



DESIGNATED AGENCY
PRACTICE GUIDE FOR INDUSTRY MEMBERS



**REAL ESTATE
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Designated Agency – Frequently Asked Questions

What is designated agency?

Designated agency is an alternative way of providing representation services to consumers. In a designated agency relationship, the agreement to provide brokerage services is still between the brokerage and the consumer but the agency relationship is between the consumer and the individual industry member(s) designated as their sole agent(s).

Why are written service agreements necessary to practice designated agency?

All service agreements between consumers and industry members should be in writing. However, industry members in traditional (common law) brokerages have been able to rely on the common law to apply agency principles when they represent consumers, particularly buyers, even when they do not document their relationship with a written service agreement.

Designated agency relationships represent a fundamental change from the common law where the agency and fiduciary relationship is between the brokerage (company) and the consumer. In designated agency, although the service agreement is with the brokerage, the agency and fiduciary relationship is between the individual industry member (not the brokerage) and the consumer. Another significant change is the designated agent's knowledge is not attributed to the brokerage or to its designated agents representing other buyers or sellers. Such fundamental changes in the common law can only be successfully implemented if they are clearly documented and agreed to in writing by the consumer, brokerage and designated agent.

What are the benefits of designated agency?

Designated agency is consistent with consumer expectations and consistent with existing practices within many brokerages. Designated agency also eliminates the conflicts of interest that commonly arise for a brokerage when two industry members from the same brokerage represent the buyer and seller in the same transaction (in-house transaction). Although the industry members may act as if they only represent their respective clients, the reality is they and their brokerage are in a conflict of interest as a result of concurrent representation of competing parties. An industry member working under designated agency remains a sole agent for all of their clients, unless a buyer represented by the industry member becomes interested in a property owned by a seller who is represented by the same industry member.

As a result of implementing designated agency, the frequency of conflicts of interest arising from concurrent representation and the practice of transaction brokerage are reduced significantly within the brokerage. Because designated

agency requires written service agreements, another benefit is the services to be provided and responsibilities of the brokerage, designated agent and consumer are clearly documented for all parties.

Who decides if the brokerage will operate under designated agency?

The owner and broker will decide if the brokerage will operate as a traditional brokerage (common law agency) or elect to operate as a designated agency brokerage.

I'm an associate, how do I know what agency my brokerage offers?

Currently, most real estate brokerages in Alberta are common law brokerages. The agency relationship in these brokerages is between the consumer and the brokerage (company). If the owner and broker decide to operate as a designated agency brokerage, the broker must advise all the industry members registered with the brokerage and employees and notify RECA of the change. The broker will need to ensure the brokerage has taken all of the steps necessary to implement designated agency.

How will designated agency affect my brokerage's real estate practice?

- the brokerage must enter into written service agreements with all clients, that is, both sellers and buyers;
- industry members who practice in a designated agency brokerage and trade in a residential real estate property, must use the forms specifically designed for designated agency in Schedule 1 of the *Real Estate Act* Rules (when they wish to enter into an exclusive relationship);
- agency relationships will be between individual industry member(s) registered with the brokerage and their clients;
- one industry member registered with a brokerage can represent a seller and another industry member registered with the same brokerage can represent a buyer without creating a conflict of interest;
- industry members must keep their clients' information confidential at all times, unless they are required to release the information by law or are authorized to do so by their client; and,
- information barriers must be implemented by the brokerage to ensure confidentiality of client information between industry members within the same brokerage and between brokerages.

Does a brokerage have to advise consumers it operates as a designated agency brokerage?

Yes. Industry members must explain to their clients how their brokerage operates. It is important for consumers to understand the basic differences between a traditional (common law) brokerage and a designated agency brokerage. Consumers would also be interested in knowing the benefits of this type of relationship.

What forms do I have to use?

A client (seller or buyer) must provide their informed and written consent to designated agency. This is achieved by having the client sign a designated brokerage agreement as a seller (listing contract) or as a buyer, as the case may be. If the service agreement involves a trade in residential real estate and an exclusive right to represent (either a seller or buyer), the agreement must also comply with the mandated wording as set out in the *Real Estate Act* Rules, section 60.1. The forms are contained in Schedule 1 of the Rules.

If the service agreement does not relate to a trade in residential real estate (e.g. commercial, industrial, investment, farm, ranch, etc.), or does not involve an exclusive right to represent the client, you are not required to use the same wording as provided in the mandated form; however, you must still use a written designated agency brokerage agreement and it must comply with sections 43 and 58.1(3) of the *Real Estate Act* Rules.

Unless a brokerage has developed its own designated brokerage agreement for either non-exclusive or non-residential transactions, RECA recommends the brokerage and its industry members refer to the forms posted on RECA's website at www.reca.ca as these forms meet the requirements of the *Real Estate Act* Rules.

If I practice designated agency and will be representing a buyer, do I have to use a written buyer brokerage agreement? Yes. Designated agency is an abrogation of the common law and can only be established by entering into a written service agreement with a client.

If I practice designated agency and will be representing a buyer, does it have to be an exclusive right to represent?

No, it does not have to be an exclusive right to represent. You can enter into a designated brokerage agreement (for buyers) that is non-exclusive. A recommended non-exclusive designated brokerage agreement for buyers is posted on RECA's website at www.reca.ca.

How are privacy and confidentiality different under designated agency?

In a traditional (common law) brokerage, the service agreement and agency relationship is between the brokerage and the client. Even though the client may only deal with one particular industry member, the client's file is available to all industry members registered with that brokerage and its employees, subject to any internal policies of the brokerage regarding access to client files. Further, the knowledge of that particular industry member is attributed by law to all of the other industry members registered with that brokerage and its employees. The obligation of confidentiality of the client's information, whether it is personal information, information relating to their service agreement or relating to a specific transaction, is at the level of the brokerage. Alberta privacy legislation (*Personal Information Protection Act*) and federal privacy legislation (*Personal*

Information Protection and Electronic Documents Act) also apply to the brokerage, registered industry members and employees in their dealings with third parties.

In a brokerage that practices designated agency, the brokerage is still responsible for keeping client information confidential with respect to its dealings with third parties. However, the brokerage must ensure each designated agent within the brokerage keeps their clients' information confidential from other industry members registered with the brokerage. The brokerage and the designated agent undertake they will not disclose any confidential information concerning the client to any other member of the brokerage or other person unless authorized by the client or required by law.

Does the broker or supervising manager have access to the client's information?

The broker has access to the client's information as it relates to the creation and administration of the service agreement between the brokerage and the client. As a general rule, the broker would not have access to the client's confidential information except in the following circumstances:

- where it was required for the broker, or supervising manager, to ensure industry members were in compliance with the brokerage's policies and procedures governing designated agents;
- to ensure industry members were providing services competently and performing their due diligence; or
- to ensure the brokerage was treating the interests of both a seller and potential buyer in an even-handed, objective and impartial manner.

I'm an associate, what happens to my listing if I change brokerages?

The designated seller brokerage agreement (listing contract) is a service agreement between the seller and the brokerage (company). The agreement will include a clause that states if, for any reason, a designated agent ceases to be licensed with the brokerage, the brokerage will designate another member of the brokerage to serve as sole agent for the seller or the buyer, as the case may be. Notwithstanding this clause, each brokerage will have a policy for such circumstances. You should discuss this question with your broker.

Who can take care of my listings if I am sick or away on holidays?

The brokerage, in consultation with the seller, would designate another industry member within the brokerage to act on the seller's behalf for the period of time you are away or otherwise unavailable. This can be accomplished through an amendment to the original seller brokerage agreement (listing contract). Alternatively, an additional industry member(s) may also be designated as an agent in the seller brokerage agreement at the time of listing the property.

What is my requirement if we have two competing buyers represented by the same brokerage, but different industry members?

Each buyer would have a separate designated agency agreement with their respective buyer's agent. Each designated agent would maintain the confidentiality of their client's information, act solely in their clients best interests and provide full agency representation. This illustrates another benefit of designated agency. In designated agency brokerages, this is not a conflict of interest and should not be a concern for either the clients or the industry members representing them.

I'm a broker, if my brokerage becomes a designated agency brokerage, can it return to a common law brokerage later?

Yes. The business model is something you choose and it can change from time to time. In order to revert to a traditional (common law) brokerage, the brokerage would have to cancel its designated agency agreements and re-sign clients to common law agency agreements.

Do I need to have an audit from RECA prior to implementing designated agency?

No. Brokers, at their option, can request a courtesy audit from RECA. RECA will provide whatever information or assistance it can to brokers who wish to implement designated agency in their brokerage but a formal audit is not a requirement.

I'm a broker, what do I have to do to implement designated agency within my brokerage?

To comply with designated agency requirements, as a broker, you must:

- notify RECA that you intend to operate as a designated agency brokerage;
- establish written policies and procedures for information barriers and designated agency; and,
- replace existing brokerage agreements by entering into new written designated brokerage agreements with sellers and buyers.

What is the role of a broker, or a delegate, in a designated agency brokerage?

A broker in a designated agency brokerage has the same responsibilities that brokers have in a traditional (common law) brokerage. For example, the broker needs to ensure the business of the brokerage is carried out competently and in accordance with the *Real Estate Act*, Regulations and Rules.

In addition to carrying out responsibilities common to all brokers, the broker of a designated agency brokerage must:

- establish the information barriers that are necessary for designated agency to be implemented

- ensure compliance by the designated agents with the brokerage's policies and procedures governing designated agents;
- supervise, or provide supervision through its managers, of the activities of designated agents and support staff to ensure the designated agents fulfill their mandates as provided in the designated brokerage agreements entered into with sellers and buyers; and,
- ensure the brokerage treats the interests of both the buyers and sellers represented by the brokerage in an even-handed, objective and impartial manner.

When a designated agent represents a seller, and another designated agent within the same brokerage represents a buyer (an "in-house" transaction), it is the responsibility of the broker to ensure the brokerage remains neutral throughout the process. This requires the broker to provide even-handed supervision. In this sense, the role of the broker is similar to that of a transaction facilitator; however, the broker does not have direct dealings with the clients. Instead, the broker is available to provide information and general advice to the designated agents and to ensure each designated agent provides competent service and performs their due diligence in the course of representing their respective client(s).

I'm a broker in a designated agency brokerage. One of our associates (designated agent) asks me for assistance on a specific purchase contract where they represent a buyer. Another associate in our brokerage represents the seller. What can I do to assist this individual?

If an associate asks the broker for assistance, it would be advisable for the broker, or a supervising manager, 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 addressed all the issues that need to be addressed. In addition, the broker may refer the associate(s) to prior information, such as the brokerage policy or procedures, or brokerage checklists for writing offers or counter offers.

The broker may also provide information or advice on issues of mutual interest to both clients. For example, upon reviewing the purchase contract, the broker may notice it does not address the issue of financing when it is clear the buyer will need to obtain a mortgage to complete the transaction. The broker can draw this deficiency to the attention of the designated agent representing the buyer and provide advice that a condition related to financing be included in the purchase contract. The broker must disclose the fact such advice was provided to the designated agent representing the seller. The broker must not provide confidential advice to either designated agent.

Without giving advice to either designated agent, the broker can also give general information and provide alternatives to address issues that have been brought to their attention. For example, the broker can explain to a designated agent the difference between a term and condition in the purchase contract. A broker may be given a set of facts related to a specific transaction and be asked whether a particular clause drafted by the designated agent properly addresses the issue they are trying to address in the purchase contract. Again, the broker or supervising manager can assist with the drafting of a clause in the purchase contract to achieve the desired intent but they cannot advocate on behalf of either party. Ultimately, the designated agents must represent their respective clients, advocate on their behalf, and assist the clients in resolving any issues that arise during the negotiating process.

I'm a broker, who actively trades in real estate. What do I do if I am the designated agent for one of the parties to the transaction and another associate in our brokerage represents the other party to the transaction?

If a broker represents one of the parties in an in-house transaction, he or she will not be able to fulfill their role as broker for that transaction or carry out their supervisory role for the associate who is the designated agent for the other party. In this case, another member of the brokerage would have to assume the broker's supervisory responsibilities in order to ensure the brokerage fulfills its responsibilities and ensure the broker and other designated agent involved in the transaction fulfill their responsibilities as designated agents for their respective clients. The most likely candidate for this temporary delegation of broker responsibilities would be a supervising manager, an associate broker, or experienced associate.