Report from Council

March 2006 Volume 41, No. 4A

5th Special Report to Licensees

DISCLOSURE! DISCLOSURE! DISCLOSURE!

This 5th Special Report to Licensees focuses on the various disclosure requirements contained in the *Real Estate Services Act* (RESA) and the Council Rules. The Council urges all licensees, whether engaged in trading, rental or strata management services to familiarize themselves with the information contained in this Special Report. The various articles in this Report will form part of the new 6th edition Licensee Practice Manual that will be delivered to all licensees later this spring.

This Report focuses on five main areas of disclosure that licensees must understand and apply in their daily practice: agency, interest in trade, remuneration, benefits and material latent defects.

The agency section outlines how agency relationships are created, identifies conflicts of interest and advises on the proper procedure for disclosure of agency relationships to parties.

The next section focuses on the disclosure of interest in trade requirements that replaced the previous disclosure requirement under section 38 of the former *Real Estate Act*. It is important to note that the disclosure of interest in trade under RESA, now applies to both the acquisition and disposition of real estate.

The Report also includes a section with detailed information on the disclosure requirements for remuneration and benefits as they relate to trading services, rental and strata management activities. As well, at the end of this Report, licensees will find two pages of frequently asked questions with respect to disclosure of remuneration and benefits. It is hoped that this information will clarify many of the most common concerns licensees have in relation to this topic.

This Report also contains detailed information outlining the expected standards for the disclosure of material latent defects. The Council Rules provide a clear definition of material latent defects and when they must be disclosed.

Licensees should note that, except for the disclosure of agency representation, all disclosures must be in writing, be separate from any agreement giving effect to a trade in real estate and be separate from the service agreement or any other agreement under which real estate services are provided.

Finally, the Report contains a series of other disclosure reminders including: licence application disclosures, disclosure when a licensee refers a client, full disclosure to lending institutions, duty to report illegal activities and home warranty disclosure requirements.

It is hoped that, after reviewing this information, licensees will be better equipped to provide the highest level of service to consumers in accordance with the requirements of the *Real Estate Services Act.*

In this Issue:

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Statistics
(March 2006)
Representatives: 13,661
Associate Brokers: 1,964
Managing Brokers: 1,342
Brokerages: 1,376

Role of the Council
The Real Estate Council is a regulatory agency established by the provincial government. Its mandate is to protect the public interest by enforcing the licensing and licensee conduct requirements of the *Real Estate Services Act*. The Council is responsible for licensing individuals and brokerages engaged in real estate sales, rental and strata property management. The Council also enforces entry qualifications, investigates complaints against licensees and imposes disciplinary sanctions under the Act.

Report from Council
The *Report from Council* newsletter is published six times per year. Past issues can be found at www.realtorlink.ca

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Disclosing Relationships with Parties

Section 5-10 of the Council Rules outlines the requirements regarding disclosure of the nature of a licensee's relationship with parties in a real estate trade. Section 5-10 of the Council Rules provides:

Before providing trading services to or on behalf of a party to a trade in real estate, a licensee must disclose the following to the party:

(a) the nature of the representation that the licensee will provide to the party,

(b) as applicable,

(i) that the licensee, or a related licensee, is or expects to be providing trading services to or on behalf of any other person, in any capacity, in relation to the same trade in real estate,

(ii) that the licensee, or a related licensee, is or expects to be receiving remuneration relating to trading services referred to in subparagraph (i) from any other person, and

(iii) the nature of the licensee's relationship or the relationship of the related licensee, with any person referred to in subparagraph (i) or (ii).

It is important to provide consumers with this information at the first reasonable opportunity. One way to do this is to provide potential sellers and buyers, at first substantial contact, with a copy of the Working with a Realtor® brochure developed by the British Columbia Real Estate Association (available through real estate boards/ associations). This brochure explains the various types of relationships that consumers may have. The brochure also describes:

·the fiduciary duties that an agent owes to a client, be that client a seller or a buyer,

·limitations on these duties should an agent be given consent to act for both parties, and

·the types of services a customer might normally expect to receive when there is no agency relationship.

This information will assist licensees in obtaining the seller's or buyer's informed consent to the relationship to be established.

It is important to stress that the seller's or buyer's informed consent is required before a licensee acts on behalf of a seller or buyer. Obtaining such informed consent before acting is also necessary if a licensee wishes to act as a dual agent.

Nature of the Agency Relationship

In a real estate transaction, the nature of the relationship that is created between the buyer or seller and the brokerage and licensee is important. The relationship may be either an agency relationship, limited dual agency, or no agency.

Before making the required disclosure regarding the nature of the representation, licensees should consider what type of relationship they would like to create. In the majority of cases, the representation that is offered and agreed to is an agency representation; however, as discussed below, it is not necessary that in every case a licensee must be the agent of the buyer or the seller. It is possible, with the agreement of the buyer or seller, as the case may be, to create a relationship that is not one of principal and agent. This is important for both the licensee and the buyer or seller to consider, since the nature of the relationship that is established determines the duties and obligations of the licensee.

Where a brokerage and the licensee act only for the buyer or the seller, an agency relationship is generally created. As indicated previously, the agreement that the brokerage and licensee will be the agent of the seller or buyer should occur early in the relationship and is often accomplished by using the Working with a Realtor® brochure. In such cases, the seller or buyer is the principal and the brokerage and licensee are the agent. The Council Rules uses the term "client" when referring to a principal who has engaged a licensee to provide real estate services on behalf of the principal.

As an agent, a licensee has certain duties to their client. As explained in the Working with a REALTOR® brochure, the licensee has a duty of undivided loyalty to the principal, a duty to keep the confidences of the principal, and a duty to obey all lawful instructions and account for all money and property of the principal.

In cases where a brokerage acts for both the buyer and the seller, with their agreement, the nature of the relationship is one of limited dual agency. Limited dual agency can occur when the same licensee

Nature of the Agency Relationship *(Continued from previous page)*

represents the buyer and seller, or where different licensees within the same brokerage represent the buyer and the seller. Before a brokerage may represent both the buyer and the seller, the buyer and seller must consent to such a relationship. Before providing their consent, the buyer and seller must be fully informed regarding the limits that will be placed on the agent's duties and obligations.

Where a dual agency relationship has been agreed to, it is not possible for the agent to fulfill all of its duties to both parties. As a result, the duties are limited to require the licensee to deal with the buyer and seller impartially. The duty of full disclosure is limited so that the licensee is not required to disclose what the buyer is willing to pay for the property or the motivation of the seller. The licensee must also not disclose personal information about the parties, unless authorized in writing.

Licensees may also agree with a buyer or seller that they will provide services to them in a transaction but that there will be no agency representation. In such a case, the buyer or the seller will be the customer of the licensee, rather than their client. The Working with a Realtor® brochure explains the services that a licensee can provide under a relationship that does not involve agency. As noted under the heading Disclosure, when a licensee is acting as the agent of a buyer, the need to disclose remuneration received from the seller arises. When acting for a seller in an agency relationship, there is an obligation to disclose all referral fees. However, if there is no principal-agent relationship, there is no obligation to disclose to the customer the amount of remuneration that the licensee's brokerage will receive from the transaction or the amount of any referral fees that are received. Thus, it is always open to a licensee, with the buyer's or seller's consent, to treat the buyer or seller as a "customer" and not create an agency relationship.

Additionally, rather than acting as a dual agent, a licensee may choose to act as the agent of only one of the parties. The licensee can treat the other party as a customer. The nature of the relationship does not impact the licensee's ability to earn the remuneration to which they are entitled.

Similarly, a licensee who enters into an agreement with a seller who is attempting to sell their home on their own can choose the nature of the relationship they wish to establish with the seller. If the seller agrees, the licensee can enter into a fee agreement which does not create an agency relationship with the seller.

Licensees should not simply assume that an agency relationship must be created but should carefully consider the nature of the relationship they wish to establish prior to explaining the Working with a Realtor® brochure to a buyer or seller.

How an Agency Relationship is Created

An agency relationship may be created by means of a written agreement, orally or by conduct.

Where the client is the seller, the listing contract sets out the terms of the agency relationship. As indicated above, a licensee has a duty of undivided loyalty to a client. However, it is not unusual for a licensee to list more than one property at a time or to act for buyers at the same time that the seller's property is listed. Therefore, the duty of undivided loyalty must be limited in order to permit the licensee to act on behalf of other buyers and sellers at the same time. The listing contract should therefore include the limitations on the duties that the licensee will owe to their client. The standard form multiple listing contract contains the limitations that permit licensees to conduct business without breaching their duties to their clients.

When representing buyers, some licensees use an Exclusive Buyer's Agency Contract. Where such a contract is used, the contract sets out the terms of the agency relationship. If a written contract is not used, the party to the trade may orally agree that the licensee is the party's agent. Where the agreement is oral, the licensee should obtain the client's agreement that the licensee be permitted to act for other buyers and sellers and that the licensee will not disclose confidential information obtained through other agency relationships.

In some cases, however, the courts have found that an agency relationship has been created as a result of the conduct of the parties. Such agency relationships are often referred to as implied agency. Licensees acting on behalf of a person who is not otherwise represented may be found to be acting as the party's agent if the actions of the licensee would lead the party to believe that the licensee was acting as their advocate. An implied agency relationship may be found to exist, even where the licensee did not intend to act as the party's agent. In any transaction which involves an unrepresented party, if the licensee does not intend to act in an agency relationship, it is very important for the licensee to confirm with that party that the licensee is not acting as their agent. It is also important that the licensee's conduct is consistent with such statements.

Conflicts of Interest – Dual Agency

Whenever a licensee attempts to act for more than one party involved in the same trade, a potential conflict can arise. While the law does not prohibit acting for more than one party, licensees wishing to act for more than one party must obtain the informed consent of both parties before acting on their behalf.

In this context, informed consent means that the licensee must disclose to both parties, in a timely manner

·the nature of the conflict of interest that would arise if the licensee were to represent both parties,

·what is being proposed by the licensee and the implications of giving their consent.

The above disclosure must occur before the licensee begins to act for both parties and before any potential conflict of interest has arisen.

The most common conflict that arises is where the listing brokerage is representing both the seller and the buyer in the same transaction (this may be because two different representatives in the listing brokerage work with the seller and buyer respectively; or because the listing licensee is the same licensee who brings the buyer to the trade, i.e. a double-ender). These situations are the ones that generally come to mind when the term "dual agent" is used.

Licensees must also keep in mind that the definition of a trade in real estate includes a transaction for the leasing of real estate. If a brokerage or licensee acts for both the landlord and the tenant, particularly in the arranging of commercial leases, the licensee may wish to act as a dual agent.

However, there are many other situations where a licensee may be involved in more than one aspect of a trade in real estate and wishes to act as a dual agent. Whenever a licensee is involved in more than one aspect of a trade in real estate, the situation can give rise to conflicts of interest. For example, a licensee who provides strata management services to a strata corporation might be asked by the owner of a strata lot within that strata corporation to list the strata lot for sale. As an agent for the strata corporation, the strata manager may have access to information that is confidential to the strata corporation and is not intended to be shared with individual strata lot owners or potential buyers (e.g. specific details concerning current legal action, including settlement negotiations, hardship cases, or concerns regarding a rogue strata lot owner). The strata manager has an obligation to keep the confidence of the strata corporation. Yet as an agent for the seller of the strata lot, that same licensee would have a duty to disclose all known facts that may affect or influence the seller's decision.

Another example could be where a licensee is acting as an agent for a seller and as a mortgage broker for a buyer in the same trade. That licensee may become aware of personal, confidential information regarding the buyer that would be of interest to the seller.

Additionally, licensees are occasionally in a position where they act as an agent for various buyers, all of whom wish to make an offer on the same property.

Whenever a licensee attempts to act for more than one party in a trade as a dual agent, the licensee is in a potential conflict of interest. In every case, the licensee must disclose the dual agency relationship or the conflict to their clients and obtain the informed consent of their clients before acting or continuing to act on the client's behalf.

The disclosure must be timely and, where possible, made before either client has disclosed confidential information to the licensee.

All other agency disclosure requirements, as set out above under the heading Disclosing Realtionships wtih Parties continue to apply. In order to comply with the agency disclosure requirements of section 5-10 of the Council Rules, appropriate disclosure of the limited dual agency relationship must be made at the first reasonable opportunity and, where possible, made before either client has disclosed confidential information to the licensee. Those licensees not using the Working with a Realtor® brochure for this purpose must ensure that they are using an appropriate alternative that provides complete and accurate disclosure of the relationships described above.

Both clients have to be fully aware of the existence of a dual agency. The courts are increasingly imposing an obligation on the dual agent to inform both clients of the "full implications of representation by a dual agent". In some recent cases, this obligation has been extended by the courts to disclosure of the implications and benefits of sole representation, and the parties' entitlement to choose sole representation. The courts have held that clients have the right to make a fully informed choice as to the nature of the representation they wish to receive.

Although, generally speaking, the informed consent of the client to a dual agency relationship is sufficient, there are some cases where a licensee should not represent both parties in a trade. Where a licensee is acquiring or disposing of property on their own account or when the licensee is providing real estate services to an associate, the licensee should not also be acting for the other party. In such circumstances, a licensee could not remain objective or neutral.

Even though a licensee has complied with section 5-9 of the Council Rules, which requires disclosure of their interest in the trade, the licensee should also resist creating a conflict of interest by agreeing to also represent the other party.

In such circumstances, the licensee may wish to treat the other party as a customer and in that way can receive the total remuneration payable, as described above in the section entitled Nature of the Relationship.

It is important for licensees to keep in mind, however, that the determination of the relationship or a change in the relationship must be agreed to by the client. A licensee who wishes to change from an agency relationship to one of dual agency or no agency must firstly obtain the informed consent of their client. Making such a change is not simply a matter of the licensee advising the client that the relationship has changed.

Duty of Disclosure by a Limited Dual Agent

Specific requirements have been developed to permit an agent to represent clients who have competing interests. When acting as a dual agent for a buyer and seller, the agent's duty of full disclosure is modified to allow the agent to keep information confidential from one side against the other in three areas:

·the price or other terms a client is willing to accept or pay (other than what is contained in the offer);

·the motivation of either client; and

·either client's personal information.

The agent is also required to deal impartially with both clients, including disclosing to the buyer any known defects about the physical condition of the property.

Licensees entering into dual agency agreements with clients often do so by using the Limited Dual Agency Agreement made available by their real estate board. In order to avoid potential misunderstandings, and prior to acting as a dual agent, licensees should review with each party the limitations placed on an agent's usual fiduciary duties by this agreement.

In cases where a licensee is acting as a dual agent in a situation other than for a buyer and seller, the limitations with respect to disclosure by the agent will change. For example, where the licensee is both the strata manager and the listing agent, the limitation may be that the agent will not disclose the personal or otherwise confidential information about either the strata corporation or a strata lot owner unless authorized in writing. Similarly, when a licensee is both the agent for the seller and the mortgage broker, the limitation may be that the agent will not disclose any personal information to the seller about the buyer.

An important point for licensees to keep in mind is that their clients must agree to the limitations placed on an agent's usual fiduciary duties before the licensee acts as a dual agent.

Additionally, licensees must keep in mind that the limited dual agent is still the agent of both parties and, subject to the limitations agreed to by the clients, must ensure that full disclosure respecting the subject matter of the contract is made to both clients. In addition, any action taken by the agent in regard to the trade must be consented to by both parties.

As a limited dual agent, a licensee should remember the key elements to correct conduct: impartiality, disclosure and consent. Licensees have a duty to treat the buyer and the seller impartially, and other than the exceptions set out in the Limited Dual Agency Agreement, licensees must make full disclosure to both the buyer and the seller.

Remember, the test of what is material is an objective one and if such information is not disclosed, the agent may face disciplinary and/or civil action.

One of the leading cases regarding disclosure is the decision of the BC Court of Appeal in *Ocean City Realty v. A&M Holdings.*

In that case, the Court of Appeal stated that:

"The duty of disclosure is not confined to these instances where the agent has gained an advantage in the transaction or where the information might affect the value of the property or where a conflict of interest exists. The agent certainly has a duty of full disclosure in such circumstances, they are commonly occurring circumstances which require full disclosure by the agent. However, they are not exhaustive.

The obligation of the agent to make full disclosure extends beyond these three categories and includes "everything known to him respecting the subject matter of the contract which would be likely to influence the conduct of his principal, or… which would be likely to operate on a principal's judgment". In such cases, the agent's failure to inform the principal would be material non-disclosure."

The Court of Appeal emphasized that an agent cannot arbitrarily decide what would likely influence the conduct of his or her principal and thus avoid the consequence of nondisclosure. If the information pertains to the transaction with respect to which an agent is engaged, any concern or doubt that the agent may have can readily be resolved by disclosure of the facts to his or her principal.

Documenting the Agency Relationship

As indicated above, while an exclusive agency agreement is normally created with a seller by way of a listing contract, the use of written buyer's agency agreements, particularly in residential real estate, has not been as common. A licensee working with a buyer will often provide that buyer with a Working with a Realtor® brochure, and acknowledgement of the agency relationship takes place on the Contract of Purchase and Sale. However, not confirming this relationship in writing prior to the Contract of Purchase and Sale is similar to working on behalf of a seller without a signed listing agreement. The licensee may be taking on fiduciary duties without an employment/fee agreement. The buyer may be working with a number of agents at the same time. Prudent licensees will want to confirm their relationship in writing with a buyer at the earliest opportunity by completing a written buyer's agency agreement.

Licensees are reminded that, in instances where the buyer is represented by an agent, the responsibility of the listing agent to the buyer remains the same; that is, not to mislead or deceive by withholding any material facts about the property. It is not acceptable for a listing licensee to assume that the buyer's agent is solely responsible to discover any and all material facts about the property.

Disclosure of Interest in Trade

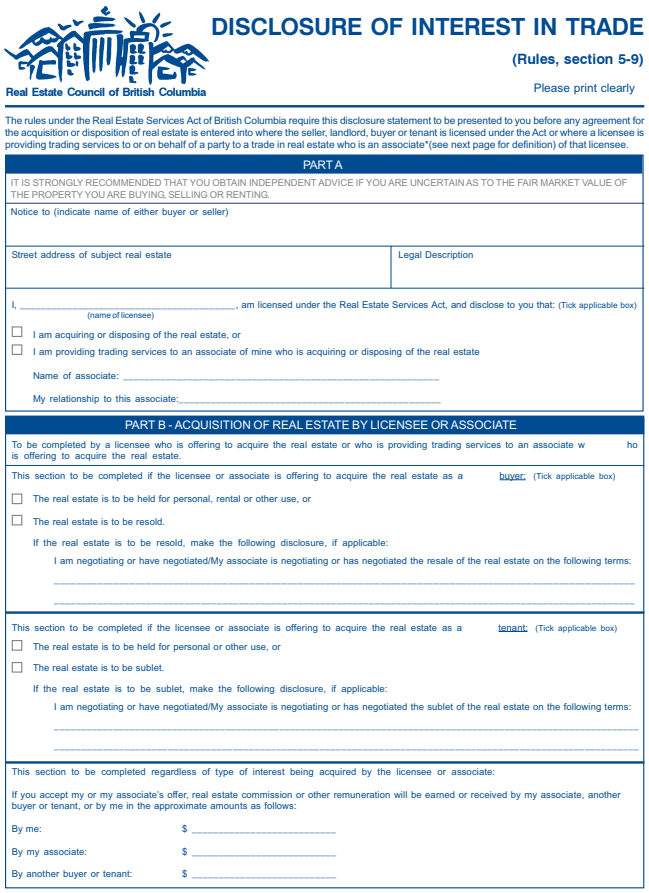
If a licensee acquires, directly or indirectly, or disposes of real estate, or if the licensee assists an associate in acquiring directly or indirectly or disposing of real estate, section 5-9 of the Council Rules requires that the licensee make disclosure in writing to the opposite party before any agreement for the acquisition or disposition of the real estate is entered into.

Section 5-9(2) of the Council Rules sets out an example of an indirect acquisition. As provided in the Council Rules, a licensee or associate may acquire real estate indirectly by having a third party purchase real estate with the intention of re-selling the real estate to the licensee or the licensee's associate.

Under the former *Real Estate Act*, licensees were required to disclose to sellers when the licensee was acquiring real estate. Under RESA, the need for disclosure has been expanded to include disclosure when a licensee is disposing of real estate and disclosure when a licensee is assisting an associate in the acquisition or disposition of real estate. The need for disclosure arises whenever a licensee is disposing of real estate, regardless of whether the licensee has personally listed the property for sale. Licensees should keep in mind that dispose includes both selling and leasing.

RESA establishes that the disclosure must be in writing, be separate from a service agreement or any other agreement under which real estate services are provided, and also separate from any agreement giving effect to the trade in real estate.

A form for licensees to use has been created by the Council entitled Disclosure of Interest in Trade (available on www.recbc.ca). The form includes the name of the person to whom the disclosure is made, as well as the name of the associate, if any, and the licensee's relationship to the associate. The form requires the licensee to indicate the purpose for which the licensee or the licensee's associate is acquiring the property and, in the case of an acquisition, the amount of remuneration earned and who will receive the remuneration. If the real estate is to be re-sold and the licensee or associate has negotiated or is currently negotiating the re-sale of the real estate, the terms of the re-sale must be disclosed. Where the form is used in relation to the disposition of real estate, the form only requires that the licensee indicates whether the licensee or licensee's associate is the owner or tenant of the real estate.



DISCLOSURE OF INTEREST IN TRADE

(Rules, section 5-9)

Real Estate Council of British Columbia

Please print clearly

The rules under the Real Estate Services Act of British Columbia require this disclosure statement to be presented to you before any agreement for the acquisition or disposition of real estate is entered into where the seller, landlord, buyer or tenant is licensed under the Act or where a licensee is providing trading services to or on behalf of a party to a trade in real estate who is an associate*(see next page for definition) of that licensee.

PART A

IT IS STRONGLY RECOMMENDED THAT YOU OBTAIN INDEPENDENT ADVICE IF YOU ARE UNCERTAIN AS TO THE FAIR MARKET VALUE OF THE PROPERTY YOU ARE BUYING, SELLING OR RENTING.

Notice to (indicate name of either buyer or seller)

Street address of subject real estate | Legal Description

I, _____ (name of licensee), am licensed under the Real Estate Services Act, and disclose to you that: (Tick applicable box)

☐ I am acquiring or disposing of the real estate, or

☐ I am providing trading services to an associate of mine who is acquiring or disposing of the real estate

Name of associate: _____

My relationship to this associate:_____

PART B - ACQUISITION OF REAL ESTATE BY LICENSEE OR ASSOCIATE

To be completed by a licensee who is offering to acquire the real estate or who is providing trading services to an associate w ho is offering to acquire the real estate.

This section to be completed if the licensee or associate is offering to acquire the real estate as a buyer: (Tick applicable box)

☐ The real estate is to be held for personal, rental or other use, or

☐ The real estate is to be resold.

If the real estate is to be resold, make the following disclosure, if applicable:

I am negotiating or have negotiated/My associate is negotiating or has negotiated the resale of the real estate on the following terms:

_____

_____

This section to be completed if the licensee or associate is offering to acquire the real estate as a tenant: (Tick applicable box)

☐ The real estate is to be held for personal or other use, or

☐ The real estate is to be sublet.

If the real estate is to be sublet, make the following disclosure, if applicable:

I am negotiating or have negotiated/My associate is negotiating or has negotiated the sublet of the real estate on the following terms:

_____

_____

This section to be completed regardless of type of interest being acquired by the licensee or associate:

If you accept my or my associate's offer, real estate commission or other remuneration will be earned or received by my associate, another buyer or tenant, or by me in the approximate amounts as follows:

By me: $ _____

By my associate: $ _____

By another buyer or tenant: $ _____

The form must be provided to the managing broker promptly after the agreement has been reached. The form must be signed by the managing broker and retained by the brokerage. The form is not required to be submitted to the Council.

Section 5-7 of the Council Rules defines associate as follows:

associate in relation to a licensee means a person who is any of the following:

(a) in the case of an individual licensee,

(i) a spouse or family partner of the licensee,

(ii) a trust or estate in which the licensee, or a spouse or family partner of the licensee, has a substantial beneficial interest or for which the licensee, spouse or family partner serves as trustee or in a similar capacity, or

(iii) a corporation, partnership, association, syndicate or unincorporated organization in respect of which the licensee, or a spouse or family partner of the licensee, holds not less than 5% of its capital or is entitled to receive not less than 5% of its profits;

(b) in the case of a brokerage that is a corporation or partnership,

(i) a director, officer or partner of the brokerage,

(ii) a shareholder of the brokerage who holds more than 5% of the voting shares of the brokerage,

(iii) a trust or estate

(A) in which the brokerage, or a director, officer or partner of the brokerage, has a substantial beneficial interest, or

(B) for which the brokerage, or a director, officer or partner of the brokerage, serves as trustee or in a similar capacity, or

(iv) a corporation, partnership, association, syndicate or unincorporated organization in respect of which the brokerage, or a director, officer or partner of the brokerage, holds not less than 5% of its capital or is entitled to receive not less than 5% of its profits.

The definition of associate is broad. In some cases, the relationship may be somewhat removed and not immediately obvious. For example, an associate of an individual licensee includes a company of which a spouse or family partner is entitled to not less than five percent of the profit. An associate of a brokerage can be a company in which a director of the brokerage is entitled to not less than five percent of the profits. Whenever a licensee assists either an individual or company that is "connected," in some fashion to the licensee or the brokerage, the licensee should refer to the definition of associate to determine whether a Disclosure of Interest in Trade form is required. Licensees should note that children and parents do not fall within the definition of associate.

Licensees should keep in mind that acquisition and disposition includes renting. As a result, when a licensee acquires property as a tenant, disclosure must be made to the landlord except in limited circumstances. Section 5-9 of the Council Rules exempts a licensee from the need to make disclosure if the rental real estate that is being acquired by the licensee, or the licensee's spouse or family partner, complies with the following provisions:

·The rental real estate is being acquired with the intention that it will be used for personal residential purposes,

·The lease is for a term not exceeding one year,

·The lease or agreement does not contain an option to purchase or a right of first refusal, and

·Any provisions for renewal do not extend the total lease period beyond one year.

Additionally, when a licensee offers property for rent in circumstances where either sections 9-1 or 9-2 of the Council Rules do not apply, the licensee must also make the appropriate disclosure. For example, if a licensee offered property for rent that was owned by a company of which the licensee or licensee's spouse was a shareholder and entitled to not less than five percent of the profits, disclosure would be required.

Licensees should also keep in mind that the disclosure must be made before an agreement for the acquisition or disposition of the real estate is entered into. When purchasing or renting real estate, the disclosure is easily made prior to presenting the offer. However, when selling or offering real estate for rent, it may be that an offer is received before the disclosure is made. In such cases, in order for disclosure to be effective, the licensee must provide the disclosure to the prospective buyer or tenant and allow the prospective buyer or tenant to determine whether they wish to withdraw their offer.

Licensees who are required to make disclosure when offering real estate for sale may wish to include the fact that disclosure will be required on the listing. In this way, the buyer's agent could obtain a disclosure form from the licensee offering real estate for sale or lease prior to writing up the offer.

In addition, if a licensee is selling their own property, licensees should keep in mind that Errors and Omissions Insurance (E&O) never covers the principals in the transaction. Therefore, when licensees sell their own property (or property owned by a spouse), they lose their E&O coverage for that transaction because they are also the principals. For further clarification, especially regarding spouses owning property, licensees are directed to the policy entitled "Indemnity Plan" No. RE0305 dated March 1, 2005, available through the Real Estate Errors and Omissions Insurance Corporation.

Licensees should also keep in mind that section 2 of RESA requires licensees who provide real estate services on their own behalf to comply with the requirements of RESA, including the Regulations and Council Rules.

To clarify that the necessary disclosure has occurred prior to entering into a Contract of Purchase and Sale, licensees are encouraged to include the following clause in the Contract of Purchase and Sale:

Buyer's/Seller's Acknowledgement of Licensee's Interest in Trade Clause

The Buyer/Seller acknowledges having received and signed a disclosure of the licensee's interest in the transaction before the making/receipt of this offer.

Disclosure of Remuneration

Under the former *Real Estate Act*, licensees were prevented from claiming or receiving a secret or undisclosed compensation or commission or failing to reveal to the principal of the licensee the full amount of the compensation or commission in relation to a real estate transaction. In other words, the Act required that the licensee disclose all compensation or commission received in relation to a real estate transaction.

The Council Rules also require that a licensee disclose all remuneration received or anticipated to be received from anyone other than the licensee's client; however, section 5-8 of the Council Rules requires that the disclosure be in writing and be separate from a service agreement or any other agreement under which real estate services are provided and separate from any agreement giving effect to a trade in real estate.

Section 5-11 of the Council Rules provides that the disclosure of the commission or compensation be in writing as follows:

(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 5-11 of the Council Rules requires a licensee to disclose all remuneration that the licensee receives that is not paid directly by the client. In relation to a licensee, a client is defined in the Council Rules as the principal who has engaged the licensee to provide real estate services to or on behalf of the principal. The definition anticipates that, a principal and agent relationship exists where a licensee is engaged by a client. As a result of the principal and agent relationship, fiduciary obligations arise, including an obligation to disclose any remuneration received from someone other than the client. If the person on whose behalf the licensee was acting was not a client, i.e. a customer, the requirement for disclosure of remuneration would not arise. Licensees must always keep in mind that it is the nature of their relationship with their client that creates the obligation to disclose all remuneration paid by other than the client.

A licensee must disclose the source and amount of the remuneration, or, if the amount is not known, the likely amount or the method of calculation.

Section 5-11 of the Council Rules requires disclosure of <u>all</u> funds that a licensee receives from other than the licensee's client and not just the amounts received from referring the client to home inspectors, mortgage brokers, etc. In cases where a licensee acts as a buyer's agent, the licensee will generally receive compensation from the listing brokerage. In all cases where a licensee is the agent of the buyer, the amount that the licensee receives from the listing brokerage must be disclosed.

Although section 5-11 of the Council Rules references the licensee's remuneration, the amount of remuneration that should be disclosed is the remuneration to be received by the brokerage.

One way that a licensee may disclose the amount that is paid by a seller is by providing the buyer with a copy of the listing information sheet, which shows the proportion of commission payable to the selling brokerage. In this way the buyer is provided with disclosure, in writing, of the percentage of the selling price which is to be paid as commission. Alternatively, a licensee may use the Disclosure of Remuneration form available on the Council's website at www.recbc.ca or any form of the licensee's choosing so long as it satisfies the disclosure requirements.

Disclosure When a Licensee Refers a Client

In some instances, during the course of working with a client, the licensee refers the client to another licensee or other service provider. The referral may result in a change to the agency relationship. Additionally, the referral may result in a referral fee or other remuneration being paid to the licensee. Section 5-10 of the Council Rules requires the licensee to notify the client that there has been a change in their relationship and if the licensee will be receiving any remuneration. Section 5-11 of the Council Rules requires that the amount or nature of that commission or remuneration be disclosed in writing. Specifically, in the case where the licensee refers the client and will be receiving a referral fee upon the completion of a transaction, the licensee should confirm in writing to the client:

(a) that he or she will receive remuneration from the party to which the referral was made; and

(b) the amount or likely amount, or method of calculation of the remuneration; and

(c) that there is a change in the relationship and the nature of the services, if any, the licensee will be providing.

Referrals of clients generally occur in the following ways. A licensee may refer a client to a developer's representative. In this case, the licensee will no longer be acting as the agent for the buyer; however, the licensee may receive remuneration from the developer for the referral. In such cases, because the relationship has changed between the buyer and the licensee, the licensee must disclose the change to the buyer.

Using BCREA's Working with a Realtor® brochure may help accomplish this purpose. The licensee should have the buyer initial beside the explanation of "No Agency Relationship" clarifying that the licensee is merely providing an introduction for which he or she will receive remuneration and that, although the licensee may provide assistance and information to the buyer, the licensee is not the buyer's agent in this transaction.

Where a client is not being represented by a licensee, the licensee who is merely providing the introduction should recommend that the client seek independent legal advice before finalizing a Contract of Purchase and Sale.

In other circumstances, a licensee may be referring a client to another licensee. For example, a licensee acting on behalf of a seller may refer their client to a licensee in another city for the purchase of real estate. Licensees may also refer clients to other professionals such as mortgage brokers. In the foregoing situations, although the agency relationship may not change, if a referral fee or other remuneration is paid, section 5-11 of the Council Rules requires that disclosure of the remuneration be made in writing.

Disclosure of Benefits Related to Rental Property or Strata Management Services

Under section 5-12 of the Council Rules, licensees engaged in rental property management or strata management must disclose to the licensee's principal and to the related brokerage certain benefits that the rental property manager or strata manager anticipates receiving as a result of the management of the rental property or the strata corporation. The disclosure must be made before the benefit is accepted.

Disclosure is required if the rental property manager or the strata manager anticipates receiving, either directly or indirectly, a benefit from expenditures made by or on behalf of a principal to whom the rental property or strata management services are provided. Disclosure must also be made if it is anticipated that an associate of the licensee will receive a benefit as a result of an expenditure on behalf of the principal.

A benefit from an expenditure may be an administration fee that the manager charges each time the manager writes a cheque on behalf of his or her principal. A benefit would also arise, and must be disclosed, if the manager retained a person or corporation that meets the definition of associate, to perform services for the principal. Thus, for example, if a manager engaged a company in which the manager, or his or her spouse or family partner owned not less than 5% of the capital to perform work for the principal, the manager would be required to disclose the benefit to the principal and to the related brokerage before the associated company was engaged.

The disclosure of a benefit must be in writing and must be separate from the service agreement or any other agreement under which real estate services are provided. This means that it is not sufficient for a rental property manager or strata manager to include reference to an administration fee or the fact that an associated company will provide services to the property owner or strata corporation in the service agreement. Where a benefit is to be received from an expenditure, the disclosure must be in a separate written document.

The Council has prepared a Disclosure of Benefits form that may be used to disclose such benefits. The form can be obtained from the Council's website at www.recbc.ca. Again, however, licensees are free to use whatever form they choose so long as it satisfies the disclosure requirement.

Disclosure of Material Latent Defects

At common law, a seller, and correspondingly, a seller's agent must disclose all known material latent defects. A latent defect is one that is not visible upon ordinary inspection but which materially affects the property's use or value. On the other hand, a patent defect is one that is readily visible and/or blatantly obvious upon ordinary inspection. A patent defect may also materially affect the property's use or value.

Section 5-13 of the Council Rules requires disclosure of known material latent defects and that section defines a material latent defect as follows:

"material latent defect means a defect that cannot be discerned through a reasonable inspection of the property, including any of the following:

(a) a defect that renders the real estate

(i) dangerous or potentially dangerous to the occupants,

(ii) unfit for habitation, or

(iii) unfit for the purpose for which a party is acquiring it, if

(A) the party has made this purpose known to the licensee,

or

(B) the licensee has otherwise become aware of this purpose;

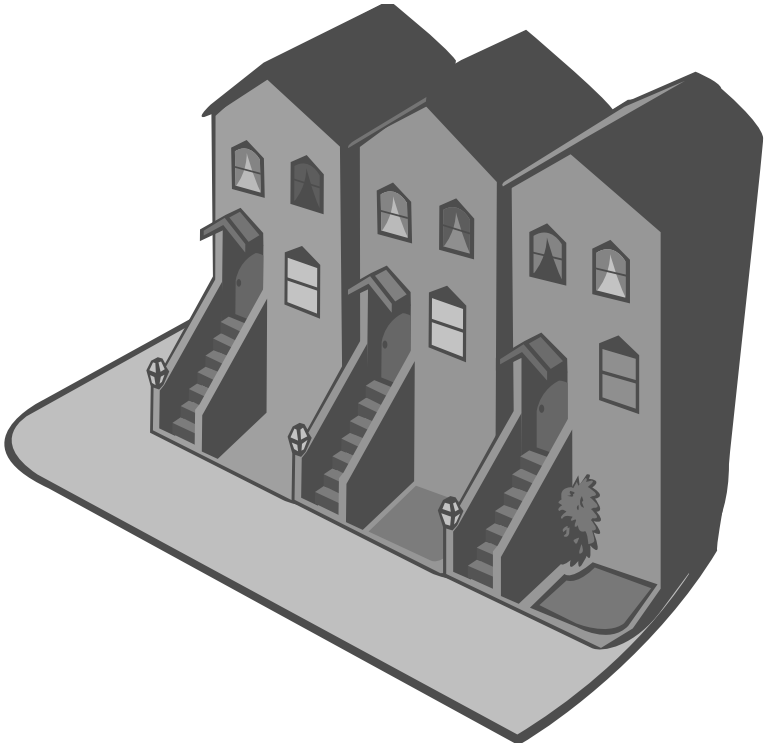
(b) a defect that would involve great expense to remedy;

(c) a circumstance that affects the real estate in respect of which a local government or other local authority has given a notice to the client or the licensee, indicating that the circumstance must or should be remedied;

(d) a lack of appropriate municipal building and other permits respecting the real estate."

Further section 5-8 of the Council Rules requires that disclosure to be in writing and separate from any agreement under which real estate services are provided and separate from any agreement giving effect to a trade in real estate. Section 5-13 of the Council Rules also requires that the disclosure must occur before any agreement for the acquisition or disposition of the real estate is entered into.

Because the disclosure must be separate from an agreement giving effect to a trade in real estate, a question that arises is whether a Property Disclosure Statement (PDS) can be used to make written disclosure of the latent defect. Generally, a PDS forms part of a Contract of Purchase and Sale. The Council Rules require, however, that written disclosure of a material latent defect must occur separately from the agreement giving effect to the trade in real estate. As a result, disclosing the material latent defect on the PDS would not satisfy the requirements of the Council Rules. As a result, written disclosure of a material latent defect, while it may appear on a PDS, should also be made in writing in a separate document. One possible means of providing this disclosure would be to include it on the listing information sheet.



It is also important that the licensee acting for the seller ensures that the written disclosure of the material latent defect was brought to the buyer's attention prior to the acceptance of the offer by the seller.

Licensees should include the following wording in the Contract of Purchase and Sale whenever a material latent defect is disclosed.

The buyer acknowledges having received separate written disclosure of a material latent defect relating to (general reference to issue).

Licensees must keep in mind that trading services includes offering real estate for rent or lease. As a result, written disclosure of a material latent defect is required regardless of whether the real estate is offered for sale or for rent or lease.

Section 5-13 of the Council Rules also provides that if the client instructs the licensee to not disclose the material latent defect, the licensee must refuse to provide further trading services to the client in respect of the trade in real estate.

Other Important Disclosure Requirements

Licence Applicants Must Make Full Disclosure

Managing brokers should impress upon first-time and renewing licence applicants the importance of full and honest disclosure of information in their licence applications. Licence applications are investigated and if the investigation discloses that the application contains inaccurate, misleading or incomplete information, a hearing may be convened to deal with the application, which could result in a licence refusal, suspension or cancellation. It is in the best interest of every licence applicant to make full disclosure with respect to criminal charges and convictions, bankruptcy or legal proceedings at the outset.

If applicants conceal adverse information by providing false or incomplete information in their applications, the presumption as to their "good reputation" is compromised. Real estate licensees constantly act in fiduciary relationships and for that reason their trustworthiness must be above question.

Licensee Disclosure Responsibilities

Section 2-21of the Council Rules states that:
(2) A licensee must promptly notify the council, in writing, if any of the following circumstances apply:

(a) the licensee is subject to any disciplinary or regulatory proceedings in which the licensee may be or has been made subject to a discipline sanction under legislation in British Columbia or another jurisdiction regulating

(i) real estate, insurance or securities activities, or

(ii) mortgage brokers, accountants, notaries or lawyers;

(b) the licensee has any court order or judgment made against the licensee in relation to

(i) real estate services,

(ii) a dealing in insurance, mortgages or securities, or

(iii) misappropriation, fraud or breach of trust;

(c) any business that the licensee owns, or of which the licensee has been a director, officer or partner at any time during the past 2 years, has any court order or judgment made against the business in relation to

(i) real estate services,

(ii) a dealing in insurance, mortgages or securities, or

(iii) misappropriation, fraud or breach of trust;

(d) the licensee is charged with or convicted of an offence under a federal or provincial enactment or under a law of any foreign jurisdiction, excluding

(i) highway traffic offences resulting only in monetary fines or demerit points, or both, and

(ii) charges initiated by a violation ticket as defined in the *Offence Act* or by a ticket as defined in the *Contraventions Act* (Canada);

(e) the licensee is the subject of any bankruptcy, insolvency or receivership proceedings;

(f) any business that the licensee owns, or of which the licensee has been a director, officer or partner at any time during the past 2 years, is the subject of any bankruptcy, insolvency or receivership proceedings.

(3) In addition to providing a written notice, the licensee must provide

(a) particulars, and

(b) any additional information or documentation, as requested by the council.

(4) In the case of notice required to be provided by an associate broker or representative, the licensee must give a copy of the notice under subsection (2) to the managing broker of the related brokerage.

Licensees must not wait for either licence renewal or licence transfer to report this information to the Council.

Full Disclosure to Lending Institution

The Council is always concerned to hear suggestions that some licensees are drafting Contracts of Purchase and Sale that may conceal the true price to be paid by a buyer. Why? Presumably to assist the buyer in obtaining financing by either inflating the value of the property, or overstating the amount of money being contributed to the transaction by the buyer.

Real estate transactions ***must not be*** structured to mislead mortgage lenders as to the amount of equity (if any) being provided by buyers. **This is fraud. Licensees who participate are subject to a wide range of penalties.**

Fraud includes contracts that state that some amount of money is to be paid directly to the seller to finish a basement when the basement is already finished and the seller never receives these funds; gift letters from family members where no gift funds are ever paid over; or a separate addendum to the contract crediting back funds to the buyer. The implications of a licensee participating in these types of deceptions are serious.

Do not confuse acting in the best interest of clients with facilitating fraudulent mortgage applications.

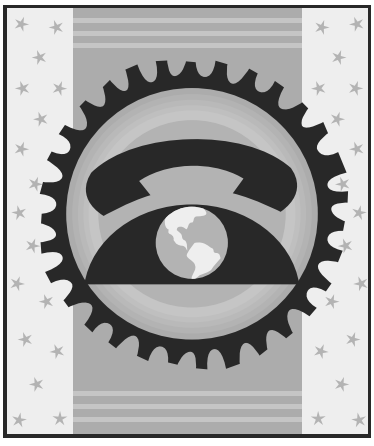
Listing agents must ensure that the Contract of Purchase and Sale spells out the proposed equity and financing being sought, in order to protect the interests of the seller. This may involve rewriting the financing section of the contract. All applicable financial information must be contained within the same contract. *"Altered"* Contracts of Purchase and Sale, which seek to mislead a lender and a seller, are fraudulent and can be deemed criminal.

Duty to Report Illegal Activities

Occasionally, licensees will come across a situation where a property they have listed for sale, or are providing rental or strata management services for, is being used for illegal purposes (e.g., a marijuana growing operation, prostitution, fraud with respect to a new home and the application of the Goods and Services Tax). The general rule is that no citizen has an obligation to report to the authorities an activity which may appear to them to be illegal. Exceptions to this general rule include the obligation to report to the authorities a child in need of protection and the requirements under the provisions of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*.

While this general rule would apply to licensees, they must be careful not to appear to be aiding or abetting the carrying on of the illegal activity. Aiding and abetting is a criminal offence if a person does or omits to do something with the purpose of aiding another person to commit an offence and there is a guilty intent behind the action or omission. There would be no guilty intent if a licensee, having observed the illegal activity, walked away from it because he or she did not want to become involved.

Guilty intent may, however, be implied if a licensee, knowing of the illegal use, promotes that use as if it were not illegal. For example, the Council has previously advised licensees that they are to avoid advertising illegal suites as a possible source of revenue for homeowners.



The same principle applies to the situation where a builder has placed a telephone, a TV and a sleeping bag in the new house and says "This house has been lived in. There is no GST." Licensees must be cautious not to knowingly make a false or fraudulent statement in advertising or representations to buyers. Do not advertise "No GST" if you know or suspect otherwise.

What does a licensee do if he/she discovers that a property he/she is managing or offering for sale is being used to grow an illegal cash crop? Your first obligation to your client is to advise them of all material information, so notify the owner!

Consideration should also be given to whether such an illegal activity may have created a material latent defect because, if such is the case, this would create a disclosure obligation. See the previous section on Disclosing Material Latent Defects on page 10 for further information.

Licensees are advised to read *Legally Speaking* column #296 (available on the internet at **www.realtorlink.ca**), which discusses the question of licensees' duties if an illegal activity, such as a marijuana growing operation, is discovered on a listed property.

Home Warranty Disclosure Requirements

For new homes constructed by licensed residential builders, a warranty provider must, as soon as reasonably possible after the commencement date for the home warranty insurance, provide an owner with a schedule of the expiry dates for coverages under the home warranty insurance as applicable to the dwelling unit and, in the case of a dwelling unit which is part of a strata plan, the schedule must include the expiry dates of the coverages applicable to the common property.

Owner-builders who sell their homes within the first 10 years of occupancy must provide the buyer with a copy of an Owner-Builder Declaration and Disclosure Notice, which indicates that the home was not built by a licensed builder and does not have third-party warranty insurance.

For building envelope renovations subject to the *Homeowner Protection Act*, a warranty provider must, as soon as reasonably possible after the commencement date for the repair warranty, provide the original "holder" (usually the strata council) with a schedule of the expiry dates for coverages under the materials and labour warranty and water penetration warranty.

Disclosure of Management of Rental Real Estate

Where a licensee provides rental property management services in relation to real estate owned by the licensee, section 9-1 of the Council Rules requires that the licensee disclose in writing to the licensee's managing broker that the licensee will be providing rental property management services on the licensee's own behalf.

If a licensee is the sole shareholder of a corporation that owns rental real estate and the licensee provides rental property management services to the corporation, the licensee must also provide written disclosure to the licensee's managing broker that the licensee will be providing rental property management services to or on behalf of the corporation.

In cases where a licensee is providing rental property management services to a spouse, family partner, son, daughter, parent, or partnership or corporation that includes such family members as partners or shareholders, the licensee must make written disclosure to the family member, partnership or corporation and must provide a copy of the written disclosure to the licensee's managing broker.

Disclosure of Strata Management Services

Licensees are permitted by section 9-3 of the Council Rules to provide strata management services to strata corporations in which they own a strata lot without the need to comply with the requirements of RESA, the Regulations and the Council Rules under limited circumstances. Whenever a licensee provides such strata management services, the licensee must make written disclosure of various matters to the strata corporation. A copy of the written disclosure must also be provided to the licensee's managing broker.

Managing Brokers Must Disclose Shortages in Trust Accounts

Section 7-5 of the Council Rules states that a brokerage must not make any payment out of a trust account if the payment would reduce the amount currently recorded in a trust ledger for the account to a negative balance or the trust ledger to which the payment relates is already in a negative balance. This Rule further requires that, if at any time there is a negative balance, the brokerage must take immediate steps to eliminate the negative balance.

The brokerage must notify the Council of a negative balance immediately if a related managing broker considers that the negative balance may result in a person having a claim of a compensable loss in relation to the brokerage; in any other case, within ten working days after the negative balance arises, unless the brokerage is able to eliminate the negative balance in that time.

Delivery of Disclosure Statements to Buyers under the *Real Estate Development Marketing Act*

Under the former *Real Estate Act*, disclosure requirements placed on developers offering certain interests in land were detailed in Part 2, and those requirements were administered by the Superintendent of Real Estate.

Effective January 1, 2005, Part 2 of the former *Real Estate Act* was replaced by the *Real Estate Development Marketing Act* (REDMA). The Superintendent of Real Estate continues to administer REDMA.

In situations where REDMA requires a developer to provide a buyer with a disclosure statement, section 15 (1) of that legislation outlines the following requirements with respect to the timing of providing a disclosure statement to a buyer:

"**15** (1) A developer must not enter into a purchase agreement with a purchaser for the sale or lease of a development unit unless

(a) a copy of the disclosure statement prepared in respect of the development property in which the development unit is located has been provided to the purchaser,

(b) the purchaser has been afforded reasonable opportunity to read the disclosure statement, and

(c) the developer has obtained a written statement from the purchaser acknowledging that the purchaser had an opportunity to read the disclosure statement."

This timing is essentially unchanged from the requirements contained in the former legislation.

These requirements clearly indicate that it is not acceptable to create a condition that effectively suggests an offer is "subject to" the buyer receiving, reading, and approving a disclosure statement, or to include a term which states that the seller will, at some time in the future, provide a copy of the disclosure statement to the buyer.

The Council is aware that some developers are suggesting that they will not provide a copy of a disclosure statement to a buyer until an offer has been presented on behalf of that buyer. In such situations it has even been determined that the contract being used, the standard wording of which has likely been prepared by a lawyer on behalf of the developer, may include a statement that the buyer acknowledges having been provided a copy of the disclosure statement, and being given a reasonable opportunity to read the disclosure statement, when neither has occurred at the time the offer is written.

Section 21 of REDMA outlines a buyer's right of rescission with respect to the purchase of a development unit where a disclosure statement is required. This 7 day rescission period is triggered in these circumstances by the **later** of the date the purchase agreement was made, and the date the developer obtained the written statement from the buyer required by section 15 (1)(c) referred to above. A buyer who has made an offer on such a developer's contract may have inadvertently triggered the commencement of the 7 day rescission period before having received, or having an opportunity to read, the disclosure statement.

In addition to this 7 day rescission period right, section 23 of REDMA provides that an agreement to purchase a development unit is not enforceable against a purchaser by a developer who has breached section 15 of REDMA.

The above types of practice contravene the requirements of REDMA, and the Council offers the following advice to licensees in this respect:

Licensees acting as agents for developers

A licensee acting as an agent has a common law obligation, and a professional obligation under RESA, to follow the legal instructions of his/her principal. Where a licensee who is acting as the agent for a developer is instructed by that developer to not provide a copy of a disclosure statement to a buyer until that buyer has presented an offer, or to structure an offer in any of the ways described above, those are not lawful instructions, and the licensee should not act upon those instructions. Instead, that licensee should remind the developer of the requirements of REDMA in this regard, and of the risk that the purchase agreement may not be enforceable by the developer. The licensee should also suggest the developer seek legal advice before attempting to proceed in this unlawful manner. The Council is of the view that a licensee should not continue to act for a principal who insists that they act in an unlawful manner.

Similarly, if a licensee acting as an agent for a developer should receive an offer where the buyer has not yet received and read the disclosure statement, and provided the required written statement acknowledging this has happened, that licensee should advise the developer that, in order to comply with REDMA, this offer should not be accepted until these requirements have been met.

Licensees acting as agents for buyers

Licensees acting as agents for buyers also have common law obligations, and professional obligations under RESA. In these circumstances a buyer's agent has both a common law duty and a professional obligation to inform the buyer of their right to obtain and review a disclosure statement prior to writing an offer, and the possibility that agreeing to some other arrangement may not be in their interest. After providing such information to a buyer, if that buyer expresses an interest to write an offer before receiving and reviewing a disclosure statement, that buyer should be advised to seek independent legal advice, and the licensee should document the fact that they have so advised the buyer.

Licensees who have questions about the proper timing for delivery of these disclosure statements should familiarize themselves with REDMA, which is available by linking from the Council's website (www.recbc.ca > Licensee Information > Real Estate Legislation). They may also wish to contact the Office of the Superintendent of Real Estate at 604-953-5300.

Frequently Asked Questions

Disclosure of Remuneration (s. 5-11) and Disclosure of Benefits (s. 5-12)

1. Why do I have to disclose what I'm making to a buyer whom I'm representing? It's none of their business. Or, isn't it a breach of my privacy to have to tell a buyer what I make?

The obligation arises out of the agency relationship. Agents have an obligation to disclose to their client (principal) everything known to them about the subject of a transaction, as well as an obligation to disclose any potential conflicts of interest between their own interests and the interests of their clients. What a buyer's agent earns from a particular trade is not that agent's private information vis a vis the buyer.

2. How and when do I make the disclosure?

The Council is not dictating how this disclosure must be made, only that it must be. The Council has created forms that can be used and which are available on its website at www.recbc.ca. However, licensees who are members of a real estate board should check with that board to determine if it has policies with respect to this disclosure. For disclosure by buyer's agents to buyers, the Council has suggested that a combination of providing a prospective buyer with a copy of the Working with a Realtor brochure (which discloses the source of remuneration in typical trades), and providing that buyer with a copy of the MLS property information sheet which includes the remuneration offered to a cooperating brokerage is sufficient in most cases. (See dual agency below for an exception.) It is good business practice for a licensee to have the buyer initial whatever document is used for this disclosure. Such disclosures must be made in a timely manner, which means when the information is useful. Therefore, this disclosure must be made no later than immediately before the buyer makes an offer.

3. Who gets copies of the disclosure?

A copy of the written disclosure must be provided to the person to whom the disclosure is made, a copy must be retained by the licensee who makes the disclosure, and a copy must be provided to the licensee's brokerage and kept in the trade file. There is no need to provide a copy to the Real Estate Council.

4. What amount of remuneration has to be disclosed in dual agency situations?

The brokerage is the agent. "Limited" dual agency means that the brokerage has two clients. This requires the brokerage, and its licensees, to be impartial. The only limitations in the Limited Dual Agency Agreement on a brokerage's obligation to disclose are that the brokerage is not to disclose information with respect to either client's acceptable price or terms, motivation, or personal information (without written consent). Otherwise, the brokerage must disclose to both clients all material information with respect to their services, the real estate, and the trade. Consequently, whether a dual agency trade involves one licensee or more than one licensee, the remuneration to be disclosed is the total remuneration to be earned by the brokerage.

5. What is the 'source' of remuneration for a buyer's brokerage?

In most transactions, sellers have, through a listing contract, appointed a brokerage to act as their agent. That listing contract stipulates the commission to be paid to the listing brokerage, and typically authorizes the listing brokerage to share a specific portion of its commission with a co-operating brokerage. Where a brokerage which is acting as an agent representing a buyer who buys such a listing, that buyer's agent is paid the co-operating broker's portion of the commission by the seller's agent. Therefore, the 'source' of the buyer's agent's remuneration is the listing brokerage, and that is what should be disclosed to the buyer, along with the amount of that remuneration.

6. What is the 'source' of remuneration for a brokerage acting as a dual agent?

As discussed in question 4 above, a brokerage acting as a dual agent, whether through one licensee or two or more licensees of the same brokerage, receives its remuneration (typically) by way of the listing contract it has entered into with the seller. The brokerage is not required to share its remuneration with any co-operating brokerage. Therefore, in dual agency the 'source' of the brokerage's remuneration is the seller wherever that remuneration arises as a result of a listing contract.

Continued on next page...

Frequently Asked Questions *(Continued from previous page)*

7. If I list and sell a property but have no agency relationship with the buyer, do I have to disclose my remuneration to that buyer?
*No. The requirement is for disclosure to a **client**, not to a customer. Section 3-4 of the Council Rules sets out that licensees have a duty to act honestly and with reasonable skill and care when providing real estate services. This includes their dealings with customers, as well as clients.*

8. Why doesn't anybody else have to make these types of disclosure?
Other industries/professions do have to make these disclosures if they are acting as agents on behalf of clients. There are similar requirements within the real estate profession in other jurisdictions such as Alberta, Saskatchewan, Ontario, and Nova Scotia. There are similar disclosure rules being developed in other industries such as insurance. Regardless of whether there are specific legislative requirements, there is the common law duty of disclosure wherever the agent/principal relationship exists.

9. If I have an Exclusive Buyer's Agency Contract signed with a buyer, have I satisfied the disclosure requirement?
Only if the buyer ends up paying the buyer brokerage's remuneration directly. The "standard form" Exclusive Buyer's Agency Contract available through real estate boards states in clause 4B that "Prior to the Buyer making an offer to purchase a property, the Buyer's Brokerage will advise the Buyer of the total amount of remuneration offered by the seller and the listing brokerage to be paid to the Buyer's Brokerage for assisting in obtaining a buyer for that property."

Clause 4E goes on to state: "The Buyer's Brokerage will advise the Buyer of any remuneration, other than that described in Clause 4B, to be received by the Buyer's Brokerage in respect of that property."

These are precisely the types of disclosure contemplated by section 5-11 of the Council Rules.

10. How does section 5-11 relate to referral fees?
The definition of 'remuneration' is very broad and includes referral fees. Therefore a licensee has an obligation to disclose to a client any referral fee they will receive in the course of providing real estate services to that client.

11. Am I required to disclose to a seller client the fact that I am prepared/have agreed to pay a referral fee to someone for them referring that client to me?
Yes, although this is not a requirement under section 5-11 of the Council Rules. Section 3-3(f) of the Council Rules requires a licensee to disclose "all known material information respecting the real estate services" being provided. The fact that a licensee has agreed to pay a referral fee (often but not always based on a percentage of the remuneration to be paid by that seller) is material.

12. What type of benefits is section 5-12 referring to that would need disclosure?
This section refers to benefits received in relation to providing rental property management or strata management services. For example, if as a strata manager, every time your brokerage pays an invoice for a strata corporation which uses the services of a particular landscaping company, your brokerage receives a 10% rebate paid directly to the brokerage. Section 5-12 of the Council Rules requires that the nature and extent of this benefit must be disclosed to the strata corporation before that benefit is accepted.