# HR and Practice Manual

# for

# [brokerage name]

## HR and Practice Manual – [brokerage name]

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# Part 1 – General terms and conditions

## Company message

*Insert your brokerage welcome message, mission statement, objectives, and philosophy.*

## Employee/ independent contractor status

*Insert your brokerage policy for employees and independent contractors.*

## Brokerage specialization

The firm conducts business in the following areas of specialization:

* \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_
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Management provides each salesperson with written confirmation of the areas of specialization where the licensee is authorized to transact business. If a salesperson obtains a lead in another area of specialization, a referral fee will be paid after the lead results in a commission earned by the brokerage.

## Dedication

The real estate business is rewarding, but challenging, and requires the cooperation of all employees and licensees to remain both competitive and successful.

It is expected that you will be dedicated to this brokerage, protect its interests, and work toward its betterment.

Internal disputes and problems may be quickly and efficiently solved through proper discussion channels. Should a problem arise, we ask you to discuss it with management.

## The Real Estate Trading Act

[Brokerage name] is licensed under the Real Estate Trading Act, as are all salespeople, brokers, associate brokers and managing brokers. [Brokerage name] will make every effort to comply with all requirements of both the Real Estate Trading Act and the Commission By-law.

As a representative for [brokerage name] it is understood that I must adhere to the requirements of the Real Estate Trading Act and the Commission By-law.

## Membership in organized real estate

This brokerage is a member of the Nova Scotia Association of REALTORS® and the Canadian Real Estate Association.

The brokerage has agreed to abide by the CREA code of ethics and standards of business practice and we insist that our licensees uphold not only the letter but the spirit of the code.

Defined simply, the word “ethics” means moral principles, quality or practice. In the real estate business, ethics govern our professional relationship with sellers and buyers, with the public and with other real estate practitioners.

All licensees of this brokerage are required to be a member of organized real estate. Should you fail to maintain your membership, your licence will be terminated.

Any licensee who is part of this organization may avail him/herself of the benefits derived by membership in these associations. Publications are distributed around the office and placed in our library. Licensees are encouraged to take full advantage of the library facilities offered, and to take these publications home for further study at any time. Library copies taken out of the office should be checked out with the office administrator, and checked in again upon their return.

## Licensing

All licensees of [brokerage name] must comply with the requirements of the Nova Scotia Real Estate Commission, including completing continuing education course requirements by June 30th of each year. Any licensee who fails to meet these requirements will not have their licence renewed and must immediately cease all trading activities. Any brokerage agreements the licensee has must be assigned to other licensees, and signage and website(s) must be taken down July 1st.

## Privacy matters

Protection of personal information of clients, unrepresented parties and this brokerage is of the utmost importance. All members of [brokerage name] are required to comply with the Privacy Act, the Personal Information Protection and Electronic Documents Act, and the brokerage policies regarding confidentiality of personal information. The brokerage must appoint a privacy compliance officer. Licensees are to consult with the privacy compliance officer when they have any concerns or questions regarding privacy issues.

### Collection, use, and disclosure of personal information

The brokerage and licensee may only collect and maintain personal information of clients and unrepresented parties specific to trades or potential trades. This information may only be maintained with the express written consent of the person to whom it pertains. Information held by the brokerage must not be disclosed to third parties without the consent of the client/unrepresented party.

### Protecting information

The brokerage and licensees will take any steps necessary to protect the confidentiality of any information maintained.

### Confidentiality

Confidentiality of clients must be maintained by all staff at all times.

In addition to the requirements of privacy legislation, a licensee must not disclose information regarding a client, property, or transaction to any other person unless authorized by the client, or required by law.

Confidentiality in transaction brokerage is a contractual item between the client(s) and the real estate firm where the firm has agreed not to disclose certain things about both parties. To disclose any such item is a breach of contract and may open the firm to liability.

### Privacy - office policies

**Office files**—Licensees are only to access transaction files in which they are involved. Pending and closed sales files are kept secure by the administrative staff and are not in the general files.

**Administrative staff**—Staff must only discuss details of a transaction with the licensee(s) involved in the transaction.

**Faxes**—Licensees must respect the confidentiality of documents related to transactions they are not involved in. Staff takes all incoming faxes off the fax machine and delivers them to the persons involved.

**Office meetings and conversation**—Licensees must not discuss the business of unrepresented parties and clients without the consent of the person involved. It is highly inappropriate and against privacy legislation to discuss such issues as divorce, forced transfers, financial difficulties, etc. unless the person it applies to has given consent to share that information.

### Legal action against company and/or licensee

Licensees of [brokerage name]must inform the broker of any legal actions, threats of legal actions or of any situation that may lead to legal action. This is of critical importance for two reasons:

* The brokerage may be able to mitigate the issue and prevent it from progressing further.
* The brokerage must give notice to the errors and omissions insurer.

The Real Estate Insurance Alliance, which provides errors and omissions insurance to licensees in Nova Scotia, gives the following instructions regarding E&O:

**Upon receipt of verbal or written notice of claim, or if you become aware of an incident which could result in a claim against you for an alleged error, omission or negligent act, give notice immediately.**

**Complete the REIA-INCIDENT CLAIM REPORT. Once completed, either print it and fax it to Centra Claims Management Inc. Fax (204) 977-8450, or email it to drivard@centraclaims.ca.**

**Attach all relevant documents (Offer to Purchase, Listing Contract, File Notes, etc.). Please retain the originals on your files.**

## Legal representation/advice

The only individuals who can give legal advice are lawyers. When a legal issue arises, your only option is to recommend the individual(s) seek legal advice. In circumstances where the client or unrepresented party refuses to obtain legal advice, you document their refusal and place it in the transaction file.

*Add any additional policies your brokerage may have here.*

# Part 2 – Office procedures

### Staff responsibilities

*Define each staff position’s responsibilities, for example, data entry on Filogix, filing, reception, etc.*

### Office hours

*Insert your brokerage office hours.*

### Common area and equipment usage

*Define the brokerage’s policies regarding:*

* *office library*
* *office equipment*
* *supplies and stationery*

### Telephone procedures

*Define the brokerage’s policies regarding telephone use. For example, is there a standard greeting you want used? Or a standard script for out-of-office voice mail? Do you want all calls logged or just specific ones?*

### Keys/ lock boxes/ access to properties

Licensees have a statutory obligation to account for and safeguard money, documents, and property entrusted to the licensee. When homeowners hand their keys over to a licensee, they are doing so with trust on the expectation that their keys, and therefore their homes, will be properly safeguarded.

*Insert your brokerage lock box policy.*

Licensees may only access a property with the permission of the listing brokerage or the property owner. Never enter a property without permission, even if it is vacant, because doing so is trespassing. When showing a property, leave your business card in a visible location to indicate you were there. Before leaving, ensure the property is exactly as you found it, including:

* Lights and heat
* Doors/cupboards
* Replacing items to original placement if moved
* Leaving pets where they were prior to your entering the property
* Locking doors

### Office keys

The brokerage will provide you with a key to the front office door. You are solely responsible for the security and use of this key. The key is to be returned immediately upon your termination of employment with the brokerage.

All doors and windows must be securely locked and lights turned off when closing the office.

## Transaction documents and files

### Completed transactions

Licensees are required to ensure that transaction files are complete and accurate. This includes both listing and sales files. You must ensure that all required documents are included and that they have been completed properly. Management will review all files for completeness and accuracy.

### Maintenance and ownership of office files

The brokerage maintains files for all listings and sales. This information is confidential and use and access is restricted to the licensees directly involved on the particular file. Documents must not be removed from the files. Listing and transaction files are the property of the brokerage.

### File retention and destruction policy

As required under by-law 615, brokers must keep real estate trade and trust account records for a seven (7) year period from the time the documents are executed. If a brokerage is sold or ceases operation, the broker is responsible for ensuring the safekeeping of the brokerage trust and transaction file records for seven years from the time the documents are executed.

## Unlicensed assistants

Licensees may employ unlicensed assistants to help carry out administrative functions. At no times are unlicensed assistants permitted to carry out any functions that are considered trading in real estate. Should a licensee employ an unlicensed assistant, they are responsible for ensuring that the assistant does not engage in any trading activities.

Unlicensed assistants can perform the following duties:

* clerical or administrative activities such as preparation of documents or reports
* make appointments for the licensees to show properties
* set up and remove signs and lock boxes
* write proposed advertising on behalf of a licensee (must still be approved by broker)
* contact agents for results on showings of listings
* contact solicitors about transactions
* respond to agents inquiries
* witness documents already discussed and presented by a licensee

Unlicensed employees cannot perform the following duties:

* host public open houses
* carry out pre-closing viewings
* present and sign any documents dealing with a real estate transaction (that is to say, listings, removal of conditions, and so on)
* solicit a contract to trade in real estate
* make cold calls by telephone or in person to potential clients
* negotiate any terms of a real estate transaction
* discuss or explain listings, offers, contracts, or other similar matters with anyone outside the employ of the brokerage
* advertise directly or indirectly in real estate
* respond to advertising inquiries from the general public

# Part 3 – Human Resource Policies

## Human Resources Policies

*Use the following headings to develop customized human resource policies for the brokerage.*

* *Attendance and Punctuality*
* *Code of Conduct*
* *Compensation*
* *Conflict of Interest*
* *Discipline*
* *Drugs and Alcohol*
* *Employee Benefit Plan*
* *Employee Orientation*
* *Employee Records*
* *Extreme Weather*
* *Harassment*
* *Hiring*
* *Holidays*
* *Leave of Absence*
* *Licence Fees and Association Dues*
* *Performance Management*
* *Reward and Recognition*
* *Terminations and Reinstatements*
* *Professional Development and Training*
* *Vacation*
* *Workplace Health and Safety*

# Part 4 – Salesperson Responsibilities and Guidelines

## Office meetings

Regular sales meetings are held from to every at *(Location*  .

Every licensee is expected to attend and be prepared to discuss concerns at these meetings, unless the broker is notified with valid reason for absence.

Regular sales meetings contribute to teamwork among staff, and better relations with the management. Any and all problems are open for discussion, permitting employees to have a voice in the management of the company.

## Desk duty

Desk duty is the office time assigned to a licensee for answering phone calls and walk-ins pertaining to inquiries on, and the listing of, properties. All licensees must be thoroughly familiar with the brokerage’s advertising schedule and be sufficiently acquainted with the brokerage listings so that they can competently and confidently service all inquiries made during scheduled desk duty times.

**Desk duty schedule** - Each licensee must check the desk-duty schedule, which includes the names of sales representatives performing desk duty, as well as specific times and dates. Desk-duty times are arranged to provide equal time for everyone. Careful planning is exercised to prevent any individual licensee from receiving disproportionate floor time. Over a given time period, every licensee has approximately the same amount and quality of floor time.

**Responsibilities of desk duty person** - It is the floor person’s duty to acquaint themselves with brokerage listings, so as to knowledgeably respond to inquiries on properties. The floor person answers all the real-estate related telephone calls. When more than one call comes in at a time, the office secretary, or other licensees in the office, answers the call and turns the information over to the floor person, unless the call is for specific licensees asked for by name.

**Furnishing a Substitute -** If a scheduled desk-duty person is to be absent, it is their responsibility to arrange a substitute. It is the desk-duty person’s responsibility to assure that someone is on desk duty during lunch breaks. If it is necessary to go out on an appointment, the desk duty person should arrange for another licensee to take their place on the desk duty schedule. Inform the office staff of any changes.

**Additional Duties of Floor Person** - The desk-duty person has certain additional administrative duties. These duties may vary from time to time and the licensee will be advised of same.

Any situations arising during duty desk which are not covered here will be referred to the manager for disposition.

## Insurance

### Errors and omissions

All licensees must carry errors and omissions (E&O) insurance. If a licensee’s E&O insurance lapses, their licence is automatically terminated. E&O insurance is supplied by the Nova Scotia Association of REALTORS®. Each licensee is responsible for paying their E&O insurance and ensuring their coverage is valid.

### Car insurance

All licensees must maintain liability insurance on any vehicle used to carry unrepresented parties/clients. The policy must have a commercial rider with a minimum of $2,000,000 in coverage. Any licensee who operates a home office and takes unrepresented parties/clients there to conduct business, must maintain liability coverage on their home that includes this specific use.

### Brokerage insurance

The brokerage maintains general property and liability insurance for the brokerage office facilities and brokerage activities.

### Seeking expert advice

Licensees of the brokerage must never give advice or hold themselves as experts on any topic on which they are unqualified or unsure. Advise clients and unrepresented parties seek expert advice when appropriate, such as lawyers, inspectors, appraisers, etc.

### Selling and buying property in your own name

*Develop an in-house policy regarding licensees buying and selling their own property based on the following information.*

When a licensee acquires or disposes of real estate, extreme care must be taken to ensure that a licensee’s duty is not put into conflict with their interest as a principal in the transaction. Act Section 38 requires the licensee to disclose their status as a “licensed salesperson” or “licensed broker” as well as their intentions for the property.

The obligation created by Section 38 is that any real estate licensee involved, directly or indirectly, in the acquisition of real estate must make written disclosure regardless of any relationships that exist and regardless of whether the trade is conducted through a brokerage or a private sale.

When disclosing licensed status, the term “licensed REALTOR®” is both incorrect and insufficient. Being a REALTOR® means you are a member the Canadian Real Estate Association (CREA) at a national level and the Nova Scotia Association of REALTORS® (NSAR) at a provincial level. CREA and its provincial counterpart are a professional membership organization and participation is voluntary. CREA does not grant licenses, and you can be licensed to sell real estate without being a CREA member.

While the Act exempts property owners from its authority, it is important for all licensees to know that their errors and omissions insurance exempts personal transactions. Any licensee who purchases or sells their own property is not covered under errors and omissions insurance should something go wrong.

Under no circumstances can a licensee act as a principal under transaction brokerage. One of the fundamental principles of transaction brokerage is fair and impartial treatment of both parties to the transaction. If a property is owned by a licensee, it is not possible (or believable) for that licensee to ignore their own best interests and act in a purely impartial manner.

## Safety

Safety is a definite concern in the real estate industry. Licensees often work alone in vacant buildings and with people that are little more than strangers.

You should take whatever steps are required to know who it is you’re dealing with. When you’re approached by a prospective new client, you should:

* meet them in the office
* verify their identities
* get their car make and license number
* photocopy their driver’s license
* complete a client information record

A serious client will not hesitate to share this information.

Make sure you tell someone who you are with, where you are going and when you will be back. Whenever possible, make sure the client knows you have shared this information with someone. You are less likely to be attacked if the assailant knows you will be missed and they can be identified.

Carry your cell phone with you at all times, clip it on and make it part of your apparel. If you keep your cell phone in a purse or briefcase, it may not be available when you need it most. Try to call the office often to let people know where you are.

### Google searches

Online scammers, while not physically threatening, are attempting to defraud the brokerage. When dealing with online property inquiries, especially where the individual is outside the country, perform a Google search of the person’s name, email address, and phrases from the body of the email. Typically, the scammer uses the same email address and wording each time they attempt the scam and it may be published on an anti-scam website. Be very suspicious of any buyer who wishes to make a very large deposit on a property sight unseen. Most often, it is an attempt at deposit fraud by which the brokerage accepts a large deposit cheque, the deal falls almost immediately, and the scammer asks for the deposit back. The purpose of the scam is to have the brokerage refund the deposit from the trust account before the original deposit cheque bounces, leaving the brokerage out thousands of dollars.

# Part 5 – Commissions and Compensation

## Commissions and other remuneration, benefits, and deductions

*Define the brokerage policy for:*

* *minimum commission rates, commission splits, if applicable*
* *approval for special situations*
* *shared commission agreements*
* *expected productivity levels*
* *disposition of listing if licensee leaves*
* *payroll schedule*
* *source deductions from pay, if applicable*
* *other deductions, (ie. registration fees, E&O fees, NSAR membership dues, etc.*
* *arbitration process or alternatives in event of a commission dispute*

### Referral fees

*Define the brokerage policy for paying and receiving referral fees. Ensure it addresses any forms to be used and filed*

### Enforced collection of commissions

*Define your brokerage policy for situations where the seller or buyer refuses to pay.*

### Disputes

The brokerage encourages licensees to avoid disputes over commissions or commission splits. Where disputes do arise, licensees are encouraged to settle the matter in an amiable manner. However, in the event that an irreconcilable dispute arises, the management will render a decision after hearing all sides of the dispute. Such decision is final and binding on all parties to the dispute.

### Incentives, inducements & remuneration sharing

Per by-law 771, an incentive or an inducement may be in the form of a remuneration rebate, provided the rebate is being made to a party to the transaction.

A licensee must not, directly or indirectly, provide an incentive or inducement unless the details of the incentive or inducement are provided in writing and the broker or managing associate broker has provided written approval.

An incentive that is directly or indirectly advertised, communicated, or offered to any person must include the details of the incentive and any terms or conditions to which it is subject. The details, terms, and conditions of the incentive must be provided in writing prior to the signing of any contract, acknowledgement, or agreement.

A licensee may give a gift to a client, an unrepresented party, or any other person provided the gift is not an incentive, an inducement, a referral fee or remuneration sharing.

# Part 6 – Listings and Listing Procedures

### Working with sellers

*Define the brokerage policies when working with sellers. Be sure to include:*

* *transaction file requirements*
* *standard clauses*
* *guidelines for different property types*
* *completion of listing agreements*
* *agency disclosure procedures*
* *conflicts of interest*
* *length of listing period*
* *types of listings*

### Multiple Listing Service®

Every licensee and administrator responsible for MLS® data entry and advertising is provided with a copy of the Provincial MLS® Rules and Regulations. The brokerage expects all licensees to be knowledgeable and fully comply with MLS® rules and procedures.

### Property inspections

Buyers/inspectors/appraisers are to be accompanied by the buyer’s licensee. If a buyer’s licensee is unable to attend an inspection or a pre-closing viewing, they must obtain the written permission of the seller or seller’s licensee to grant the inspector/appraiser and the buyer access the property without the buyer’s licensee being present. Proper notice must be given and appointments made with the seller or their licensee.

At closing, keys cannot be turned over to the buyer without confirmation from the seller’s lawyer that the closing has taken place. Typically, once the pre-closing viewing has taken place, the keys are to be delivered to the seller’s lawyer, unless alternate instructions are given by the seller or seller’s lawyer.

### Open houses

The licensee holding an open house is responsible for ensuring that the property is available for viewing during advertised hours. No licensees holding an open house may leave the property for any reason, without first making arrangements for a substitute to attend the property during the absence.

Under no circumstances may an unlicensed person conduct an open house.

### Servicing listings

A listing licensee is required to make regular reports to the seller; at a minimum, on a weekly basis. Regular contact with the seller assists in the marketing of the property, provides an opportunity to relay feedback from potential buyers, and permits discussions about price reductions and extending the listing. The listing licensee must request an extension at least a week prior to the expiry. Under no circumstances can a listing contract be extended after it expires.

### Expired listings

When a listing expires, the listing licensee must be prepared to have a discussion with the seller about why the property did not sell.

Management reserves the right to assign another licensee to that property should the original listing licensee fail to get a renewal.

### Withdrawn listings

*Define the brokerage policy on withdrawn listings.*

### Cancelled listings

*Define the brokerage policy on cancelling listings. Be sure to include*

* *who has the authority to cancel a listing*
* *Expenses*
* *Long term implications of not allowing cancellations when a seller is unhappy*

### Sold Listings

*Define the brokerage policy on sold listings. Be sure to include:*

* *what needs to be in the closed transaction file*
* *where the files are stored*
* *who has access to the files*

### Showing properties listed with other brokerages

Appointments must be made through the listing brokerage in accordance with instructions found on the listing information sheet unless directed otherwise by the seller in writing. This direction may appear in REALTOR® Remarks section on the NSAR/AVREB MLS® System. The listing brokerage must make appointments for buyer brokerages without delay, unless otherwise directed by the seller in writing.

If a co-operating salesperson is unable to keep an appointment to show a property, they must advise the listing salesperson. If the listing salesperson is unreachable, contact the seller or tenants directly.

### Presenting offers

All offers are to be in writing. An offer is a confidential document and as such, offers to purchase must be treated confidentially. The contents of the offer may only be disclosed to someone other than the seller with the written consent of the buyer and the seller.

Present offers to the seller as quickly as possible. In the event two offers are obtained on a single property, they must both be presented to the seller. Remember that all offers must be presented to the seller for consideration and acceptance, even if the property is already subject to an accepted Agreement of Purchase and Sale. No offer is to be withheld subject to the acceptance or rejection of a previous offer.

Negotiations with the seller for the showing and/or the purchase of a property listed on the MLS® System must be conducted through the listing brokerage except under the following circumstances;

1. the listing brokerage gives the co-operating brokerage specific authority to negotiate directly, or
2. the listing brokerage or his nominee is unavailable to present a signed offer within 24 hours, in which case the selling salesperson may appeal to the executive officer or in his absence the regional director, the vice-president or the president for further direction. NSAR may arrange with the seller to allow the selling salesperson to present the offer directly to the seller, or
3. Seller rights reserved or mere postings.

### Competing offers

If you are representing a seller, whether to disclose a competing offer situation to potential buyers is entirely up to the seller. The seller’s three options are to direct the brokerage or designated agent to:

* Inform the competing buyers that they are competing and how many buyers they are competing with;
* Inform the competing buyers that they are competing but not how many buyers they are competing with; or
* Not inform the competing buyers that they are competing.

The decision to disclose or withhold the existence of competing offers from buyers is documented in the Seller Brokerage Agreement, Clause 6: Competing Offers (or Clause 8 in the SDBA). As the seller’s licensee, you must ensure you are following their lawful instruction. Should a seller change their mind regarding whether to disclose, the Agreement can be modified by using an amendment. Note: all offers must be in writing.

#### If you are the seller’s licensee

* Upon learning of the competing-offer situation, inform the seller immediately.
* Recommend the seller review every offer prior to making a decision, if circumstances allow.
* It is important to remember that you may disclose the presence of multiple offers if your seller has directed you to do so, however, the content of the offers may not be disclosed.
* If the seller indicated in the SBA/SDBA to disclose the existence of multiple offers, advise the respective buyers’ licensee as soon as possible.
* A back-up offer is not considered a competing offer; it is a second accepted offer that only comes into play if the first offer falls. Because a back-up offer is not a competing offer, the disclosure requirement in by-law 737 does not apply. The only exception to this rule is transaction brokerage. To remain fair and impartial to all parties, a back-up offer must be disclosed to the first buyer.
* Advise your seller of options, such as:
  + Accept one offer, reject all others.
  + Counter one offer and set others aside pending the result.
  + Reject all offers. If the seller does not want to sign the rejection, sign your name to the rejection and return it to the buyer’s licensee.
  + Counter or accept more than one offer with the protection of an appropriate seller’s condition, which will remove their obligation from the first contract prior to moving on to the next. (I.e. “seller’s acceptance of this back-up offer is subject to the seller ceasing to be obligated in any way by \_\_\_\_ date under the previously accepted purchase contract. This condition is for the sole benefit of the seller.”)
  + Closed Bidding – ask each buyer to put forth a final sealed offer to bring the negotiation process to a close.
  + Open Bidding – disclose the contents of all offers and any counter offer the seller gives back. Written consent of the buyers’ is required.
* NSAR members note, in a multiple offer situation, the MLS® Rules and Regulations require the listing brokerage to disclose any commission reduction to all brokerages with competing offers.

#### If you are the buyer’s licensee

* + If the seller’s licensee disclosed multiple offers, inform the buyer as soon as possible.
  + Advise the buyer of the seller’s multiple offer options.
  + Advise the buyer of his/her options such as:
  + Increase the offer prior to presentation.
  + Leave offer as it is.
  + Withdraw the offer.
  + Reconsider the fixtures, chattels, terms and conditions of the offer.
* Other considerations which could improve the buyer’s position may include:
  + A term or condition that will compel the seller to deal with the offer at the time of presentation or face withdrawal
  + A requirement that the seller not disclose the price and terms to any other buyer or face withdrawal

### Offers from Other Brokerages

*Define the brokerage policy on receiving offers.*

### Offers on Other Brokerages’ Listings

Licensees must never present an offer directly to the seller without the permission of the listing brokerage, unless directed to do so by the listing brokerage (mere posting or seller’s rights reserved).

Copies of all accepted offers must be obtained for brokerage records.

#### Delivery of Accepted Offers

The Real Estate Trading Act requires that a signed copy of the accepted offer be delivered without delay to each party of the contract.

The brokerage office must have an original copy of any signed offer for the office files.

### After the Sale Is Made

Upon making a sale, the licensee must do the following:

1. Complete licensee portion of Trade Record Sheet.
2. Turn over to the administrator or sales manager the copy of accepted offer, deposit cheque, and Trade Record Sheet.
3. If it is a subdivision sale, show it on the plan of subdivision.
4. If an MLS® sale, update the listing on the MLS® System.
5. Put a “sold” notice on the sign once all conditions are removed.

### When a Sale Falls

When a sale falls, the licensee must:

1. Notify the administrator and sales manager to close the file.
2. After receiving written consent from the buyer and the seller, refund the deposit.
3. Remove “sold” notation from the listing.
4. If a subdivision sale, remove the notation from the plan of subdivision.
5. Notify the mortgage company and the builder or seller and change the status on MLS®.
6. Remove “sold” sticker from sign.

### Commission on Listings

The licensee who obtains an MLS® or exclusive listing, properly signed by the owner of the property and properly filed with the office, is entitled to receive for services a listing commission arising from the sale of the property during the term of the listing.

# Part 7 – Advertising Policy

### Advertising Approvals

In preparing copy, licensees are permitted certain latitude on individualizing ads, but the management reserves the right to amend or change any ad that it feels does not conform to the brokerage advertising. The brokerage must also ensure all advertising complies with the Nova Scotia Real Estate Commission Advertising Guidelines, the Act, the By-law, and NSAR requirements.

All advertisements, business cards, promotional materials, and specialty signage must be approved by the broker.

# Part 8 – Expenses Paid by Licensees

## Charges to Licensee

* Real Estate Commission Licensing and Recovery Fund fees
* NSAR dues
* MLS® fees
* Lockbox system fees
* Photocopying charges
* Long distance telephone charges
* Postage
* Franchise - national advertising fees
* \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_
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# Part 9 – Deposits and Trust Accounts

## Real Estate Trust Account

Every brokerage licensed in Nova Scotia is required to maintain an interest-bearing trust account in the province of Nova Scotia. The interest accrued on monies held in the brokerage’s trust account is remitted to NSREC at least semi-annually by the financial institution. A brokerage may open a special trust account at the written instruction of the buyer and seller in a particular transaction. This written instruction is to include to whom the interest will be paid. NSREC trust account record-keeping requirements apply to all trust accounts.

The Brokerage Transaction and Trust Account Policy outlines the requirements for timely deposits into trust, and restrictions around the disbursement of trust funds from trust.

Section 506 of the Policy requires that “when deposits are received in accordance with the accepted agreement, the funds must be deposited into the brokerage trust account within two business days following the date of receipt by a brokerage representative.”

The Commission By-law Part 6 and Brokerage Transaction and Trust Account Policy Part 5 outlines the restrictions around the disbursement of funds from trust.

Brokerages are trustees for money when that money is deposited into and held in a brokerage’s trust account. As such, careful attention must be paid when handling trust deposits and trust accounts. Also, licensees must clearly explain the protocol when dealing trust to all interested parties.

## Deposits

Deposits may be received in any legal tender, unless the agreement of purchase and sale defines in what manner a deposit will be received (i.e. cash). *[insert brokerage policy on forms of deposit, if any]*

As a general rule, money does not belong in a trust account until there is an accepted agreement. A deposit is deemed as “received” when the listing brokerage receives it; that includes receipt by any person employed by the listing brokerage, (including independent contractors).

1. The deposit must be received exactly as spelled out in the offer.
2. The deposit cheque must be properly dated and capable of being accepted for payment by the bank.
3. The deposit cheque is made payable to the listing brokerage “in trust”. Never under any circumstance to any licensee, whether employed by the firm or not.
4. The deposit must go directly from its origin into the trust account, except for cash deposits which may go to the buyer’s brokerage’s trust account, as per the By-law.
5. Deposits that are received short for any reason (such as because of a wire transfer fee levied by the bank or a foreign exchange calculation) must be reported in writing to the seller, and the agreement of purchase and sale should be written to reflect the new amount.
6. Deposits that are received late (after midnight on the due date per the agreement of purchase and sale) or are returned nsf must be reported to the seller in writing immediately. And amendment to the agreement of purchase and sale should be written to amend the due date.

### Amount of deposit required

There is no standard amount for a deposit.

### Deposits: full explanation required

Many buyers and sellers do not understand nor appreciate our obligations regarding trust accounts under the Real Estate Trading Act. All licensees should take a great care to explain to sellers and buyers how trust deposits are handled.

**Sellers** – At the time of listing you should explain to sellers that any deposit taken on their property is placed in the brokerage trust account and is governed by strict rules under the Real Estate Trading Act. The deposit is not automatically forfeited to the seller, should the buyer default. If the buyer refuses to forfeit their deposit, then only a judge can disburse the trust money via court order, usually in Small Claims Court.

**Buyers** – The deposit procedure should be explained to buyers early in the process, before getting to the stage of writing up an actual offer. When a buyer gets to the offer stage they have a lot of things on their mind and the Commission's requirements for deposit release is not high on their list. By properly explaining, early on, how deposits work and the procedure for getting them released, helps prevent issues arising later on. Buyers should understand that release of the deposit, should notification be given by the buyer terminating the agreement under the inspection, financing or some other clause, within the time limits, is not automatic. The listing brokerage has to get the seller to sign off on the deposit release before the deposit money can be returned to the buyer.

Money can only be released from trust under the following circumstances:

1. Successful closing of sale;
2. Back to the buyer(s) with the written consent of the seller(s);
3. To the seller(s) with the written consent of the buyer(s);
4. To a third party with the written consent of both parties or their lawyers;
5. To another trust account, with the written consent of both parties or their lawyers;
6. At the direction of the Commission.

*Insert a brokerage policy regarding appropriate cheque clearing timelines, etc.]*

# Part 10 - Agency

### Agency relationships

Agency is a legal concept and the root of all licensee/client relationships. The law of agency describes agency as a relationship where one party (the licensee) accepts responsibility for representing another party (the principal or client) in dealing with a third party.

In a real estate transaction, agency applies to the relationship that exists between a brokerage and its client. While the person the client typically deals with is a licensee employed by the brokerage, the legal relationship is actually between the client and the brokerage. For example, the parties to a Seller Brokerage Agreement to sell a property are the brokerage and the property owner. A licensee employed by the brokerage is authorized by the brokerage to enter into such contracts on its behalf.

### Types of agency

#### Common law agency

In common law agency, the agency is between the client and the brokerage. Under common law agency, all licensees within the brokerage are deemed to know all relevant transaction information about principals (buyers and sellers with whom the brokerage has an agency relationship).

#### Designated agency

In designated agency, the brokerage designates the agency to a specific agent within the brokerage. This designated agency can be for a seller or a buyer. With designated agency, no other licensee within the brokerage are deemed to know all relevant transaction information about principals (buyers and sellers with whom the brokerage has an agency relationship).

#### Transaction brokerage

Transaction brokerage is not an agency relationship. Under transaction brokerage, buyers and sellers are unrepresented parties of the brokerage, not clients, and receive the following from the licensee: impartiality, reasonable care and skill in carrying out services, providing accurate information and following strict procedures regarding disclosure and non-disclosure.

### Forming agency relationships

Agency relationships are most commonly formed in one of two ways:

#### Express agency

In express agency, the parties (brokerage and client) clearly express their intention to enter into an agency relationship and the agreed terms of that relationship.

Consumers can choose to enter into a written agreement with a brokerage (written express agency) or a verbal agreement (oral express agency).

Written express agency occurs when a consumer and brokerage enter into a written Brokerage Agreement. The contract authorizes the brokerage to represent the client in the necessary capacity and indicates the details of the relationship. In most situations a written agreement is preferred because it clearly establishes the formation of an agency relationship and offers better protection for both the consumer and the brokerage and its licensees.

Oral express agency occurs when a consumer and brokerage discuss their agency relationship and agree verbally that the brokerage will represent them. For example, a buyer may verbally agree to a brokerage seeking out a suitable property and representing them in a purchase.

#### Implied agency

This form of agency relationship is less tangible than express agency. It is created by the conduct of the parties rather than their express written or verbal agreement. Therefore, when certain behavior implies a relationship exists, such as when a licensee acts like an advisor or a consumer acts like a client, their activities may still be subject to agency law whether or not they had entered into an agreement. Because implied agency is less clear than an express agreement, licensees and consumers might unintentionally create an agency relationship and may be held liable for their actions toward the other.

### Other forms of agency

#### Agency by ratification

Agency by ratification is agency where consent is given after the fact. An example of agency by ratification is where a licensee represents the buyer in a transaction without a signed Buyer Brokerage Agreement.

#### Consumer creates implied agency

Just as a licensee can enter into an agency agreement by their actions rather than the signing of a contract, a consumer can enter into an agency agreement based on their actions.

#### Avoid the pitfalls

To avoid the potential pitfalls of implied agency relationships all parties should be clear about their roles in a transaction. The Real Estate Trading Act and Commission By-Law require Nova Scotia licensees to clearly disclose their roles.

### General obligations

Eight general obligations apply to real estate brokerages and licensees when performing agency duties for a principal. These obligations are:

#### 1. Exercise care and skill

A brokerage and its licensees must possess the necessary skills and knowledge to perform services on behalf of the principal at a level of competence expected of any prudent, reasonable person in the profession.

A brokerage and its licensees must also ensure the completeness and accuracy of all information provided and recommend relevant experts where applicable, to ensure that principals are well informed. The obligation to exercise care and skill also extends to unrepresented parties.

#### 2. Negotiate favourable terms

The brokerage and its licensees must diligently advance the principal’s interests by assisting in negotiations and drafting favourable terms and conditions for agreements arising from such negotiations.

Accordingly, a brokerage and its licensees must possess the necessary knowledge and skills to successfully negotiate agreements and also ensure that legally binding agreements are drafted on behalf of its principals.

#### 3. Maintain confidentiality

Trust is critical to the agency relationship. Accordingly, the brokerage and its licensees must maintain confidentiality regarding all matters that could adversely impact the principal or in any way undermine the principal’s position during negotiations.

All Information received from the client or obtained as a result of representing the client must be kept confidential. For example, the client’s personal information, motivation for selling/buying, the amount to be paid or accepted during negotiations. This duty of confidentiality survives termination of the agency agreement and the closing of the transaction.

#### 4. Disclose information

A brokerage in agency, including its licensees, has a duty to disclose information broadly grouped under two categories:

* Information pertinent to the principal/agency relationship (i.e. actual or potential conflicts)
* Matters relating to the transaction (i.e. situations or events involving the property, the offer, or third parties) that impact the principal.

The first category relates to fiduciary obligations, see the following section on fiduciary obligations, while the second is viewed legally as a general obligation applying to all licensees/principal relationships. Both duties assume forthright disclosure before the principal makes a decision or takes and action affecting his or her interest.

#### 5. Ensure honesty and fairness

A brokerage in agency, and its licensees, must demonstrate honesty of intent and ensure adherence to facts. Honesty extends to all dealings and brokerages must ensure that the client or unrepresented party is not misled in any way and that all known facts are disclosed, including the role of the licensee performing the services.

A brokerage acting fraudulently may not only incur liability to a client, but also to a third party (unrepresented party induced to enter into a transaction with the client). For example, liability can arise if a buyer is not informed about material latent defects known by the brokerage.

#### 6. Act in person

A brokerage in agency, and its licensees, must perform duties personally unless instructed otherwise. Seller brokerage agreements commonly extend authority through an MLS® agreement to other NSAR members, but could also extend it to licensed non-member brokerages.

#### 7. Obey instructions

A brokerage in agency, and its licensees, is obligated to obey all lawful instructions of the principal. For example, a seller who instructs their licensees not to disclose a multiple offer situation to buyers must be obeyed even though the instructions may not be in the client’s financial best interest. However, a licensee cannot follow a principal’s unlawful instructions, for example, a seller’s instruction to not disclose a material latent defect or a buyer’s instruction to falsify financial information to obtain a mortgage or any instruction that would result in breaching human rights legislation (i.e. refusing to enter into a transaction based on race, gender, etc.).

#### 8. Perform mandate

Licensees must perform the mandate as set out in the brokerage agreement between the parties and act within specific authorities granted. The licensee must seek clarification when doubt exists regarding such authorities.

A brokerage, including its licensees, is not legally obligated to act unless specific terms are set out in the agreement. However, a brokerage’s non-performance of obligations that are the norm in the real estate industry may result in successful legal action for negligence.

### Fiduciary obligations

The Supreme Court of Canada has recognized that certain classes of relationships, including agency relationships, are assumed to give rise to fiduciary obligations (special relation of trust). A fiduciary relationship is based on three fundamental premises that, in turn, flow to five fiduciary obligations.

Legal debate remains as to whether fiduciary duties always attach to agency relationships, but Canadian courts have consistently confirmed the connection between real estate agency relationships and fiduciary duties. If a dispute arises, the onus rests fully on the brokerage to prove that a fiduciary relationship did not exist. Licensees should note that such relationships do not need to be in writing and can be created even if no fee is charged.

Prudence dictates that licensees should always presume that a fiduciary relationship exists, regardless of circumstance, and assume that associated obligations are owed to the client.

#### Trust and confidence

Various elements must be present to create a fiduciary relationship. The key factor for brokerages is whether the client places trust and confidence in the brokerage and relies on the advice given. When this occurs, the client becomes dependent on and vulnerable to the brokerage. Fiduciary obligations typically attach to the relationship at the time a brokerage agreement is signed, but the relationship may also be formed by way of a verbal agreement or by the sharing of confidential information depending on the actions of the parties at the time the confidential information was shared. Consider the following example:

CAUTION: A fiduciary relationship can be created even when no agreement is reached, but is warranted by the facts. Licensees must be aware that fiduciary relationships can arise when they have in some way implied that a relationship exists (due either to some action or in action), are working gratuitously for clients, or are engaged in joint ventures with clients.

#### Best interests

In a fiduciary relationship, the brokerage must act in the client’s best interest at all times. Licensees in fiduciary relationships must never permit their own interests, or those of a third party, to override this fundamental duty.

The client’s consent, in writing, must be obtained if such interests come into conflict, directly or indirectly, with the client’s interests.

#### Loyalty

Loyalty is critical to any fiduciary relationship, and encompasses all other obligations. The licensee must ensure that the client’s best interests are served and that such interests always take priority over personal interests.

### Fiduciary obligations—examples

Fiduciary obligations can be grouped under five categories. Two examples are provided for each fiduciary obligation: one where the licensee acts appropriately and one where the licensee breaches their fiduciary duty.

#### Maintain utmost loyalty

***The competing offer****—A seller’s licensee has an offer, but is informed that another licensee will be submitting a competing offer later in the day. The licensee advises his client that an additional offer will be forthcoming, which is in the best interests of the client to consider before entering into the first agreement.*

***Property in demand****—A licensee locates a property that suits his client’s needs. The licensee, upon viewing the property, decides that he wants the property for himself and puts in an offer that will expire before the client’s scheduled viewing. The offer is accepted. The buyer submits a complaint to the Commission about the licensee’s actions, who determined that the licensee breached his fiduciary duties and imposes a one-year licence suspension.*

#### Avoid conflicts of interest

***The second client****—A licensee, originally working with a seller, is approached by first-time homebuyers seeking representation to purchase the seller’s house. The licensee explains transaction brokerage to the buyers and explains how, as novice buyers, it is important for them to obtain independent representation. The buyers take the licensee’s advice, obtains representation from another brokerage and proceeds with the transaction.*

***Own property****—A licensee lists their own property. A couple without representation wishes to purchase the property and the licensee enters into transaction brokerage with them. Due to a number of issues, the deal eventually collapses and a complaint is filed with the Commission. The Complaint Review Committee determines that the licensee breached their fiduciary duty to avoid conflict of interest. To perform transaction brokerage, licensees must treat both parties to the transaction fairly and impartially. It is impossible for a licensee to be perceived as impartial when they have a personal stake in the transaction. The licensee receives a $1000 fine.*

#### Disclose conflicts

***The written disclosure****—A licensee wants to buy a property that is listed by his brokerage. When drafting the offer, he discloses, in writing, that he is a licensed salesperson employed by the brokerage with which the property is listed, his intentions for the property, and also discloses other facts that are relevant under the circumstance.*

***Builder licensee****—A licensee who also owns a company that builds homes lists one of the homes for sale. The licensee enters into transaction brokerage with the buyer and completes the transaction. When the brokerage-transaction files are audited, the auditor notices not only did the licensee enter into transaction brokerage inappropriately, because he was a principal in the transaction and therefore cannot be perceived to be impartial, but he also failed to disclose in writing that they were the owner of the property. The licensee is fined $500.*

#### Not make secret profit

***The finder’s fee****—A new licensee had an opportunity to sell a friend’s restaurant. He receives a mortgage finder’s fee from the lender who places the first mortgage for his buyer client, but discloses that fee in writing to both the buyer and the seller.*

***The flat fee****—The listing licensee, in addition to receiving a commission from his seller client, receives a flat fee from the buyer unrepresented party for services performed in bringing about the negotiated sale. This amount received from the buyer unrepresented party is not disclosed to the seller client and results in charges laid under the By-law.*

#### Not misuse confidential information

***Maintain confidentiality****—The seller client informs their licensee in confidence that a divorce is pending and financial commitments demand a quick sale. The listing licensee keeps this information confidential, as disclosure to another party (i.e. potential buyer) would impair the seller’s negotiating position.*

***Breach of confidentiality****—The Commission received a written complaint from a seller who was very upset with the licensee that listed their property. The seller alleged the licensee told the buyers, unrepresented parties of the brokerage, that the seller was going through foreclosure proceedings. When it was investigated, the licensee did in fact tell the buyers that the seller was in foreclosure and moreover, that the information was incorrect. The seller was at risk of foreclosure, but no proceedings had commenced. The licensee was fined $1,000 and required to complete the agency module of the licensing course.*

### Statutory obligations

Licensees owe their clients a number of statutory obligations beyond those imposed by common law (general and fiduciary obligations). Seven common obligations are explained below. Two examples are provided for each obligation, one in which the licensee acts in accordance with statutory obligations, and one in which the licensee does not.

#### To account

Licensees have a statutory obligation to account for and safeguard money, documents, and property entrusted to the licensee.

***Deposit****—A licensee receives a deposit from a buyer and delivers it to the brokerage, which in turn places the funds into the brokerage trust account within the specified regulatory time limit. Funds must be deposited within 48 hours of receipt excluding weekends and holidays.*

***Premature key release****—On the day of closing, a buyer contacted their licensee and told her that he had met with his lawyer and that the closing was complete. The licensee released the key from the lockbox to the buyer. Later that evening, it was discovered that the funds had not been transferred and the property hadn’t closed. The seller filed a complaint with the Commission. The licensee did not have the authority to turn over the key because there had been no proper confirmation that the property had closed and was fined the licensee $400.*

#### To deliver agreements, offers and statements

The Act and By-law require the prompt delivery of copies of agreements, offers and statements upon execution.

***Seller Brokerage Agreement****—The sellers sign a seller brokerage agreement in the brokerage office. Their licensee then takes the agreement, makes a photocopy, and gives it to the sellers.*

***Amendment to closing****—Sellers wish to extend their closing date because their next house is still under construction. The seller’s licensee makes the request to the buyer’s licensee over the phone, but does not put the request into writing. The buyer’s licensee never passes on the request to the buyers and eventually a complaint ensues. The seller’s licensee is fined $400 for failing to submit the request in writing. The buyer’s licensee is fined $400 for failing to convey information pertinent to the transaction to the buyers.*

#### Not to induce breach or make certain promises

The Act and By-Law prohibit brokerages from inducing a party to break a contract for the purpose of entering into a new one. Further, brokerages and licensee cannot make certain promises, for example, to resell the property, unless the promises are put in writing, signed by the broker and delivered to the party to whom the promise is made.

***The signed deal****—A licensee is asked by their buyer client how to get out of an accepted Agreement of Purchase and Sale because a new property has come on the market and the buyer likes it more than the property they have promised to purchase. The licensee directs the client to discuss the matter with legal counsel.*

***The unsigned lease****—A licensee prepares a short-term lease on a residential property for out-of-country buyer clients who are moving to Nova Scotia. The licensee has the buyer clients sign the lease and sends it off to the property owners. The licensee does a walk through with the clients and tells them it is okay to leave personal belongings in the house. The owners, whom the licensee did not contact to ensure the lease was accepted and signed, do not agree to the lease. Without having the lease signed, the licensee’s assurances to the buyer clients that the property was theirs is a promise that shouldn’t have been made. The licensee is fined $400 for failing to protect and promote the interests of their client.*

### Obligations to clients/unrepresented parties

The Act and By-Law contain common obligations owed to both unrepresented parties and clients regarding standards of conduct and document handling. Further, the Act and By-Law have obligations regarding the handling of transaction funds and related disbursements to clients or unrepresented parties.

### Agency relationship/forms

Licensees are required to use standardized forms approved by the Commission for all residential real estate transactions. Licensees are also required to explain and obtain informed consent from their clients and unrepresented parties about the type of agency they are providing, through the use of Form 100: Working With the Real Estate Industry, which must be signed and retained in the transaction file.

#### Disclosing representative capacity

Real Estate Trading Act, Section 26, and Part 7 of the By-law outline that licensees are required to make several disclosures and to immediately make further disclosure if there is any material change to those facts during the course of the relationship

Each licensee must disclose in writing:

* The nature of the assistance or representation the licensee is providing to the person
* Whether the licensee is, or will be, acting in the transaction on behalf of any other person in any capacity
* Whether the licensee is, or will be, receiving remuneration relating to the real estate transaction from any other person and, if so, the nature of the licensee's relationship with each such other person or persons

Licensees must also disclose their relationship to a client when speaking to a member of the public who may become involved in a transaction that client, for example, a listing licensee holding an open house must disclose their agency relationship with the seller to any potential buyers.

### Duty of care

Real estate brokerages owe a duty of care to clients as well as a limited duty of care to unrepresented parties. Licensees must conduct themselves in accordance with a standard of care expected of knowledgeable practitioners. Failure to do so exposes brokerages and licensees to liability for professional negligence as well as the Commission discipline process.

**By-law 708 (duty to act with reasonable care and skill):**

*(a) In carrying out business, a licensee must:*

*(i) be courteous and responsive to clients, unrepresented parties, and other persons; and*

*(ii) be competent, meaning that they must possess and demonstrate the necessary level of skill and judgment required with respect to any matter on which they are representing a party, or in which they are asked to provide information to unrepresented parties.*

*(b) A licensee must not, in respect of a trade in real estate, provide opinions or advice to an unrepresented party.*

**By-law 710 (duty to operate within skillsets):**

*(a) A licensee must advise a person to obtain services from another person if the licensee is not able to provide the services with reasonable knowledge, skill, judgment, and competence or is not authorized by law to provide the services.*

*(b) A licensee must not discourage a person from seeking a particular kind of service from another person if the licensee is not able to provide the service with reasonable knowledge, skill, judgment and competence or is not authorized by law to provide the service.*

*(c) When the licensee is unable to render such service, either alone or with the aid of other licensees, the licensee must not accept the assignment or otherwise provide assistance in connection with the transaction.*

**By-law 711 (licensee’s duty to discover)**

*(a) A licensee in an agency relationship with a seller has a fiduciary obligation to discover facts about the seller’s property that a reasonably prudent licensee would discover to fulfill the licensee’s obligation to protect the seller’s interests and to avoid error, misrepresentation, omission or concealment of pertinent facts and ensure that any representations of the property that the licensee makes to the public are factual and accurate.*

*(b) A licensee in an agency relationship with a buyer has a fiduciary obligation to make sufficient inquiries of the buyer to determine the buyer’s needs and to discover facts about a property in which the buyer is interested that a reasonably prudent licensee would discover to fulfill the licensee’s obligation to avoid error, misrepresentation, omission or concealment of pertinent facts that if known, might reasonably affect the buyer’s decision to purchase the property.*

Duty of care encompasses certain basic requirements:

* honesty
* reasonable care and skill in ensuring accurate information
* reasonable care and skill in performing functions to which they have agreed

#### Standards imposed under duty of care

The standard of care is based on how ordinary and prudent licensees conduct themselves under similar circumstances. The standard is objective, i.e. based on facts and criteria, without regard for personal interpretations or intervening circumstances.

Licensees cannot use any of the following arguments as a defense for failure to provide duty of care:

* I just got my licence
* I wasn’t familiar with this type of property (e.g. city practitioner selling rural property)
* I don’t have any experience with that type of transaction (e.g. commercial leasing)
* I didn’t charge for my services
* I did the best I could under the circumstances
* I didn’t know I had to do that
* I didn’t know I had to disclose that

#### Establishing the formal standard

The standard of care is based on how ordinary and prudent members of the industry would conduct themselves under similar circumstances. The standard expected is not of perfection, but of reasonableness according to how knowledgeable, well-trained practitioners would act. It is expected that all licensees know how to accurately measure a property. It is also expected that all licensees exercise due diligence in discovering the zoning of the properties they list.

#### Exception to formal standards

Any licensee who claims to possess special expertise or experience, for example, condo transactions, military relocations, or a specific neighborhood, will be judged on that higher standard.

### Complying with duty of care requirements

Duty of care focuses on reasonableness, not perfection, but licensees can avoid many pitfalls by ensuring the following duty-of-care rules are applied.

**Seek advice when needed**—Be aware of the limits of your expertise. If you don’t know, find out.

**Diligently prepare contracts and other documents—**Ensure contracts and documents are properly worded, lawful, delivered appropriately, and the people signing the documents are aware of all the implications.

**Stay on top of relevant issues**—Stay informed about issues impacting property, like zoning, local improvement charges and HST.

**Make reasonable inquiry**—Do not simply rely on information supplied by others regarding material matters affecting the property. If something is questionable, check it out.

**Verify the accuracy of information**—Ensure the information in listings is accurate and double-check information*.*

### Types of agency

#### Single agency

The most common agency relationship arises when a seller is represented by a brokerage (Seller Brokerage Agreement) or a buyer is represented by a brokerage (Buyer Brokerage Agreement). In both cases, the brokerage owes duties to the client and vice versa.

#### Common law agency - seller

The seller brokerage and all licensees in its employ promote the listing, seek qualified buyers, and use their professional negotiation skills to advance the seller’s interests. General, fiduciary and statutory duties are owed to the seller/client, with a duty of care owed to both client and unrepresented party.

#### Designated agency - seller

The seller brokerage designates a specific licensee(s) to represent a seller. Unlike common law agency, in a designated agency brokerage, all other licensees in the brokerage’s employ are not in an agency relationship with the seller. A licensee acting as a designated agent for a seller has all the same obligations as a licensee representing a seller under common law agency as well as additional requirements regarding client confidentiality. The licensee representing a seller as a designated agent must not disclose any confidential information concerning the client to any other licensees at the brokerage except when authorized by the client or required by law.

#### Common law agency – buyer

The buyer brokerage and all licensees in its employ promote the buyer’s interests, locate suitable properties, and use their professional negotiation skills to advance the buyer’s interests. General, fiduciary and statutory obligations are owed to the buyer/client, with a duty of care owed to both client and unrepresented party.

#### Designated agency - buyer

The buyer brokerage designates a specific licensees(s) to represent a buyer. Unlike common law agency, in a designated agency brokerage, all other licensees in the brokerage’s employ are not in an agency relationship with the buyer. A licensee acting as a designated agent for a buyer has all the same obligations as a licensee representing a buyer under common law agency as well as additional requirements regarding client confidentiality. The licensee representing a buyer as a designated agent must not disclose any confidential information concerning the client to any other licensee at the brokerage except when authorized by the client or required by law.

#### Transaction brokerage

Transaction brokerage is a relationship in which a brokerage (common law) or a designated agent (designated agency) represents both the buyer and the seller in the same transaction. In transaction brokerage the duties a brokerage owes to the buyer and the seller are, by necessity, limited with the licensee acting as an impartial facilitator rather than an advocate for the clients. This limitation is required because it is impossible to work in the best interests of both parties.

#### Common law transaction brokerage

Transaction brokerage is an option when a brokerage has agency relationships with a seller and a buyer and the buyer is interested in purchasing the seller’s property. Interested means the buyer has expressed an interest in purchasing the seller’s property.

In transaction brokerage, the brokerage and its licensee must treat both parties to the transaction in an even-handed, objective and impartial manner. Licensees cannot use discretion or judgment that benefits one client to the prejudice of the other client. Both the buyer and the seller have the right to refuse to enter into a transaction brokerage relationship and seek alternate representation.

Transaction brokerage is not always appropriate, see When transaction brokerage is inappropriate**.**

A licensee in a transaction brokerage relationship must:

* disclose conflict of interest, and obtain informed consent and agreement to transaction brokerage in writing
* assist the buyer and seller in negotiating a mutually acceptable agreement
* provide any advice or information given to one party to the other party
* provide information and advice to assist the parties in addressing issues of mutual interest to both parties
* keep confidential the motivation of the buyer or seller
* keep confidential the price a seller may be prepared to accept or a buyer is maybe willing to pay
* disclose material latent defects concerning the property or the financial ability of the buyer to complete the transaction
* prepare all necessary documents in accordance with the instructions of the buyer or the seller
* exercise reasonable care and skill in the provision of services.

The facilitation services a licensee can provide under transaction brokerage include the following:

* provide real estate statistics and other information through listing services or other local databases
* assist the buyer and seller in negotiating a mutually acceptable agreement
* provide standard form agreements of purchase and sale, lease and other relevant documents
* prepare documents with the instructions of the client(s)
* provide the names of appraisers, mortgage brokers, surveyors, building inspectors, lenders, insurance agents, architects, engineers and so on, but not recommend any particular professional (must recommend a minimum of three professionals per specialty)
* present in a timely manner, all offers and counter-offers to and from the client(s) regardless of whether the property is already the subject of a contract
* convey to the client(s) in a timely manner all information that either wishes to have communicated to the other
* keep client(s) informed regarding the progress of the transaction; and,
* comply with the Real Estate Trading Act and By-Law

#### Refusal to enter into transaction brokerage

If either client does not agree to enter into transaction brokerage, there are several options:

* Clients may reach their own agreement as to which party continues to be represented by the brokerage
* If not, the brokerage needs to determine which party was the first to enter into a client relationship with the brokerage. The brokerage continues to represent the first client and the other party is offered a choice of options:
  + the brokerage may offer to refer the other client to another brokerage for representation,
  + or the brokerage may offer the client unrepresented party status (non-agency representation). In that case, the party would sign a Unrepresented Party Status Acknowledgement form.

#### Implementing transaction brokerage

After a licensee shows a buyer client one of the brokerage’s listings and the buyer expresses an interest in the property, the licensee must discuss the conflict of interest that arises from representing both the seller and buyer in the same transaction. The licensee must also explain the options available to the client. If the buyer consents to transaction brokerage, the licensee needs to obtain the buyer’s written consent to a transaction brokerage relationship before writing an offer. The licensee must then discuss the conflict of interest that arises from concurrent representation with the seller. The seller’s consent to transaction brokerage must be sought and obtained (by signing the transaction brokerage agreement) prior to presentation of the buyer’s offer.

#### When transaction brokerage is inappropriate

Transaction brokerage is not an agency relationship; it is one of being a facilitator. Under transaction brokerage, buyers and sellers are unrepresented parties of the brokerage, not clients, and are entitled to impartiality, reasonable care and skill in carrying out services, providing accurate information and following strict procedures regarding disclosure and non-disclosure. It is highly inappropriate for licensees to enter into transaction brokerage under the following circumstances.

**Family, colleagues, and self**—If you represent a family member or a business associate, the personal relationship you have with that person may cause others to question your ability to be impartial. Likewise, you cannot represent yourself impartially. Regardless of how well you handle a transaction brokerage situation, a personal relationship with one party of the transaction or self representation leaves you and your conduct open to speculation by the other party.

**Ongoing agency relationship**—Any time you have an ongoing agency relationship with a client; do not enter into a transaction brokerage relationship with them. For example, if you have an agency relationship with a builder, a developer, or a repeat seller, you cannot be perceived to act impartially towards opposing parties to a transaction.

**Novice seller or buyer**—When representing an inexperienced seller or a first-time home buyer, entering into a transaction brokerage agreement is doing a huge disservice to that person. Novice sellers and buyers need unencumbered representation—they need your help, advice and support—services that cannot be provided under transaction brokerage.

Licensees who choose to enter into a transaction brokerage relationship in a situation where it should be avoided can face disciplinary action.

#### Designated agency transaction brokerage

In a designated agency brokerage, transaction brokerage is an option when the same licensee represents both the buyer and seller in the same transaction. All the same rules, requirements, and obligations under common law transaction brokerage apply to transaction brokerage in a designated agency situation.

### No agency/unrepresented party status

In a no agency relationship, the licensee represents either the buyer or the seller in a single agency relationship. The party that is not represented is the unrepresented party, for whom the licensee performs unrepresented party services.

If a buyer or seller chooses unrepresented party status, the brokerage does not represent the unrepresented party. The brokerage is not the unrepresented party’s agent and does not owe the unrepresented party fiduciary duties. The brokerage will not provide the unrepresented party any services that require the exercise of discretion or judgment, the giving of confidential advice or advocating on the unrepresented party’s behalf.

The services a licensee can provide to an unrepresented party are:

* exercise reasonable skill and care
* not negligently provide false or misleading information
* present all offers and counter offers in a timely fashion
* convey all information that the unrepresented party wants to have communicated to the client in a timely fashion
* keep the unrepresented party informed regarding the progress of the transaction
* hold all monies in trust with respect to the transaction in accordance with the Act and By-Law
* comply with the Act and By-Law

Licensees must ensure any person who is considering unrepresented party status is fully aware of their option to choose another brokerage to represent them rather than agreeing to unrepresented party status.

### Fee agreement and seller/unrepresented party status

When a brokerage or a licensee represents a buyer on the purchase of a property that is not listed with any brokerage, the transaction may proceed through the use of a fee agreement with the seller as an unrepresented party of the brokerage. The licensee must present and explain Form 100: Working With the Real Estate Industry to the seller and obtain their informed consent. The licensee must also clearly explain the terms and conditions of the Seller Unrepresented Party Acknowledgement and Fee Agreement form before proceeding with the transaction.

In this situation, the buyer’s representative does not list the property (enter into a Seller Brokerage Agreement). To do so would create an agency relationship with the seller and the only way the transaction can move forward is through transaction brokerage, which deprives the buyer of their independent representation.

# Acknowledgement (Licensee Copy)

To: [brokerage name]

I hereby acknowledge receipt of the [brokerage name] Policies & Procedures Manual, dated \_\_\_\_\_ day of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, 20\_\_\_, which sets out my relationship with the Brokerage, and agree that our association shall be in accordance with the terms set out in this Policies & Procedures Manual and/or employment contract that may be entered into.

Date: \_\_\_\_\_ day of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, 20\_\_\_.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Witness Licensee

### Confidentiality of Manual

Use of this manual is restricted to members of the staff of the Brokerage ONLY. This is a confidential manual and may not be reproduced or transmitted in any form. This manual is the property of the brokerage and the complete manual must be returned to management prior to any employee leaving its employ.