these situations.

If a brokerage has not entered into a written agreement with respect to these limitations of duties they would otherwise have, the safest approach may be for the brokerage to only act for one of the competing buyers, perhaps the one to whom it first showed the subject property and suggest the second buyer seek representation from another brokerage. The brokerage still requires the agreement of the buyer it will be representing that the brokerage is not required to disclose any confidential information it may have acquired as a result of acting for the competing buyer. This would allow the brokerage to continue to act in the best interest of the first buyer and allow the second buyer to obtain independent representation.