

## ADVERTISING – FALSE OR MISLEADING

**Summary: Industry members must avoid misrepresentations or conduct that is reckless or intentional and that misleads or deceives any person. [See *Real Estate Act Rules*, s.42(a)]**

Any advertisement undertaken or authorized by an industry member must not be false, inaccurate, capable of misleading the recipient or intended recipient, in bad taste or offensive, harmful to the best interests of the public or industry or prohibited by law. Advertising includes any activity, public notice or representation authorized, made by or on behalf of an industry member that promotes an industry member or the business, services, real estate trades or mortgage deals of industry members in any medium including print, radio, television or publication on the Internet. Advertising includes all promotional events, printed material, circulars, pamphlets, bill boards, signs, business cards, letterheads, bench signs, fax cover sheets and other similar materials. The line between “innovative” and “misleading” advertising may be thin and care must be taken.

The Real Estate Council of Alberta considers both the literal meaning of the advertisement and the general impression it creates in order to determine if it is misleading.

- An advertisement is considered misleading when it makes a representation or claim that is false or misleading *in a material respect*.
- An advertisement may be considered misleading even if it is not demonstrated that a consumer was actually misled. It is only necessary to show that the advertisement is *capable of misleading a reasonable consumer*.

Misleading advertising can be the result of inadvertence, negligence, incompetence, recklessness or an intentional misrepresentation (an intentional untrue statement).

Industry members making performance representations or claims have a duty to demonstrate that the representations are based on adequate and proper tests.

Brokers are responsible for all advertisements taken or made by associates and associate brokers on behalf of the brokerage. To ensure the brokerages advertisements are not misleading, brokers should have policies and procedures for the submission and review of advertisements. Brokers should also be aware of and review all associate-administered brokerage websites. The advertisements should not only be reviewed from a misleading advertisement perspective but also whether any claims or offers made by the associate constitute an incentive that is not a brokerage incentive. For more information on incentives, see RECA's *Information Bulletin: Incentives*.

There are some factors industry members need to consider when preparing advertisements that may affect whether the advertisement could be misleading.

### Permanence

Advertisements in circulation for long periods of time (billboards, yellow pages and flyers) present special problems for industry members as the factors upon which the

advertising claims are based may change while the original advertisement is still in the public domain. To prevent this, industry members need to consider whether the claims being proposed are likely to change. If the claims are likely to change the claims should be qualified or considered for less permanent forms of advertising. Should the factors upon which the advertising claims are based change, steps must be made to make corrections or deletions as soon as possible.

## **Implied Endorsements**

Care should be taken to avoid giving the impression of advertising endorsement unless written confirmation of the endorsement has been provided. The use of an implied endorsement, that is, the use of information that implies without actually stating that a certain individual or organization endorses the advertisement, could also result in a misrepresentation unless written confirmation of the endorsement has been provided. As well, occasionally industry members attach the logo of the Real Estate Council of Alberta to their advertising. This is prohibited. The use of a logo other than one's own is an example of an improperly implied endorsement, in addition to potential copyright or trademark interference.

## **“Restrictions or Conditions Apply” References**

When space or time is limited, it is difficult to decide how much information to include in an advertisement. Sometimes, a simple reference to “terms and conditions apply” eliminates the need for a long description. The statement “terms and conditions apply” should only be used when the conditions do not substantially alter the offer being advertised. If the terms and conditions substantially alter the advertisement, the terms and conditions must be disclosed in a clear and conspicuous manner within the advertisement.

## **Use of industry terms not readily understood by the public**

What is clear to industry members may be confusing to the general public. For example, claims regarding the listing commission or selling commission may unintentionally mislead the public. The public often does not realize that each of these terms refers only to a portion of the total commission payable. When using industry-specific terms in advertising, industry members must present the information in such a way that the general public will have a clear understanding of what the advertising means.

## **Comparisons to other Industry Members**

Comparative advertisements can be very beneficial to the market place as they enable industry members to communicate their comparative advantage and assist the public in making more intelligent decisions. Industry members considering comparative advertising must ensure that:

- The facts and figures are presented in a clear, straightforward way;
- The facts and figures are qualified and are not taken out of context; and,
- The industry members have reliable facts and the conclusions based on those facts are based on adequate and proper tests.

## Use of Terms Implying Special Qualifications or Expertise

Industry members often advertise that they may have special qualifications or expertise in either specific industry sectors or in geographical areas. Consumers often rely very heavily on these advertisements. When using these terms, industry members must ensure they are in a position to demonstrate the qualification or expertise claimed.

### “Bait and Switch” Tactics

There are many marketing seminars offered to industry members to enhance their marketing effectiveness. RECA has found that some marketing schemes proposed at these seminars work on the concept of communicating a misleading offer to get a foot in the door with a client, but the offer is then substantially qualified during the meeting with the prospective client. This is a form of misleading advertising called “bait and switch” and it is illegal in Alberta and most jurisdictions across Canada. The marketing seminars also entice industry members to offer incentives that are not brokerage-based (RECA’s *Information Bulletin: Incentives*). The Real Estate Council of Alberta cautions all industry members to carefully consider whether the marketing programs promoted at these seminars are misleading.

### Internet Advertising

Industry members must also take care with their Internet advertising. The primary issues with online listing and other information relate to “currency” of online information (i.e. keeping all online sources of the same listing information current and consistent), and advertising of another licensed entity’s listing information.

The public is entitled to assume that the information provided in the online listing is current and accurate. This principle applies to all forms of advertising and marketing media. For example, online listing information should be consistent with the property description and actual status of the listing. Material changes to the listing status or property description should be updated in a timely manner. For more information on the topic of Internet advertising, see RECA’s *Information Bulletin: Advertising – Internet Guidelines*.

### Examples applicable to all industry sectors

1. Business cards or advertisements are misleading if an industry member is holding himself out to be a specialist in a given area when he does not have the necessary education and experience to advertise such a specialty.
2. A misrepresentation may be deliberately made with the intention of enticing a party to act, i.e. an industry member justifies a commission rate by stating that commissions are fixed by industry associations or another party to the transaction.
3. Identifying an authorized industry member along with an unauthorized assistant without qualifying that the assistant is unauthorized is misleading advertising.

### Examples applicable to real estate broker industry members

4. A misrepresentation may result from advertising a property for sale without a brokerage agreement and without the owner’s consent.

5. Advertising may be misleading by the use of language (i.e. “built to exacting standards”) leading the reader to believe that the building construction is of a superior quality.
6. An advertisement that leads the public to believe that they may buy real estate with no money down may be misleading advertising. Caution should be exercised and explanations provided as to how the down payment (no money down) may be raised without recourse to personal funds; e.g. rebate opportunities, gifting or other innovations.
7. A brokerage incentive that states “Our brokerage promises to pay you \$1,000 if your property does not sell within 90 days. Terms and conditions apply” when in order to qualify, the property must still be sold by the brokerage to qualify and the \$1,000 is really a reduction in commissions.
8. Statements such a “why pay for a single associate when you can get a whole team working for you” might be misleading because the client contracts with the entire brokerage.
9. Statements such as “sell your home faster and for more money” are misleading unless the industry member has reliable facts and the conclusions based on those facts are based on adequate and proper tests.
10. A real estate brokerage wishes to advertise a commission rate of 3%, even though it sometimes uses higher commission rates. The lower rate is only offered with a reduced level of services. If the real estate brokerage runs an ad in the newspaper promoting its brokerage commission rates at 3%, this leaves the impression that all commission rates offered by the brokerage are 3%. Because there was no indication in the ad of the reduced level of services, the ad would be construed as misleading. To prevent this misrepresentation, using language such as “Rates Starting From 3%” or something similar could avoid the misunderstanding.
11. In a situation where a mortgage may be assumed, care must be taken by brokerages not to misrepresent the purchase potential of a property. If the buyer must qualify to assume the mortgage, this must be stated in any ad. It is not enough to advertise that the property may be purchased with a low down payment without providing full details.

### **Examples applicable to real estate broker industry members practising property management**

12. A real estate broker states that the landlord will perform certain repairs when the landlord has not made any such commitment.

### **Examples applicable to mortgage broker industry members**

13. Phrases in mortgage industry member advertisements such as “we provide professional advice so you can make the best choice,” “we will ensure the mortgage you get will be the best possible mortgage for you,” or “we’ll get the best rate for you” imply the brokerage will act as an agent for, or represent, borrowers to assist them in negotiating the best mortgage terms possible. However, if the mortgage brokerage only intends to act as an intermediary or facilitator of mortgage business between borrowers and lenders, the brokerage is really acting as a transaction broker (and not on behalf of the borrower), in which case the use of such phrases is false or misleading to consumers.

14. Mortgage brokers are prohibited from advertising interest rates that do not accurately reflect the actual mortgage interest rate charged in interest blending circumstances.
15. Care must also be taken by mortgage brokers when advertising “mortgage sales” with lower rates, when in fact upon closer review, this is not accurate.