

CONFLICT OF INTEREST

In an article which I wrote in the February issue of REM I set out how RECO's new disciplinary procedures operated procedurally, from the initial complaint through to the Disciplinary process.

What has been implemented by RECO is a comprehensive package whereby real estate agents and brokers have a responsibility to the public through both disciplinary procedures and the implementation of an insurance program, the purpose of which is to elevate the status of the real estate agent and broker to that of a full professional, who is self-governing but is responsible to discipline and insure itself like any independent professional body.

Real estate agents and brokers appear to be most vulnerable in the exceedingly gray but important area of conflict of interest; the law with respect to conflict of interest which is complicated remains to be fully developed with respect to agents and brokers.

The issue of conflict of interest is, in my opinion, the underlying theme of the code of ethics that has been implemented by RECO; it is the single most important issue which most seriously confronts any real estate agent and broker in the province of Ontario.

For example, in the definition section of the code of ethics reference is made to a "buyer agency agreement" which is an agreement between a member and a client to assist a client to purchase property; a "client" is a person who is represented by a member, and can be either a buyer or seller.

"Consensual dual agency" refers to a relationship where the member however represents both the buyer and the seller in a transaction provided there is the informed consent of the buyer and the seller; the definition of "consent" means the voluntary consent of the person who appears to understand the material facts and considerations and who appears to appreciate the reasonably foreseeable consequences of the decision he or she is making when agreeing to dual agency.

It is this vague and ambiguous wording that may give rise to many problems with respect to both discipline procedures and insurance claims, as against agents and brokers. Further this is only one small problem in the much broader issue of conflict of interest.

Returning to dual agency, it has been stated that, by definition, consensual dual agency will not arise when two (2) different agents with the same firm are involved in the transaction, one representing the buyer and the other the seller.

However the code of ethics appears to be silent as to what type of agency does arise in this case, is it a single agency to each client (the buyer and the seller) or is it perhaps an undisclosed dual agency? It will be left to the Courts and the Disciplinary body to

determine in each case the degree and type of disclosure and understanding that exists, and thus the degree of liability or culpability of each agent or broker.

It is extremely important now that the real estate agents and brokers have been elevated to the status of professionals regarding discipline and insurance matters that the complex issue of conflict of interest, dual agencies, agents, full disclosure and informed consent be understood by every broker and agent in Ontario.

What appears to be informed consent by one person may not be the informed consent by another. Such factual determinations will become more the subjective, or depend on actual interpretation of facts of each case thereby leaving both agents and clients in a state of continuing uncertainty.

In order for real estate agents and brokers to avoid such uncertainty it behooves the agent or broker to lead in clarifying the relationship with the client.

This can be done in the clear wording of the agency agreement itself as well as the keeping of written notes of any discussions of the issue. Agents and brokers would be well advised to have their agency agreements reviewed by a lawyer prior to executing it with a client particularly when dual agency is being contemplated. Agents and brokers should keep dated memoranda of conversations they have with their clients regarding what is or is not communicated to the client which can be used as evidence at a later date should the issue of conflict arise.

In my view one of the most important underlying themes of the code of ethics is to prevent/avoid conflicts of interests arising between a reasonably knowledgeable real estate community and a reasonably unsophisticated public. There is a clear concern that without specific language in contractual arrangements or specific notations on discussions with clients regarding disclosure, Courts will find in favour of the unsuspecting public or client and against the professional real estate agent or broker any time a conflict of interest arises.

Indeed if any such complaint does arise it is imperative for an agent or broker to obtain legal advice even before responding to an oral or written complaint because the nature of that response could be critical to the ultimate success or failure of the complaint or claim.