



TRANSACTION BROKERAGE – NOT ALWAYS APPROPRIATE

Summary: While transaction brokerage offers a solution to resolving the conflict of interest that occurs when a brokerage finds itself representing a seller and buyer in the same transaction, there may be situations where it is not appropriate for the brokerage to agree to act as a transaction facilitator. [See: *Real Estate Act Rules* s.41(a)(d)(e)(f), s.43, s.59(3), s.59.1(3)]

While transaction brokerage offers a solution to resolving the conflict of interest that occurs when a brokerage finds itself representing a seller and buyer in the same transaction, there may be situations where it is not appropriate for the brokerage to act as a transaction facilitator.

Transaction brokerage may not be suitable for clients who may need sole agency representation during the negotiations that often occur. In addition, it may not be appropriate if the industry member's conflict of interest, or perceived conflict of interest, cannot be resolved to the satisfaction of the clients or the brokerage or the industry member in question.

Client May Need Sole Agency Representation:

Transaction brokerage may not be appropriate for all clients. For example, it may not be appropriate for clients of advanced age or physical limitations. It may not be suitable for a new immigrant who is unfamiliar with the English language, Canadian business practices or private property ownership. Although those individuals have the capacity to enter into a contract, a general level of acquired knowledge may not be present or their ability to access that information on their own may be limited. If the brokerage is of the opinion that sole agency (representation) is in the client's best interests, then transaction brokerage and customer status would not be viable options for such a client.

A client who requires sole agency representation should be referred to another brokerage or, if it is a designated agency brokerage, to another designated agent in the same brokerage.

Conflict of Interest and Ethical Issues May Persist

Transaction brokerage requires the brokerage and industry member to act as a facilitator in the transaction. The transaction facilitator must treat the interests of both the buyer and seller in an even-handed, objective and impartial manner, including but not limited to, that any advice or information given to one party must be disclosed to the other party. The transaction facilitator must not use his or her discretion or judgment in a way that benefits the buyer or seller to the prejudice of the other.

In transaction brokerage, this role of impartiality, objectivity and not advocating for the interests of one party over the other is a significant challenge and true test of professionalism for the brokerage and individual industry member who assumes the role of transaction facilitator.

The reality is that in some situations the industry member will continue to be faced with a real or perceived personal conflict of interest as well as the representational one. For example, one of the parties the industry member is representing may be a family member, a relative, a co-worker, another associate with the brokerage, a close friend, long term client, or business associate. He or she must disclose these conflicts to other clients. Is it realistic to expect the industry member will meet these standards of neutrality under these circumstances? Human nature would suggest it is unrealistic for any person to meet these standards in these situations.

A personal conflict can also arise when industry members are in personal real estate trades. For example, an associate has ownership in a property listed for sale with the brokerage and the buyer client is represented by the same brokerage. Alternatively, the associate wants to buy a property listed by his or her own brokerage. The brokerage, through its industry members, is required to disclose these conflicts to their clients. Again, it would be unrealistic for industry members to remain neutral under these circumstances.

Practice Tip

In addition to the legal and regulatory standards that must be met, these situations may also pose an ethical dilemma for the practitioner. Notwithstanding the fact an industry member has successfully provided professional transaction facilitation services to many clients, is it ethical to proceed in a situation where one's loyalty clearly lies, or is perceived to lie, with one of the parties in the transaction? In addition, one of the clients in the transaction may be prepared to enter into transaction brokerage at the outset but, because of their connection to the industry member, is expecting the industry member to provide them with advice and promote their interests over the interests of the other party during the process of negotiation.

These are difficult situations and should be discussed fully with the broker in advance of making a decision. It is the broker who will decide the appropriate options to offer such clients. If the decision is to refer the client to another brokerage, the new brokerage (or new designated agent) that ultimately provides representation services to the client should be provided with the reasons the brokerage chose not to engage in a transaction brokerage or customer relationship with the client in question.

The *Real Estate Act* Rules section 51(f) requires brokerages to have a policy for personal trades by their associates [*Real Estate Act* Rules s.62]. Brokerage policies must be adhered to by associates and may affect the options they offer their clients. For example, a brokerage may require full representation for clients in a personal trade with their associates. If so, transaction brokerage and customer status may not be suitable options. Common law brokerages might offer to refer the client to another brokerage for this transaction and designated agency brokerages might offer to refer the client to another designated agent or another brokerage.