

An Agent's Obligation to Disclose Remuneration

Section 5-11 of the Council's Rules states:

5-11 Disclosure of additional remuneration

(1) This section applies if a licensee receives or anticipates receiving, directly or indirectly,

(a) remuneration as a result of providing real estate services to or on behalf of a client, other than remuneration paid directly by the client,
(b) remuneration as a result of recommending

(i) a home inspector, mortgage broker, notary public, lawyer or savings institution, or

(ii) any other person providing real estate related products or services to a client, or

(c) remuneration as a result of recommending a client to a person referred to in paragraph (b) (i) or (ii).

(2) The licensee must promptly disclose to the client, and to the licensee's related brokerage,

(a) the source of the remuneration,

(b) the amount of the remuneration or, if the amount of the remuneration is unknown, the likely amount of the remuneration or the method of calculation of the remuneration, and

(c) all other relevant facts relating to the remuneration.

Section 5-8 of the Council's Rules requires that disclosures under section 5-11 must be in writing and separate from any agreement giving effect to a trade in real estate (e.g. separate from the Contract of Purchase and Sale).

The requirements of section 5-11 are a reflection of the common law of agency, and a reworking of a similar requirement contained in both sections 36 and 9.06 of Regulation 75/61 under the previous *Real Estate Act*. Similar disclosure requirements are found in the real estate legislation of other jurisdictions such as Alberta, Saskatchewan, Ontario, and Nova Scotia.

The following quotation extracted from the research paper *Agency Law and Real Estate Brokerage: Current Issues (A Review of the Case Law and some Industry Practices)* prepared by William Foster, Faculty of Law, McGill University expresses the law with

respect to such disclosures.

"Brokers, when acting as fiduciaries, are prohibited from making any secret profits or, indeed, receiving any form of remuneration or reward from anyone but their clients in the absence of the fully informed consent of their clients to the receipt of such payment. This prohibition extends to the receipt of:

·commissions from the other party to a transaction, a situation which creates potential difficulties for brokers in buyer agency and dual agency relationships;¹

·referral fees or gifts from third parties (contractors, lending institutions, other brokers, lawyers and the like) for referring clients to them for particular purposes.²

It would appear that the prohibition on secret profits extends to payments received from third parties:

·whose services are necessary for the satisfactory consummation of the transaction itself (e.g. lenders, appraisers, building inspectors, lawyers, etc.); and

·who provide what may be described as incidental services (e.g. building contractors, landscapers, interior decorators, moving companies, etc.).

It is suggested that the acid test for determining what constitutes a secret profit is: would the payment have been earned by the broker but for the existence of the broker-client relationship in the circumstances of the case? If the answer is no, then the payment is likely to be considered a secret profit for which the broker is accountable to the client."

Section 5-11 requires this disclosure to be made to the client 'promptly'. The common law requires that such disclosures must be timely, occur before any potential conflict of interest has arisen, and when it has some meaning.

For example, consider what would be timely and effective disclosure by a licensee, acting as a buyer's agent, who anticipates receiving remuneration by way of the amount

offered to cooperating brokerages by the listing brokerage. This is not remuneration that will be paid directly by the buyer/client, and therefore the disclosure requirements of section 5-11 apply.

To begin the process of disclosure, licensees should have a general discussion about remuneration with a prospective buyer/client at the same time as the licensee is describing the services to be provided. The last two paragraphs on the first page of the Working with a Realtor brochure describe the *source of remuneration* for cooperating brokerages (buyer's agents) in many cases. In these cases, providing a buyer/client with this brochure would satisfy the requirement to disclose in writing the source of remuneration not being paid directly by the buyer/client.

There remains the obligation to disclose *the amount (or the likely amount, or the method of calculating the amount)*. One effective way would be to provide a buyer/client with a copy of the MLS® information respecting properties under consideration that includes the remuneration being offered to a cooperating brokerage. This would constitute effective disclosure so long as the full amount or method of calculation of the full amount is clear (i.e. any bonus or additional amount being offered is included in the information). Having the buyer/client initial that information would be a useful acknowledgment. Obviously, some other method of disclosure would be necessary if a property being considered was not listed on MLS®.

With respect to timing, in order to satisfy the common law requirement that disclosure be made when it has meaning, the very latest time would be before an offer is to be written.

The above only addresses a buyer's agent's remuneration with respect to the actual trade in real estate that is not to be paid directly by the buyer. The requirements of subsections 5-11(b) and (c) to disclose remuneration as a result of recommending other service providers, or a client to another service