

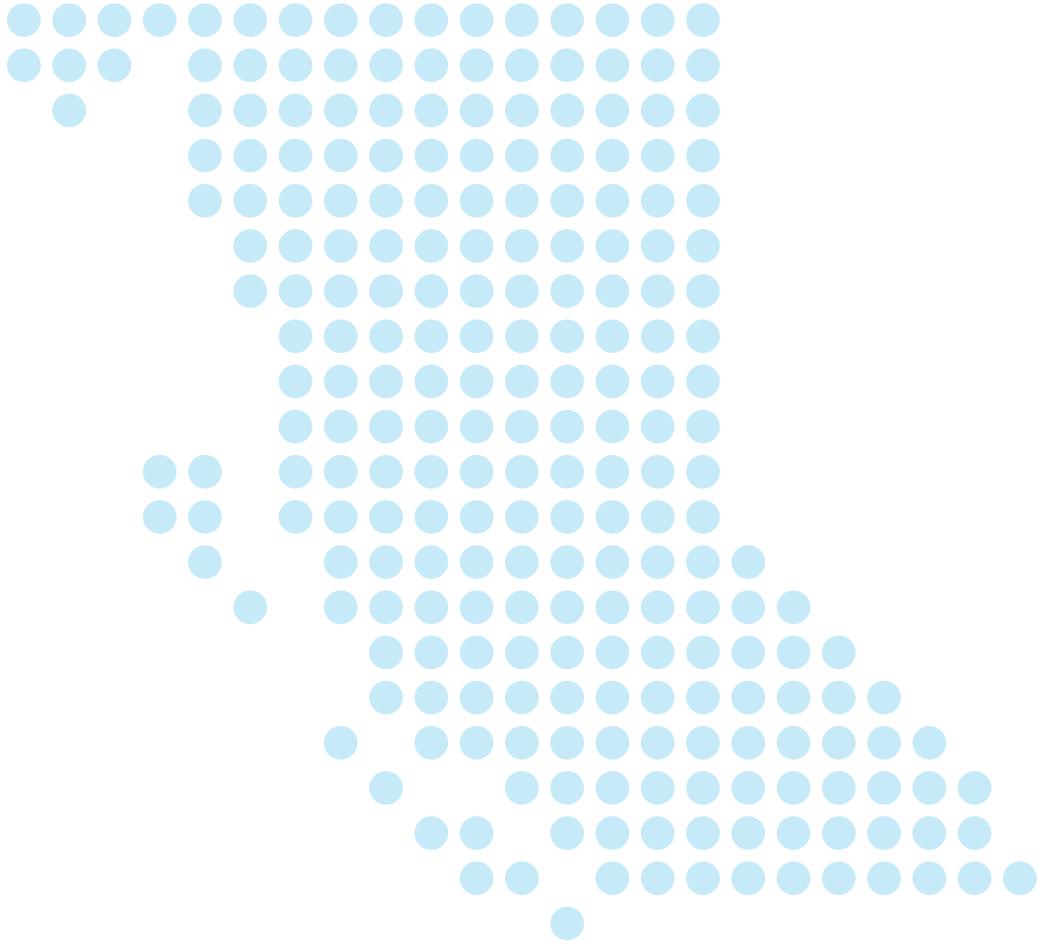
RECBC

REAL ESTATE COUNCIL
OF BRITISH COLUMBIA

Ethics for the Real Estate Professional

LEARNER RESOURCE BOOK





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Table of Contents

Overview	3	Module 4	61
Disclaimer	3	Disclosure	
Acknowledgements	3	4.1 How disclosure supports ethical behaviour	62
Introduction	4	4.2 General Duty of Disclosure and Duty to Disclose Conflicts of Interest	63
Framework for Ethical Decision-Making	5	4.3 Specific Duties of Disclosure	66
Module 1	7	4.4 Exemptions to the Disclosure Requirements	79
Honesty & Integrity		4.5 Summary	83
1.1 The case for professionalism	8	Module 5	85
1.2 The public interest	11	Reporting Misconduct	
1.3 The importance of trust	14	5.1 Introduction	86
1.4 What does “honesty” mean?	15	5.2 The Profession is a Shared Responsibility	87
1.5 What does “integrity” mean?	16	5.3 The Role of Real Estate Professionals in Maintaining Professionalism	88
Module 2	23	5.4 The duty to report in other professions in BC	89
Duties to Clients		5.5 The Duty to Report in RESA and the Rules	90
2.1 Introduction	24	5.6 The Duty to Report as an Ethical Duty	92
2.2 Sources to duties	25	5.7 What to do When Unsure of Whether to Report	93
2.3 Duties to Clients under the Real Estate Rules	26	5.8 Where to Report Misconduct	94
2.4 Duties to third parties	40	5.9 How Managing Brokers Handle Reports of Misconduct	95
2.5 Guidance for managing brokers	41	5.10 Conclusion	99
Module 3	45		
Conflicts of Interest			
3.1 What is a conflict of interest?	46		
3.2 What are the requirements regarding conflicts of interest?	49		
3.3 How to avoid conflicts of interest	49		
3.4 Conflicts of interest and former clients	51		
3.5 Identifying and addressing conflicts of interest	51		
3.6 Using a reasonable and informed third party test	56		
3.7 Disclosure and consent are necessary but not sufficient	57		
3.8 Brokerage responsibilities	57		

Overview

Disclaimer

The materials in this course and the classroom discussions are for educational purposes and are general in nature. The materials and the discussions do not constitute legal or other professional advice. Licensees are responsible for exercising their own professional judgement in applying comments to particular situations.

During the class, please be mindful of confidentiality requirements and keep situations generic as needed. Contact the Real Estate Council of British Columbia (RECBC) Professional Standards Advisors for further guidance.

Land Acknowledgment

It is important that we acknowledge the First Peoples on whose traditional territories we live and work. The offices of the Real Estate Council of BC are on the traditional, ancestral, and unceded Indigenous territories of the Musqueam, Squamish and Tsleil-Waututh First Nations.

We particularly recognize the privilege of BC real estate professionals to participate in land transactions on the traditional territories of various First Nations. We encourage you to find out on whose land you live, work and play here: <https://native-land.ca/>. Please take a moment to acknowledge those territories.

Course Acknowledgment

The Real Estate Council of British Columbia would like to thank the following who contributed their time and expertise. Your assistance in the creation of this course has been invaluable:

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Introduction

This course focuses on ethical decision-making in the context of the real estate profession. As a real estate professional, your clients look to you to be a trusted adviser, whether you provide residential or commercial trading, rental property management or strata management services. Fulfilling that role requires you to pay attention to the ethical implications of the decisions you make, both on a day-to-day basis as you go about providing services for clients, and in more challenging situations where an ethical concern arises. This course will help you understand your obligations and the expectations placed on you as a licensee. This course is designed for all real estate professionals. As you work through the course, some of the materials will deal with roles that might not currently apply to you. As a member of the profession, it is important that you have a broad understanding of the industry and the obligations of your fellow professionals in other service areas.

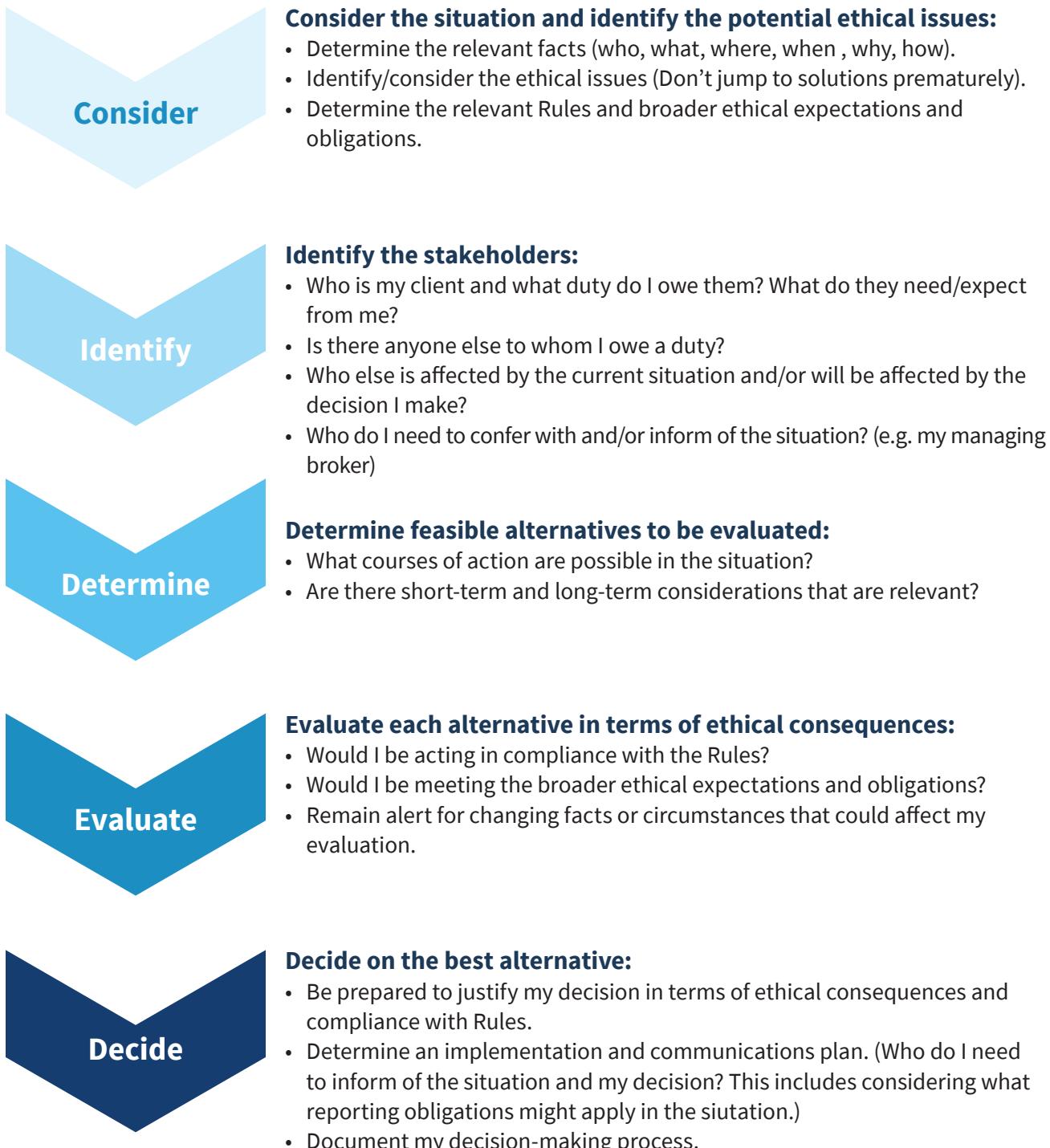
The course is made up of both online and classroom-based elements. The online material will ensure that you have reviewed the relevant requirements of the profession. It will challenge and guide you in meeting those requirements and the broader expectations of the public and the profession by applying an ethical lens to decision-making.

Although this course makes frequent reference to legal and regulatory obligations under relevant Acts and the Real Estate Rules, the focus of this course is not an interpretation of rules and regulations. Rather, it concentrates on providing guidance on ethical decision making in the context of professional obligations.

Note also that in addition to the regulatory requirements referenced in this course, you also need to be aware of any compliance obligations you may have from industry associations to which you might belong (for example, the CREA Code, Rules of Cooperation, etc.).



Framework for Ethical Decision-Making



Module 1

Honesty & Integrity

Learning Objectives

By the end of this module, you will be able to:

- Explain what it means to be a member of a profession and the general expectations that society places on professionals.
- Justify why trust is the essential element underlying the value of a profession and explain how trust is built.
- Explain why honesty and integrity are essential for building trust as a professional.
- Illustrate how honesty and integrity apply to common interactions with colleagues and clients.

Module 1: Honesty & Integrity

1.1 The case for professionalism

What comes to mind when you think of the word professional?

In your answer, did you include the names of any particular professions (such as accountants, lawyers, doctors, or engineers)? If so, did you include real estate professionals on that list?

You could also have included words that represent characteristics that you expect from professionals. You may have included words like “trustworthy” or “trusted”, “ethical”, “respected”, “skilled”, “competent”, “expertise”, “capable”, “honest”, “objective”, “educated”.

Society expects these characteristics from every person who is a member of a profession. To be recognized as a professional, we need to earn the respect and trust of the public.



Module 1: Honesty and Integrity

In every profession, it is important that its members understand the fundamental concepts behind being part of the profession. So let's begin by considering what a professional is. There are many definitions of profession, but most definitions share common elements. In general, members of a profession:

- accept a responsibility to put the interests of the public (and their clients and employers) ahead of their own interests;
- have a high level of expertise that is valued by members of the public;
- are required as a condition of membership to complete specific requirements for initial and ongoing training and education;
- are required to maintain objectivity when making decisions;
- are required to follow specific rules of conduct, developed primarily for the protection of the public; and
- are held accountable for their actions.

The last point is especially noteworthy. Professionals have an ethical obligation to report incompetent or unethical practice, meaning that they are obligated to take appropriate actions if they become aware that they or one of their professional colleagues has violated the standards of the profession.

Reporting requirements within the profession help to increase professionalism and enhance public trust. In order to build and maintain public trust, real estate professionals must hold themselves, their employees and other real estate professionals to high professional and ethical standards. You'll study the specific obligations for reporting misconduct within the real estate profession in Module 5.

Professions are often, at least traditionally, thought of as "callings" rather than jobs or occupations. This framing of professions focuses on providing valuable service to others as opposed to making money for oneself. This focus motivates professionals to:

- collaborate and work together;
- share knowledge and best practice; and
- move the profession forward through striving for continuous improvement.



Professions are typically regulated, either directly by the government or through delegated self-regulation. In BC, real estate professionals are regulated by a Crown Agency reporting to the

Module 1: Honesty and Integrity

Minister of Finance. Until 2021, that Crown Agency is the Real Estate Council of British Columbia (RECBC), overseen by the Office of the Superintendent of Real Estate (OSRE). In 2021, regulatory authority for real estate professionals will transfer to the British Columbia Financial Services Authority. The regulator sets the standards of professional conduct and, more broadly, protects consumers who are buying, selling or renting a home, or living in a condominium or other strata property that requires management.

There are a number of sources of professional requirements that are relevant to the roles of licensed real estate professionals:

- The *Real Estate Services Act* (RESA) and related regulations
- The *Strata Property Act* and related regulations
- The *Residential Tenancy Act* and related regulations
- RECBC *Rules*
- Laws of Agency and Fiduciary Duty under common law

You should already have a general understanding of your obligations under each, but in this course you will consider many of these requirements in more depth, through the lens of professional ethical behaviour.



1.2 The public interest

The previous topic placed a great deal of emphasis on the need for professions to protect the public interest. In the real estate profession, this mandate is stated specifically in the *Real Estate Services Act* (RESA):

- 73 (2) The objects of the real estate council are to ...
 - (c) uphold and protect the public interest in relation to the conduct and integrity of its licensees.

Read Section 35 of the RESA now, and see what is meant by *professional misconduct* and *conduct unbecoming* a licensee. In the Preface, you considered the difference between complying with rules and meeting the role of a professional by adhering to broader professional principles. Section 35 of the RESA illustrates how this concept is reflected in the real estate profession. Section 35(1) requires compliance with the RESA, the Regulations and the Rules, but it also includes broader requirements. Section 35(2) states:

- (2) A licensee commits conduct unbecoming a licensee if the licensee engages in conduct that, in the judgment of a discipline committee,
 - (a) is contrary to the best interests of the public,
 - (b) undermines public confidence in the real estate industry, or
 - (c) brings the real estate industry into disrepute.



Note that this section of the RESA sets the scope of a real estate professional's obligations based on upholding the public interest, and maintaining public confidence and professional reputation. This would include complying with the Rules, but it goes beyond that.

As a real estate professional, your duty to your clients has to be balanced off against your duty to the public. Your duty of loyalty to the client does not, for example, extend to complying with instructions that are illegal or unethical. In situations where a client's instructions are contrary to the public interest, you'll want to get guidance from your managing broker, RECBC's Professional Standards Advisors or a lawyer. You'll look closer at your duties to clients in Module 2.

Module 1: Honesty and Integrity

What does it mean to conduct oneself in a way that does not undermine the public's confidence in the real estate industry? Imagine the following scenario. Two real estate professionals meet at a coffee shop and are discussing their recent deals. Here's part of their conversation:

Sam: Hey, Pat, how's business?

Pat: Not bad, but this restriction over dual agency has sure cut into my commissions! I'm taking a real hit, but I guess that's the way it is now.

Sam: No way! You just need to be more creative. You can still effectively double-end deals, without "technically" being offside of the new rules. I didn't spend all that time building my network just to lose half my take on deals!

Pat: Really? No wonder you're seen as one of the best in the industry. Tell me more!

Imagine the impression this would give to a member of the public who was at the next table and overheard the conversation. Does it inspire confidence that the real estate professionals are acting in the best interest of the public? What is the person overhearing the conversation likely to think of the real estate industry? Consider this in the context of the Framework for Ethical Decision-making.

The issue here is that even if Sam is managing to "technically" comply with the Rules, his self-interested behaviour puts public confidence and the reputation of the industry at risk. You should question whether Sam is meeting his obligations to his clients and to others. For example, are there unrepresented parties being unfairly treated as part of his "creative" approach, or worse, is his approach in fact actually offside of the Rules? Consider alternative approaches to the situation below.



Question • What would you say to Pat?

You: Hey, Pat, how's business?

Pat: Not bad, but this restriction over dual agency has sure cut into my commissions! I'm taking a real hit, but I guess that's the way it is now.

You: *Yes, you have to remember that the Rules were changed to mitigate the risk for the public. This focuses more on meeting a single client's needs and removes the conflict of interest and allows the real estate professional to do a better job. This will then help you gain great recommendations from satisfied clients and hopefully increase your business.

Suggested response:

You could have reminded Pat of why the Rules were changed and the risk to the public that was mitigated by the change in Rules. You could also have discussed how focusing more on meeting a single client's needs removes the conflict of interest and allows the real estate professional to do a better job which should generate more positive leads in the future through recommendations from satisfied clients. You'll learn more about identifying, evaluating, and mitigating conflict of interest situations in Module 3.



Acting in the public interest includes not conducting business using methods that are deceptive or illegal. But what if the behaviour in question is not directly related to a real estate professional's business? Consider the following scenario:

Lise Ensee is a real estate professional who is very active in the profession. A couple of years ago, she was convicted of driving under the influence. Recently, she was stopped on suspicion of impaired driving, and was criminally charged after refusing a breathalyzer test.

Does Lise's behaviour have the potential to bring the industry into disrepute or undermine public confidence? It's quite possible, depending on the situation. For example, was there damage to property or was anyone injured or killed? Have there been additional offenses? And so on.

The potential for harm to the profession is the basis for the requirements in Section 2-21 of the Rules, which requires real estate professionals to promptly disclose to RECBC any discipline, bankruptcy or criminal proceedings. This type of disclosure doesn't necessarily mean that the individual won't be able to obtain or retain a license – each situation is assessed on its own merits, in accordance with RECBC's Education and Licensing Guidelines. It is important to remember, however, that your actions (both professional and personal, involving clients and non-clients) have the potential to reflect on the industry as a whole and might affect your eligibility for licensing.

Section 10 of the RESA outlines the qualifications for obtaining a licence. In addition to education and experience requirements, applicants must be fit to be licensed. Fitness for licensing includes being of good reputation, and considers whether the applicant has been refused a licence or had a license suspended or cancelled in any jurisdiction, or whether the applicant has been convicted of an offence. For more information, see also the Licensing Information in the RECBC Knowledge Base.

Module 1: Honesty and Integrity

1.3 The importance of trust

Trust is fundamental to ensure that a profession is valued by clients and society at large. If the public doesn't trust that you are competent and have the necessary expertise, they won't want to engage your services. Even more importantly, if they don't trust that you'll act ethically and professionally and put their interests ahead of your own, they also won't want to hire you. Trust is a profession's most valuable, and fragile, asset.

Trust becomes increasingly important when consumers have other choices. For example, consumers may choose to bypass the services of a real estate professional if they can manage the transaction on their own. All real estate professionals should be mindful of this, especially as technology (such as online tools, automated services and AI-enabled algorithms) continues to emerge and provide new ways for consumers to supplement the traditional activities of real estate professionals, and society in general adopts a more "do-it-yourself" mentality. The relevance of the profession in the future will depend on how trusted real estate professionals are as a whole and how much value they are perceived to provide.

Trust takes a long time to build but can be diminished in an instant through one bad decision or inappropriate action. You should guard your trustworthiness as if your future depends on it – because it does!

Trust is earned and maintained at both an overall profession level as well as through the actions and behaviour of individual real estate professionals.

Think about how trust is created and maintained.

How the regulator builds and maintains trust in the profession	How individual real estate professionals build and maintain trust
Setting strong professional requirements	Being honest, transparent, and fair in business and personal dealings
Executing stringent entrance standards and continuance standards	Demonstrating professional competence and due care
Publicizing communication and education initiatives	Complying with the regulatory and ethical requirements of the profession
Holding real estate professionals accountable for breaches of requirements	Acting in accordance with broader ethical principles—confidentiality, integrity, objectivity
Communicating appropriate public disclosure of outcomes of complaints	Presenting yourself and your documents in a manner that demonstrates professionalism and respect for clients and colleagues

You reviewed some aspects of how the profession as a whole builds trust in the Preface. For the remainder of this Module, we'll focus on how individual real estate professionals can build and maintain trust by consistently acting with honesty and integrity. These are the foundations of trust, and are the core values that professionals are expected to demonstrate at all times.

1.4 What does “honesty” mean?

Honesty refers to what you say, how you say it, and what you don’t say. The table below lists a number of behaviours associated with honesty.

Behaviour	Example
Being transparent in communications (within the bounds of confidentiality)	Providing the required disclosures and taking time to fully explain them to the client
Providing information clearly so the consumer is not misled	Making sure listing information and disclosures are accurate (e.g., what is included in the reported square footage?)
Not withholding information to mislead a consumer	Advising the client if the strata bylaws are expected to change in a way that would impact their desired use
Not being deceptive	Being forthright about uncertainty as to whether a property may contain asbestos or an oil storage tank
Setting appropriate and realistic expectations about outcomes	Not overestimating the rent that a property will likely generate or the expected sales price of a residential or commercial property Not setting unrealistic expectations about how long a property might take to sell
Following through on promises	Ensuring that any “sweeteners” to encourage a deal are accurately and fully documented and agreed to as per Section 5-6 of the Rules (regarding inducement representations), and are carried through on as represented
Being truthful about the relevant knowledge and experience you possess and the services you are competent to provide	Ensuring that your advertising is appropriate and doesn’t oversell your expertise (consider use of terms such as “expert”, “specialist”, etc.). Being honest with a potential client about your specific understanding of a particular geographic area or property type (e.g., farm, recreational, out-of-area property). Being careful to advise the client when they should seek additional guidance from a lawyer or other professional with specific expertise.

Requirements for honesty are found in both the RESA and in the Rules. For example, Section 35(1) of the RESA includes deceptive dealing as a form of professional misconduct, and Section 118 specifies that it is an offense to make a false or misleading statement in a record required or authorized by the Act. Section 3-4 of the Rules requires real estate professionals to act honestly and with reasonable care and skill when providing real estate services. This is a broad statement, and applies when dealing with clients, non-clients and other real estate professionals.

Module 1: Honesty and Integrity

1.5 What does “integrity” mean?

Integrity is a hard word to define, but we know it when we see it (and especially when it is lacking!). Honesty is a necessary element of integrity, but integrity is much broader. Remember the idea that there are common ethical principles that are expected of professionals by clients and the public that go beyond the Rules. These principles play a part in demonstrating integrity and are included in the examples below.

We show integrity when we:	By:
Behave professionally	<ul style="list-style-type: none"> • exhibiting professional courtesy to colleagues • not disparaging colleagues or the regulator to consumers/ the public • dressing appropriately in a manner that reflects our commitment to professionalism • being respectful and professional to the public and the regulator
Act objectively	<ul style="list-style-type: none"> • not allowing our judgement to be compromised by bias, conflicts of interest, or undue influence or pressure from others • doing what is best for the client, even if it's not in your own interest (you'll study more about conflicts of interest in Module 3)
Deal fairly and in good faith	<ul style="list-style-type: none"> • negotiating a fair price without misleading the other party or taking advantage of a vulnerable individual • not bullying or unfairly pressuring another party or using manipulative tactics • not discriminating against or giving less favorable treatment to colleagues or consumers because of their race/ethnic origin, religion or beliefs, sexual orientation, gender/gender identity, marital status, age or mental or physical capacity
Maintain competence and know the limits of our expertise	<ul style="list-style-type: none"> • understanding and upholding the requirements of the profession (Act, Regulations, Bylaws, Rules, other relevant laws, etc.) • referring clients to another real estate professional if we don't have the required experience or expertise in a transaction • advising a client to obtain independent professional advice on matters beyond our expertise
Maintain confidentiality (more on this in Module 2)	<ul style="list-style-type: none"> • not disclosing a client's personal information, bottom line, or motivation without authorization

continues

Module 1: Honesty and Integrity

OVERVIEW

MODULE 1

MODULE 2

MODULE 3

MODULE 4

MODULE 5

We show integrity when we:	By:
Act with due care and diligence	<ul style="list-style-type: none">• understanding and addressing risks of latent defects or environmental conditions (e.g., presence of asbestos, oil storage tanks, riparian areas)• providing clients with information on how to get additional expertise/advice when needed• taking appropriate care when showing a property (e.g., not sending clients to a showing on their own, taking care to not damage property, locking the property up afterwards and following instructions from the client or listing agent)
Have accountability for our actions	<ul style="list-style-type: none">• owning our mistakes and accepting responsibility• disclose to clients (after discussing with Errors and Omissions)• reporting our own mistake to the managing broker• never attempting to coerce or compensate a complainant to not file or to withdraw a complaint to RECBC

Take special care when you are dealing with consumers who may be vulnerable, disadvantaged or unable to fully understand the character, nature or language of a real estate transaction. For example, consider the extra care needed when dealing with the elderly or with individuals who show signs of cognitive impairment. Think about what they need in order to make informed decisions and not be taken advantage of. Make the extra effort and get advice if you're not sure how to meet your obligations.

Remember:

- All of these ways of demonstrating honesty and integrity drive the level of trust that clients and the public have in ourselves and in our profession overall.
- Trust is the most fundamental driver of the value of any profession, including ours.



To close out this Module, here's a tool to help you decide whether a decision or behaviour you're contemplating would demonstrate honesty and integrity:

Module 1: Honesty and Integrity



The Headline Test

Imagine how you'd feel if your actions became a headline on the home page of a news site — or were widely shared on social media. If you'd be embarrassed, ashamed or concerned about your professional reputation, the actions are probably not ones that demonstrate honesty and integrity. See how the headline test can be used in the following scenarios.

Trading Services

You've been engaged as listing agent for a property in a neighbourhood that has historically been predominantly Caucasian. The lots are large, the location is very desirable, and homeowners tend to stay for many years. Your clients are a Caucasian couple who are moving to another city to be closer to their adult children. They say to you:

“Look, we’re not racist or anything, but we’re good friends with a lot of our neighbours here, and we’re all concerned that the character of the neighbourhood is starting to change — and not in a good way. The people buying here lately are tearing down the old estate homes and putting up monster homes. Our friends would be really upset if that happened to our place too, so we really want to sell to people more like us — you know, people of European descent and so on.”



Question • What would you tell your clients?

Suggested response:

Imagine what a headline could look like if you were to comply with your clients' wishes and only solicit or prioritize offers that were written by Caucasians of European descent:

Real estate “professional” supports overt racism!

Clearly, this would have the potential to undermine public confidence and to bring the profession into disrepute. Refusing to sell to someone because of their race or ethnicity would be discriminatory, and would violate the Human Rights Code. Your duty to your clients does not include taking part in illegal or unlawful actions.

In this situation, you should explain to your clients that you are required by law and by the standards of the profession to uphold the Human Rights Code and cannot screen offers or requests for showings in a manner that would be discriminatory. You might also mention that discriminatory screening practices may not be in the clients' best economic interest. Although it is ultimately their decision whether to accept an offer or not, you are obligated to present every offer to them. You may not be able to change your clients' attitudes, but you are responsible for ensuring that your own actions and discussions remain professional and non-discriminatory.

Rental Property Management

You've been engaged to manage a rental property in a neighbourhood that has historically been predominantly Caucasian. The lots are large, the location is very desirable, and homeowners tend to stay for many years. Your clients are a Caucasian couple who are moving to another city to be closer to their adult children and want to rent out their current home, rather than selling. They say to you:

“Look, we're not racist or anything, but we're good friends with a lot of our neighbours here, and we're all concerned that the character of the neighbourhood is starting to change — and not in a good way. Many of the people moving in here lately don't even speak English. Our friends would be really upset if we were part of that trend, so we really want to rent to people more like us — you know, people of European descent and so on.”

OVERVIEW

MODULE 1

MODULE 2

MODULE 3

MODULE 4

MODULE 5

Module 1: Honesty and Integrity



Question • What would you tell your clients?

Suggested response:

Imagine what a headline could look like if you were to comply with your clients' wishes and only rent to Caucasians of European descent:

Real estate “professional” supports overt racism!

Clearly, this would have the potential to undermine public confidence and to bring the profession into disrepute. Refusing to rent to someone because of their race or ethnicity would be discriminatory and would violate the Human Rights Code. Your duty to your clients does not include taking part in illegal or unlawful actions.

In this situation, you should explain to your clients that you are required by law and by the standards of the profession to uphold the Human Rights Code and cannot screen tenants in a manner that would be discriminatory. You should also point out that by limiting the possible tenant pool, they risk not achieving the highest possible rent. Ultimately, you may not be able to change your clients' attitudes, but you are responsible for ensuring that your own actions and discussions remain professional and non-discriminatory.

Strata Management

You've been engaged as strata manager for an age 55+ townhouse complex in a neighbourhood that has historically been predominantly Caucasian. The strata Council members have all served on Council for many years, and they operate as a tight-knit group. The Council's chair says to you:

“Look, we're not racist or anything, but we're concerned that the character of the neighbourhood is starting to change — and not in a good way. When we need to get painting or landscaping done, it's getting harder and harder to even find someone who speaks English! And you know, the owners get a little uncomfortable when there's questionable workers roaming around. So when you hire service people, please hire people more like us — you know, people of European descent and so on.”



Question • What would you tell Council?

Suggested response:

Imagine what a headline could look like if you were to comply with the Council's wishes and only hire service providers who are Caucasians of European descent:

Real estate “professional” supports overt racism!

Clearly, this would have the potential to undermine public confidence and to bring the profession into disrepute. Although you (and the Council) clearly have a right to expect service providers to be professional and to communicate effectively in English (if that's your language of choice), refusing to contract with someone because of their race or ethnicity would be discriminatory, and would violate the Human Rights Code. Your duty to your client does not include taking part in illegal or unlawful actions.

In this situation, you should explain to the Council that you are required by law and by the standards of the profession to uphold the Human Rights Code and cannot act in a manner that would be discriminatory. You should assure them that you will select service providers who are professional in conducting their trade and are fluent in English. Ultimately, you may not be able to change your client's attitudes, but you are responsible for ensuring that your own actions and discussions remain professional and non-discriminatory.



Module 2

Duties to Clients

Learning Objectives

By the end of this module, you will be able to:

- Compare and contrast the main sources of the duties you owe to clients.
- Apply the duties owed to clients and explain how these duties align with the ethical obligations of the profession.
- Explain and apply the duties owed to third parties including non-clients.
- Assess whether actions would be considered “reasonable” in accordance with legal and regulatory requirements.

Module 2: Duties to Clients

2.1 Introduction

The previous module provided you with an overview of professionalism and the importance of building and maintaining trust through acting with honesty and integrity. In this module, we'll focus on how professionalism and ethical behaviour are fundamental when working with clients. As a real estate professional, your clients expect you to act ethically, to be trustworthy and to do what is best for them.

These broad expectations and principles are the foundation on which the common law and Real Estate Rules are based. When you face ethical decisions, it is essential that you understand and comply with the Rules and laws that specify the duties owed to clients. It is equally important that you consider those obligations in the broader context of professional integrity and trustworthiness. This broader context will help you avoid approaching a situation with a “checklist” mentality and keep you driving towards an enhanced level of trust in yourself and your profession.

A significant component of ensuring that you are acting in an ethical manner is your ability as a real estate professional to identify the legal and ethical duties that you owe to others in any given situation. For licensees in British Columbia, the primary individual to whom you owe duties is your client.

The sources of the duties you owe to clients are varied and include common law as well as the Real Estate Services Act, Regulation and Rules. The duties imposed by these sources can be challenging to understand given that they overlap in numerous ways.

This chapter will help to clarify this by reviewing the duties that you owe to clients, and by exploring how to apply these duties in an ethical manner.

2.2 Sources of Duties

There are four main sources of duties to clients for licensees, as summarized in the table below:

Source	Requirements imposed
Common law: Agency	<ul style="list-style-type: none"> Applies in a relationship where one individual, called the principal, gives authority to another party (the agent) to act for and/or represent the principal's legal interest. In the context of real estate, the licensee is the agent and the client is the principal. Licensees acting as agents are legally obligated to act in the best interest of their principal. Their obligations include acting within the scope of authority, discharging duties with reasonable care and skill, avoiding conflicts of interest and keeping an accurate account of the assets (money and property) entrusted to the agent for the principal.
Common law: Fiduciary duty—the highest level of duties recognized in Canadian law	<ul style="list-style-type: none"> Arises when a party is acting for another party, is being relied on by that party, and is entrusted with discretionary power. Fiduciary relationships carry an expectation of loyalty—you are to act solely in the best interests of your client to the exclusion of all other interests including your own. In addition to the loyalty obligation, there are the duties of confidentiality and to avoid conflicts of interest. Further, as an agent you must disclose all relevant facts and material that you know that pertain to your principal's interests.
Real Estate Rules—especially section 3-3 <i>Duties to Clients</i>	<ul style="list-style-type: none"> The main codified (i.e., officially documented) source of duties to clients. The Rules align with and reflect the obligations under common law.
<i>Real Estate Services Act (RESA)</i> —especially section 35(1) and 35(2)	<ul style="list-style-type: none"> Does not explicitly impose duties to clients but specifies that if a licensee breaches the Rules (including sections of the Rules related to the duties owed to clients) they would be committing professional misconduct and/or conduct unbecoming a licensee. You reviewed this section of the Act in Module 1

The four sources provided above combine to form a set of overlapping duties to your client as well as to other parties to a transaction. Remember that your duties arise from both regulatory obligations (from RESA and the Rules) and from other legal requirements (from the common law of agency and fiduciaries). This means that it is possible for you to face discipline from RECBC due to a breach of a duty under RESA and the Rules, while at the same time facing civil legal action for a breach of the common law duties of agency and fiduciaries.

Module 2: Duties to Clients

The requirements placed on licensees typically stem from your role as an agent of your client. But when does agency end? Most likely, your agency role will end once your contract with the client expires or when the transaction you've been hired to do has been completed and you've met all your obligations. Agency can also be terminated by mutual agreement (i.e., by cancelling the contract early.) But be aware that the duty to maintain confidentiality lives on past the end of the agency relationship. So just because you're no longer acting as your client's agent, you are not free from all obligations.



2.3 Duties to Clients under the Real Estate Rules

In the Rules, duties to clients are specified in Section 3-3, subsections (a) to (j). As you work through these duties in the next section, keep in mind the overall ethical obligations of real estate professionals to act with honesty and integrity.

3-3(a) Act in the best interests of the client

This is arguably the most important duty that all professionals owe to their clients. In practice, the duty to act in the best interests of a client is relatively easy to understand. As a licensee, you must not do anything that would go against your client's interests.

The obligation to act in the best interests of the client is also a key component of the agency relationship under common law and is at the core of the duties of a fiduciary. At the heart of the fiduciary duty of loyalty is the concept of putting your client's interests first, ahead of your non-client's interests and even ahead of your own personal interests.

Acting in your client's best interest does not include taking actions that are unlawful or that constitute an undisclosed or unacceptable conflict of interest. For example, providing money to a client to close a deal could be argued to be in the client's best interest, but this action would also put you in a conflict of interest with your client.

Examples of cases where licensees have been disciplined for failing to act in the best interests of their client include providing erroneous information to a client, not disclosing information that is relevant to a client, failing to collect rent owed to the client by tenants, failing to make reasonable inquiries, and counseling a client to accept a low offer on their property when this may not be in their best interest.

Some actions you can take as a real estate professional that demonstrate that you are putting your client's interests above non-client's interest and your own are:

- Getting to know your client and seeking to understand what is important to them
- Explaining information to them in a way that they understand
- Knowing the risks that are specific to the transaction, and keeping the client informed of those risks and available ways of mitigating them
- Putting in enough time and effort to ensure that their needs are met
- Effectively and efficiently carrying out their instructions
- Following through on what you've said you will do
- Being honest about the limitations of your expertise and advising them to seek specialized advice if needed

As you continue through this module, you'll notice that several of the items on this list relate directly to other subsections of section 3-3 of the Rules. In this way, 3-3(a) serves as a broad reflection of the rest of the section.

As a real estate professional, you may feel that you need a sufficient client base to be successful. Be careful, though, not to take on so many clients that you are not able to serve them all professionally. Only you know the answer as to how many is too many, however you should ensure that you have enough time to properly manage the needs and expectations of each client.

Consider the following scenario:

You are licensed for strata management with a small brokerage that provides each strata manager with responsibility for a separate portfolio. You are good at your job and have been assigned a full portfolio. You become aware that a number of other local strata corporations want you to also manage them. You know that these strata corporations have been looking for a strata manager for some time and you would feel guilty if you couldn't help them. Plus, it's a great opportunity for you to bring in new business. You convince your managing broker to enter into new service agreements with 7 of the strata corporations.

Roll forward 4 months, and your managing broker is now having to take many calls from strata councils in your portfolio, asking why you have dropped the ball and even simple things aren't done in a timely manner. Some of them file complaints with RECBC.

Module 2: Duties to Clients



Question • What should you have done differently?

Suggested response:

Although you may have had good intentions, you did not act in the best interests of the brokerages' existing clients. Instead, you gave preference to the interests of the strata corporations who were previously unrepresented. Arguably, you also put your own interests and those of your brokerage first in enlarging the client base. You should have been more careful in determining how many clients you could adequately serve, and limit the clients you took on. Other clients should have been referred to other strata managers inside of or outside your brokerage.

3-3(b) Act in accordance with the lawful instructions of the client

As a licensee, you are required to complete any instruction from your client that does not violate the law.

Legal link:

The common law of agency also establishes a basic obligation for agents to follow the instructions of their principal. This obligation is also part of the fiduciary duty of obedience.

When receiving instructions, it is important for you to consider whether the form in which you have received the instructions complies with any listing or service agreement that is in place. For instance, if you have a service agreement that requires instructions to be in writing and you receive a verbal request to complete a task, you should ask your client to send their instructions to you in writing.

Most instructions from clients are perfectly legitimate, but you should remain watchful for any instruction that could result in the breach of applicable legislation.

Consider the following situation:

You are a rental property management licensee. Your client calls you and tells you that he had an argument with a residential tenant, which resulted in a shouting match. The client instructs you to evict the tenant immediately. When you tell the client you can't do that, he asks "isn't there some form we can just sign to get rid of him?" You explain that the tenant would also have to be in agreement and sign to mutually end the tenancy. Your client says "fine, fill that out — he yelled at me that he was sick of the place and would love to move. If he doesn't sign it willingly, I'll sign it for him!"



Question • What would you do?

Suggested response:

Evicting the tenant without proper process would breach the *Residential Tenancy Act* (RTA). If the tenant chooses to end the tenancy based on mutual agreement and signs to that effect, the tenancy would be ending lawfully, but you cannot be a party to a client forging the tenant's signature as he has threatened to do. As a professional, remember your obligation to the public. You have a responsibility to treat the tenant fairly and in accordance with the RTA. Turning a blind eye to the client's potentially illegal behaviour would be a breach of your professional obligations.

In this situation you should seek counsel from your managing broker and perhaps even outside legal counsel. If it is decided that the instruction you have received is illegal, then you should notify your client in writing of your position and you should not carry out the instruction. It is also appropriate to advise your client to obtain independent legal advice on their intended course of action. In addition, you should consider whether the client's suggestion of illegal action represents a pattern of behaviour. If so, you and your managing broker may want to consider whether the client is one you should continue representing. Finally, you should be aware that if you are disciplined for taking such an illegal action, it would not be a valid defense to claim that you were just following a client's instruction.

3-3(c) Act only within the scope of the authority given by the client.

A licensee has a duty to their client to only act within the authority that is granted to them. From a practical perspective, the first step in ensuring that you act only within the scope of authority given by your client is to ensure you have a clear understanding of the scope of your authority.

Legal link:

Acting outside the scope of the authority granted by your client is also a breach of a basic common law agency principle. In general, (and unless limited by the agency agreement) an agent has authority to form binding agreements or commitments on behalf of the principal. When representing the principal to third parties, you as the agent are providing a guarantee to these third parties that you have the power to act for the principal. This is known as the "warranty of authority". In order for you as an agent to ensure that you are not exceeding your authority, you should clearly establish the scope of your authority.

There is no direct fiduciary duty that speaks to the scope of authority, however, if you take action outside the scope of your authority, you would likely be breaching your fiduciary duty to act with reasonable care and diligence.

Generally speaking, there are two kinds of authority that you should be aware of:

Module 2: Duties to Clients

- Express authority is authority that has been clearly granted. This could be given verbally, or in writing through a document like a listing agreement or a service agreement.
- Implied authority is authority that has been given to take actions that are reasonably necessary to carry out the express authority granted. For example, if you have express authority to show a seller's house, you have implied authority to unlock and enter the house during the allotted time.

As an example of scope of authority, remember that the Rules require you to get written authorization to sign agreements on behalf of your clients (see section 5-3). In other words, signing agreements for your client is outside of your scope of authority unless you have received express written authority to do so.

Written contracts are always recommended, even if not required under the Rules. This helps to avoid misunderstandings as to what authority has or has not been granted to you.

If you are in doubt as to whether you have the authority to carry out an action, you should confirm your authority with your client in order to ensure that you don't fail in this duty.

Consider the following scenario:

Your brokerage has a service agreement with a strata corporation in a ski resort in the Kootenays. There are not many owners present for most of the year, and the strata lots are rented out by the owners to vacationers. The service agreement requires the brokerage to get authorization from strata council before making any expenditures over \$5,000.

During a major storm in mid-May, there was a leak in the roof. Fortunately, only the common property was damaged; however, the damage to the corridors appears to be significant. The strata council members are all non-resident owners, and you cannot reach them immediately. Another storm is forecasted to start the next evening, with significant wind and rain expected. You call in restoration services to put tarps over the area of the roof that appears to have leaked in order to stop further damage. The restoration company sets up fans to dry the walls, ceiling, and flooring, and offers to have their inspector provide an estimate of repairs that will be needed. While evaluating the damage, the inspector discovers that a section of the retaining wall immediately behind the building is in serious danger of collapsing, which would cause significant damage to the property. He also cautions that the temporary tarps won't withstand the strong winds anticipated to be arriving with the coming storm.

Although you still haven't been able to reach the council members, you ask the restoration company to stabilize the retaining wall and do what is needed to repair the roof well enough to withstand the anticipated storm. The emergency repairs cost \$7,500.

Two to three days later, the strata council members respond to your emails. After hearing of your actions, they ask you under what authority you made the decision to proceed with the repairs.



Question • Which of the following statements would be appropriate to include in your response to the strata council?

Choices	Feedback after they choose and submit their choices
Even without express authority, you had implied authority to take action because it was an emergency.	No, you didn't have express or implied authority. You took action in order to protect the interests of the strata corporation, even though you were not authorized to do so.
Although the remediation company had contained the immediate damage, there was a significant risk that further damage would occur if a comprehensive assessment and repairs were not done quickly.	This is a valid point to include.
You knew that the owners' earnings could be negatively impacted if more damage occurred, and they could be facing significantly higher costs if the retaining wall failed.	This is a valid point to include.
It is the strata council's fault that the situation occurred—if you had been able to reach them, the problem would have been avoided.	Although it's true that the problem would have been avoided if you had been able to reach the strata council members, you cannot put the blame on them. As a competent professional, you should have foreseen that emergencies might arise and should have addressed this in your agreement.
In the absence of clear instruction, you wanted to protect the strata corporation's interests and minimize further losses.	This is a valid point to include.

In this situation, you acted in a manner that you believed to be in the best interest of the client and, as such you were fulfilling an ethical obligation. On the other hand, you also acted outside of the scope of your express authority. According to the service agreement, you are not authorized to make expenses over \$5,000, even in an emergency.

To respond to the strata council, be sure to keep your tone and language professional—the contract does not expressly authorize your actions, and strata council has a right to question you. In explaining your decision to order the repairs, you will want to help them understand that you believed you were acting ethically to protect their interests.

Going forward, you would likely want to clarify how to more efficiently contact council members and/or adjust the wording in the service agreement to include the client's wishes if a similar emergency situation were to occur.

3-3(d) Advise the client to seek independent professional advice on matters outside of the expertise of the licensee

In the practice of real estate, you will often be asked a wide range of questions by your clients.

Module 2: Duties to Clients

These questions are often in complex areas such as tax, law, appraisal, construction and others. Strata and rental property management licensees may also be asked about property maintenance issues, such as insurance, finances, roofing, plumbing, landscaping and more where the clients may expect you to be an expert on all property matters. If you are in any doubt as to whether you have the expertise to adequately answer a client question, you should immediately refer your client to another competent professional such as an accountant, lawyer, insurance broker, roofer, etc. You should also be aware of the increased risks of dabbling in niche areas such as agricultural or commercial property if you do not possess the relevant expertise to properly assist a client in such a transaction.

Legal link:

There are no direct equivalents of this duty under the common law of agency or fiduciaries. However, if you fail to advise your client to seek independent advice on matters outside of your expertise, this would likely be seen as a breach of:

- your agency obligation to discharge your duties with care and skill; and
- your fiduciary obligation to act with reasonable care and diligence.

3-3(e) Maintain the confidentiality of information respecting the client

In practice, you should ensure that you do not disclose any information that has been told to you by your clients unless you have been authorized by them to disclose it, or unless you are required by law to disclose the information.

Legal link:

The maintenance of confidential information is also at the cornerstone of the obligations of an agent and a fiduciary. An important aspect of the agency and fiduciary duty of confidentiality is that it is one of the few duties that continues to bind you as a licensee even after your agency relationship has come to an end. This means that you must keep all information about your past clients confidential as well.

Confidentiality and former clients:

When would a situation arise where a former client's confidential information would be relevant to a current situation? As an example, consider the following scenario:

Charles lists a property for his client, Sigmund. A few days later, Sigmund advises Charles that there is mould behind the panelling in the basement of the house, but instructs Charles not to disclose that fact to prospective purchasers as he doesn't believe anyone

would find it anyway. Charles explains to Sigmund that they both are obligated to disclose the defect, and that he can only act in accordance with instructions that are lawful, but Sigmund won't agree to disclosure. As a result, Charles withdraws from representing Sigmund in listing the property.

Several months later, Charles is approached by a potential client who is interested in buying Sigmund's property and wants Charles to become their buyer's agent to do so.



Question • Should Charles disclose the material latent defect to the potential buyer?

- Yes — he no longer represents Sigmund, and the potential new buyer deserves to know the truth
- No — he is still bound by a duty of confidentiality

The answer to the question is "No". A licensee's responsibility to maintain their client's confidentiality continues beyond the termination of an agency relationship.



Question • What should Charles do in this situation?

- Represent the potential buyer without disclosing the defect
- Refer the potential buyer on to another licensee

Answer:

Charles should not represent this potential buyer. He had previously represented the seller and cannot disclose confidential information obtained in that earlier relationship concerning matters such as:

- Sigmund's motivation for selling;
- personal information concerning Sigmund; and
- the condition of the property.

Based on the information that Charles can't disclose to the potential buyer, he would not be able to act in their best interest and meet his obligations to them. Even if the Rules would allow Charles to represent that potential buyer, it would not be feasible for ethical reasons.

Module 2: Duties to Clients

Avoiding inadvertent breaches of confidentiality:

One of the key reasons why maintaining confidentiality is so important is the direct tie to trust. When someone we trust discloses information against our wishes, the loss of trust that results can be devastating to the relationship. This is true of professional relationships as well — acting with integrity and not discrediting the profession requires that you safeguard information appropriately. One of the more difficult aspects of this is avoiding inadvertent breaches of confidentiality. Consider the following situation:

You recently listed the property of your 92 year-old widowed client Betty. Betty is estranged from her daughter, Ava. You are aware of the details of Betty's problems with her daughter, and Betty specifically advises you to keep the location of her new home private. However, on occasion, Betty discusses with you her desire to have a better relationship with her daughter.

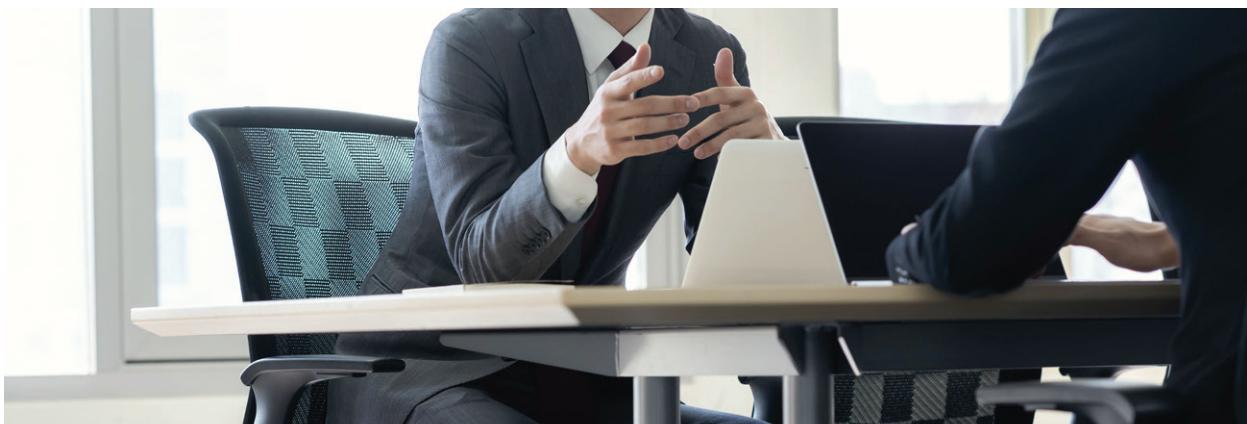
During the sale of the property, Betty moved to a senior care home. As per her request, you did not provide Betty's new contact information to her daughter.

Over the next few months, however, you receive numerous emails from Ava with respect to contacting her mother. Ava says that she just wants to mail her mother a letter and has expressed concern that Betty may need help as she ages. You assume Ava may be attempting to resolve their relationship issues.



Question • Should you give Ava her mother's address?

- Yes — it's better for Betty in the long term to have a better relationship with her daughter, and you have an ethical obligation to assist with this
- No — you need to respect Betty's wishes



Suggested response:

Your instinct in this situation may be to try to help resolve the relationship issues by putting Ava in contact with her mother — after all, wouldn't this be in Betty's best interest? Maybe, but this isn't for you to decide. Betty has hired you for professional services, and you owe her a duty of confidentiality. She has asked you not to disclose her address to Ava, and she is well within her rights to keep that information private. The most that you could do would be to ask Ava if she would like you to give her contact information to Betty so that Betty could get in touch with Ava if she chooses to.

3-3(f) Disclose to the client all known material information respecting the real estate services, and the real estate and the trade in real estate to which the services relate

Disclosure plays an important role in real estate practice in British Columbia today and there is a wide range of disclosures that must be made under certain circumstances in order for you to adequately discharge your duties to clients. Under section 3-3(f) of the Rules, a licensee has a duty to disclose to their client all known material information respecting the real estate services, and the real estate to which the trade relates. You will specifically study disclosure requirements in Module 4.

Legal link:

Full disclosure is also an important part of your fiduciary duties.

3-3(g) Communicate all offers to the client in a timely, objective and unbiased manner

You should ensure that you promptly communicate all offers to your clients in a timely and objective way. This does not mean that you cannot provide your opinion and advice on whether your client should accept any given offer, but any opinion or advice provided must be objective and cannot be influenced by inappropriate considerations like personal interest or biases.

Legal link:

While there is no directly related duty under the common law of agency or fiduciaries, failure to communicate offers in a timely and objective manner could be a breach of your agency and fiduciary obligations of full disclosure. It is also highly likely that such a failure would constitute a breach of your obligation to discharge duties with reasonable care.



The only exception to this duty is a situation where you have been specifically instructed by your client not to communicate offers promptly. This situation may occur if your client is going to be away and unavailable for a certain time period. However, you should ensure that any such instruction is provided in writing. (Even if you have such an instruction, you may, depending on the nature of the offer, decide to communicate anyway.)

Module 2: Duties to Clients



Question • What if a client has stated in conversation that they will not accept offers below the listed price and you receive an offer below the listed price? What should you do?

- Present the offer anyway
- Don't present the offer, as it would be wasting the client's time

Suggested response:

You are obligated to bring all offers to the client unless they specifically advise you otherwise. Even if an offer is below list and the client stated they would not accept such an offer, there is still the potential for a counter-offer. Information about offers is also important for your client to hear, so that they have full information about the property's potential and how the market is responding. If the client really doesn't want to be presented with offers below a certain level, you should get these instructions in writing so that you and the client have the same expectations.

3-3(h) Use reasonable efforts to discover relevant facts respecting any real estate that the client is considering acquiring

As a real estate licensee in British Columbia, you have a duty to your client to use all reasonable efforts to discover relevant facts respecting any real estate that your client is considering acquiring. In practice this duty can be challenging to define, and it is not uncommon for licensees to face discipline for breaching this duty.

Legal link:

The common law also imposes a duty on all agents to carry out their duties with reasonable care and skill. Similarly, the common law places a duty on all fiduciaries to use reasonable care in the discharge of their responsibilities.

What constitutes “reasonable efforts” will reflect the fact that as a licensee, you are expected to be a professional with a degree of expertise in real estate matters that is above that of an average person. You will be held to the standard of care of a competent real estate professional, and will be expected to find out any facts that a competent real estate professional would discover.

As an example, imagine the following situation:

Meadowvale is a strata lot townhome development originally built in the mid-1990s. Plans and a project timeline for the roof replacement were discussed and referred to from time to time at strata council meetings and AGMs in 2018 and 2019. Multiple strata documents refer to the roof replacement project.

Your buyer client was interested in a townhome in Meadowvale. On the MLS listing information, the listing agent provided a link to a Dropbox containing strata council meeting minutes and AGM minutes for two full years prior to the listing of the property. You believed you were familiar with the development as you had listed a strata lot there several years ago, so you decided it wasn't necessary to review the strata documents.

You viewed the property with your client, who had never purchased a strata lot before. There were multiple offers on the property, so based on your advice your client instructed you to write a subject-free offer to purchase the unit. On moving-in, the new owner received a welcome package from the strata with details of the roof replacement resolution to be voted on at the AGM the following week.

At the AGM the owners of the strata voted on the roof replacement and approved a resolution to fund it from the contingency reserve fund as well as a special assessment on the owners. The new owner's portion of the special assessment is \$16,538.

Until she received the welcome package, the buyer was unaware of the roof replacement project, and unaware of the special assessment (or the possibility of a special assessment) for the roof replacement.



Question • Did you meet your obligations to the client under section 3-3(h) of the Rules?

Suggested response:

No, it would be difficult to argue that you used reasonable efforts to discover the relevant facts with respect to your client's townhouse purchase. Your client had never purchased a strata lot before and was relying on your expertise to help her make an informed decision.

RECBC offers the following guidance to licensees

If a buyer's agent elects not to read the available strata minutes, the licensee should ensure that he or she has already made all the inquiries reasonably expected of a competent licensee acting as a buyer's agent. These inquiries include, but are not limited to, asking one or more of the sellers, the listing agent, or a strata council member about the history of any problems with the building and the strata lot, as well as reading the bylaws. The Council expects a buyer's agent to read the bylaws for restrictions.

Where the buyer's agent intends not to review certain other documents, such as minutes, as part of his or her services to the buyer, the licensee should make that very clear to the buyer to avoid any misunderstanding.

Module 2: Duties to Clients

The licensee should also explain to the buyer the significance of the document in question and warn the buyer about the risks of not carefully reviewing the material himself or herself. The licensee should also warn the buyer to obtain professional advice if a document raises a question of a technical nature; for example, to get legal or engineering advice, where appropriate. Finally, it is recommended that the licensee record these communications in writing in case any dispute later occurs over the matter.

Be aware that not reading available strata minutes or otherwise making sufficient appropriate enquiries could also contribute to being found non compliant under RESA.

Activity:

- What other types of information should you ensure you've made appropriate enquiries about and discussed with your clients?

Suggested response:

Depending on your role, you may have included:

- Title matters (e.g., encumbrances)
- Permitting of improvements
- Pet restrictions
- Age restrictions
- Usage restrictions
- Zoning restrictions
- Applicability of GST and/or any other taxes payable

3-3(i) Take reasonable steps to avoid any conflicts of interest and 3-3(j) if a conflict of interest does exist, promptly and fully disclose the conflict to the client

One of the central duties that you owe your clients is avoiding conflicts of interest. This duty is set out in section 3-3(i) and the accompanying duty of disclosure for when a conflict exists is established in section 3-3(j). This topic will be discussed in further detail in Module 3 on Conflicts of Interest and Module 4 on Disclosures.

Legal link:

The avoidance of a conflict of interest is also a key component of both your fiduciary duties and your duties as an agent to your principal.

Using a reasonable and informed third party test

In deciding whether you have undertaken reasonable efforts to discover relevant facts (as required by section 3-3(h) of the Rules), acted with reasonable care and skill (as required under common law), or taken reasonable steps to avoid conflicts of interest (as required by section 3-3(i) of the Rules), it's useful to think about the situation from the perspective of an impartial outside observer. Imagine that the situation was being evaluated by a third party who has the relevant knowledge and experience to understand and evaluate the appropriateness of your decision in an impartial manner. If such a person were to weigh all the relevant facts and circumstances in the situation, would they believe that your efforts, care and skill were at a reasonable level?

Legal link:

The Rules and the duties under common law are very similar, which means that complying with the Rules will most likely keep you onside of legal requirements. However, the reverse is also true — if you don't comply with the Rules, you could find yourself in trouble not only from a professional discipline perspective, but also in terms of legal proceedings from the client for breach of your fiduciary duty.

Activity:

- Before moving on, let's revisit these duties from an ethics perspective. If a licensee breaches one or more of their duties to a client, are they acting unethically?

Suggested response:

Failing to meet your duties to a client is indeed an ethical lapse. It might seem to some people that ethical issues only arise if a licensee intentionally lies to or cheats a client, but that's too restrictive a view. Clients choose to hire real estate professionals because they trust the licensee to protect their interests and live up to their commitments. Failure to meet their obligations as a trusted professional is generally seen as a breach of professional ethics.

There may be an exception if the situation was truly not under the control of the licensee and the client could not have expected the licensee to deal with the matter differently, but this is a rare situation. Remember that making a mistake because you weren't knowledgeable enough or careful enough is not a valid excuse as a professional.



Module 2: Duties to Clients

2.4 Duties to third parties

While the primary parties to which you owe duties are your clients, you must also be aware that certain duties are owed to third parties. These duties primarily arise from two sources: Section 35(2) of RESA, which we discussed earlier in this Module, and the Rules.

Section 35(2) of RESA requires a licensee to act in such a manner that does not constitute conduct unbecoming. This obligation involves more than your conduct towards clients. It also involves unrepresented parties as well as members of the general public.

Additionally, the Rules also prescribe duties that licensees owe to non-clients.

To clarify, when we discuss “non-clients”, we are referring to individuals who are involved in the trade of real estate but who are not being represented by you.

When dealing with a non-client, you do not owe them the fiduciary duties that you owe clients. For instance, you don’t have a duty of loyalty to a non-client, especially in cases when the non-client is a rival party to your client in a transaction. In addition, you have no duty of full disclosure and no duty of confidentiality. Nonetheless, you still have a duty to act honestly and with a level of reasonable care and skill (see Section 3-4 of the Rules). For example, whatever information you provide to the non-client should be truthful and should reflect reasonable diligence.

You also have certain disclosure obligations to fulfill. You must use the mandatory “Disclosure of Risks to Unrepresented Parties” form (see section 5-10.1 of the Rules). This form has been created by RECBC in order to make a specific list of details known to the non-client:

- you must alert the non-client to the risks they face in soliciting advice from a licensee who has overriding duties to their own client.
- you must warn the non-client that the advice and help you are able to offer is constrained by your duties to your own client.
- you need to advise the non-client to seek their own independent professional advice.

Legal link:

These duties are important because of the risks involved for the non-client — if the non-client shares any information with you, you will be obligated to tell your own client because of the duty of full disclosure. You are only able to work in the best interest of your client, and the non-client needs to be aware of the risks that accompany this position.



2.5 Guidance for managing brokers

Avoiding inadvertent breaches of confidentiality

Protecting the confidential information of clients can be particularly challenging when supervising two licensees that are representing competing parties to a trade.

Consider the following situation:

In your role as managing broker, two of your licensees separately approach you for advice on a transaction where each represents a buyer wishing to make an offer on the same property. They are aware it is a multiple offer scenario and offers will be presented to the seller the next day. The property is listed by another licensee in your brokerage.

It is critical for you to remember you act for the brokerage for all purposes under RESA, not on behalf of the designated agents' clients. The designated agent has the duties to the client, not the managing broker. The brokerage, through you, its managing broker, has certain contractual duties, such as:

- handling money in accordance with RESA
- supervising related designated agents to ensure they fulfill their duties to their respective clients
- treating the interests of clients in an even-handed, objective and impartial manner and not disclosing any confidential information concerning the clients to any other person unless authorized to do so by the client or required by law.

When seeking your advice, it is important that the licensees don't reveal any confidential information about their clients so that you can remain impartial.

In the April 2013 Report from Council, the following description accompanied section 3-3.2 of the Rules, which became effective on July 1 of that year.

“... no other licensees from that brokerage will have any duties to that client.

The agreement to designate agents must either be contained in a written service agreement (e.g. a listing contract or buyer agency contract), or in a written disclosure. . . . The agreement must be clear that no licensees other than the designated agents have any duties to the client. The brokerage continues to have duties to supervise and to not disclose confidential information. While the brokerage's designated agents have the full range of duties to their respective clients, the brokerage must remain impartial.”

Module 2: Duties to Clients



Ensuring that the brokerage and related licensees are complying with the obligations set out under section 3-3 of the Rules

One of your main duties as managing broker is to ensure that the brokerage and its licensees are meeting their professional obligations to clients, non-clients and the public. The brokerage's reputation for quality service and professionalism rests on the behaviour of its licensees. Each licensee needs to appreciate their role as an ambassador for the brokerage and the profession as a whole. As managing broker, you have a significant role to play in setting the tone from the top and creating a culture of professional excellence within the brokerage.

To be effective in this role:

- Be a strong role model and demonstrate the behaviours you expect of the licensees in your brokerage.
- Ensure that all licensees understand their roles and obligations as professionals and that they undertake appropriate continuing education.
- Structure your own role to ensure that you have adequate time to support each licensee and guide their growth and development.
- Develop a working environment where licensees are comfortable discussing decisions with you and bringing ethical challenges to you for guidance.
- Ensure that all licensees understand their duty to report concerns about the professional behaviour of colleagues to you.
- Deal with ethical concerns in a timely and appropriate manner (you will look at this more closely in Module 5).

Overseeing Continuing Education Activities

Continuing education helps keep knowledge up-to date and skills sharp. As managing broker, you are responsible for your own continuing education and for overseeing that the licensees under your responsibility are meeting their continuing education requirements. Here are some practical tips for meeting these obligations:

- ensure that your own expertise and education is at least as good as, if not better than, the licensees you are responsible for. As a managing broker, you're expected to assist, advise and direct licensees, so make sure you have the current information and education that you need to provide appropriate oversight;
- ensure that all licensees are aware of their obligations with respect to continuing education and are scheduling training courses appropriately;
- keep track of licensees' continuing education courses using a simple spreadsheet or other application. Be sure to include all the licensees you manage, along with their licence category and training history. You'll be able to easily identify any training gaps or courses a licensee needs to complete during their licensing cycle;
- recommend that your licensees attend further education courses and seminars offered by RECBC and/or by legal firms, industry / professional associations, or colleges;
- consider internal training / lunch & learns. Invite a speaker to your events and keep a record of attendance; and
- ensure that all licensees are aware of RECBC's Knowledge Base and Practice Guidelines and know to contact you, and RECBC's Professional Standards Advisors when they need guidance.

Module 3

Conflicts of Interest

Learning Objectives

By the end of this module, you will be able to:

- Explain what a conflict of interest is and distinguish between types of conflicts of interest.
- Explain the requirements in the Real Estate Rules regarding avoiding, disclosing, and addressing conflicts of interest.
- Illustrate how to take reasonable steps to avoid situations where conflicts of interest may arise.
- Identify, evaluate and address conflict of interest situations.

Module 3: Conflicts of Interest

3.1 What is a conflict of interest?

We're all human, and we all have personal goals, objectives and pursuits. But as a licensed real estate professional, you are bound by duties and obligations to your client. You studied these duties, and how they come about, in Module 2. In Module 1, you also studied your obligations for professionalism and to act in the public interest. A conflict of interest occurs when either:

Your personal interests are in conflict with the interests of an individual or organization to whom you owe a professional duty; or

You have a duty to act in the interests of two individuals or organizations, and those interests are conflicting or competing.



In the context of real estate services, RECBC frequently uses the following definition of conflict of interest:

A conflict of interest is a situation where there is a substantial risk that the agent's representation of a client would be negatively affected by the agent's own interest or by the agent's duties to another current client, a former client, or a third party.

Being in a conflict of interest doesn't automatically mean that you're offside of professional requirements under the RESA or Real Estate Rules. However, because conflicts of interest result in greater risk to clients and consumers, they need to be avoided where possible and handled promptly and appropriately in order to ensure that you stay in compliance.

The reason why conflicts of interest are so important to professionals goes back to the concept of trust that you studied in Module 1. In order for a profession to have value, the public needs to be able to trust that the members of the profession are acting in the public's interest rather than in their own self-interest. At an individual level, this means that your clients and prospective clients need to trust that you will put their interests ahead of your own.

Consider the following situations:

- A listing agent's client is not in a hurry to sell and wants to be patient to wait for an offer at or near the asking price, but the listing agent is hoping to sell more quickly in order to get the deal wrapped up.
- A rental property manager is compensated based on the net profit generated from the rental properties they manage, so they are motivated to forego maintenance as long as possible to avoid expenses, even though this may cause larger repair and replacement costs in the future.
- A commercial agent has been offered sizable referral fees by a renovation company specializing in office space renovations in exchange for recommending their clients who have recently purchased office space to the company.
- A strata manager has been asked by a client to hire a paving company to repave the streets and parking areas throughout the property. The strata manager mentioned this to her brother-in-law who owns a paving company, and the brother-in-law has provided a quote.
- A buyer's agent is acting for two couples who are both looking for very similar residential properties in the same area, and they both have expressed interest in a particular house.
- A rental property manager is asked by a friend to provide them with a Residential Tenancy Agreement for a fictitious unit in a building under management, so that the friend can gain access to particular schools for their children.
- A real estate professional is acting as a listing agent for one client and as a buyer's agent for another, and the buyer client shows interest in the listed property.

A real estate professional's friend, family member, or close business associate is interested in leasing property listed by the real estate professional, and has asked for preferential terms.

Module 3: Conflicts of Interest

When conflicts of interest like the ones noted above exist, there is a risk that the real estate professional's ability to act in the interest of the client will be negatively affected — either by the real estate professional's own interests or by the fact that they also owe a duty to another client. The significance of the risk will depend on the specifics of the situation, but be sure not to underestimate the potential implications. Conflicts of interest can have serious repercussions if they are not dealt with appropriately.

Commission-based remuneration structures result in conflicts of interest arising more frequently than with other types of remuneration, and some level of conflict of interest is sometimes unavoidable. Because the commission is earned by closing a deal, there is always an incentive to make sure the deal is — in fact — closed. But this motivation cannot be allowed to get in the way of ensuring that the duty to the client is met. Encouraging a client to enter into a contract that is not in their best interest is not only a violation of the Rules, but would also be considered conduct unbecoming a licensee under Section 35(2) of the Act.

Be aware also of apparent or perceived conflicts of interest. These are situations where there is no actual conflict of interest, but a reasonable person might think that there is. These types of perceptions, if not addressed, can lead to a loss of trust in the same way that a real conflict can. To avoid any perception of a conflict of interest that doesn't actually exist, anticipate situations that might place you into a perceived conflict and be transparent with your clients and colleagues, within the bounds of confidentiality.

Perceived conflicts of interest can be just as serious as real conflicts of interest. They can sometimes be challenging to even identify, as they are based on the way someone else sees the situation.

Activity:

- Consider the possible perceived conflicts of interest in the following scenarios:

For trading representatives	For strata managers	For rental property managers
Two licensees in the same brokerage are close friends and frequently refer clients to one other. There might be a perception that they are sharing confidential client information, even if they are not.	A licensee serves as strata manager for a strata corporation; another licensee from the same brokerage owns two units in the strata, and the two licensees work closely together. Even if it's not true, there could be a perception that the licensee owner could inappropriately influence the licensee strata manager.	A licensee manages a number of rental units and is authorized to set rental rates. The licensee's sister rents one of the units. Even if the sister is paying the market rate for rent, there may be a perception that she is receiving favourable treatment.

3.2 What are the requirements regarding conflicts of interest?

In Module 2, you studied the legal requirements that arise from fiduciary duties. These requirements include avoiding conflicts of interest and ensuring full disclosure. These common law duties are mirrored in Section 3-3 of the Rules. Review Section 3-3 now, paying special attention to paragraphs (i) and (j).

Section 3-3(i) and (j) of the Rules requires licensees to take reasonable steps to avoid any conflict of interest; and if a conflict does arise, to promptly and fully disclose the conflict to the client.

You'll study the specific disclosures required related to conflicts of interest in Module 4. In this Module, we'll focus on avoiding, identifying and addressing conflicts of interest.

As you saw in Module 2, the Rules and the fiduciary duties under common law are very similar. In fact, with respect to conflicts of interest the Rules and common law are effectively the same, which means that complying with the Rules will most likely keep you onside of legal requirements. Remember, however, that the reverse is also true — if you don't comply with the Rules, you could find yourself in trouble not only from a professional discipline perspective, but also in terms of legal proceedings from the client for breach of your fiduciary duty.

3.3 How to avoid conflicts of interest

What does it mean to “take reasonable steps” to avoid conflicts of interest? To come up with an answer, think about it from the opposite perspective. What would you expect from an agent acting on your behalf?

I would expect a real estate professional acting for me to:

Suggested response:

You may have listed things like:

- Understand their role and duties
- Know the prohibitions and requirements, and have standardized practices to stay in compliance and ensure things aren't overlooked
- Know the common situations that lead to conflicts of interest in their specific area of practice
- Be transparent and talk to me at the outset about potential conflicts that might arise
- Understand and abide by the policies in their brokerage
- Talk to their managing broker about any questions relating to potential conflicts
- Keep informed about the properties being considered and the parties on the other side of potential transactions to watch for former clients
- If in doubt, disclose any potential conflict so that I am aware

Module 3: Conflicts of Interest

One of the suggestions is to ensure that you know the common situations that lead to conflicts of interest in your specific area of practice. This requires that you consider and address questions such as the following:

For trading representatives	For strata managers	For rental property managers
<p>Do I act as both listing agent and buyer's agent for clients, and if so, to what extent are my buyer clients likely to be interested in the properties I have listed?</p> <p>Do I have clients who are "regulars" who would see me as their licensee even without a current agency situation in progress?</p>	<p>Do I have family members or close friends who provide the types of services I typically contract for on behalf of the strata corporations?</p> <p>Do any licensees or employees of the brokerage own strata units in the complexes under management, and if so, do they serve on strata council?</p>	<p>Do I have family members or close friends who provide the types of services I typically contract for on behalf of the owners?</p> <p>Are compensation arrangements set in such a way as to incentivize decisions that are not in the owner's best interest?</p>

In these situations, there is often no conflict of interest at the moment, but you can foresee the risk of a conflict occurring in the future. This is referred to as a potential conflict of interest. When these situations arise, you need to recognize that risk and be particularly careful. How would you handle these situations if they arose in the course of your practice? A key means of avoiding conflicts of interest is to have transparent discussions with clients about potential conflicts of interest early and often. For example, the potential for a conflict of interest between current clients should be discussed at the outset of an agency relationship if you regularly work in an area of the province where you may use dual agency. In areas where dual agency can't be used, you should discuss up front with your client what would happen if another client became interested in their property (for example, that you may need to refer one of them to another real estate professional or may be unable to represent either client). The possibility of other types of conflicts of interest should also be discussed early on in the relationship. It's better to be transparent up front in order to avoid misunderstanding later.

Where there is the potential of a future conflict of interest arising between a prospective client and existing clients, consider referring the prospective client on to another real estate professional to avoid future problems. Not doing so could put you at greater risk of receiving a complaint against you (and/or being sued) by a client if they believe you have not met your duties to them. If you decide to accept the client despite the potential risk of a conflict of interest developing down the road, it will be necessary to monitor the situation very closely to ensure that if a conflict does arise, it is recognized immediately and properly and promptly addressed. For representatives, this would also be something to discuss with your managing broker.



3.4 Conflicts of Interest and Former Clients

Remember from Module 2 that the duty of confidentiality persists after the agency relationship has ended. This means that you can't disclose confidential information about former clients. Knowing confidential information about a former client can lead to conflicts of interest with respect to your duties to a current client. Consider the following scenario:

You acted as buyer's agent for Ms. Devi when she bought her house, and as listing agent when she subsequently sold it, a few years later. Ms. Devi comes to an open house you are hosting for Mr. Kumar, and she is interested in putting in an offer. You know from previous dealings with Ms. Devi that she tends to place offers that are much lower than what she is actually willing to pay, in order to leave a lot of room for negotiation. Your duty not to disclose or use Ms. Devi's confidential information is in conflict with your duty to act in the best interest of Mr. Kumar and help him achieve the best price for his house.

You also need to make sure that a former client understands that you are no longer acting as their agent. Imagine this fact pattern:

You are licensed for rental property management and for trading services. You've acted as buyer's agent for Dr. Yang and her adult children several times over the years. Recently, Dr. Yang called you because her youngest child is looking to rent a condo close to the school where her son will be studying, and she knows that you manage several properties in that area. Will Dr. Yang realize that you are now on "the other side" of this transaction?

3.5 Identifying and addressing conflicts of interest

As you learned earlier, avoiding conflicts of interest is important. Unfortunately, however, this is not always possible. Whenever you are in an agency relationship, you need to remain alert for situations where a conflict of interest might arise. It is your responsibility to recognize conflicts of interest when they do arise and to take prompt and appropriate action.

For example, within a single transaction, a conflict of interest would arise if a real estate professional providing trading services were to represent both the buyer and seller, lessor and lessee, or assignor and assignee, as the case may be. Similarly, a conflict of interest would result

Module 3: Conflicts of Interest

if a real estate professional were to provide strata management services to a strata corporation, while at the same time providing rental property management services or trading services to an owner of a strata lot in the strata corporation. These are examples of conflicts of interest caused by owing a duty to two clients at the same time, but where the interests of those clients are inherently competing. It's not possible to act in the interests of both clients at the same time — one will always be favoured.



With respect to trading services, the conflict of interest that would occur in dual agency is addressed specifically in section 5-16 of the Rules. The risk of harm to consumers is significant enough that dual agency is prohibited in almost all situations when providing trading services. Review Sections 5-16 to 5-18 of the Rules now.

The restriction on dual agency in section 5-16 of the Rules is at the level of the brokerage, meaning that a brokerage can't represent parties on both sides of the same transaction. In order to avoid dual agency from occurring, the brokerage would need to designate different licensees as designated agents to serve each party to the transaction.

The one exception to the prohibition on dual agency in Section 5-16 is where a property is in a remote location that is under-served by licensees and where it is impracticable for the clients to engage different licensees. If these conditions are met, dual agency is permitted, provided that the provisions of Section 5-17 are followed. These provisions relate to:

- providing justification for why the conditions for exception apply;
- properly disclosing the duties, responsibilities and risks related to dual agency;
- entering into a written agreement of dual agency with each party; and
- providing the disclosures to RECBC.

In situations of dual agency (other than in remote areas as described above), the requirements are clear and are set out in Section 5-18 of the Rules. To address the conflict of interest, you can either stop providing trading services to all of the clients in the transaction, or you can arrange to represent only one client in the transaction. If you want to continue representing one client, you need to get written agreement from all of the clients. You, the Continuing Client and the Released Client(s) must all sign an Agreement Regarding Conflict of Interest Between Clients.

The requirements to address dual agency situations in trading services are clear, but what about other conflict of interest situations? If you find yourself in a conflict of interest, you'll need to consider whether the conflict might impede your ability to represent the best interests of your client. If this risk is present, you'll need to evaluate the significance of the risk and decide whether the risk can be sufficiently mitigated or whether the conflict of interest needs to be eliminated altogether.

It's important to recognize that it might not always be appropriate to continue to act for a client, even if there's no rule that explicitly says you can't. Remember from Module 1 how important it is to maintain trust and act with integrity. Trust requires honesty and transparency, so if a conflict of interest has arisen, have an open discussion with your client and explain the situation to them (without disclosing any confidential information of course).

For example, imagine the following situation:

Trading services:

For the last couple of months, you have been acting as buyer's agent for a client looking to acquire a distribution warehouse. You are also a part-owner of a warehouse that would be suitable. Yesterday, your business partner — the other warehouse owner — advised you that they are looking to divest themselves of the warehouse, as they want to free up cash to help a family member who has run into financial difficulties. You don't have the financial means to buy out the other owner's stake in the property right now, but you think that your client may be interested in buying the warehouse outright, or potentially in buying out your business partner's share and co-owning the warehouse with you.



Question • What would you do?

Suggested response:

The key thing to remember is that you are currently the client's agent, and you owe them a duty of loyalty. All of the duties to client in Section 3-3 of the Rules still apply. Your self-interest will motivate you to sell the warehouse under the most favorable terms for yourself and your business partner. This is a clear and real conflict of interest.

There may be an argument that if the client were to buy out your partner's share, the client would be buying from your partner, not from you, so the conflict of interest would be eliminated. But would a reasonable observer think there was still a conflict of interest? Likely so, as you have a relationship with your business partner and presumably want to see them do well. Even more directly, whatever price is negotiated impacts the value of your ownership also. Moreover, you'd need to be involved in laying out the terms for the new joint ownership, so your objectivity will naturally be challenged.

Module 3: Conflicts of Interest

You would likely consider the following alternatives:

Option 1: Keep the agency agreement as is, and simply keep your building out of it — don't bring it to your client's attention at all.

This would seem to eliminate the conflict of interest, but it has the downside of not serving the client's interest if your property would in fact be a good fit. This is particularly true if there are relatively few suitable properties available.

Option 2: Discuss the matter with the client, and if they are interested in considering your warehouse, terminate the agency relationship and advise them to engage a new agent to represent them going forward.

This eliminates the conflict of interest and ensures that their best interests are still being represented. The risk is that if the deal doesn't end up going through, they may well not re-hire you, but accepting that risk is part of being a professional and acting with honesty and integrity.

Remember that in any situation where you are buying, selling or leasing a property, there are disclosure requirements you need to meet. With respect to this situation, you would need to promptly and fully disclose the conflict under section 3-3 (j) of the Rules, then seek the client's instruction. You'll review the disclosure requirements in Module 4.

Be careful also of situations where a property is owned not by you, but by an associate. Associates include your spouse/family partner as well as related estates, trusts and businesses. Associates to a brokerage include the directors, officers, partners/shareholders, as well as related estates, trusts and businesses. See Section 5-7 of the Rules for the detailed definition and criteria.

Rental property management and Strata management:

You are licensed to provide rental property management and strata management. For many years, you have been providing rental property management services to the Lim family who collectively owns six condominiums in a downtown building. Mr. and Mrs. Lim have two adult children who have an ownership stake in the condos but have never shown any interest in decisions regarding the rentals, even though their parents are aging and could use some assistance.

You've recently learned that the strata council is looking to replace their current strata management company. The strata council has asked you to take on the contract but has specified that they would not be willing to sign off on limited representation — they'd expect to be the primary client. It's a sizable contract, that would be a significant opportunity for your brokerage.



Question • What would you do?

Suggested response:

The key thing to recognize is that acting as strata manager for the strata corporation while at the same time providing rental property management to the Lims represents a conflict of interest. You owe a duty to the Lims to act in their best interest, but if you were to take on the strata management role as well, you'd owe the same duty to the strata corporation. Think of what would happen, for example, if in your role as strata manager you were advised of the strata council's future plans and that those plans would negatively impact the Lims. You'd be obligated to tell them (as part of your duty of loyalty to them), but at the same time unable to do so (because of your duty to maintain confidentiality of the strata until authorized to release information).

You would likely consider the following alternatives:

Option 1: Explain the situation to the Lims and ask them to consent to limited representation. This would allow you to take on the strata management role with the strata as the primary client.

This would be allowable under the Rules (assuming it was done properly in accordance with the requirements of section 3-3.1 of the Rules regarding Modification of Duties). But remember that just because an action is allowable, that doesn't make it ethical or professional. Because the Lims are aging and their children are not engaged in the decision-making, you'd need to consider whether asking them to accept limited representation is appropriate. Would they actually understand that you wouldn't be safeguarding their interests any longer? Would they continue to share information freely with you, not realizing that you'd be obligated to pass on anything relevant to the strata council?



Module 3: Conflicts of Interest

Option 2: Refer the Lims to a new rental property manager from a different brokerage and take on the strata management contract.

This would meet your obligations under the Rules and would also protect the Lims' interests. The downside is that they've looked to you for guidance over the years and it may seem as if you're "abandoning" them to chase after more money. This may damage your reputation and that of the profession. If you were to choose this option, you'd need to be careful and honest in your explanation to the Lims, and ensure that they were comfortable with their new rental property manager.

Option 3: Stay on as rental property manager for the Lims and forego the strata management opportunity.

This option would be the one most likely to be seen as demonstrating integrity, although it is not as financially rewarding. It demonstrates commitment to your client and dedication to professionalism. On the downside however, it turns down an opportunity to grow your business. This type of decision is generally best made after honest and transparent discussion with your client.

3.6 Using a reasonable and informed third party test

In deciding whether you can maintain objectivity in order to fulfil your duty to the client, it's useful to use the perspective of a reasonable and informed third party, as you saw in Module 2. Imagine that the situation was being evaluated by a third party who has the relevant knowledge and experience to understand and evaluate the appropriateness of your decision in an impartial manner. If such a person were to weigh all the relevant facts and circumstances in the situation, what would they likely conclude?

For example, imagine that your client wants to sell their current home and buy a new one. What if, during the process, your client has an accepted offer in on a property that will be perfect for them, but they run short of cash for the deposit? Should you loan them the needed funds until they sell their house and can repay you from the proceeds? It may sound innocent enough, but if you think it through you should realize the danger. As the agent, you owe a duty to your client. It sets up a conflict of interest if they also become financially indebted to you. By doing so, you have effectively just become an investor in your client's transaction. A reasonable and informed third party would likely say that this situation is inappropriate. And carry the



scenario further — what would happen if their home doesn't sell easily? If you were to then advise the client to reduce the selling price, would they trust that your advice was in their best interest, or would they suspect that you were trying to ensure that you'd be repaid sooner rather than later? The bottom line here is that you're not a bank and shouldn't try to act as one.

In addition to looking at the perspective of a reasonable and informed third party, you should also speak with your managing broker.

3.7 Disclosure and consent are necessary but not sufficient

In Module 4 you will review the requirements for disclosing conflicts of interest to clients and obtaining consent. Disclosure and consent are key safeguards to help mitigate the risks associated with conflicts of interest.

But disclosure and consent are not enough. You still need to ensure that you remain aware of changes in the situation and continue to be transparent with your client. Watch for signals that your client is expecting more from you than is reasonable under the current situation, or where they are not protecting their own interests, and remind them that they should consider seeking independent advice wherever appropriate. Ensure that your managing broker is kept informed and is able to oversee the situation effectively.

Ultimately, disclosure does not absolve you from your duty to act in the best interest of your client at all times. You cannot continue to represent a client if you can't fulfill your fiduciary duties, even if you have made the required disclosures and obtained the client's agreement.

3.8 Brokerage responsibilities

Providing multiple types of real estate services

RECBC's practice guidance for managing brokers states that:

It is important for brokerages to recognize that the duties that are owed to a client are owed to all clients regardless of the type of real estate services provided. In other words, brokerages providing trading services, rental property management services and strata management services must all comply with section 3-3(1) of the Rules and must take reasonable steps to avoid conflicts of interest.

The more services a brokerage offers, the more likely it is that conflicts of interest will arise. For brokerages that are licensed to provide trading, rental property management and strata management, it is essential to be aware of what services are being provided to each client. Conflicts of interest can arise, for example, when the interests of the strata corporation conflict with the interests of a strata lot owner for whom trading or rental property management services are being performed. This compromises the brokerage's ability to act in the best interests of one of its clients.

Module 3: Conflicts of Interest

Consider the following scenario:

Brokerage A provides strata management services to Strata Corp ABC through Derek as strata manager. Elene, another representative in Brokerage A, owns a strata unit in the complex and serves on strata council. Two different strata unit owners are looking to sell and rent their units out, respectively. The owners have approached Derek and Elene about representing them in these trading services.

This type of situation is rife with potential for conflict of interest. Derek and Elene both have confidential information about Strata Corp ABC that might be in conflict with their duties to represent owners in trading services.

Policies and procedures

Brokerages need to ensure that they have developed policies and procedures on how conflicts of interest will be addressed that are consistent with the Rules. Managing brokers should ensure that they are aware of the situations within their brokerage that could cause conflicts of interest to arise. These situations should be monitored on an ongoing basis to avoid conflicts where possible and mitigate or eliminate them when they cannot be avoided.

Remember the concept of perceived conflict of interest. Even if a situation is technically allowed by the Rules, consider how it might look to clients and potential clients if two licensees who are very good friends or close colleagues were designated as agents for a buyer and seller on the same transaction.

Managing brokers should pay particular attention to ensuring that:

designated agency is used as an effective means of avoiding potential conflicts of interest in respect of a trade in real estate;

- confidential information is properly protected between licensees;
- appropriate referral policies have been established and are enforced;
- transactions are appropriately evaluated and addressed when licensees engage in trading services on their own behalf, or for close friends or family;
- representatives and employees are adequately trained and properly supported to ensure that they understand the requirements and know how to avoid and address conflicts; and
- all licensees and employees are held accountable for complying with the brokerage's conflict of interest policies and procedures, as well as with the Rules and legal requirements described throughout this module.

In instances where a conflict of interest has been inappropriately handled, the situation should be reviewed and addressed in the same manner as other potential instances of misconduct. You'll review the steps a managing broker should take in this type of situation in Module 5.

Conflicts of interest related to the managing broker's duties

It is also incumbent on you as a managing broker to properly address conflict of interest risk areas that involve your own duties. For example, when providing advice to two licensees representing clients in the same transaction, you need to take particular care not to favour one side of the transaction through your advice or information given. Be cautious about licensees divulging confidential information.

In addition, if you also provide trading services, you need to have a policy in place for dealing with any conflicts of interest that include you directly. For example, you may want to establish a process to have an associate broker assist in situations where your direct involvement would create a conflict of interest.



Module 4

Disclosure

Learning Objectives

By the end of this module, you will be able to:

- Explain how disclosure helps support professional obligations and builds trust.
- Identify the disclosure requirements set out in the common law and the Real Estate Rules, and explain how the general disclosure requirements of section 3-3(f) of the Rules compliment the more specific disclosure requirements in the Rules.
- Compare and contrast the differences between a seller's and a licensee's duty to disclose material latent defects.
- Explain how full disclosure benefits both consumers and licensees.
- Evaluate situations and identify the required and desired level of disclosure.

Module 4: Disclosure

4.1 How disclosure supports ethical behaviour

The previous Modules have emphasized how various Real Estate Rules and legal requirements for real estate professionals help support your ability to make ethical decisions when facing day-to-day challenges. The same is true of disclosure requirements — ensuring sufficient disclosure is a key part of transparency, which in turn is an important element of demonstrating honesty and integrity.

To reach this goal of adequate transparency in your dealings with clients, consider the following general principles for disclosure:

- Early disclosure ensures that decision-making can occur most efficiently.
- Continuous updating of disclosures is needed as situations change.
- Full disclosure ensures that clients can make the most well-informed decisions with all material information.
- Disclosure in writing minimizes miscommunications and provides evidence that the requirements were met.

These principles will be illustrated throughout the Module as you review your obligations.



4.2 General Duty of Disclosure and Duty to Disclose Conflicts of Interest

As a licensee, your duty of disclosure exists in both the common law and in the RECBC Rules.

Over thirty years ago the BC Court of Appeal articulated a licensee's common law duty of disclosure as follows:

"The relationship between a real estate agent and a person retaining him to sell property is a fiduciary and confidential one and the real estate agent's duty to his principal is to be construed strictly. The agent has a duty to obtain the highest possible price for his client and to disclose all material facts which might affect the value of the property. The onus is upon the agent to prove that the transaction was entered into after full and fair disclosure of all material circumstances and of everything known to him respecting the subject matter of the contract which would be likely to influence the conduct of the principal...I would emphasize that the agent cannot arbitrarily decide what would likely influence the conduct of his principal and thus avoid the consequences of non-disclosure. If the information pertains to the transaction with respect to which the agent is engaged any concern or doubt that the agent may have can be readily resolved by disclosure of all facts to his principal."

As you saw in Module 2, those overriding common law principles have been codified in section 3-3(f) of the Rules which requires licensees to:

"without limiting the requirements of Division 2 (Disclosures) of Part 5 (Relationships With Principals and Parties) disclose to the client all known material information respecting the real estate services, and the real estate and the trade in real estate to which the services relate."

Section 3-3(j) of the Rules also codifies the duty to disclose conflicts of interest and requires licensees to:

"without limiting the requirements of Division 2 (Disclosures) of Part 5 (Relationships With Principals and Parties), if a conflict of interest does exist, promptly and fully disclose the conflict to the client."

Disclosure must be early, ongoing and complete.

For many of the disclosures required under Part 5 Division 2 of the Rules, the timing of the disclosure is prescribed in the specific Rule (i.e. before trading services). In section 3-3(j) the disclosure is required to be made promptly. Section 3-3(f) of the Rules is silent as to timing.

Module 4: Disclosure



Where no specific timing is prescribed disclosure should be made promptly upon the need for disclosure arising. For example, if you become aware of material facts that your client should be made aware of, disclosure of those facts should be made as soon as practicable.

The duty of disclosure is ongoing. As material facts emerge or existing facts change, further disclosure is required so that your client is always fully informed. In addition to fulfilling your legal obligations, it will build trust with your client. Even where disclosure has been made, further disclosure or clarification may be required if your client's or a consumer's words and actions indicate a lack of understanding.

Finally, disclosure must be complete. Don't summarize or leave facts out. Make sure your client is aware of all facts that you are. This would include, for example, being mindful of perceived conflicts of interest that may arise and discussing these transparently with your client.

Questions often arise as to the form of disclosure. In many of the Rules in Part 5 Division 2 disclosure is required to be made on prescribed forms. Where disclosure is required and the Rules are silent as to method the most prudent form of disclosure is written. In that way there is no misunderstanding as to what was disclosed. Verbal disclosure is sufficient when all parties are in agreement as to what was said. However, difficulties can easily arise with verbal disclosures when disputes arise over who said what to whom. For this reason, even where there is no dispute, licensees should nonetheless follow up as soon as practicable with written disclosure (e.g. e-mail), confirming the details of the discussion.

Both the common law and Rules set a high minimum standard of disclosure for you to meet. The simplest way to achieve the standard is to always exceed it. Remember the guidance from the BC Court of Appeal you read earlier — it is not up to you to decide whether information is relevant to your client or not, so you should keep them fully informed. As a professional, you should hold yourself to the highest ethical standards. Rather than focussing on what is the minimum that must be disclosed to your client (a difficult task, given that it is the client and not the licensee that determines what would likely have influenced them) you should focus on the highest standards of full disclosure. This approach is both the most ethical course of action and also the most prudent

one. It lessens — if not eliminates — the chance of a successful claim or complaint by a client or former client that you failed to disclose a material fact that would have influenced them if they had known it.

Where you are required to make disclosures to parties other than your client, you should ensure that the disclosure is complete and complies with the Rules (making sure of course that any disclosure does not violate your duty of loyalty and confidentiality to your client) — you'll revisit this situation later in the Module.

Consider the following scenario:

You have listed your client's property for sale. Your client has accepted an unconditional offer from a buyer, with closing to take place in 60 days. The buyer is represented by another licensee in your brokerage. You've continued to receive interest in the property but have advised the interested parties that there is an accepted offer in place.

Ten days before closing, you inadvertently overhear your colleague who is the buyer's agent on the phone with the buyer. Your colleague is advising his client that the buyer of his property has just backed out of the deal. You don't know if the buyer needs the proceeds from the sale of his house to complete the transaction with your client.



Question • How would you handle this situation?

Suggested response:

Under section 3-3(f) of the Rules, you are required to disclose all material information to your client. Even though you don't know the consequences arising out of the conversation, it is prudent for you to advise and let the seller decide whether the information is material.

But this is an awkward situation, because you should not have overheard the information — your colleague should have been more diligent in ensuring that his conversation with his client was kept private. Depending on the situation, you might bring it up with your managing broker, who should likely remind the group about the need for confidentiality and due diligence or you might discuss the need to be more careful with your colleague. Remember that as a professional, you have an obligation to act with honesty and integrity. You should not be trying to overhear your colleagues' private conversations, and you should strive to encourage professionalism throughout your office.

In addition, you should have advised the seller of continued interest. They may have wished to accept a backup offer. You might think that this information was not material once the seller had accepted the first offer, but the seller would surely argue it was material, particularly if the first offer collapsed.

Module 4: Disclosure

This is a good example of how ethical behaviour is greatly enhanced by ensuring care and diligence up front:

- If you had properly kept your client informed of the continued interest, the client may have accepted a backup offer, which would alleviate concerns if the accepted offer fell through.
- If your colleague had been more careful, the confidential information wouldn't have been overheard.

4.3 Specific Duties of Disclosure

In addition to the general duties of disclosure set out in the common law and Rules 3-3(f) and (j), Part 5 Division 2 of the Rules prescribes a variety of specific disclosures that licensees are required to make in certain situations. Under section 5-8 of the Rules, these disclosures (and any substantive changes) must be in writing and must be separate from a service agreement or a Contract of Purchase and Sale. The sole exception is with respect to the disclosure of remuneration under section 5-11 of the Rules which may be included in a service agreement.

The requirements around disclosure are somewhat complicated, but the underlying purpose is simple — adequate transparency is essential in order for you to be seen as an honest and ethical professional. It is important to recognize this principle and keep it in mind as you go about your day-to-day dealings. Inadequate disclosure can lead to clients, consumers and the public in general thinking that you are hiding information or being purposefully deceptive which decreases trust. You should ensure that you understand your obligations clearly so that you can maintain professionalism.

Section 5-9 of the Rules: Disclosure of Interest in Trade

Where a licensee proposes to directly or indirectly acquire real estate, the licensee must provide the owner of the real estate with prior written disclosure on the form prescribed by RECBC. Further, where a licensee is providing trading services to an associate who proposes to directly or indirectly acquire real estate, the licensee must also provide the owner of the real estate with prior written disclosure on the form prescribed by RECBC. While such disclosure is easily understood by licensees who are acquiring fee simple property in their own name, you must be acutely aware of who and what constitute an associate in order to comply with section 5-9 of the Rules.

- An associate of a licensee is defined as:

In the case of an individual licensee

- a spouse or family partner of the licensee
- a trust or estate in which the licensee, or their spouse or family partner, has a substantial beneficial interest or for which the licensee, spouse or family partner serves as trustee
- a corporation, partnership, association, syndicate or unincorporated organization of which the licensee, spouse or family partner holds not less than 5% of its capital or is entitled to receive not less than 5% of its profits

In the case of a brokerage that is a corporation or partnership

- a director, officer or partner of the brokerage
- a shareholder of the brokerage who holds more than 10% of the voting shares
- a trust or estate in which the brokerage, or a director, officer or partner of the brokerage has a substantial beneficial interest or for which the brokerage, or a director, officer or partner of the brokerage, serves as trustee
- 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 not less than 5% of its profits

You should always assume disclosure will be required under section 5-9 of the Rules if you are representing your spouse or family partner in a purchase of real estate. You also need to take care when acting for clients who may have a financial or managerial role in the brokerage. For example, if the owner of the brokerage asks you to represent them in the purchase of a new home, disclosure would be required to the seller under section 5-9 of the Rules.

Similar disclosures must also be made to buyers if you or an associate you are representing is disposing of real estate.

Generally speaking, disclosure under section 5-9 of the Rules is not required when the licensee is a tenant and renting real estate for their own, spousal or family partner personal residential use (for more specifics please refer to Section 5-9(2.1) in detail).

You should also be aware that the acquisition or disposition of real estate will extend beyond fee simple property. For example, an assignment of a contract of purchase and sale or in some cases the disposition of shares would constitute a trade in real estate for which disclosure under section 5-9 of the Rules would be required.

When acquiring real estate which is to be disposed of by the licensee or an associate of the licensee, disclosure of that fact is required. Problems can arise if you are in this situation but are not aware of the intentions of your associate. The test set out in Section 5-9(7) of the Rules is what



Module 4: Disclosure

the licensee's reasonable belief was at the time the disclosure was made. Some type of inquiry of your associate might be necessary to establish a defence of reasonable inquiry.

Consistent with the goals of the real estate regulatory framework, section 5-9 of the Rules is directed toward the protection of the public. The regulator has determined that the public is best protected by knowing, in advance of entering into a contract to acquire or dispose of real estate, whether a licensee or an associate of a licensee is involved in the transaction. Such transparency also protects you from claims or complaints from unhappy parties that believe they were taken advantage of by the undisclosed presence of a licensee or associate of the licensee in the transaction.

Scenario:

Ernie acted as the agent of Bert with respect to the purchase of real property from Sam. The Contract of Purchase and Sale (CPS) entitled Bert to assign the CPS to a third party without the consent of Sam. Bert assigned the CPS to Ernie's wife and son. Ernie had disclosed to Bert the conflict of interest resulting from his wife and son being parties to a transaction with Bert. Sam was served with notice of the assignment under section 5-9 of the Rules that Ernie's wife, who is an associate of Ernie, is acquiring the property by way of assignment. Ernie also followed the disclosure rules under section 5-11 (you'll read more about these requirements shortly).



Question • Is this situation acceptable?

Suggested response:

Ernie has met the disclosure requirements under the Rules, but his actions might still not be ethical. Ernie has set up a situation that has put him in a conflict of interest — and disclosure does not change that. A reasonable third party would likely question why a client would agree to assigning a CPS to their agent's wife and son, and would also likely find it unreasonable to conclude that Ernie was putting Bert's interests ahead of his wife and son's.

In assignment situations, you should be very mindful of acting with integrity and ensuring adequate transparency. Although contracts can be properly structured to allow for assignment to take place, and assignments often have legitimate practical benefits, if not based on a legitimate purpose and properly disclosed they can be (or can seem) deceptive. The transactions you facilitate should be done in good faith, and with integrity. Adequate disclosure and consideration of the public interest are important parts of demonstrating good faith. Failure to do so can result in damage to the reputation of the profession.

Section 5-10 of the Rules: Disclosure of Representation in Trading Services

Before providing trading services to or on behalf of a party to a trade in real estate a licensee must disclose to the party whether or not the licensee will represent them as a client. The intention of section 5-10 of the Rules is to ensure that all parties dealing with a licensee correctly understand the relationship they have with that licensee. If they are a client of the licensee, the licensee will owe them the full range of duties you studied in Module 2. If, on the other hand, they are not a client, the licensee will have far fewer obligations. Most notably, the duty of confidentiality would not apply to a non-client, and this is important for the consumer to understand. The intention of section 5-10 of the Rules is to ensure that all consumers understand what the relationship is — and is not — between them and the licensee.



Disclosure under section 5-10 of the Rules must be made on the written form prescribed by RECBC. A copy of the disclosure form should be left with the consumer (this true for all other written disclosures). You are required to date and sign the form. There is a section for the consumer to initial, acknowledging receipt of the form. The consumer's signature is not mandatory. While many consumers will willingly acknowledge receipt, some might be reluctant to do so. In that case you should make a note in your file, detailing the time and place of the disclosure or, if you have the consumer's email address, simply email the consumer the completed disclosure.

The definition of trading services is very broad including:

- “advising on the appropriate price for the real estate,”
- “making representations about the real estate” and
- “finding the real estate for the party to acquire.”

For those reasons, disclosure under section 5-10 of the Rules will usually arise early in the relationship between a licensee and a consumer. Often it will arise at the first meeting between the two parties. Disclosure under section 5-10 is not required at an open house or when providing factual responses to consumers (unless you are soliciting or receiving information from the party about their motivation, financial qualifications or needs in respect of real estate). Despite the “open house exception” you should focus on providing disclosure under section 5-10 sooner rather than later.

It is important to understand that, as the licensee, the onus will always fall to you to ensure that the consumer is aware of the nature of the relationship. If the consumer is not a client, it is your responsibility to ensure that they understand that. For example, imagine that a consumer has arrived at your open house and indicates that they are “working with another licensee” who is not accompanying them. To protect yourself and the consumer, you should ensure that the consumer

Module 4: Disclosure

understands that you represent the seller, not the consumer, and that anything they tell you will be relayed to the seller. You should not assume that the unknown licensee they are working with has made those disclosures. When the relationship changes (such as when a non-client becomes a client) a new disclosure under section 5-10 of the Rules will be required.

Even after disclosure under section 5-10 of the Rules has been provided, you might still find it necessary to remind the consumer of the nature of the relationship if the words or actions of the consumer evidence a lack of understanding. For example, if the consumer asks for your advice or opinion on something and they are not your client, it might be a sign that they don't fully understand that your loyalty lies with your actual client. It would be inappropriate and unethical to try to encourage them to open up to you with details that they should only disclose to their own agent.

Section 5-10.1 of the Rules: Disclosure of Risks to Unrepresented Parties

If you are representing a client in a trade in real estate and the party on the other side of the transaction is not represented by a licensee, a written disclosure of the risks of not being represented must be given to the unrepresented party. The unrepresented party could be a buyer or a seller. The disclosure of risks to an unrepresented party must be on the form prescribed by RECBC. This disclosure is in addition to — and served at the same time as — the disclosure of representation in trading services (which must be served before providing trading services to the unrepresented party).

As with section 5-10, the intention of section 5-10.1 of the Rules is to ensure that the unrepresented party is adequately advised of the risks they are taking in entering into a trade in real estate without representation. Again, more disclosure is better than less disclosure. Any time you are dealing with an unrepresented party there is risk. Particular attention should be paid to former clients who have agreed to you representing another client in a transaction pursuant to section 5-18 of the Rules. While most of those former clients will find other representation to protect their interests in the transaction, some might choose to remain unrepresented. While



that is their right, you should ensure they are not doing so in the mistaken belief that you, as their former agent, will somehow protect their interests in the transaction. Although you cannot compel them to get other representation, it is in their interests as well as your own that they do so.

Even after providing a disclosure under section 5-10.1 of the Rules you might still need to remind the unrepresented party, in writing if appropriate, of the risks they are taking in remaining unrepresented. From an ethics perspective, your reminders should increase as the sophistication level of the unrepresented party decreases. For example, if the unrepresented party is less cognitively able to understand all of the complexities of the transaction being undertaken, there is a greater risk that they will make a poor decision. Similarly, if the unrepresented party is not fluent in English or is unfamiliar with the real estate industry processes in BC, they may be more vulnerable. As a professional, you have an obligation to try to ensure that consumers are adequately protected in the real estate market, so you should encourage all consumers — especially those who are less sophisticated — to get the professional advice they need. The greatest protection of the public (and also of yourself and your clients) comes when all parties to a real estate transaction are represented by their own licensee or other qualified professional. The profession and the public are best served when this occurs.

As an illustration, imagine the following situation:



Gisela listed a client's property for sale, and was approached by Micha who is interested in purchasing the property. Micha is a newcomer to Canada and finds it challenging to converse in English. He has never purchased property before and is unfamiliar with the process. Gisela provides the Disclosure of Representation in Trading Services and indicates that she is not in an agency relationship with Micha. Micha submits an offer to purchase the property signed by him and his spouse.



Question • What further disclosures, if any, are required by Gisela? How can she ensure that she is acting professionally?

Suggested response:

Because Micha's spouse is now a party to the transaction, Gisela has a duty under section 5-10 of the Rules to disclose the nature of her representation (i.e., that she doesn't represent

Module 4: Disclosure

Micha's spouse). Gisela also has a duty under section 5-10.1 to provide a disclosure of risks to unrepresented parties to both spouses at the same time as the section 5-10 disclosures are made.

Because Micha is new to Canada and is not fluent in English, Gisela should carefully explain what the disclosures mean, and should encourage Micha to seek representation from another licensee. This is particularly true if Micha's spouse is also not fluent in English and is also unfamiliar with the real estate processes here. It would be highly unethical for Gisela to try and use Micha's limited language skills or unfamiliarity with the process of purchasing real estate to her client's advantage. To do so could be seen as conduct unbecoming a licensee, in that it is contrary to the best interests of the public, undermines public confidence in the real estate industry, and potentially brings the real estate industry into disrepute. Your duty of loyalty to your client does not mean that you should act dishonestly or without integrity.

Section 5-11 of the Rules: Disclosure of Remuneration

Section 5-11 of the Rules requires you to promptly disclose to your client all remuneration, other than remuneration paid directly by the client, which is paid or payable to your brokerage in relation to the real estate services provided. This would include:

- a cooperating brokerage commission paid by the listing brokerage to a cooperating brokerage
- referral fees from other licensees and
- benefits received from banks, notaries, inspectors etc.

This disclosure is in keeping with a fiduciary's common law duty to disclose all material information to their client. It is essential that clients understand if their agent is receiving remuneration from other than them and whether that other remuneration creates a conflict for the licensee and might jeopardize their duty of loyalty. This is another example of how transparency can help ensure that clients trust that they are fully informed.

Section 5.11.1 of the Rules: Disclosure to Sellers of Expected Remuneration

Under section 5.11.1 of the Rules, licensees representing sellers are required to provide their clients with a form prescribed by RECBC setting out, in dollar amounts:

- the remuneration to be paid by the seller to the listing brokerage
- the remuneration to be paid by the listing brokerage to the cooperating brokerage
- the remuneration to be retained by the listing brokerage, and
- any remuneration being received by the licensee from someone other than their client.

This form must be delivered to the seller with every offer or counteroffer received from a prospective buyer.

The rule is intended to enhance transparency and requires licensees to make a disclosure of brokerage remuneration, and of any additional remuneration a licensee anticipates receiving (or has received) related to the sale of the property, at the time an offer is made, rather than after the fact.

Notwithstanding what is in the listing agreement, brokerage remuneration may vary depending on the offer, and the information provided in this disclosure might affect how a consumer decides to proceed in the sale of their property.

Section 5-12 of the Rules: Benefits in Relation to Rental Property Management and Strata Property Management Services

In addition to your general duty to disclose remuneration received under section 5.11 of the Rules, if you are providing rental property management services or strata property management services, you must disclose to your client any benefit being directly or indirectly received by you or your associate from expenditures made on behalf of your client.

Consider the following situation:

Maya is licensed to provide rental property management services, and manages a number of properties for offshore owners. The rental property management contract authorizes Maya to paint and clean the units upon tenant turnover and to make necessary repairs as needed. She is authorized to pay for the services out of the rental proceeds. A tenant ends their tenancy on short notice and the usual cleaning and repair firm is unavailable. Maya has her husband do the cleaning, as he has recently been laid off from his job. To get the painting done quickly, she gets in touch with her brother. He is a qualified painter and has just launched his own company. Maya offers her brother the same rate as would have been charged by the painting company. He is more than happy to accept that rate, as he normally has to offer discount rates to attract new customers. In addition, the fridge is broken, so Maya purchases a new one at Home Depot, using her credit card, and reimburses herself from the rental funds on hand. At the end of the month, she sends her usual report to the client, outlining the services provided, the appliances purchased, and the amounts paid from the rental proceeds.



Question • What disclosures is Maya required to make under Section 5-12 of the Rules? What further disclosures should Maya make? Why do the Rules require the types of disclosures needed in this situation?

Suggested response:

Maya is required under section 5-12 of the Rules to disclose direct or indirect benefits to her or her associates. In this case she received the benefit of points on her credit card and her husband (an associate) received payment for the cleaning. Maya should also disclose that the painter was her brother. Although he is not an associate, section 3-3(f) of the Rules requires disclosure of material facts. The client may or may not care that her brother was the painter, but the client is entitled to know the information.

Module 4: Disclosure

The disclosure requirements aim to ensure appropriate transparency in conflict of interest situations. If the benefits to Maya, her husband and brother were not disclosed and the client found out afterwards, the client would likely feel that they had not been fully informed, and would likely wonder if Maya's actions had been motivated by serving the client's interest (by getting it done efficiently) or by her own self-interest (to help her husband and brother). This concern is valid, as it seems that Maya may have been putting her brother's interest ahead of the client's by paying him more than he would normally charge. This action and the lack of adequate disclosure of benefits have the potential to degrade trust in Maya and, by extension, to reduce trust in the profession overall.

Section 5-13 of the Rules: Disclosure of Latent Defects

The law in BC is quite clear. A seller is required to disclose to a buyer the existence of all known latent defects respecting the real estate. At common law a latent defect is a defect that renders a property dangerous or potentially dangerous for occupation or unfit for habitation. A seller is not required to disclose the existence of patent defects which are the responsibility of the buyer under the doctrine of caveat emptor (buyer beware). The difference between a latent defect and a patent defect has been the subject of many lawsuits and is best described as follows:

"Patent defects are those that can be discovered by conducting a reasonable inspection and making reasonable inquiries about the property. The authorities provided some guidance about the extent of the purchaser's obligation to inspect and make inquiries. The extent of that obligation is, in some respects, the demarcation of the difference between latent and patent defects. In general there is a fairly high onus on the purchaser to inspect and discover patent defects. This means that a defect which might not be observable on a casual inspection may nevertheless be patent if it would have been discoverable upon a reasonable inspection by a qualified person. In some cases it necessitates a purchaser retaining the appropriate experts to inspect the property."

In addition to a seller's common law duty to disclose latent defects, section 5-13 of the Rules imposes a statutory duty on licensees to disclose material latent defects which are described in the section as follows:

- a defect that renders the real estate dangerous or potentially dangerous to occupants, unfit for habitation or unfit for the purpose for which the party is acquiring it where that purpose is known to the licensee
- a defect that would involve great expense to remedy
- a circumstance where a local government or other local authority has given notice to the seller or licensee that the circumstance should be remedied
- a lack of appropriate municipal building and other permits

Under section 5-13 of the Rules a licensee who is providing trading services to a seller must disclose to all other parties to the transaction promptly, but in any case before an agreement is entered into, any material latent defect that is known to the licensee. This enhanced disclosure obligation from licensees protects the general public and can give added confidence to the public when dealing with licensees.

Module 4: Disclosure

Note that if the seller has already provided written disclosure of the defect to the potential buyer, you do not need to disclose again. See section 5-13(4) for more information. To avoid any misunderstanding of what was disclosed by the seller and when, you should get a copy of the disclosure from your client. This will allow you to properly evaluate whether your professional obligations have been met.

It is important to note that the definition of material latent defect in section 5-13 of the Rules is much broader than the common law duty imposed on sellers and that difference may have consequences under section 5-13 of the Rule. The Court in *Cardwell v Perthen* suggested that in many cases a reasonable inspection would include the use of a qualified inspector. Section 5-13 of the Rules merely describes a material latent defect as one that cannot be discerned through a reasonable inspection of the property. Further, section 5-13 of the Rules describes a material latent defect as one that would involve great expense to remedy. At common law, cost is not a consideration in determining whether a defect is latent or patent. Further, section 5-13 requires disclosure if the property is unfit for the buyer's purpose (if that purpose is known to the licensee). All of these differences mean that situations could arise where your duty to disclose under section 5-13 of the Rules might be greater than the client's duty to disclose at common law.

You must always comply with your statutory obligations under the Rules. If a latent defect is present, you should always seek the instructions of your client with respect to the disclosure of the defect. If the client instructs you not to disclose a material latent defect, you must refuse to provide further trading services to or on behalf of the client and withdraw from representing the seller with respect to that real estate. If you are unsure as to whether a defect is latent or patent, you should first discuss disclosure with the client. If the client chooses to disclose, the distinction is moot as there is no downside to disclosing a patent defect. If however the client does not wish the defect to be disclosed and it is not obvious that the defect is patent, then you should seek immediate advice from your managing broker or a lawyer as to whether the defect falls under the definition of material latent defect in section 5-13 of the Rules. If it does, you must withdraw from the representation.

In Module 2 you met Charles and Sigmund. Let's revisit their situation:



OVERVIEW

MODULE 1

MODULE 2

MODULE 3

MODULE 4

MODULE 5

Module 4: Disclosure

Charles lists a property for his client, Sigmund. A few days later, Sigmund advises Charles that there is mould behind the panelling in the basement of the house, but instructs him not to disclose that fact to prospective purchasers as he doesn't believe anyone would find it anyway. Charles explains to Sigmund that they both are obligated to disclose the defect, and that he can only act in accordance with instructions that are lawful, but Sigmund won't agree to disclosure. As a result, Charles withdraws from representing Sigmund in listing the property.

Sigmund is seeking to relist the property with Donalda who phones Charles and asks why he cancelled the listing. At the same time, Hardeep — one of Charles' existing buyer clients — expresses interest in Sigmund's property.



Question • How should Charles handle this situation? Use the Framework for Ethical Decision-making to guide your response.

Suggested response:

This puts Charles in a particularly difficult situation. The two main questions to resolve are:

- What can Charles disclose to Donalda?
- Should Charles tell Hardeep about the mould?

With respect to the first question, Charles would likely consider the following alternatives:

Option 1a. Be honest with Donalda and tell her that Sigmund was not willing to disclose a mould issue.

Although honesty is important, and Sigmund is acting unethically, that does not erase Charles' duty to keep information about Sigmund's property confidential. Charles cannot disclose the defect to Donalda, or even indicate that a defect exists.

Option 1b. Advise Donalda that he cannot discuss the reasons for cancelling the listing.



This is the correct way to address the situation. Charles should advise Donaldada that he is not at liberty to discuss the reasons why he no longer represents Sigmund. Although there is a public interest argument that licensees should share this information for the purpose of transparency, maintaining client confidentiality is paramount to trust. All licensees should understand this dynamic, and should act prudently and diligently. In other words, in this situation, Donaldada should understand that if another licensee has cancelled a listing but can't disclose why, she needs to be careful in her discussions with Sigmund and diligent in deciding whether to take the listing or not.

With respect to the second question, Charles would likely consider the following alternatives:

Option 2a. Tell Hardeep about the mould in the basement.

Although Charles has a duty to Hardeep to disclose all material facts, Charles also has a duty to protect the confidential information of Sigmund. Remember that the duty of confidentiality continues after agency has ended. He cannot breach that duty by advising future clients of the material latent defect.

Option 2b. Carefully explain to Hardeep that:

Although he had originally listed Sigmund's property, Charles withdrew from representing Sigmund for reasons he cannot disclose;

Because Sigmund is a former client, Charles still owes Sigmund a duty of confidentiality, and that Charles takes all of his professional obligations seriously;

Hardeep's interest in Sigmund's house results in a conflict of interest for Charles, because if Hardeep wanted to explore purchasing the house, Charles would be limited by his obligation to Sigmund and wouldn't be able to provide full advice or information or protect Hardeep against certain risks; and

If Hardeep is serious in her interest in Sigmund's house, Charles can't represent her, but instead, he would refer her to another licensee who does not have confidentiality requirements in relation to Sigmund.



Module 4: Disclosure



Most likely, if Charles explains the matter clearly and accurately, Hardeep will understand that Sigmund's house poses some form of risk that Charles cannot disclose, and that Charles is committed to serving her interests as a loyal agent, while also needing to meet his duty to a former client — in other words, that Charles is acting professionally.

What do you think would happen if Hardeep did want to pursue purchasing Sigmund's property and Charles referred her to another licensee?

Any competent licensee should understand what Charles' actions mean, and should be able to explain the potential risks more fully. The other licensee should know for example, that if Charles referred a current client on because of a conflict with a former client whose listing Charles had cancelled, the reason could very well be due to a desire by Sigmund for Charles to breach his professional obligations (this would include, for example, not disclosing a material latent defect). The other licensee would explain this risk to Hardeep, and Hardeep would be better armed to make an informed decision about the property.

Reflective thought:

Be careful not to fall into the trap of “winking” disclosure, for example if Charles were to say to Hardeep as part of his explanation “If, for example, the seller had told me there was mould behind the paneling in the basement, I wouldn’t be able to tell you that, if you know what I mean...and I think you know what I mean.” Although this conveys useful information to the current client, it still sends the wrong message — namely that Charles does not take the principles of his professional obligations seriously and has substantively breached confidentiality.

Section 5-17 of the Rules: Disclosure of Dual agency in under-served remote location

In Module 3, you reviewed the prohibition on dual agency in section 5-16 of the Rules. Recall that the one exception to this prohibition is where a property is in a remote location that is under-served by licensees and where it is impracticable for the clients to engage different licensees. If these conditions are met, dual agency is allowed, as long as it is provided in accordance with the Rules. Special disclosures are required to each party, which must be made by the brokerage on the written form prescribed by RECBC. The required disclosures:

- provide reasons why the exception applies;
- disclose the duties and responsibilities of the licensee to the clients under dual agency; and
- explain the risks related to dual agency.

Once these disclosures are complete, the brokerage enters into a written agreement of dual agency with each party under section 3-3.1 of the Rules — Modification of duties. The brokerage is required to provide the disclosures to RECBC.



As you have seen throughout this Module, it is important to be as transparent as possible with your clients and ensure they are fully informed. But when the confidentiality of a former client is at stake, you need to be careful to meet all of your obligations. This is one situation where over-disclosure is actually a risk.



Think about why the exemption under section 5-17 is available. To protect consumers, sole agency is always preferred. Every client deserves to be advised by a professional working solely in their interests. But if sole agency is not possible, the public interest is better served by giving limited representation rather than no representation at all. When faced with this type of situation, remember your obligations to act honestly and with integrity, and to avoid conflicts of interest. These would require that you only consider using this exception when there really is no other viable option, and that you serve both parties carefully and competently.

4.4 Exemptions to the Disclosure Requirements

The previous sections outlined the disclosure requirements and ethical considerations for licensees in the course of representing clients, or when directly or indirectly acquiring real estate on their own behalf.

But what about those situations where there is no client? In these situations, your professional expertise and conduct may still be placed under scrutiny.

What are the exemptions?

Module 4: Disclosure

Part 9 of the Rules allows licensees to provide certain real estate services without the legislation applying to them in respect of those services. These apply to four situations:

- When an individual licensee manages their own rental property
- When an individual licensee manages rental property for their spouse, child or parent
- When a licensee provides strata management services to or on behalf of the strata corporation in which the licensee is a strata lot owner
- When a licensee who is not licensed for trading services acquires or disposes of real estate for themselves or their spouse/family partner (Note: if you are licensed for trading services, you need to follow disclosures in section 5-9 Disclosure of interest in trade (i.e., this exemption is not available to you)

In these situations, RESA and the Rules do not apply, as long as the licensee meets the requirements laid out in the specific section of the Rules. Review these sections before continuing.

Why are these exemptions allowed, and how is the public protected?

Think about why the Rules allow these exemptions. Part of the rationale is to ensure that real estate professionals are not hindered from conducting business on their own behalf, or from providing certain free services to close family or their own strata corporation. In general, what this means is that if you are acting in the capacities described above, you are not seen to be acting as an agent and therefore you are not strictly bound by the RESA and the Rules. Of course, you still have ethical obligations — you are still a professional and expected to act as such, with honesty and integrity.



The requirements related to using the exemptions ensure that consumers are adequately protected when transacting with real estate professionals doing business on their own behalf. They include actions and disclosures to avoid misleading other parties to any transaction. For example, the exemptions require that you do not tie the activity to your brokerage so that the consumer doesn't think the brokerage is supervising or overseeing your actions. You are also required to advise the other party that although you are a licensee, you are currently acting outside of that role on behalf of yourself or your family member.

Consider the following situation:

Jenny is a trading service licensee. She is the sole owner of a rental property that she wishes to rent out. She will be managing it on her own behalf. To whom does she need to make disclosures? In what ways does the Rule provide for those disclosures to be made?



Question • How might these disclosures promote professionalism, transparency and trust?

Suggested response

There are two sets of disclosures to be made: one to the tenant(s) and one to the managing broker.

The Rule does not specify that the disclosure to the tenant has to be in writing; however, a prudent licensee will ensure that the disclosure is in writing to confirm details of the verbal disclosure and so that a copy can be retained by the licensee. Also note the timing of the disclosure to the tenant. By providing it prior to entering into any tenancy agreement, you are fulfilling your professional obligation for early disclosure as required by the Rule.

The Rule is specific that the disclosure to the managing broker be in writing. In both cases, by setting out the appropriate details of the disclosure in writing, we can ensure that the disclosure is complete.

Where might Jenny encounter the need for ongoing disclosure? The most obvious one is the ongoing disclosure required for each new tenant. Even though the tenants are not clients, the provisions of this Rule ensure that a real estate professional acts with professionalism and transparency when interacting with the public. An additional aspect of professionalism is that it also assists the brokerage in meeting their record keeping requirements under 8-4(a) to retain the disclosures required under Part 9 of the Rules.

Pay attention to the requirements to disclose relevant details to your managing broker – this is sometimes overlooked by licensees, but it is important that your managing broker be kept informed whenever you are availing yourself of an exemption under the Rules. Without adequate disclosure, your managing broker might think you're acting behind their back — remember the concept of perceived conflict. Transparency with your managing broker helps ensure that everyone understands the context and can watch for risks to the public.

Be diligent about following the requirements when using these exemptions. Recall that you need to ensure adequate transparency to avoid misunderstandings and protect the profession's reputation. When you're acting on your own behalf, you are obviously pursuing your own best interest, but you still need to act, and be seen as acting, with integrity and honesty.

Just because the exemptions in Part 9 of the Rules are available, they may not always

Module 4: Disclosure

be appropriate in practice. For example, if you have no experience with providing strata management services, it is likely inappropriate to offer these services to your own strata corporation under this exemption. Similarly, if you are not licensed for trading services and have no experience buying or selling property, you are likely better off to hire a trading services licensee to represent you and/or your spouse rather than acting on your own behalf. As always, consider the limits of your own expertise and act accordingly to avoid causing harm and damaging your own reputation and that of the profession.

Consider the following situation:

Gilli is a licensee sitting on strata council. She has a friendly relationship with the strata council president and tells him that she is a licensee. The strata council president thinks it's a benefit to have a real estate professional on council. Gilli also tells her managing broker she's a member of her strata council, and her managing broker suggests that being involved in the community is an important aspect of a real estate professional's profile. She is also assisting a client to purchase a unit in the strata and hasn't yet mentioned she's on strata council.



Question • Has Gilli fulfilled all of her professional disclosure obligations under 9-3? Is there a conflict of interest?

Suggested response

Although Gilli has disclosed verbally to the president of the strata, she has not disclosed in writing, before providing services to the strata corporation. While her managing broker is aware that she sits on strata council, the managing broker has not received a copy of the written disclosure made to the strata. The managing broker will be required to retain a copy of the disclosure under Rule 8-4(a). Providing adequate disclosure in the correct form, at the correct time, assists others in understanding the limits imposed by the legislation on your role, as well as the limited protections available to the strata corporation.

Acting as the agent for the buyer in an offer to purchase a strata lot while Gilli is a member of strata council is contrary to the duty to take reasonable steps to avoid a conflict of interest pursuant to section 3-3(i) of the Rules and the duty to promptly and fully disclose the conflict to the client pursuant to section 3-3(j) of the Rules.

This example highlights the need to be diligent in understanding and meeting your obligations as a real estate professional. Gilli's managing broker is correct that it's important to be involved in your community, but you need to be careful that you are doing so in a professional manner.

4.5 Summary

Full and complete disclosure to a client is a fundamental cornerstone of your relationship with them. Your clients must feel confident in the information and advice you are providing. They need to know that you owe your loyalty to them and them alone. Disclosure confirms that understanding. In addition to being required by law, it demonstrates the highest ethical standards of professionalism.

The disclosure requirements set out in the common law and the Rules are minimum standards which must be met to comply with the law. But you should never settle for simply complying with the law. You should strive to conduct yourself in a manner which exceeds the minimum and demonstrates a commitment to the highest forms of professionalism. Remember: keep your client fully informed and let them decide whether information is relevant!



Module 5

Reporting Misconduct

Learning Objectives

By the end of this module, you will be able to:

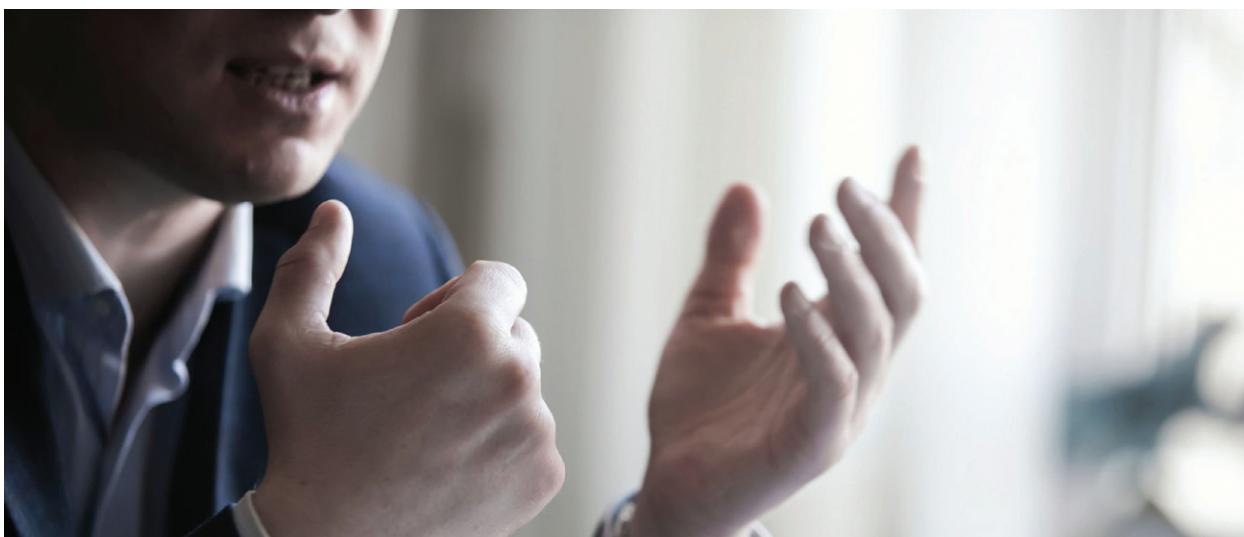
- Explain the importance of appropriately reporting any contraventions of the RESA and the Real Estate Rules;
- Describe how and where to seek advice if you are unsure about whether a report about ethical misconduct should be made;
- Explain what should be reported to managing brokers by representatives and how managing brokers handle complaints about misconduct; and
- Demonstrate a clear understanding of which issues must be directly reported to RECBC, and which issues can be addressed through alternative reasonable steps when a managing broker becomes aware of ethical issues.

Module 5: Reporting Misconduct

5.1 Introduction

Clients engage real estate professionals like yourself for assistance in some of the most complex, stressful, time-consuming, and rewarding transactions of their lives. In doing so, they entrust you with their money and confidential information. However, this privilege comes with certain responsibilities and expectations. Primarily, the public expects that, as a real estate professional, you will conduct yourself professionally and within the boundaries of the law.

All of the previous modules in this course have focused on holding yourself to the highest professional and ethical standards. The focus of this final module of the course is about holding others in the profession to the highest standards through the reporting of misconduct. This is known as the duty to report.



5.2 The Profession is a Shared Responsibility

As you learned earlier, section 73 of RESA places the obligation for administering RESA and upholding and protecting the public interest on RECBC, the regulator of the real estate services profession, overseen by OSRE (recall that in 2021, regulatory authority for real estate professionals will transfer to the British Columbia Financial Services Authority.) Maintaining the integrity and the confidence the public places in real estate professionals is a shared responsibility between RECBC, OSRE, and the members of the profession.

Reflective Thought:

Many real estate professionals are quick to complain of poor conduct by fellow licensees or less than ideal adherence to best practices and high standards, but not enough real estate professionals speak up against misconduct. If you’re not speaking up, you are not doing your part and may be part of the problem.



Members of professions should hold themselves, and each other, to an ethical standard that is higher than anyone else does. When members of the profession do not “do their part” in upholding this responsibility, the profession will be seriously jeopardized, as was the case in 2016. In 2016, RECBC convened a panel of experts to review the conduct and regulation of real estate professionals, and make recommendations to improve the regulatory framework. That panel, known as the Independent Advisory Group (IAG) found that real estate professionals were not reporting misconduct as frequently as they should. In the final report the IAG submitted following their review, they noted that more licensees and managing brokers were aware of reportable issues than were actually bringing these issues to RECBC’s attention:¹

It is not enough for individual licensees to act ethically; they must also hold each other to a high standard. Each member [...] needs to be part of the compliance regime and report misconduct promptly.

The Expert Panel on Money Laundering had a similar finding in July of 2019. Real estate professionals and the regulators have an opportunity to rebuild the public’s confidence in the profession. The duty to report plays an important role in this challenge.

¹ IAG Report, p. 41.

5.3 The Role of Real Estate Professionals in Maintaining Professionalism

While RECBC can act on consumer complaints and uncover misconduct through various audit practices, those within the profession must also play a role in regulating the conduct of others in the profession. There are four key reasons for this:

1. Real estate professionals are the “boots on the ground”: Regulators are not omnipresent – they cannot be in all places, at all times. Licensees like yourself are the ones dealing with customers and other real estate professionals on a daily basis. Therefore, you and your professional colleagues are in the best position to identify misconduct at the earliest stage.

2. Many consumers do not file complaints: There are a number of reasons why a consumer may not file a complaint of licensee misconduct to RECBC. For example, the consumer may not even know that a given action was wrong.

Consider the following scenario:

Grant sold his farm property to a corporation. Sherry acted as Grant’s listing agent in this sale. Shortly after the transaction completed, Grant heard that Sherry’s husband owns 10% of the shares of the corporation that purchased his property. When Grant asked Sherry if this was true, she said yes, but downplayed the notion that her husband’s small percentage ownership had any impact on the transaction. Based on Sherry’s response, Grant assumed that no misconduct had occurred. He didn’t realize that Sherry was obligated to disclose to Grant that her husband was an owner of the corporation under section 5-9 of the Rules (see Topic 4.4).

In other cases, the consumer may not have the time, energy, or incentive to initiate a complaint. In the scenario above, even if Grant felt that Sherry probably breached her duties to him in some way, what do you think is likely to happen if, for example, Grant had already relocated to Ontario? He might feel that he had “moved on” from the situation, or might find it too cumbersome to follow up from a distance. Therefore, Grant might not file a complaint with RECBC, especially if his property had sold for an amount he was satisfied with.



It is wrong to conclude that, because a consumer did not complain to RECBC, no misconduct occurred. Any licensee misconduct, whether it is reported or not, has the potential to tarnish the reputation of the profession. Going back to the example, how do you think Grant is going to speak about his experience with Sherry when he talks to friends and family? Would he describe her as a professional who was looking after his interests first and foremost?

3. Consumer complaints often occur “after the fact”: Most consumer complaints are initiated only after the consumer experiences harm or injury. On the other hand, the real estate professionals involved in the transaction can often spot the warning signs of misconduct even before it actually occurs, or spot the misconduct early enough to minimize its impact.

4. The power of peer pressure: Professionals who know that their misconduct will not be ignored or overlooked by their peers tend to take greater care in their practice. Those who might be tempted by self-interest are more likely to be dissuaded from inappropriate actions, and those feeling pressured by colleagues to “go along” with unethical schemes will be more likely to refuse to do so.

In conclusion, real estate professionals cannot expect that an effective regulator that responds to consumer complaints efficiently is enough to maintain the integrity of the profession. As mentioned earlier, the profession is a shared responsibility and requires all real estate professionals to do their part in ensuring that others in the profession conduct themselves appropriately. As a real estate professional, you play an important role in enforcing professional behaviour.

5.4 The duty to report in other professions in BC

The duty to report is a common obligation on professionals. This is consistent with the premise that public confidence in a profession can only be maintained when the members of the profession help enforce the values of the profession.

Lawyers in BC are required to report “conduct that raises a substantial question as to another lawyer’s honesty, trustworthiness, or competency as a lawyer.”² In the Law Society of British Columbia’s commentary relating to the duty to report, it states that reporting at an early stage can often minimize the potential harm to others, which will, in turn, minimize the negative impact on the profession. Furthermore, it states that it may be worth it to report even seemingly minor breaches, as a minor breach may simply be one component or indicator of much greater misconduct. Waiting for conduct to become serious before reporting may result in more harm being done than necessary.

² Section 7.1-3 of the Law Society of British Columbia’s *Code of Professional Conduct for British Columbia*.

Aside from a few narrow exceptions, Chartered Professional Accountants (“CPAs”) in BC are required to report to the Registrar of CPABC any information concerning an apparent non-trivial breach of the CPABC Code or any information raising doubt as to the competence, integrity, or capacity to practise of another CPA.³

Health care professionals that are regulated under the *Health Professions Act* (e.g., physicians, nurses, dentists, massage therapists, acupuncturists, chiropractors, optometrists, pharmacists, and psychologists) are required to report in writing if they, on reasonable and probable grounds, believe that the continued practice of the health profession by another health care professional might constitute a danger to the public.⁴ Focusing more closely on physicians, Canadian Medical Association’s *Code of Ethics and Professionalism* requires them to report to the appropriate authority any unprofessional conduct by colleagues.⁵

As you can see, the duty to report is a common duty among professions in BC. Real estate professionals who want their profession to be as highly respected as law, accounting, and health care must therefore play an active role in maintaining the standards of the profession by reporting the misconduct of others in the profession.



5.5 The Duty to Report in RESA and the Rules

The duty to report, while not explicitly mentioned in RESA, is clearly a fundamental component of the licensing regime. Section 35(2) states that a licensee commits conduct unbecoming a licensee if the licensee engages in conduct that:

- is contrary to the best interests of the public,
- undermines public confidence in the real estate industry, or
- brings the real estate industry into disrepute.

Clearly, a failure to report the misconduct of another licensee, particularly if that misconduct puts a consumer at risk, is contrary to the best interests of the public and could undermine the public confidence in the profession. As such, a failure to report misconduct of a serious nature could result in a finding of conduct unbecoming a licensee against the real estate professional who failed to report.

³ Rule 211 of the Chartered Professional Accountants of British Columbia’s CPABC Code of Professional Misconduct.

⁴ Section 32.2 of the *Health Professions Act*.

⁵ Section 33 of the Canadian Medical Association’s *Code of Ethics and Professionalism*.

The Real Estate Rules, on the other hand, make explicit mention of the duty to report. Section 3-2, which contains a number of responsibilities for representatives and associate brokers, states that they must promptly notify their managing broker on learning of conduct that they consider may be:

1. professional misconduct;
2. conduct unbecoming a licensee; or
3. improper or negligent conduct.⁶



“Professional misconduct” is defined in RESA and includes things such as breaches of RESA, the Real Estate Services Regulation, the Rules, or a condition or restriction of one’s licence; wrongful taking or deceptive dealing; incompetence; and failing to comply with an order of RECBC, a discipline committee, or OSRE. “Conduct unbecoming a licensee” is also defined in RESA and is conduct that is contrary to the best interests of the public; that undermines public confidence in the real estate industry; or that brings the real estate industry into disrepute.

Section 3-2 does not simply focus on breaches of RESA, and includes breaches of other statutes or laws. For example, what would you do if you were a representative and you found out that another member of your brokerage is engaging in email marketing activities that breach Canada’s anti-spam legislation? Under section 3-2, such a breach could fall under the category of incompetence or improper conduct, and in either case, it must be reported to your managing broker.

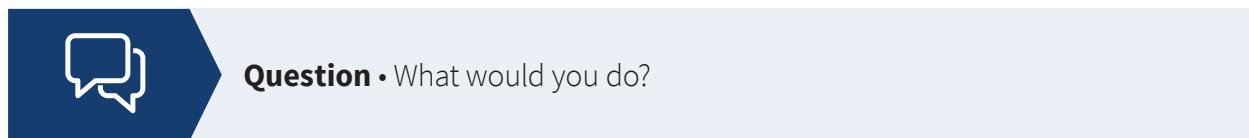
Imagine the following scenario:

You are on your way to host an open house with Lindsay, another real estate professional in your brokerage. You congratulate her on a property she recently sold, and she replies “thanks — I’m glad that one is done! The buyer and her agent were really challenging to work with. The buyer’s agent asked me to convince my seller client to accept a lower purchase price on the contract and take \$100,000 in cash on the side to reduce the buyer’s property transfer tax. Can you imagine? And this buyer was loaded too — her offer was the highest one that came in by a long shot, she paid the deposit in cash, and she flew in from somewhere overseas to sign the deal!”

You ask: “Wow, it actually sounds like something that might need to be reported to FINTRAC — did you file a Suspicious Transaction Report?”

Lindsey answers: “What are you nuts? I don’t have time for that kind of bureaucracy! I didn’t agree to underreport the purchase price on the contract, so my job is done!”

⁶ Section 3-2(5).



Suggested response:

In situations where a professional colleague is in violation of their duties (including legal requirements) you owe a duty to the public and the profession to hold that colleague accountable for their actions (or, in this case, for their inaction).

Failure to report a suspicious transaction is a violation of the reporting requirements under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*. Also, the buyer's agent was acting unethically in the situation.

Your first option will likely be to remind Lindsay of her legal and professional obligations and the risk she assumes if she does not comply with her professional obligations.

If you can't convince Lindsay to take further action, you have an obligation to talk to your managing broker, both about the potential suspicion of money laundering and Lindsay's lack of appropriate action. As you will soon see, you also have an ethical obligation to talk to your managing broker about the other real estate professional's behaviour.

The duty to report under Section 3-2 applies to a licensee's own conduct, the conduct of others acting on the licensee's behalf, and the conduct of anyone acting on behalf of or within the brokerage (e.g., other licensees and unlicensed assistants). **In short, Section 3-2 applies to any misconduct within a licensee's brokerage and requires representatives and associate brokers to report the misconduct to their managing broker.**

5.6 The Duty to Report as an Ethical Duty

The duty to report in the Rules focuses on licensees reporting the misconduct of others within their brokerage to their managing broker. But what about the misconduct of licensees and unlicensed employees at other brokerages?

There is no explicit duty in the Rules for licensees to report the misconduct of those outside of their brokerage. Despite this, and for all of the reasons discussed earlier in this module relating to public protection, public confidence and trust in the profession, and the overall integrity and reputation of the profession, you have a broader ethical duty to report the misconduct of any licensee, whether they are a member of your brokerage or not. Under this ethical duty, you have a responsibility to report the conduct of any licensee:

- that you believe might constitute professional misconduct, conduct unbecoming a licensee, or improper or negligent conduct; or
- that presents a danger to that licensee's clients or to the public interest.

Finally, the ethical duty to report also applies to potential misconduct by unlicensed employees at brokerages, as these individuals play an important part in shaping the public's perception of the industry.

If you are faced with a situation that requires reporting potential misconduct by individuals outside of your own brokerage, start by talking to your managing broker, who can help you determine how to report the matter to RECBC. You'll learn more about where to report matters in topic "Where to Report Misconduct" of this Module.

The duty to report must not be used to extract personal advantage, and licensees should never threaten to report the misconduct of another licensee or employee of a brokerage for this purpose. Such conduct may be known as blackmail or extortion, is unprofessional in itself, and may also be a criminal offence.

5.7 What to do When Unsure of Whether to Report

Sometimes, the fact that misconduct has occurred is obvious. However, there are other times when things are not as clear. When another real estate professional's actions "feel wrong", yet you're not sure whether they constitute professional misconduct, conduct unbecoming a licensee, or improper or negligent conduct, ask yourself the following questions:

- Have a consumer's interests been harmed by the real estate professional's actions?
- Does it seem likely that someone's interests may be harmed in the future by the real estate professional's actions?
- Does the real estate professional stand to benefit as a result of their actions, and this has not been adequately disclosed to the client?
- Does the real estate professional seem unaware or unwilling to correct his/her actions?

If the answers to any of these questions is "yes," you report the misconduct to your managing broker. It is important to discuss only with the managing broker and not with other licensees. You and your managing broker may wish to consult with a RECBC Professional Standards Advisor for further guidance about conduct you've observed and the requirements for real estate professionals.

Another helpful approach is to put yourself in the position of a member of the public and think about what their reaction would be if they learned that another real estate professional knew of the potential misconduct and chose not to report it. Would this help or hurt the profession's reputation? If in doubt about whether reporting is necessary, err on the side of caution and report the matter.

Do you remember the concept of the "reasonable and informed third party" from Module 2? The same concept applies here — think about the situation from the perspective of a third party who has the relevant knowledge and experience to understand and evaluate the appropriateness of your decision in an impartial manner. If such a person were to weigh all the relevant facts and circumstances in the situation, what would they likely conclude?

5.8 Where to Report Misconduct

The licensing regime, as set out by RESA, rests on the foundation that individual licensees, through and on behalf of their brokerages, provide real estate services to consumers, while being supervised by the brokerage's managing broker. As such, managing brokers serve a vital role in the overall integrity of the industry. It is useful to think of a managing broker as the captain of the ship (i.e., the brokerage) — he or she must be kept apprised of all significant issues on board the ship. Therefore, in most cases, reports of misconduct should be directed to your managing broker. When reporting an incident of misconduct to your managing broker, be prepared to clearly outline any risks you believe the conduct might present to consumers.

The fact that misconduct should generally be reported to your managing broker does not preclude or prevent you from reporting misconduct directly to RECBC. When might direct reporting to RECBC be necessary?

Direct reporting to RECBC would be necessary if:

- another licensee's conduct presents such a great risk to the public that immediate action by RECBC is necessary (e.g., a licensee has misappropriated, or stolen, a client's money);
- your managing broker is not immediately available, and the misconduct is of a serious nature.
- you have concerns about how your managing broker is handling, or has handled, an instance of misconduct;
- it is the managing broker who has committed the professional misconduct, or
- for any other reason, you would feel more comfortable reporting to RECBC rather than to your managing broker.

RECBC's Anonymous Tip Line

In addition to handling formal, written complaints, RECBC maintains an anonymous tip line where real estate professionals and members of the public can report suspicious activity or unethical conduct by licensees or employees of brokerages by telephone or by submitting an online tip form. Real estate professionals must remember that, if they choose to make an anonymous report to RECBC, they must still provide sufficient information for RECBC to begin an investigation.

What should you include in an anonymous tip to ensure that there is sufficient information for RECBC to investigate?



Suggested solution:

- name of other licensee(s) and their brokerage(s)
- type of real estate service involved
- property address
- description of key details of the transaction and the inappropriate actions
- dates
- names of parties
- Rules you believe might have been violated

5.9 How Managing Brokers Handle Reports of Misconduct

A. The Duty to Take Reasonable Steps to Deal with Misconduct

Section 3-1 of the Rules, which sets out a number of responsibilities of managing brokers, states that a managing broker must take “reasonable steps” to deal with any matter relating to professional misconduct, conduct unbecoming a licensee, or improper or negligent conduct that is committed by those acting on behalf of, or associated with, their brokerage.

The issue of how managing brokers were handling misconduct was addressed in the IAG Report, which stated:

We believe that managing brokers need to play a greater role in identifying and acting on reports that suggest industry practices that are harmful to consumers.

B. What does “Reasonable Steps” Mean?

What do “reasonable steps” entail? The standard of reasonableness is not equivalent to perfection, nor does it require excessive or extreme effort.

With respect to the standard of reasonableness in the law of negligence, a well-known Canadian scholar wrote:

The reasonable person is not perfect, nor someone with unusual qualities or prescience, courage, or sagacity. The reasonable person is expected to behave in the way an ordinary prudent person would act in the circumstances.

In other words, when handling reports of misconduct of those within their brokerage, managing brokers must take those steps that an ordinary, diligent, and prudent managing broker would take. This goes beyond what would be expected of a general member of the public: an “ordinary, diligent, and prudent” managing broker would be held to the high standards expected of all professionals.

When determining what is reasonable in the circumstances, managing brokers should exercise their professional judgment. Every incident is unique and dependent on the particular facts of the matter; therefore, there is no one “right” answer for how to handle a complaint or report of misconduct. In fact, for the government or a regulator to create a comprehensive set of rules for how to handle each and every unique situation is simply unrealistic and inconsiderate of the complexity of the real estate profession.

The “reasonable steps” standard set out in the Rules is therefore both cognizant of the reality of real estate transactions and flexible towards multiple approaches to solving a problem.

C. Taking “Reasonable Steps” to Deal with Misconduct

The first step in dealing with a report of misconduct should be to gather as much information about the misconduct as possible. Gaining a complete picture of the matter is important in order to determine the best way to deal with it.

Information-gathering activities might include:

- speaking to the licensee(s) and other parties involved in the matter, including the managing broker of any other brokerage involved;
- speaking to impacted consumers; and
- collecting available documents such as contracts, disclosure, emails, notes, etc.

The next step should be to consider the facts (not rumors and hearsay) and the relevant context.

What facts and contextual information would be relevant for consideration?

Things to consider may include:

- whether steps have already been taken to remedy or correct the misconduct;
- whether the misconduct is a one-time incident or if it has been committed on numerous occasions;
- whether the misconduct appears to be a mistake vs. an ethical breach
- whether a consumer has already been harmed; and
- whether there is a risk of continued harm to a consumer.

A breach of the Rules might reflect an inadvertent error or a lack of awareness of certain professional obligations. If no risk of harm to the public results, it may be appropriate to deal with the issue with the licensee or employee directly, without reporting the matter to RECBC.

However, in other cases, particularly where the conduct has the potential to do harm to the public or hurt the reputation of the industry, such as in the case of ethical breaches, it is also appropriate to report the matter to RECBC. Managing brokers should put themselves in the position of the consumer(s) impacted by the misconduct. What would consumers think if they found out that the supervising managing broker dealt with the matter internally and did not report it to the regulator — would this help or hurt the profession’s reputation?

The following is a non-exhaustive list of steps that managing brokers may want to consider taking when dealing with issues of misconduct within their brokerage.

- Speaking to a Professional Standards Advisor at RECBC for guidance.
- Addressing the issue with:
 - the licensee or employee subject of the potential misconduct to:
 - hear their “side of the story”;
 - identify why the misconduct occurred (e.g., was the misconduct an accident, or were the actions committed with knowledge that it was wrong?);
 - determine whether enhanced supervision or additional education is required;
 - reinforce that the conduct is or was unacceptable; and
 - discuss whether the licensee and/or brokerage should report the matter to the Real Estate Errors and Omissions Insurance Corporation.⁹
 - the consumer(s) impacted by the misconduct to:
 - hear their “side of the story”;
 - inform them of their ability to report the misconduct to the RECBC directly;
 - reiterate that the misconduct will be taken seriously;
 - be transparent about how the brokerage intends on dealing with the issue; and
 - seek the information necessary to determine what can be done to minimize or compensate the consumer for their losses.
 - the managing brokers of the other licensees and employees involved to:
 - make them aware of the issue; and
 - be transparent about how the brokerage intends on dealing with the issue.
 - others in the brokerage who were not involved in the misconduct to:
 - clarify the brokerage’s position on the conduct;
 - discourage others from acting in a similar manner; and
 - allow a healthy level of discussion around the issue, particularly if it is contentious.
 - the brokerage’s legal counsel to determine what legal risks may be associated with the conduct.

Resolving the matter might include:

- reporting the matter directly to RECBC. The decision to report is separate from any decision regarding compensation provided to a client who has been harmed. In other words, even if the matter has been “made right” with the client, the obligations for reporting the matter still stand;

⁹ Under the Indemnity Plan, licensees are required to give written notice to the Real Estate Errors and Omissions Insurance Corporation if they become aware of an error or any circumstance which could reasonably be expected to be the basis of a claim, however unmeritorious. A failure to do so could jeopardize insurance coverage.

- cancelling the employment or independent contractor relationship with the licensee or employee;
- reviewing and updating the brokerage's policies and procedures to address the unacceptable conduct;
- creating brokerage training that focuses on discouraging the inappropriate behavior; or
- offering to compensate those who have suffered damages with respect to the misconduct.

D. Taking “Reasonable Steps” With Respect to Misconduct Outside of Your Brokerage

If misconduct was committed by a licensee or employee at another brokerage, the managing broker should contact the managing broker at the other brokerage to discuss the conduct, the risks presented by the conduct, and the steps that should be taken to resolve the situation. At this point, the managing broker at the other brokerage becomes subject to the requirement to take reasonable steps to deal with the matter.

In addition to informing the managing broker at the other brokerage, the managing broker who initially became aware of the misconduct, using their professional judgment, may decide to also report the matter directly to RECBC. This is particularly important where the conduct has the potential to do harm to the public or hurt the reputation of the profession. Again, approaching the issue from the public's perspective may be helpful in deciding upon a course of action. If in doubt, the matter should be reported.



5.10 Conclusion

In this module, you learned about the fundamental purpose of the duty to report: to maintain the trust of the public in the profession by placing an obligation on professionals to hold each other to the highest standards. The real estate profession is collegial, where real estate professionals often work together towards common goals. Therefore, some real estate professionals may be hesitant to report the misconduct of other licensees and employees of brokerages. They may believe that keeping misconduct “internal” or “in the house” is preferable to reporting it. Alternatively, they may be fearful of retaliation for reporting misconduct, especially in smaller communities or other situations where real estate professionals fear damaging relationships with colleagues. However, these attitudes can contribute to the public perception that real estate professionals are self-interested in their practice. This is incompatible with the core characteristic of a profession, which is that while professionals may primarily serve their clients, they owe a broader duty to society at large.

The IAG Report stated, “...the industry and the interests of individuals and the public suffer when conduct and practice issues go unreported and unaddressed.”¹⁰ Therefore, not only must you be accountable for your actions, but you must make other real estate professionals accountable for their actions. You have a role in enforcing the values of the profession. Hold others to the high standards that you set for yourself. Those who knowingly act unprofessionally will be less likely to do so if they know that it will not be tolerated by their fellow professionals.

If for whatever reason you feel unable to report a matter that should be reported to RECBC through the complaints process, remember that RECBC also has an anonymous tip line available to give the public and real estate professionals the opportunity to let RECBC know about suspicious activities, while protecting their identities.

In conclusion, be a champion for your profession, and treat your role as a professional as a privilege worth fighting for.

¹⁰ IAG Report, p. 42.

Notes

RECBC

REAL ESTATE COUNCIL
OF BRITISH COLUMBIA

The Real Estate Council is a consumer protection agency established by the provincial government to administer the *Real Estate Services Act*. Its role is to license and regulate the conduct of real estate licensees in British Columbia. RECBC enforces entry qualifications, investigates complaints against licensees and imposes disciplinary sanctions under the Act.

www.recbc.ca