DISCIPLINARY News

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THE COMPLAINT PROCESS

The Nova Scotia Real Estate Commission (the Commission) is responsible for the administration of the Real Estate Trading Act and our Bylaw, part of which includes receiving complaints about a brokerage or a licensee and investigating and taking disciplinary action when necessary.

You will notice as you read on that while two licensees may be charged with the same violation, the penalties may be different. This is because the Commission deals with each case individually as each investigation is distinct and often complicated in its own way.

Each case also goes through several levels of procedure. When a complaint is made that warrants a full investigation, the following steps are taken:

1. The Registrar initiates an investigation. He may also do so on his own should he deem it necessary.
2. Notification that an investigation has been initiated is sent to the respondent licensee and corresponding broker, if applicable, along with a copy of the complaint and directions on how to reply.
3. The Commission's Compliance Investigator requests statements and supporting evidence from all parties involved. Other parties involved with the case, including other licensees, may also be contacted for statements or information if required.
4. Upon its completion, the investigation report is turned over to the Registrar for his decision.
5. The Registrar's decision as well as the full brokerage transaction file and email correspondence pertaining to the investigation is reviewed by the Complaints Review Committee (CRC), who may accept, reject or make recommendations to amend the decision to:
    a. recommend no charges;
    b. recommend charges through a settlement agreement. If the licensee accepts the proposed settlement agreement, they must satisfy the imposed penalty. If the licensee does not agree with the proposed settlement agreement, the matter is referred to the Discipline Committee.
    c. refer the matter to the Discipline Committee.

The CRC or the Registrar may refer the matter to the Discipline Committee, where a panel is appointed and a formal hearing will make a final decision on the matter.

nova scotia real estate COMMISSION

WHAT IS THE COMPLAINTS REVIEW COMMITTEE?

The Complaints Review Committee (CRC) is comprised of industry and public volunteers from across the province.

The role of the CRC is to:

- review all of the Registrar's complaint decisions
- accept, reject or make recommendations to amend the decisions
- make recommendations to the Commission Board of Directors on conduct, trade practices and standards of business practice
- hear requests for review of the Registrar's decision to dismiss a complaint

BROKERAGE INSPECTIONS

Every year, the Commission's Compliance Inspectors conduct trust account inspections (formerly known as *audits*) on each brokerage in Nova Scotia. In addition to the trust inspections, each brokerage is subject to a full brokerage inspection every three years which includes a review of the brokerage transaction files and trust record keeping. Inspection results fall into one of three categories: 'very good', 'good', and 'needs improvement'. Any brokerage that receives three consecutive ratings of 'needs improvement' is subject to a $500 fine and the penalty increases if the brokerage receives a fourth or fifth consecutive rating of 'needs improvement'.

Three consecutive needs-improvement inspections:

One broker was fined $500 for three consecutive 'needs improvement' on trust inspections and is required to retake the trust account portion of the broker's licensing course.

INSPECTION TRENDS

Calculating the number of pages for your APS

Recently, Compliance Inspectors have noted that the number of pages on Part I of the Agreement of Purchase and Sale is often left blank or completed incorrectly. This number of pages line must amount to only the pages forming and attached to the agreement at the time it was written, which includes Part I, Part II and any attached schedules or addendums.

What isn't included in this page number and does not form part of the Agreement of Purchase and Sale? Some examples are: a Counter Offer, Property Condition Disclosure Statement or a Transaction Brokerage Agreement.

Proper Procedure for Releasing Trust Funds

If one party is requesting trust funds (in excess of the remuneration owed) to be removed from the brokerage's trust account prior to closing, the brokerage holding the funds in trust must have both parties' (i.e. both the buyer(s) and seller(s)) signed consent in writing prior to closing. An amendment to the Agreement of Purchase and Sale or another written form that gives clear instruction from other parties will satisfy this requirement.

Keep in mind that an email does not constitute '*in writing*' and is not sufficient to satisfy the requirement as there are no actual signatures captured.

Brokerage Representative Signature Line

Another common trend the Compliance Inspectors have identified is an increase in Brokerage Agreements not having been signed by a brokerage representative.

Brokerage Agreements (i.e. Seller/Buyer Brokerage Agreement) and service contracts (i.e. Fee Agreement & Seller Customer Status Acknowledgement) require the signature of a brokerage representative. Licensees trade in real estate on behalf of their brokerage, hence why the term "brokerage representatives" exists. Brokerage representatives can be the licensee working directly with the consumer, or any other licensee at the brokerage who is given the authority to sign by the brokerage.

Further, amendments to brokerage agreements and service agreements must also be signed by a brokerage representative as changes to agreements must be done in writing per the agreement and signed by all parties. Typing a licensee's name into a form or sending an email does not constitute a signature, though an secure e-signature service is acceptable so long as it is accompanied by a certificate of authenticity from the e-signature service provider.

Signatures are required in this instances because, after all, brokerage agreements and service contracts are just that – legal contracts – where both parties (i.e. consumer and brokerage representative) are required to sign.

INVESTIGATIONS

The following cases are provided as learning opportunities for the industry. The following cases do not cover every complaint investigated by the Commission, but are representative of the more serious and consistent issues. Disciplinary actions are distributed to licensees in accordance with Commission Bylaw 839.

CASE #1 • FAILURE TO ADVISE OBTAINING EXPERT ADVICE

A buyer engaged a licensee to purchase land on which he could build a home and found land which appeared to be suitable for his needs. The Agreement of Purchase and Sale drafted for this piece of land clearly stipulated that the buyer would receive copies of all documentation respecting the property, including a development permit and wetland delineation sketch.

The buyer closed on the sale and several months later discovered that he could not build on most of the land as it had wetland restrictions. The buyer also discovered that, as early as three weeks before the condition date for the required documents expired, both licensees in the transaction were in possession of the wetland delineation sketch that illustrated these restrictions. The buyer alleged that he did not receive a copy.

As a result of the investigation, the evidence did not support the complainant's allegations. Instead, it revealed that the buyer had been emailed the development permit and wetland delineation sketch as soon as his licensee received it from the seller's brokerage.

The evidence did support, however, that the buyer's licensee failed to discuss, or offer to discuss, the potential implications of the environmental restrictions outlined in the delineation sketch and failed to advise his client to obtain expert advice on the matter. It was the Commission's position that the licensee deferred this duty to the buyer's lawyer, with whom he assumed his client had consulted.

In July 2014, the licensee was charged with one violation of Bylaw 702, Article 39, for failing to advise the client to obtain expert advice and for failing to act in a manner that demonstrated reasonable care and skill. The penalty was a fine of $500.

LESSONS LEARNED

The lawyer review clause and, in fact the involvement of lawyers at all, does not absolve licensees of fulfilling their agency obligations. Unless a licensee is a lawyer, they cannot give legal advice; but they can and must advise their clients to obtain expert advice.

CASE #2 • MISLEADING ADVERTISING

A complainant alleged that the licensee listing a property adjacent to them inaccurately advertised the property as having 20 feet of water frontage on the listing cut, when it had only a right-of-way over the complainant's property. They believed that the statement was misleading as it conveyed to potential buyers that they would own 20 feet of her property. The complainant's property was also listed for sale and their licensee tried several times to reach the licensee representing the neighbour, to no avail. Upon closing, the buyer of the adjacent property proceeded to grade and gravel a driveway on the right-of-way.

The evidence in this case supported that the licensee advertised water frontage on the listing of the subject property when it only had right-of-way access. This was determined to be misleading and based on the MLS® listing cut, the public may have perceived this property to have water frontage.

In June 2014, the licensee was charged with for one violation of Bylaw 708(i)(ii)(iii) for misleading advertising. The penalty was a fine of $400.

LESSONS LEARNED

While there was deeded right-of-way on the property, the issue remained that the advertisement for the property was misleading to the consumer as it did not technically have 20 feet of water frontage. Had they simply identified that the water access was by way of a deeded right-of-way, the advertisement would not have been deemed misleading to the public. Always seek legal counsel in situations where you are unclear as to how the property should be advertised.

CASE #3 • UNPROFESSIONAL CONDUCT

A consumer agreed to allow a licensee to show their property and alleged that only after the showing were they made aware that it was for research purposes, alleging that the showing was arranged under false pretenses to prepare a CMA for their seller's future listing.

The seller claimed to have spent several hours preparing the house for the showing and made arrangements for her and her young children to leave the house at the scheduled time. After the showing, the licensee sent a text message to the seller's licensee indicating that the showing was only for research purposes. Several days later, the same licensee listed a property nearby. The seller, in discussing with neighbours who also had their houses on the market, realized that the licensee had also viewed their homes for research.

In response to the allegations, the licensee apologized but assured that the other sellers did not have an issue with this practice and that she had told all licensees that the purpose of the showing was for market research. She also advised that this was a common practice amongst licensees, herself included, and that she was taught to do this in the salesperson's licensing course.

As a result of the investigation, the evidence did not support the licensee's statements. Conducting a viewing for the purpose of market research may only be done with consent, preferably written, from the seller.

In January 2015, the listing licensee was charged with one violation of Bylaw 702, Article 35, for unprofessional conduct. The penalty was a fine of $400.

The licensee was also cautioned about making misleading statements when booking appointments for viewings.

LESSONS LEARNED

When viewing properties, it is paramount to remember that it is the seller who decides who, when and for what purpose they agree to allow a licensee and/or a buyer to enter their home. Doing research to better understand the market and inventory in itself is a good idea; but it must be done with the informed consent of the homeowner, preferably in writing.

CASE #4 • FAILURE TO PROTECT THE CLIENT

Two salespeople and one managing associate broker listed a cottage for two sellers. The sellers returned to the property on closing day to fill in some holes they had previously dug in trying to locate the septic tank when they discovered the keys to the cottage under a large rock. The sellers allege that the keys had been placed there without their consent or direction.

Once an investigation was initiated, the managing associate broker indicated that he put the key under the rock and that the other licensees were not involved. He stated that the LockBox had been removed from the property when the transaction became "firm" and following the pre-closing viewing, when he was alone, he placed the key under the rock for the later convenience of the buyers. From his experience, he knew that the closing could take a while and it was unlikely that either licensee could return to the property to personally give the keys to the buyers. He had intended to inform the buyers of the location of the keys when he received notice that the sale had closed.

The investigation revealed that the paperwork in this transaction contained several discrepancies, for instance, the buyer was a relative of one of the licensees but did not identify which one. Clauses were not written clearly or understandably and the sellers did not terminate their Seller Broker Agreement (as transaction brokerage was inappropriate with the buyer being a relative) until the day before the closing, though the sellers had signed a Seller Customer Status Acknowledgement a month prior. The brokerage also did not provide a signed agency brochure to the sellers.

In May 2014, the managing associate broker was charged with one violation of Bylaw 702, Article 2, one violation of Bylaw 702 Article 11; and Bylaw 704(a), for failing in the review and preparation of documentation to ensure compliance with the Real Estate Trading Act and Commission Bylaw. The penalties totaled $1500.

LESSONS LEARNED

Convenience does not supersede fiduciary obligations. When a seller lists their home and inevitably provides the licensee and/or brokerage a key to their house, the brokerage's obligation to safeguard that key, and the house, is created. If a licensee cannot make the key available to the buyer when the property transaction closes, they ought to obtain the seller's consent to make other arrangements. For example, keys can be left with the buyer's lawyer.

CASE #5 • VERBAL AGREEMENTS, CONTACTING ANOTHER BROKERAGE'S CLIENT & RELEASE OF CONFIDENTIAL INFORMATION

A buyer in transaction brokerage alleged that a leak in the basement of the house they purchased was not disclosed to them and that both licensees involved were negligent in not doing so.

The investigation involved multiple offers with various parties on the subject property which the brokerage had listed. While the evidence did not support the complainants allegations, the investigation identified several other Bylaw infractions.

The investigation revealed many paperwork discrepancies for both the licensee facilitating for the buyer and the licensee facilitating for the seller. The investigation also revealed that the buyer's facilitator recommended inspectors, lawyers and insurance companies while in transaction brokerage. Further, the buyer's facilitator disclosed to the complainant the offer amount of a previously accepted offer without written permission from all parties to do so.

The evidence supported that the seller's facilitator also had several paperwork discrepancies and engaged in a verbal amendment via text messages to the Agreement of Purchase and Sale with a licensee at a different brokerage (regarding a transaction that did not close). Finally, the evidence supported that the seller's facilitator did not respect the agency relationship with a competitor by contacting the buyers directly when they could not reach the buyer's facilitator.

The evidence showed that the broker did not identify the paperwork discrepancies, violating 703(e) and (b), nor did they immediately notify the seller in writing of a late deposit, violating Bylaw 625(b).

Finally, the evidence showed that the licensee who represented a buyer from a different brokerage (who was told confidential information) engaged in a verbal amendment to the Agreement of Purchase and Sale via text message.

In March 2015, the licensee facilitating for the buyer was charged with one violation of Bylaw 702, Article 11 ($400). They were also cautioned for providing a list of recommended service providers while in transaction brokerage and for disclosing that the accepted competing offer was for more money.

The licensee facilitating for the seller was charged with two violations of Bylaw 702, Article 11 ($800), and one violation of Bylaw 702, Article 28 ($400), for a total of $1200 in fines. The licensee was cautioned for disclosing the contents of the backup offer without the written permission from both parties.

The broker was charged with one violation of both Bylaw 703(b) & (e) ($500) and Bylaw 625(b) ($500) for a total of $1000 in fines.

The licensee representing the buyer from a different brokerage was charged with one violation of Bylaw 702, Article 11 ($400).

LESSONS LEARNED

All real estate agreements and their amendments and/or addendums must be in writing and signed by all parties. While texting may initially appear to be 'in writing' it is not considered so under the Commission's rules because, similar to emails, nothing is signed. Further, in this case both licensees facilitating for the buyer and the seller disclosed confidential information to each other. This is never ok unless you have the informed consent from those the information came from. Confidential information includes details about the client, property, or the transaction that is not required to be disclosed by law.

CASE #6 • UNDERSTANDING WHO YOUR CLIENT IS

A seller in her senior years listed her home with a licensee and alleged that the licensee lowered the purchase price on a counter offer by $2,000 without her consent and stated that the initials on the counter offer were not her own.

The evidence in this case did not support that the licensee initialed the counter offer on behalf of the seller, but did support that they wrote the incorrect purchase price on the counter offer, violating Bylaw 702, Article 2. The evidence also supported that throughout the transaction, the licensee took direction from the seller's son and daughter-in-law and did not receive the clients' expressed written permission to discuss the transaction or to take direction from any family members. Finally, the evidence showed that the licensee did contact the family members when she discovered the error in the counter offer, but did not contact the client regarding the error until eleven days later.

In August 2015, the licensee was found in violation of Bylaw 702, Article 2. The penalty was a $400 fine.

The licensee was also cautioned for not receiving written direction from the seller when consulting with family members throughout the transaction and on the incorrect purchase price.

LESSONS LEARNED

When you are engaged by a client, it is the role of the licensee to work only with them and not their family. In circumstances where the client wishes to have family members involved, they must obtain expressed written permission for them to be involved. This can only be done if agreed to by all parties.

CASE #7 • FRAUD

As a result of findings in a regularly scheduled inspection (formerly *audit*), the Commission initiated an investigation into a residential transaction where the buyer was a licensed salesperson. The file for the transaction in question contained an Agreement of Purchase and Sale that had a *Schedule X* attached, though the *Schedule X* was not mentioned in the body of the Agreement of Purchase and Sale and the line indicating the number of pages was left blank. The schedule, which had been signed by all parties, called for two credits totalling to $16,500 in cash backs to the buyer at closing. One credit was for electrical/plumbing upgrades and the other was for closing costs. The file also contained an amendment to the Agreement of Purchase and Sale that called for a further cash back to the buyer to replace knob and tube wiring, though no mention of a home inspection was made (nor was the clause referenced) and no copies of the pertinent pages of the home inspection were in the transaction file.

As a result of the investigation, the evidence supported that the buyer/licensee failed to provide the *Schedule X* to his mortgage broker, and thus the bank. He also did not provide a copy of the amendment to the mortgage broker, and thus the bank. The Commission viewed his overall conduct to be unprofessional for personal gain.

In April 2015, the licensee was charged with one violation of Section 32 of the Real Estate Trading Act, for unprofessional conduct in intentionally concealing large credits from the mortgage lender for his own financial gain; one violation of Bylaw 702, Article 11, for effecting poor paperwork; one violation of Bylaw 702, Article 34, for creating a false document when he changed the copy of the APS he gave his broker; and one violation of Bylaw 708 for non-compliant advertising.

The penalties were a four-month licence suspension from Aug 1/15 to Nov 30/15, a total of $3200 in fines and a payment to the Commission for its legal costs, totalling $4,618.

LESSONS LEARNED

Cash back and credits are not illegal, however, mortgage lenders ultimately make the decision on what they will and will not fund. It is imperative that credits are handled appropriately and that lenders receive copies of all relevant documentation respecting the property that they are financing. Concealing any material facts from a lender is tantamount to mortgage fraud. When representing a third party, extra care has to be taken in what could be sensitive situation. Advising a client to seek legal advice on such matters is critical, but licensees are only required to follow the lawful instructions of their clients in any event. Creating paperwork in the furtherance of the concealment of facts may be deemed to be participation in fraudulent activity. Doing it in the furtherance of your own personal gain is nothing short of unprofessional. If you are unsure of how to handle a cashback, obtain advice from a lawyer and immediately discuss with your broker or managing associate broker.

CASE #8 • DISGRACEFUL, DISHONORABLE & UNPROFESSIONAL CONDUCT

In February 2015, the Commission received an email from a member of the public, who forwarded a string of messages between them and a broker. The member of the public was attempting to sell their property themselves and the broker approached the member of the public to attempt to solicit his brokerage's services. The member of the public had made repeated requests to have the broker stop communicating with him to no avail. The broker then allegedly became aggressive with the member of the public and made remarks that were personal in nature. The member of the public advised the broker that he would submit a complaint to the Commission, which they did that evening. In the morning, the broker emailed the Commission to advise that his email had been hacked, though he was unable to provide sufficient supporting evidence to this claim.

The Registrar initiated an investigation, where the evidence supported that this broker had previously violated Bylaw 702, Article 35, as a result of another investigation. Further, the evidence supported that the broker attempted to mislead the Compliance Investigator by providing false information prior to the initiation of the investigation by claiming that his email was hacked.

In July 2015, the broker was charged with violating Bylaw 702, Article 35, and fined $2000 for the repeat offence.

The broker was also charged with one violation of Bylaw 816 ($750) for attempting to mislead the Commission.

CASE #9 • REQUIRING CONSENT

Two sellers listed their condo with a licensee in early fall with the intention to move out of province by November of that year. They told the licensee that they preferred to sell, but would also be open to renting the unit. The sellers were contacted by an interested renter and when informing their licensee, they were told that an offer was believed to be coming soon and were asked to wait. When the offer came in, the sellers felt it was too low and were torn between renting and selling. They allege that their licensee used scare tactics to dissuade them from renting, suggesting that renters can devalue their home.

The sellers ultimately decided to sell and accepted the offer on the table. Sometime later, a friend of the sellers who checked on the unit periodically indicated that someone had been inside the unit. The sellers contacted their licensee as they had previously allowed access to the condo to the buyers, but had withdrew that permission. They asked their licensee to remove the LockBox immediately, which was done that same day, albeit with pushback from the licensee. The sellers eventually discovered that the buyer and their licensee had accessed the property without the sellers' permission. The sellers allege that their licensee did not assist them in identifying who had been inside their home to their satisfaction.

During the investigation, the licensee stated that she was not attempting to use scare tactics with respect to advising the sellers on the risks of renting their condo and was simply informing them of a possible capital gains tax and the potential for a renter to devalue the property. She also stated that she gave advice to the sellers on the deposit and how to address items like a special assessment. When the buyer's licensee booked a viewing to take measurements, she had not told the sellers immediately but had cancelled the appointment as instructed. The licensee stated that when the sellers told her that someone had been in the unit, she immediately removed the LockBox as instructed and checked the log, which indicated that it had been the buyer's licensee who had gained access to the property.

The evidence did not substantiate unprofessional conduct, but did reveal that the licensee disclosed, without permission, confidential information about her clients to the buyer's licensee when receiving an offer for rental. The evidence also revealed that paperwork in the transaction contained several discrepancies such as a change to the monthly condo fee not being initialed by all parties. The evidence further supported that the sellers' licensee did not give her broker true copies of the transaction files for their review and that the buyer's licensee accessed the property without the permission of the sellers.

The brokers of both brokerages were also questioned with respect to the paperwork discrepancies and the sellers' brokerage file did not contain all the documentation pertaining to the transaction, such as the condominium documentation.

In December 2014, the sellers' licensee was charged with one violation of Bylaw 702, Article 11, for poor paperwork, one violation of Bylaw 702, Article 37, for disclosing confidential information to the buyer's licensee and one violation of Bylaw 705(c), for not giving their broker the true copies of the real estate documentation. The three penalties totaled to $1200 in fines.

She was also cautioned about not telling the sellers about the buyer's request for a showing until the last minute and for not retaining copies of all documentation relating to the transaction.

The buyer's licensee was charged with one violation of Commission Bylaw 702, Article 11, for poor paperwork and one violation of Bylaw 702, Article 35, for unprofessional conduct in accessing a property without confirming with the sellers' licensee. The two penalties totaled to $800 in fines. The licensee was also cautioned about not retaining copies of all documentation relating to the transaction.

The broker for the sellers' licensee was charged with one violation of Bylaw 703(b) and (e) which requires broker supervision.

The other broker was charged with one violation of Bylaw 704(a) which requires the review of all real estate documentation. The penalty for each broker was a fine of $500.

LESSONS LEARNED

It is critical that confidential information of a client is not released without their informed consent, preferably obtained in writing. You also want to ensure that you have clear confirmation from the seller's licensee to show their property. In this situation, the buyer's licensee assumed that they were given permission to enter the premises as they hadn't heard otherwise from the seller's licensee. It is crucial that permission from the sellers is always sought prior to entering the property; the notion of 'no news is good news' should never be applied in these situations.

Finally, paperwork discrepancies are the most common mistakes our compliance team deals with. If you are unsure if your paperwork complies with the Act and Bylaw, ask your broker. Furthermore, always ensure that your broker has true copies of all real estate documents relevant to the transaction, which includes Certificates of Authenticity (read more about those here) from e-signature software. Consult Bylaw 621 for a comprehensive, though not exhaustive, list of what is required in an individual brokerage transaction file.

COMPLIANCE TEAM

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Complaints must be in writing* and may be submitted by fax at 902-468-1016/800-390-1016 or by mail or email at:

Attention: Compliance
Nova Scotia Real Estate Commission
601-1595 Bedford Highway, Bedford, NS, B4A 3Y4

compliance@nsrec.ns.ca

For information on our complaint requirement visit the **Complaints section of our website.*

Additional information on the complaint and discipline processes can be found on the Commission's website at **www.nsrec.ns.ca**

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