

## MERE POSTINGS

**Summary: There are many variations and combinations of different services provided by real estate brokerages. Before entering into a service agreement for the provision of real estate services, consumers are encouraged to clearly understand the different business models available to them and in particular, the scope of services being provided by the real estate broker they have chosen to engage. Consumers must know what services will be provided and, perhaps of equal importance, what services will not be provided. Industry members must ensure the role of the industry member is clearly understood by their clients and third parties. [Real Estate Act Rules, Section 41(e)]**

How does Consent Order #CT-2010-02 (the Consent Order) between CREA and the Commissioner of Competition that addresses the issue of “Mere Postings” affect the practice of trading in real estate in Alberta?

### Background

There are many variations and combinations of services offered to consumers by real estate brokerages licensed in Alberta. Some examples of real estate services include providing a current market assessment (CMA) for a particular property, installing a “For Sale” sign on a particular property, showing properties to prospective buyers, posting information to a local real estate board MLS® system, providing agency representation services, etc.

The *Real Estate Act* Rules (the “*REA* Rules”) section 1(1)(g) defines a “client” as, “a person who has entered into a service agreement with an industry member in accordance with these rules, whether or not that service agreement is in writing.” Service agreements are created explicitly or implicitly, may be oral or written and may or may not include agency representation as one of the services to be provided. When an industry member provides service(s) to a consumer, that consumer is a client of the industry member. The obligations of the industry member to the consumer will depend on the relationship and the service(s) on which the consumer and industry member have agreed.

The *REA* Rules section 1(1)(i) defines a “customer” as, “a person who has contacted, but not engaged or employed, an industry member to provide services.” An unrepresented or self represented consumer should be treated as a customer of the industry member. For example, when an industry member representing a buyer approaches the seller of property who is not represented by another industry member (i.e. “for sale by owner”) on behalf of their client (a potential buyer), the seller is a “customer”. As another example, when an industry member representing a house builder (seller) is approached by a potential buyer, who is not represented by another industry member, the buyer is a “customer”.

There are administrative services that may be provided to customers, at the option of the industry member, without creating a client relationship. Typically, industry members will provide these services to a customer because doing so would be for the benefit of their client and the transaction. These are described in the *REA* Rules section 60(4) and 60(5). When dealing with a customer, an industry member must be honest and must exercise reasonable care and skill in relation to any activities outlined in the *REA* Rules section 60 pertaining to customer status.

With these definitions in mind, an industry member has three options when establishing a relationship with a member of the public.

- 1) A Customer relationship in which no service(s) will be provided to the consumer.
- 2) A Client relationship in which various service(s) will be provided to the consumer.
- 3) A Client relationship in which service(s) including agency representation service will be provided to the consumer.

The Consent Order was registered October 25, 2010. Part III, Clause 4 states, "Effective upon registration of this Agreement, CREA shall amend its Rules to remove the Agency Pillar, Rule 17.1.1.2, and replace it with the following: A listing REALTOR®/brokerage must act as agent for the seller to post, amend or remove a property listing in a Board's MLS® System. The nature of any additional services to be provided by the listing REALTOR®/brokerage to the seller is determined by agreement between the listing REALTOR®/brokerage and the seller."

The amended CREA rule allows for the "Mere Posting" of a listing to the MLS® System and removes the requirement for a continuous agency representation service relationship for the full duration of the listing. The Consent Order, in Part I, Clause 1(h) defines a "Mere Posting" as, "a listing on a Member Board's MLS® System in respect of which the Member has chosen or agreed not to provide services to the Seller other than submitting the listing for posting on a Member Board's MLS® System."

A REALTOR® who enters into an agreement with a seller of a property to facilitate a "Mere Posting" into the MLS® System database and displayed on [www.realtor.ca](http://www.realtor.ca) has entered into a "service agreement" as defined in the *REA* Rules. This relationship, therefore, constitutes a client relationship in which service(s) are provided to a consumer i.e. seller.

The Real Estate Council of Alberta (RECA) has undertaken a review of "Mere Posting" services and concluded a person involved in providing a "Mere Posting" service in Alberta for a seller is trading in real estate and requires an authorization pursuant to the *Real Estate Act*. Further, the obligations of a REALTOR® who provides a "Mere Posting" service, and the obligations of an industry member representing a buyer who is dealing with the seller directly in respect of a "Mere Posting" property, are clearly addressed in the current *REA* Rules. Accordingly, at this time, RECA anticipates no *REA* Rule changes because of the Consent Order.

Section 41(e) of the *REA* Rules states, "Industry members must ensure the role of the industry member is clearly understood by their clients and third parties." A clear understanding of the service(s) to be provided, and the implications of limiting service(s)

as is the case with “Mere Posting” service agreements, will help to establish realistic expectations for consumers and industry members. From a practical perspective, a clear understanding of the nature of the relationship and services to be provided is the best dispute prevention strategy for consumers and industry members.

As indicated, a self-represented (“Mere Posting”) seller is a customer to an industry member who is representing a Buyer. When industry members representing buyers deal with For Sale By Owner (FSBO) sellers, whether in the MLS® System or otherwise, they should not provide advice, or any service that requires the use of their judgment or discretion, or otherwise do anything that might create an implied agency representation relationship with the seller.

A seller is a client to an industry member who is providing “Mere Posting” service. Industry members must impart a clear understanding of their role and extent of services to be provided. RECA recommends industry members clearly articulate to a seller in these situations that the “Mere Posting” service agreement does not include agency representation service without prior written amendment to the service agreement. In these situations, a REALTOR® should not provide advice, or any service that requires the use of your judgment or discretion, or otherwise do anything that might create an implied agency representation relationship with the seller.

The industry member is responsible for ensuring the roles in any relationship with a consumer are clearly understood and properly documented. Important as well is ensuring the documentation precisely matches the relationship to which the parties have agreed. Of greatest importance, conduct must always reflect the nature of the relationship. The 4 D’s of representation relationships are **Decide**, **Disclose**, **Document** and **Do**.

## Frequently Asked Questions

**Question:** *How can I ensure my role is clearly understood with “Mere Posting” sellers?*  
When providing “Mere Posting” services, the service agreement should clearly identify the relationship and service(s) being provided. When representing buyers in a trade involving a “Mere Posting” seller, the industry member is advised to obtain a signed *Customer Status Acknowledgement for Sellers* or a *Customer Status Acknowledgement and Fee Agreement for Sellers*.

**Question:** *How will I know when a MLS® listing is a “Mere Posting” listing?*  
You may require further direction from your broker and / or real estate association to answer this question. In Part III, Clause 3(e)(i), the Consent Order indicates the sellers’ contact information, instructions for contacting the seller directly and instructions for offer presentation will be in the REALTOR®-only remarks section. If that information is incomplete, or in any way seems unclear, then the industry member is advised to contact the listing industry member for further clarification.

**Question:** *Do I have to advise buyer clients about “Mere Posting” listings?*  
Yes. If you are providing agency representation services for a buyer, the REA Rules section 58(h) states, “The basic obligations of an industry member who is in a sole agency relationship with a buyer include the obligation to “seek out and advise the buyer in a timely manner of available properties in the market area which may meet the buyer’s

requirements, including those listed with other brokerages and other available properties known to the industry member.” Details about the properties for which the industry member will search should be clearly identified in a written service agreement and may include mutual agreement between the buyer and the industry member to exclude certain types of properties or properties with specific characteristics.

**Question:** *As an industry member, do I have to offer “Mere Posting” listing service(s)? Can the brokerage create policies regarding “Mere Posting” listing service(s)?*

Whether this type of service will be provided by a brokerage is a business decision of the owners of the brokerage. Brokerages and, therefore, their registered associates, associate brokers and brokers are not obliged to offer “Mere Posting” listing service(s) as part of their service(s) offerings. YES, brokerages can create policies around whether or not the brokerage will offer “Mere Posting” listing service(s). These are business decisions and RECA does not regulate business models.

**Question:** *If I decide to offer “Mere Posting” listing service(s), what are my obligations regarding the accuracy of information posted to the MLS® system?*

You may require further direction from your broker and / or real estate association to answer this question as specific MLS® System obligations may apply. However, as a general obligation that applies to all industry members providing service(s) to either sellers or buyers, section 42 of the REA Rules states, “Industry members 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.” When providing “Mere Posting” listing service(s), reasonable care and skill must be exercised. Some examples of exercising reasonable care and skill are; conducting a review of title to ensure the parties have a legal right to sell the property; confirming property tax information being posted on the board’s MLS® System; taking current measurements in accordance with industry standards; confirming the timing and extent of recent improvements to the property; etc. This duty of care will be based on how competent and prudent members of the real estate industry would act under similar circumstances. If the intention is to have a buyer determine or obtain any information, this should be clearly indicated.

**Question:** *How do I offer additional services after the “Mere Posting” agreement is signed?*

A “Mere Posting” seller may request additional service(s) not contemplated in the original agreement. Alternatively, an industry member may choose to offer additional service(s) and the seller may agree to the provision of additional service(s). Before providing the additional service(s), a written amendment to the original agreement must be executed by all parties.

**Question:** *Is it true the more services I provide, the more likely the relationship will be construed as an agency representation relationship?*

The likelihood of an implied agency representation service relationship being created may increase when providing more service(s); however, an agency representation relationship is created by the nature of services and conduct of the parties, not the quantity of services. When the services include the exchange of confidential information, providing confidential advice or providing services that require the use of your judgment or discretion on which a consumer will rely, or when the consumer is led to believe you are communicating with third parties or negotiating on their behalf, then an industry member risks an implied agency representation relationship.

**Question:** *Can I advertise I will provide “Mere Posting” listing service(s)?*

All industry member advertising is done on behalf of the brokerage with which the industry member is registered. Prudent brokerages have policies and procedures with respect to industry member advertising. As brokers take responsibility for industry members registered with the brokerage, it is entirely appropriate and advisable that a broker review all industry member advertisements before they are placed. Additionally, if a broker identifies an issue of concern with an industry member advertisement, the broker should have the ability to change the advertisement – either directly or indirectly.

**Question:** *How will I ensure payment of remuneration when providing “Mere Posting service(s) to a seller?*

When providing “Mere Posting” listing services, section 43(2) of the REA Rules states, “Every written service agreement shall clearly show all terms and conditions of the agreement” and “shall include the amount or method of calculating the remuneration or alternate compensation to be paid and the circumstances on which it will be payable.” In complying with this REA Rule and this section of the Rule in particular, you create an obligation for the seller to pay remuneration as a specific term in the agreement.

**Question:** *How will I ensure prompt payment of remuneration when representing a buyer in a trade involving a “Mere Posting” seller?*

When representing buyers in a trade with a “Mere Posting” seller, the remuneration will be paid by either the buyer or the seller. In the event the buyer will pay the remuneration, ensure there is a written service agreement in place with the buyer that includes a remuneration provision as stated above. In the event the intent is to have the seller pay the remuneration to the buyer’s brokerage, ensure you have a service agreement with your buyer and ensure the seller executes a Customer Status Acknowledgment and Fee Agreement for Seller(s). Once again, clearly articulate the amount or method of calculating the remuneration in Clause 6 of the standard RECA form.

**Question:** *Who will hold the trust deposit(s)?*

Holding the trust deposit(s) is a matter of negotiation and agreement between the buyer and the seller and is contemplated as a term of the Purchase Contract. Industry members do not have authority to impose trust conditions, however, when representing a buyer in a trade with a “Mere Posting” seller, the industry member may provide advice to the buyer, different options for the holding of trust deposits and the implications of the choices the parties might make. As an example, recommending the deposit be held in the buyer’s brokerage trust account will ensure Real Estate Assurance Fund coverage if required. In the end, the decision must be made by mutual agreement between the buyer and seller. Industry members are cautioned to not provide advice for the seller.

**Question:** *Who will undertake conveyance?*

Conveyance is a service that has traditionally been provided by the listing brokerage. In the case of a “Mere Posting” seller, this may be a service that has not been requested by the seller or agreed to by the brokerage that facilitated the “Mere Posting”. The issue of conveyance, therefore, will also be a matter of negotiation between the buyer and the seller. If the seller is unrepresented, they may wish to convey documents or this may be a service provided by the listing brokerage or another service provider. When representing buyers in a trade with a “Mere Posting” seller, industry members must ensure they understand how conveyance will be done and follow the buyers’ lawful instructions.

**Question:** *Who is responsible for FINTRAC identification for “Mere Posting” sellers?*  
FINTRAC record keeping falls outside of RECA’s jurisdiction. You will require further direction from your broker, FINTRAC and / or your real estate association.

**Question:** *How will “Mere Posting” sellers handle multiple offer situations?*  
Self-represented sellers do not fall under RECA’s jurisdiction as they are exempt from authorization requirements under the *Real Estate Act* section 2(1)(c)(ii). Industry members, however, should proceed based on the service(s) they have agreed to provide. If an industry member accepts a “Mere Posting” listing service agreement that does not include consultation service in the event of multiple offers, then the industry member should decline to provide consultation service until and unless there is a written amendment to the service agreement.

**Question:** *How will I handle multiple offer situations when representing buyers in a negotiation with a “Mere Posting” seller?*  
When representing buyers in a trade with a “Mere Posting” seller, industry members must continue to act in the best interest of their buyer client. In dealing with the seller, do not provide advice, or any service that requires the use of your judgment or discretion, or otherwise do anything that may create an implied agency representation relationship.

Further inquiries may be directed to ...  
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