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CHAPTER 9

PROFESSIONALISM AND ETHICS

Learning Objectives

After studying this chapter, a student should be able to:

- ☒ List a number of the common elements that members of all professions share
- ☒ Define ethics and describe the relationship between ethics and professionalism
- ☒ Describe BC Financial Services Authority's mandate of regulating in the public interest
- ☒ Explain why trust is fundamental in establishing the value of a profession, and how trust relates to honesty and integrity
- ☒ List the sources of duties to clients
- ☒ Discuss the key duties owed to clients under sections 30, 33, and 34 of the Rules
- ☒ Explain how conflicts of interest undermine trust
- ☒ Describe the components of early, continuous, and full written disclosure
- ☒ Describe the rationale behind the duty to report
- ☒ Explain a licensee's obligations to report under RESA, the Rules, and general professionalism
- ☒ List and describe the five elements to the framework for ethical decision making

INTRODUCTION

Real estate licensees enjoy a privileged position in society. They assist people through the time consuming, stressful, and complex process of acquiring and disposing of real estate. These transactions are some of the largest and most important transactions in people's lives. Furthermore, they may only occur a few times in someone's lifetime. As such, clients view their real estate licensee as a trusted advisor.

The trusted reputation that licensees must maintain not only requires them to competently fulfil the legal duties they owe to their clients, but to also ensure that their conduct is consistent with the ethical obligations placed upon them by the public at large. This requires licensees to have a solid grasp of the law, as well as to be able to identify and work through the ethical dimensions of their conduct.

The focus of this chapter is to ensure that you, as a licensee, understand how professionalism must underscore everything that you do in your role as a trusted advisor. In other words, professionalism must be the foundation upon which your career is built. Necessary to this discussion is an examination of your key obligations as a licensee.

While professionalism and ethics are closely related, they are distinct. Ethics is simply one aspect of overall professionalism, which involves an examination of one's skills, competence, judgement, and behaviour. The ability to identify ethical issues and respond accordingly is a foundational aspect of professionalism.

Although you will see references to legal and regulatory obligations under relevant legislation and the *Real Estate Services Rules* (the "Rules"), the focus of this chapter is not to engage in a technical interpretation of these obligations. Rather, its purpose is to provide guidance on ethical decision-making in the context of these professional obligations.

PROFESSIONS, PROFESSIONALS, AND PROFESSIONALISM

As you are reading this, pause for a moment and think of what comes to your mind when you read or hear the word "professional". Certain professions, such as accountants, lawyers, doctors, or engineers, may have come to mind. Real estate licensees are a part of this group of professionals. Additionally, you may be thinking about someone who is trustworthy, ethical, respected, skilled, competent, capable, honest, and objective. Would you want a real estate licensee acting for you in a real estate transaction to possess these characteristics?

While there are numerous definitions of "profession", most share some common elements in that the members of a profession (i.e., professionals):

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

Professions are often, at least traditionally, thought of as "callings" rather than jobs or occupations. This idea focuses on the fact that professionals are primarily motivated to provide a valuable service to others as opposed to making money for themselves. This focus encourages professionals to:

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

Professionalism refers to the overall competence of a professional. It is achieved by ensuring that the values of the particular profession are ethically observed.

professionalism
the overall competence of a professional, considering their skills, judgment, and behaviour

ETHICS

A key component of professionalism is the ethical fulfilment of a professional's duties and obligations. So, what is ethics, and what does it mean to be ethical?

ethics
moral principles
that govern a
person's behaviour

The law involves a system of rules to regulate the activities of those within a society and to set out the consequences for non-compliance. Simply put, law governs behaviour. However, many legal principles are expressed in general terms, which means that it is impossible for the law to address every aspect of human conduct that may cause harm to others. *Ethics* recognizes that it is possible to do wrong without breaking any civil or criminal law.

A useful way to think about ethics is to examine whether certain conduct not only follows the “letter of the law”, but also the “spirit of the law”:

The spirit of the law is not concerned so much with setting down rules. Rather it reflects the values which a society draws upon in its development of legal rules.¹

Thus, a professional should strive to ensure the intention of the lawmakers is considered when applying a specific rule or law. The spirit of the law may include values such as the protection of the public, fairness, and transparency. Simply following the letter of the law can lead to the exploitation of technicalities, loopholes, and work-arounds.

Ethics is a complex topic, and an in-depth discussion could be an entire course on its own. For the purposes of this course, however, ethics can be thought of as the moral principles, rather than legal principles, that guide an individual's conduct. Morality is centrally concerned with right versus wrong, and good behaviour versus bad behaviour. Unfortunately, there is no universal agreement on many of the core principles of ethics, which contributes to its complexity.

Ethics for real estate licensees can be described as a question of how one ought to act in any given situation in order to meet one's professional obligations. Often, there may be more than one way to fulfil one's professional obligations. From an ethical perspective, selecting the option that only technically fulfils one's obligations may not be enough.

Fortunately, those in regulated professions, like real estate licensees, are provided with significant guidance on how they ought to act through the well-developed (and continuously evolving) common law, and the standards of practice set by their regulator. However, in cases where no guidance exists, real estate licensees, like other professionals, must rely on their professional judgment to determine the correct course of action. The ability to identify ethical issues and respond accordingly is a foundational aspect of professionalism. Therefore, you will see numerous references to ethics as a component of professionalism and professional practice.

This chapter will conclude by introducing you to a framework for ethical decision making that you can carry with you throughout your career.

THE REGULATION OF A PROFESSION

Professionals are subject to the common law, like any other person. For example, they must fulfil their obligations under contracts to which they are a party, they must not commit torts (e.g., negligence), and they must fulfil fiduciary duties owed to clients (e.g., the duties of loyalty, confidentiality, full disclosure, and avoiding conflicts of interest). Additionally, professions are typically regulated, either directly by the government or through delegated self-regulation. In either case, the regulator sets many of the standards of professional conduct and, more broadly, protects the consumers served by the professional. These standards provide an additional level of duties to which licensees are subject. Much of this chapter focuses on these standards of professional conduct.

Crown agency
a public sector organization
under the supervision
of the government, but
administered independently

In British Columbia, the *Real Estate Services Act* (“RESA”) states that those providing real estate services must be licensed, or exempt from the requirement to be licensed. BC Financial Services Authority (BCFSA) is a *Crown agency* that has the authority to regulate the real estate services industry. Under RESA, BCFSA must administer RESA; maintain and advance the knowledge, skill, and competency of licensees; and uphold and protect the public interest in relation to the conduct and integrity of licensees.

¹ Gonthier, C.D. 2005. “Sustainable Development and the Law/Le développement durable et le droit” (2005) 1 McGill J.S.D.L.P. 11 at 13.

REGULATING IN THE PUBLIC INTEREST

Part of BCFSAs role in upholding and protecting the public involves addressing licensee misconduct. Section 35 of RESA sets out two key types of *misconduct*:

1. *professional misconduct*; and
2. *conduct unbecoming a licensee*.

While professional misconduct is primarily focused on competency in practice and technical breaches of RESA, the *Real Estate Services Regulation* (the “Regulation”), the *Home Buyer Rescission Period Regulation*, or the Rules, BCFSAs may also discipline licensees for conduct unbecoming a licensee, which is defined as conduct that:

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

The idea behind conduct unbecoming a licensee is that upholding the public interest, maintaining public confidence, and protecting the profession’s reputation must take into account everything that a licensee does, inside or outside of the workplace.

misconduct

unacceptable or improper behaviour

professional misconduct

a type of misconduct under the *Real Estate Services Act* that focuses on competency in practice and technical breaches of the *Real Estate Services Act*, the *Real Estate Services Regulation*, the *Home Buyer Rescission Period Regulation*, and the *Real Estate Services Rules*

conduct unbecoming a licensee

a type of misconduct under the *Real Estate Services Act* that is contrary to the best interests of the public, undermines public confidence in the real estate industry, or brings the real estate industry into disrepute

Consider the Following...

Imagine that two friends, who are both licensees, are having a conversation over coffee. Here is part of their conversation:

Larry Licensee: Hey Belinda, what do you think of that new requirement in the Rules requiring us to...?

Belinda Broker: It’s so stupid, I can’t believe we now have to do that. No one even cares about that requirement, but I think I’ve actually figured out a way around it so that I can avoid all the hassles from the outset of the transaction. The best part is, the clients don’t know the difference and I’m “technically” complying with the Rules!

Larry Licensee: Wow, no wonder you’ve been so successful in this business – tell me more!

Imagine the impression this would give to a member of the public who was at the next table, if they overheard the conversation. Does it inspire confidence that the real estate licensees are acting in the best interests of the public? What is the person overhearing the conversation likely to think of the real estate industry?

The issue here is that even if Belinda is managing to “technically” comply with the Rules, her self-interested behaviour puts public confidence and the reputation of the industry at risk.

Acting in the public interest includes conducting one’s business in a professional manner. But, what if the behaviour in question is not directly related to a real estate professional’s business?

Consider the Following...

A couple of years ago, Liam Licensee was convicted of driving under the influence of alcohol. Recently, he was stopped on suspicion of impaired driving, and was criminally charged after refusing a breathalyzer test.

Does Liam’s behaviour have the potential to bring the industry into disrepute or undermine public confidence? It is quite possible. Consequences that follow from poor behavior such as damage to property and injuries suffered by victims increase the risk of harming the industry’s reputation.

The fact that conduct outside of a professional’s core business can impact the profession as a whole is reinforced by two key sections of RESA and the Rules:

1. Section 10 of RESA outlines the qualifications for obtaining a licence. In addition to education and experience requirements, applicants must be fit to be licensed. Fitness for licensing includes being of good reputation, and considers whether the applicant has been refused a licence or has had a licence suspended or cancelled in any jurisdiction, or whether the applicant has been convicted of an offence.

2. Section 23 of the Rules requires licensees to promptly notify BCFSa and their managing broker if they have been subject to any disciplinary or regulatory proceedings in related industries, have had any court order or judgment made against them in relation to certain matters, have been charged with or convicted of an offence, or are the subject of any bankruptcy, insolvency or receivership proceedings.

While the events described above do not necessarily disqualify a licensee from obtaining or maintaining a licence (as each case will be assessed on its own merits), you should know that your actions (both professional and personal, involving clients and non-clients) have the potential to reflect on the industry as a whole and might affect your eligibility for licensing or your suitability to remain licensed.

TRUST

Trust is fundamental in establishing a profession's value in the eyes of the public. If the public does not trust that the professional will act ethically and professionally and put their interests ahead of the professional's own interests, they will not utilize the services of that professional. As such, trust is a profession's most valuable, but also most fragile, asset.



As a Licensee...

Trust takes a long time to build but can be diminished in an instant through one bad decision or inappropriate action. You should guard your trustworthiness as if your future depends on it – because it does! As stated by Warren Buffet, an American investor, businessman, and philanthropist, “it takes 20 years to build a reputation and five minutes to ruin it.”

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

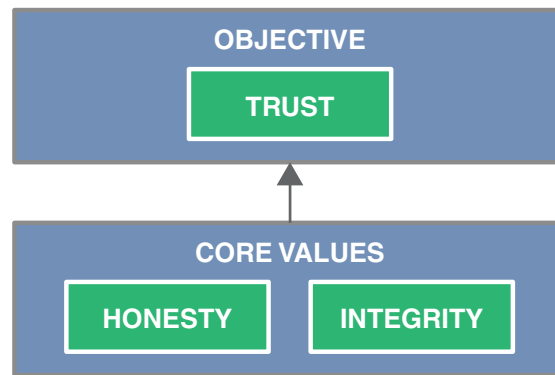
Both the regulator and individual licensees have a role in building and maintaining trust in the profession. The following figure lists how this is done.

The Regulator's Role in Building and Maintaining Trust in the Profession	An Individual Licensee's Role in Building and Maintaining Trust in the Profession
Establishing strong practice standards for licensees	Being honest, transparent, and fair in business and personal dealings
Setting stringent standards to enter and remain in the profession	Demonstrating professional competence and due care
Creating education initiatives and opportunities	Complying with the regulatory and ethical requirements of the profession
Communicating with the public about matters of importance (e.g., the results of a complaint)	Acting in accordance with broader ethical principles (e.g., confidentiality, integrity, objectivity)
Enforcing standards of practice and holding licensees accountable for breaches of their obligations	Presenting oneself and one's documents in a manner that demonstrates professionalism and respect for clients and colleagues

HOW HONESTY AND INTEGRITY RELATES TO TRUST

core values
fundamental beliefs of
a person or organization

If trust is the goal, how does one achieve it? The foundation of trust is built from honesty and integrity. Honesty and integrity are *core values* of professionals, including licensees, and are key to building and maintaining trust. Only when honesty and integrity are strictly and consistently practiced can trust be achieved.

FIGURE 9.1: Honesty and Integrity: The Foundation for Trust

HONESTY

Honesty is the practice of acting in a manner that is sincere, truthful, and free of deceit. It includes what one says, how one says it, and what is not said. The table below lists a number of behaviours associated with honesty, along with a related example.

honesty
acting in a manner that is sincere and truthful, and free of deceit

Behaviour	Example
Being transparent in communications (within the bounds of confidentiality)	<ul style="list-style-type: none"> Providing the required disclosures and taking time to fully explain them to the client
Providing information clearly so that the consumer is not misled	<ul style="list-style-type: none"> Making sure listing information and disclosures are accurate (e.g., what is included in the reported square footage?)
Not withholding information to mislead a consumer	<ul style="list-style-type: none"> Advising the client if the strata bylaws are expected to change in a way that would impact their desired use
Not being deceptive	<ul style="list-style-type: none"> Being forthright about uncertainty as to whether a property may contain asbestos, or have an underground oil storage tank
Setting appropriate and realistic expectations about outcomes	<ul style="list-style-type: none"> Not overestimating the rent that a property will likely generate or the expected sales price of a residential or commercial property Not setting unrealistic expectations about how long a property might take to sell
Following through on promises	<ul style="list-style-type: none"> Ensuring that any “sweeteners” to encourage a deal are accurately and fully documented and signed to as per section 49 of the Rules (regarding inducement representations), and are carried through as represented
Being truthful about the relevant knowledge and experience you possess and the services you are competent to provide	<ul style="list-style-type: none"> Ensuring that your advertising is appropriate and does not oversell your expertise (carefully consider the use of terms such as “expert,” “specialist,” etc.) Being honest with a potential client about your specific understanding of a particular geographic area or property type (e.g., farm, recreational, out-of-area property) Being careful to advise the client when they should seek additional guidance from a lawyer or other professional with specific expertise

Honesty is explicitly addressed in both RESA and the Rules. For example, section 35(1) of RESA includes deceptive dealing as a form of professional misconduct, and section 118 specifies that it is an offense to make a false or misleading statement in a record required or authorized by RESA. Section 33 of the Rules requires real estate professionals to act honestly when providing real estate services. This is a broad statement, and applies when dealing with clients, non-clients, and other real estate professionals.

Integrity

Integrity is a hard word to define, but we know it when we see it or, more particularly, when it is lacking! Honesty is a necessary element of integrity, but integrity is much broader. Integrity involves acting ethically and doing the “right thing”, whether or not anyone is watching and whether or not it benefits you.

The following figure lists some ethical principles that underlie integrity, and examples of how they can be demonstrated or fulfilled.

We show integrity when we:	By:
behave professionally	<ul style="list-style-type: none"> • exhibiting professional courtesy to colleagues • not disparaging colleagues or the regulator to consumers or the public • dressing in a manner that reflects our commitment to professionalism • being respectful and professional to the public and the regulator
act objectively	<ul style="list-style-type: none"> • not allowing our judgement to be compromised by bias, conflicts of interest, or undue influence or pressure from others • doing what is best for the client, even if it is not in our own interest
deal fairly and in good faith	<ul style="list-style-type: none"> • negotiating a fair price without misleading the other party and taking advantage of a vulnerable individual • not bullying or unfairly pressuring another party or using manipulative tactics • not discriminating against or giving less favorable treatment to colleagues or consumers because of their race/ethnic origin, religion or beliefs, sexual orientation, gender/gender identity, marital status, age, or mental or physical capacity
maintain competence and know our limits of expertise	<ul style="list-style-type: none"> • understanding and upholding the requirements of the profession (RESA, the Regulation, the Rules, other relevant laws, etc.) • referring clients to another licensee if we don't have the required experience or expertise in a transaction • advising a client to obtain independent professional advice on matters beyond our expertise
maintain confidentiality	<ul style="list-style-type: none"> • not disclosing a client's confidential information, bottom line, or motivation, without authorization, both during and after the transaction
act with due care and diligence	<ul style="list-style-type: none"> • understanding and addressing risks of latent defects or environmental conditions (e.g., presence of asbestos, underground oil storage tanks, riparian areas) • providing clients with information on how to get additional expertise/advice when needed • taking appropriate care when showing a property (e.g., not sending clients to a showing on their own, taking care to not damage property, locking the property up afterwards, and following instructions from the client or listing agent)
have accountability for our actions	<ul style="list-style-type: none"> • owning our mistakes and accepting responsibility • reporting our own mistakes to our managing broker • never attempting to coerce or compensate a complainant to not file or to withdraw a complaint to BCFS

The Headline Test

headline test

a test that one can use to evaluate whether a decision or action aligns with one's overall professionalism that considers how the decision maker would feel if the decision or action were to appear as a headline of a newspaper or news site

One way to evaluate whether a decision or action aligns with honesty and integrity is to imagine how you would feel if your actions became a headline on the home page of a news site, or were widely shared on social media. If you would be embarrassed, ashamed, or concerned about your professional reputation, the actions are probably not ones that demonstrate honesty and integrity.

Example

You've been engaged as a listing agent for a property in a neighbourhood that has historically been predominantly Caucasian. Your clients are a Caucasian couple who are moving to another city to be closer to their adult children. They say to you:

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

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

Real estate “professional” supports overt racism!

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

So, how can a licensee respond to clients such as the ones described above in a way that demonstrate honesty and integrity? A licensee should first explain to their clients that licensees are required by law and by the standards of the profession to uphold the *Human Rights Code* and cannot screen offers or requests for showings in a manner that would be discriminatory. Further, a licensee should inform clients that, although it is ultimately their decision whether to accept an offer or not, the licensee is obligated to present every offer to them.

Human Rights Code
a statute to protect and promote human rights in British Columbia, including protection from discrimination

Although these are difficult conversations, licensees must be prepared to discuss this topic with their clients. In addition to explaining their obligations under the *Human Rights Code*, the licensee might also mention that discriminatory screening practices may not be in the clients' best economic interest. For example, by limiting the buyers, the clients risk not obtaining the highest possible price for their property. Ultimately, licensees may not be able to change their clients' points of view, but they are responsible for ensuring that their own actions and discussions remain professional and non-discriminatory.

If you are unsure about how to approach this conversation, you should consult your managing broker for advice. On top of the professional ethics discussed in this chapter, licensees are also entitled to consider their personal ethics in deciding whether they are able to assist the client in this or similar situations.

DUTIES TO CLIENTS

The primary duties owed by licensees are to their clients. Professionalism and ethical behaviour are fundamental when working with clients. Clients expect licensees to act ethically, to be trustworthy, and to do what is best for the client. These broad expectations and principles are the foundation upon which the common law and the Rules are based. When faced with ethical decisions, it is essential that licensees understand and comply with the Rules and laws that specify the duties owed to clients. It is equally important that one considers those obligations in the broader context of professional integrity and trustworthiness.

Sources of Duties to Clients

The duties owed by licensees to clients are derived from two key sources: the common law and legislation. The table below summarizes these duties, while other chapters in this course will discuss them in greater detail:

Source of Duties		Requirements Imposed
Common Law	Contractual Duties	<ul style="list-style-type: none"> Fulfil all obligations within contracts with clients (e.g., listing contracts and buyer agency agreements)
	Tort Law Duties	<ul style="list-style-type: none"> Avoid the commission of torts against clients, with the key obligation being to act with reasonable care and skill (i.e., to not be negligent)
	Agency and Fiduciary Duties	<ul style="list-style-type: none"> Personally perform the duties accepted as part of the agency relationship (i.e., do not delegate duties), unless otherwise permitted by the principal Fulfil all fiduciary duties, the overarching duty being the duty of loyalty (i.e., to act solely for the benefit of the client)
Legislation	The Rules (Primarily Sections 30, 33, and 34)	<ul style="list-style-type: none"> Section 30 contains duties owed to clients, including those that mirror fiduciary duties and duties relating to acting within one's scope of authority, advising clients to seek independent professional advice in certain cases, communicating offers, and using reasonable efforts to discover relevant facts about a property Section 33 includes the duty to act honestly, and section 34 describes the duty to act with reasonable care and skill. The duties described in these sections are owed to both clients and non-clients.
	RESA (Primarily Sections 35(1) and (2))	<ul style="list-style-type: none"> Section 35(1) specifies conduct that falls within the definition of "professional misconduct" and includes contravention of RESA, the Regulation, the <i>Home Buyer Rescission Period Regulation</i>, and the Rules; wrongful taking and deceptive dealing; incompetence; and making false or misleading statements in certain documents Section 35(2) specifies conduct that falls within the definition of "conduct unbecoming a licensee" and includes conduct that is contrary to the best interests of the public; conduct that undermines public confidence in the real estate industry; and conduct that brings the real estate industry into disrepute

The sources of duties above combine to form a complex set of overlapping duties to clients as well as to the other parties in a transaction. Because these duties arise from both legislation and the common law, improper conduct could result in disciplinary proceedings with BCFSa relating to a breach of RESA or the Rules, and civil legal action by clients for breach of common law duties (particularly, breach of fiduciary duty).



As a Licensee...

You may feel that you need a sufficient client base to be successful. Be careful, though, not to take on so many clients that you are not able to serve them all professionally. Only you know how many is too many, but your managing broker can assist in this evaluation. In all cases, you should ensure that you have enough time to properly manage the needs and expectations of each client, and fulfil the duties owed to each client.

Duties to Clients under the Rules

fiduciary

a person who holds a position of trust with respect to someone else and is obliged, by virtue of that relationship of trust, to act solely in the other person's benefit

Section 30 of the Rules sets out the key duties owed to clients. Many of these duties are also *fiduciary* duties that the common law states are owed by agents (or fiduciaries) to their principals (i.e., clients). Sections 33 and 34 set out general duties to both clients and non-clients. When reading each duty, keep in mind the overall ethical obligation of licensees to act with honesty and integrity.

Section 30(a) – Act in the Client’s Best Interests

The duty to act in the best interests of the client is arguably the most important duty that licensees owe to their clients. In practice, the duty to act in the best interests of a client is relatively easy to understand. Licensees must not do anything that would go against their clients’ interests. The overarching fiduciary duty that *agents* owe to their *principals* (i.e., clients) is this same duty of loyalty. Many of the other duties in the Rules and the other fiduciary duties are simply extensions of the overall duty of loyalty to act in the client’s best interests.

The duty to act in a client’s best interests does not require the licensee to take actions that are unlawful or that constitute an undisclosed or unacceptable conflict of interest. For example, loaning money to a client to help them complete a real estate purchase could arguably be in the client’s best interests, but would also put the licensee in a conflict of interest with their client.

agent

a person who is authorized to act on behalf of another person or group

principal

a person who authorizes an agent to act on their behalf (e.g., a client)



As a Licensee...

Take a moment to think to yourself about how you, as a professional, can demonstrate that you are putting your client’s interests above your own. Here are some ideas:

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

Putting the above into practice will not only result in you being more professional in the eyes of the client, but also in the eyes of all others with whom you deal.

Section 30(b) – Act in Accordance with the Client’s Lawful Instructions

Licensees must follow all instructions from their clients, provided that those instructions do not violate the law. This duty is also a fiduciary duty. While most instructions from clients are perfectly legitimate, licensees should remain watchful for any instruction that could violate the law.

Example

Recall the earlier example where you were engaged as a listing agent for a property where the sellers told you that they preferred to sell to buyers who were of European descent. Refusing to sell to someone because of their race or ethnicity would be discriminatory, and would violate the *Human Rights Code*. The duty to follow the lawful instructions of clients does not include taking part in illegal or unlawful actions.

When receiving instructions, it is important for licensees to consider whether the form in which they have received the instructions complies with any service agreement that is in place. For instance, if the applicable service agreement requires instructions to be in writing and the licensee receives a verbal request from the client to complete a task, the licensee should ask the client to send their instructions in writing. While the client may perceive this request to be unnecessarily nitpicky, it also demonstrates to the client that the licensee is acting professionally by ensuring that clear expectations are set, and complete records are being kept.

At the very least, after a situation in which oral instructions are given by the client, the licensee can follow up with a written note (e.g., email or text message) confirming the receipt of the oral instructions. For example:

“Hi Client, it was nice to chat on the phone with you today. I just want to confirm, so that my records are complete, that you are ok with me showing your property to prospective buyers while you are away on vacation next week, provided that I am always personally present during those showings. If this isn’t what you meant or I interpreted things incorrectly, please let me know. Thanks and have a great vacation!”

Section 30(c) – Act Only Within the Scope of the Authority Given by the Client

Licensees have a duty to only act within the authority that is granted to them by their client. This duty is also touched upon by the common law, as acting outside one’s *scope of authority* can result in a claim of breach of contract or negligence.

As will be discussed in Chapter 12: “Law of Agency”, generally, an agent’s authority can be express (orally, or in writing) or implied. Licensees should always seek to establish their scope of authority in writing, starting with the service agreement with the client.

scope of authority
the bounds or extent of authority granted by the principal to the agent

Section 45 of the Rules requires licensees to obtain written authorization to sign agreements on behalf of their clients. In other words, signing agreements for a client is outside of the licensee’s scope of authority unless they have received express written authority to do so.



As a Licensee...

If you are ever in doubt as to whether you have the authority to carry out a specific action, you should first confirm your authority with your client. This can occur orally or in writing; however, writing is preferable and can be as simple as an email or text message. An example of how that can be done was provided in the previous section on the duty to act in accordance with the client’s lawful instructions.

Section 30(d) – Advise the Client to Seek Independent Professional Advice on Matters Outside of the Licensee’s Expertise

The real estate sales industry is a complex field where licensees are asked a wide range of questions by clients. Questions may relate to tax, law, appraisal, mortgages, or construction, to name a few areas. Licensees who are in any doubt as to whether they have the expertise to adequately answer a client question should immediately refer the client to another competent professional such as an accountant, lawyer, insurance broker, mortgage broker, appraiser, roofer, etc. Licensees should also be aware of the increased risks of dabbling in niche areas such as agricultural or commercial property if they do not possess the relevant expertise to properly assist a client in such a transaction. Failing to observe this duty can also result in common law liability, particularly through a claim of negligence.



ALERT

In the past few years, there have been a number of disciplinary cases relating to licensees providing incorrect or misleading information/advice on the GST implications in real estate transactions. Tax law and tax planning are generally not within a licensee’s expertise, and clients with tax-related questions should be advised to seek independent professional tax advice.

Section 30(e) – Maintain the Confidentiality of the Client’s Information

This duty, which mirrors the fiduciary duty of confidentiality, requires licensees to keep confidential any non-public information that has been told to them by their client unless:

- they have been authorized by the client to disclose it; or
- they are required by law to disclose the information.

As you will learn in Chapter 12: “Law of Agency”, the fiduciary duty of confidentiality, unlike other fiduciary duties, does not terminate when the relationship between the agent and the client ends – it lasts forever.

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



As a Licensee...

Two particular types of issues with respect to confidentiality have to do with former clients and good faith breaches of confidentiality.

Former Clients – Example

You list a property for sale and the seller instructs you not to disclose the mould behind the panelling in the basement of the house. As you will learn later in this course, a licensee must withdraw from representing the seller if the seller insists that their licensee not disclose a material latent defect in the property (i.e., the mould). As such, you end the relationship with the seller. A few months later, a buyer client becomes interested in your former seller client's property.

Can you disclose the mould issue?

No, a licensee's responsibility to maintain their client's confidentiality continues beyond the termination of an agency relationship. Further, you should not represent this potential buyer in a sale of this particular property because the confidential information you received from the seller prevents you from properly acting in the buyer's best interests in this transaction. This potential buyer would be better off working with a licensee who is not encumbered by pre-existing obligations to the seller.

Good Faith Breaches – Example

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

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

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

Should you give Ava her mother's address?

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

Section 30(f) – Disclose All Known Material Information

Section 30(f) requires that licensees disclose to their clients all known material information respecting the real estate services, and the real estate and the trade in real estate to which the services relate. The duty of full disclosure is also a fiduciary duty. Material information is any information that might affect the value of the property or the client's decision, or a fact that could cause a reasonable person to make a different decision about the transaction. Any information, however trivial it may initially appear, that might influence the conduct of the client, must be disclosed by the licensee. It is not appropriate for the licensee to make decisions on what information should be disclosed to the client and what information should not.

Disclosure, as a general concept under RESA and the Rules, will be discussed later in this chapter.

Section 30(g) – Communicate All Offers to the Client in a Timely, Objective, and Unbiased Manner

Licensees must promptly communicate all offers to their clients in a timely and objective way. This does not mean that licensees cannot provide their opinion or advice on how the client should respond to a given offer; however, any opinion or advice provided must be objective and cannot be influenced by inappropriate

considerations like personal interest or biases. Failure to communicate offers in this required manner can also be seen as negligent and a breach of the fiduciary duty of loyalty.

One exception to this duty is when a client specifically instructs their licensee not to communicate certain offers to them promptly, or at all. This may be the case if the client is going to be away and unavailable for a certain time period. They may say something like, “I’ll be out of town and on vacation for the next week. I’d rather not be bothered while on vacation, so just wait to present any offers that come in until after I’m back.”

Example

A client has stated in a conversation with you that they will not accept offers below the listed price and you receive an offer below the listed price – what should you do?

You are obligated to bring all offers to the client unless they specifically advise you otherwise. Even if an offer is below the listed price and the client stated they would not accept such an offer, there is still the potential for the seller to make a counter-offer and reach an agreement with the buyer at a higher price. Information about offers is also important for your client to hear, so that they have full information about the property’s potential and how the market is responding. If the client insists on not wanting to be presented with offers below a certain level, you should get these instructions in writing so that you and the client have the same expectations. As the passage of time can also change the circumstances, you may want to consider re-confirming this instruction periodically.

Section 30(h) – Use Reasonable Efforts to Discover Relevant Facts

Section 30(h) requires licensees to use reasonable efforts to discover relevant facts respecting any real estate that the client is considering acquiring. Relevant facts could include physical features of the property, characteristics of the development and/or neighbourhood, and general market conditions. In practice, this duty can be challenging to define, and it is not uncommon for licensees to face discipline for breaching this duty. Furthermore, failing to use reasonable care and skill could also expose the licensee to a lawsuit by the client for negligence. The concept of reasonableness will be discussed shortly.

Sections 30(i) and (j) – Avoiding and Disclosing Conflicts of Interest

Sections 30(i) and (j), when read together, require licensees to take reasonable steps to avoid any conflict of interest; however, if a conflict of interest does exist, licensees must promptly and fully disclose the conflict to the client. The Knowledge Base uses the following definition of *conflict of interest*:

conflict of interest

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

A conflict of interest is a situation where there is a substantial risk that your ability to represent a client would be negatively affected by your own interest or by your duties to another current client, a former client, or a third party.

The avoidance and disclosure of conflicts of interest is a key fiduciary duty that can undermine the overall fiduciary duty of loyalty, if it is not observed.

A common misconception is that the presence of a conflict of interest means that some wrongdoing has occurred. In fact, being in a conflict of interest does not automatically mean that the licensee is offside of professional requirements under RESA or the Rules. However, because conflicts of interest result in a greater risk to clients and third parties, conflicts need to be avoided, where possible, or otherwise handled promptly and appropriately.

The reason why conflicts of interest are so important to professionals goes back to the concept of trust. In order for a profession to be seen as valuable, the public needs to trust that the members of the profession are acting in the public’s interest rather than in their own self-interest. At an individual level, this means that one’s clients and prospective clients need to trust that their licensee will put their interests ahead of all other interests. Along these lines, it is sometimes helpful to think about the conflict of interest not from the professional’s point of view, but from the client’s point of view, and whether they would perceive there to be a conflict of interest, whether or not there is an actual conflict of interest.

Think about the following situations:

- A listing agent’s client is not in a hurry to sell and wants to be patient to wait for an offer at or near the asking price, but the listing agent is hoping to sell more quickly in order to get the deal wrapped up before their vacation begins.

- A commercial agent has been offered sizable referral fees by a renovation company specializing in office space renovations in exchange for recommending clients who have recently purchased office space through the commercial agent.
- A buyer's agent is acting for two couples who are both looking for very similar residential properties in the same area, and they both have expressed interest in a particular house.
- A real estate professional is acting as a listing agent for one client and as a buyer's agent for another, and the buyer client shows interest in the listed property.
- A real estate professional's friend, family member, or close business associate is interested in leasing property listed by the real estate professional, and has asked for preferential terms.

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

Commission-based remuneration structures result in conflicts of interest arising more frequently than with other types of remuneration, and some level of conflict of interest is sometimes unavoidable. Because commission is earned by closing a deal, there is always an incentive to make sure the deal is - in fact - closed. However, this motivation cannot be allowed to get in the way of ensuring that the duty to the client is met.

Even perceptions of conflicts, if not addressed, can lead to a loss of trust in the same way that a real conflict can. To avoid any perception of a conflict of interest that does not actually exist, licensees should anticipate situations that might place them in a perceived conflict and once identified, they should be transparent with their clients and colleagues, within the bounds of confidentiality.

Addressing Conflicts of Interest

What does it mean to take reasonable steps to avoid conflicts of interest? One way to approach this question is to think about it from the opposite perspective – what would you expect from an agent acting on your behalf? Another approach is to be familiar with the common situations that lead to conflicts of interest in one's specific area of practice. For example, if you do a lot of business in a relatively small geographic area, it may be common for your buyer clients to become interested in purchasing your seller clients' properties. In these situations, there is often no conflict of interest at the moment, but one can foresee the risk of a conflict occurring in the future. This is referred to as a *potential conflict of interest*. When these situations arise, licensees need to recognize that risk and be particularly careful.

potential conflict of interest
a situation where there is currently no conflict of interest, but the circumstances suggest that a conflict could arise in the future

A key means of avoiding conflicts of interest is to have transparent discussions with clients about potential conflicts of interest early and often. For example, you should be up front with your clients and discuss what would happen if another client became interested in their property. The possibility of other types of conflicts of interest should also be discussed early on in the relationship. It is better to be transparent up front in order to avoid any misunderstandings later.

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

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

Ultimately, disclosure of a conflict does not eliminate your duty to act in the best interests of your client at all times. You cannot continue to represent a client if you cannot fulfil your fiduciary duties, even if you have made the required disclosures and obtained the client's agreement.

Responding to, and dealing with, conflicts is discussed in considerable detail in Chapter 12: “Law of Agency”. For the time being, keep in mind that, while the Rules permit a licensee to act in certain conflict situations (with appropriate disclosures being made), it may not always be appropriate to do so. For example, while the Rules do not prohibit a licensee from selling their own property to a buyer client, recall the importance for professionals to maintain trust and to act with integrity. A licensee in a particular situation may nevertheless refuse to sell their own property to a client while representing that client, because the risk to their reputation and integrity is too great.

Section 34 – Acting with Reasonable Care and Skill

Example

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

The key thing to remember is that you are currently the client’s agent, and you owe them a duty of loyalty. All of the duties to clients in section 30 of the Rules still apply. Your self-interest will motivate you to sell the warehouse under the most favorable terms for yourself and your business partner. This is a clear and real conflict of interest.

There are two general alternatives for proceeding:

1. Keep the agency agreement as is, and simply keep your warehouse out of it – don’t bring it to your client’s attention at all. This would seem to eliminate the conflict of interest, but it has the downside of not serving the client’s interests if your property would in fact be a good fit. This is particularly true if there are relatively few suitable properties available.
2. Discuss the matter with the client, and if they are interested in considering your warehouse, terminate the agency relationship and advise them to engage a new agent to represent them going forward. This eliminates the conflict of interest and ensures that their best interests are still being represented. The risk is that if the deal doesn’t end up going through, the client may well not re-hire you, but accepting that risk is part of being a professional and acting with honesty and integrity. Remember that in any situation where you are buying, selling, or leasing a property, there are disclosure requirements under the Rules and common law that you need to meet.

negligence

the failure to exercise reasonable care and skill, which causes someone to suffer harm or damages

Section 34 imposes the common law standard of *negligence* upon licensees when providing real estate services. In other words, when serving clients, licensees cannot be negligent and must act with reasonable care and skill. Negligence is a common law concept that is discussed in Chapter 5: “The Professional Liability of Real Estate Licensees”. Note that section 34 applies to licensees when dealing with both clients and non-clients.

Defining Reasonableness

The common law, and some of the duties in section 30, impose a reasonableness standard on licensees. For example, the common law of negligence requires licensees to act with reasonable care and skill and act as a reasonably prudent licensee would in comparable circumstances. Further, section 30 places a duty upon licensees to undertake reasonable efforts to discover relevant facts, and the duty to take reasonable steps to avoid any conflict of interest.

The concept of reasonableness is difficult to determine with any measure of exactness and is highly dependent on the facts and context of the particular situation. The analysis will reflect the fact that licensees are expected to be professionals with a degree of expertise in real estate matters that is above that of an average person. They will be held to the *standard of care* of a competent real estate professional, meaning that they will be expected to conduct themselves as a competent real estate professional would in the circumstances. In a court case, to establish the standard of reasonableness, senior and experienced licensees may provide testimony or evidence as to what is normal, typical, or common in the industry.

standard of care

the reasonable degree of care a person should provide to another



As a Licensee...

When involved in a situation where reasonableness is required, it is useful to think about the situation from the perspective of an impartial outside observer. For example, imagine that the situation was being evaluated by a third party who has the relevant knowledge and experience to understand and evaluate the appropriateness of the conduct or decision in an impartial manner. You should ask: if such a person were to weigh all the relevant facts and circumstances in the situation, would they believe that my efforts, care, and skill were at a reasonable level?

Another strategy is to imagine a panel of five highly experienced licensees, such as managing brokers, evaluating your conduct. Ask yourself: would this panel of experienced managing brokers conclude that I am acting appropriately?

Breaching Duties to Clients

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

One further question should be asked: If a licensee breaches one or more of their duties to a client, are they acting unethically?

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

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

DUTIES TO THIRD PARTIES

While the primary party to whom you owe duties is your client, you must also be aware that certain duties are owed to third parties. These duties primarily arise from section 35(2) of RESA (i.e., conduct unbecoming a licensee) and the Rules (i.e., sections 33 and 34).

Section 35(2) of RESA (Conduct Unbecoming a Licensee)

Conduct unbecoming was discussed earlier in this chapter, and includes conduct that is contrary to the best interests of the public, conduct that undermines public confidence in the real estate industry, and conduct that brings the real estate industry into disrepute. Clearly, conduct unbecoming includes more than just a licensee's conduct towards their clients. It also involves conduct towards the (represented and unrepresented) parties on the other side of a transaction, as well as members of the general public.

Sections 33 and 34 of the Rules

Although a licensee's primary duty of loyalty is to their clients, it does not mean that a licensee is free to sabotage other third parties' interests. Fiduciary duties are not owed to non-clients (i.e., individuals who are involved in the real estate transaction but who are not being represented by the particular licensee); however, sections 33 and 34 of the Rules still apply and state that when providing real estate services, a licensee must act honestly (section 33) and with reasonable care and skill (section 34). For example, whatever information you provide to a non-client should be truthful and should reflect reasonable *diligence*.

Disclosure requirements imposed under the Rules to non-clients, particularly unrepresented non-clients, will be discussed in greater detail in Chapter 12: "Law of Agency".

diligence
careful and detailed work

DISCLOSURE

One of the key fiduciary duties owed to clients is that of full disclosure. In addition to the general duties of disclosure that are set out in the common law and sections 30(f) and (j) of the Rules, Part 5 Division 2 of the Rules prescribes a variety of specific disclosures that licensees are required to make in certain situations. A discussion of these disclosures and the specifics of each is beyond the scope of this chapter and will be examined in later chapters of this Course. For now, simply remember that the specifics of these disclosures are somewhat complicated, but the underlying purpose is simple – adequate transparency is essential in order for licensees to be seen as honest and ethical professionals. It is important to recognize this principle and keep it in mind in day-to-day dealings. Clients must feel confident in the information and advice that they are provided by their licensee.

Inadequate disclosure can lead to clients, consumers, and the public in general thinking that the licensee is hiding information or being purposefully deceptive. This negatively impacts trust. Ensuring sufficient disclosure is a key part of transparency, which in turn is an important element of demonstrating honesty and integrity. Licensees should ensure that they understand their disclosure obligations clearly so that professionalism can be maintained.

As a general rule, ethical and transparent disclosure requires early, continuous, and full written disclosure. While the common law and Rules are minimum standards which must be met to comply with the law, ethical professionals do not settle for mere compliance with the law. Rather, they practice disclosure with the end goal in mind: fully informed consumers reflect the professionalism of those in the industry.

The following figure summarizes the individual components of early, continuous, and full written disclosure.

Early Disclosure	<ul style="list-style-type: none"> Ensures consumer decision-making can occur most efficiently Some disclosure requirements in the Rules specify the timing of the disclosure (e.g., section 30(j) requires conflicts to be disclosed “promptly”), while others do not specify the timing of disclosure In all cases, licensees should seek to make disclosure early and as soon as practicable
Continuous Disclosure	<ul style="list-style-type: none"> Disclosure must continue to be updated as the circumstances change so that the client is always fully informed Helps in building trust with clients because they are being updated throughout the process
Full Disclosure	<ul style="list-style-type: none"> Summarizing, or leaving key facts out, must be avoided It is not up to the licensee to decide whether or not information is relevant to the client When in doubt, disclose! Additional disclosure or a further conversation may be required when an otherwise complete disclosure is not understood or appreciated by the client
Written Disclosure	<ul style="list-style-type: none"> Most of the disclosures required under the Rules must be made on prescribed forms In all cases, the safest practice is to ensure all disclosures are in writing Helps to ensure there are no misunderstandings as to what was disclosed Verbal disclosures should be followed up with a written disclosure (e.g., by email) as soon as practicable, confirming the details of the discussion

THE DUTY TO REPORT MISCONDUCT

The discussion in this chapter thus far has focused on holding yourself to the highest professional and ethical standards. The focus of this section is about holding others in the profession to the highest standards through the reporting of misconduct. This is known as the duty to report.

The Profession is a Shared Responsibility

Maintaining the integrity of the real estate profession and the confidence the public places in licensees is a shared responsibility between BCFSa and the members of the profession. Members of professions should hold themselves, and each other, to an ethical standard that is higher than anyone else expects. Not only must licensees be accountable for their own actions, but they must also make other licensees accountable for their

actions. Licensees have a role in enforcing the values of the profession. Those who knowingly act unprofessionally will be less likely to do so if they know that their fellow professionals will not tolerate it.

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

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In this case, a licensee was found to have committed conduct unbecoming a licensee when he threatened to retaliate against his co-listing agent for filing a complaint with RECBC (now integrated into BCFSa) in relation to his conduct in a transaction. After learning about the RECBC investigation into his conduct, the licensee called the co-listing agent and left her a voice-message where he stated, “so if you really want to get blackballed you’ve gone to the right person because trust me I wield a bigger bat than you do...so you’re off my books as far as ever doing a deal. I will never, ever, ever, process one of your offers ever. So you’re done”

The duty to report plays an important role in the challenge of ensuring that the public has confidence in the real estate profession.

The Role of Licensees in Maintaining Professionalism

While BCFSa can act on consumer complaints and uncover misconduct through various audit practices, those within the profession must also play a role in regulating the conduct of others in the profession, and the following figure summarizes the four key reasons why.

1. Licensees are the “boots on the ground”	Regulators cannot be in all places, at all times. Licensees deal with consumers and fellow licensees on a daily basis; therefore, they are in the best position to identify misconduct at the earliest stage.
2. Many consumers do not file complaints	There are a number of reasons why a consumer may not file a complaint to BCFSa, including that they were not aware that a given action was wrongful, or that they did not have the time, energy, or incentive to initiate a complaint. As such, it is wrong to conclude that, because a consumer did not complain to BCFSa, that no licensee misconduct occurred.
3. Consumer complaints often occur “after the fact”	Licensees involved in the transaction can often spot the warning signs of misconduct even before it actually occurs, or spot the misconduct early enough to minimize its impact.
4. The power of peer pressure	Professionals who know that their misconduct will not be ignored or overlooked by their peers tend to take greater care in their practice.

Licensees cannot expect that an effective regulator that responds to consumer complaints efficiently is enough to maintain the integrity of the profession – licensees also have a role to play.

The Duty to Report in Other Professions in British Columbia

The duty to report is a common obligation for professionals. This is consistent with the premise that public confidence in a profession can only be maintained when the members of the profession help to enforce the values of the profession. The following figure summarizes the duty to report of other professions in British Columbia.

Lawyers	Required to report “conduct that raises a substantial question as to another lawyer’s honesty, trustworthiness, or competency as a lawyer.”*
Chartered Professional Accountants	Aside from a few narrow exceptions, required to report to the Registrar of CPABC any information concerning an apparent non-trivial breach of the CPABC Code or any information raising doubt as to the competence, integrity, or capacity to practise of another CPA.**
Health Care Professionals regulated under the <i>Health Professions Act</i>	Required to report in writing if they, on reasonable and probable grounds, believe that the continued practise of the health profession by another health care professional might constitute a danger to the public.***

* Section 7.1-3 of the Law Society of British Columbia’s *Code of Professional Conduct for British Columbia*.
 ** Rule 211 of the Chartered Professional Accountants of British Columbia’s *CPABC Code of Professional Misconduct*.
 *** Section 32.2 of the *Health Professions Act*.

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

The Duty to Report in RESA and the Rules

The duty to report, while not explicitly mentioned in RESA, is clearly a fundamental component of the licensing regime. It directly relates to conduct unbecoming a licensee, as a failure to report the misconduct of another licensee, particularly if that misconduct puts a consumer at risk, is contrary to the best interests of the public or could undermine the public confidence in the profession. As such, a failure to report misconduct of a serious nature could result in a finding of conduct unbecoming a licensee against the licensee who failed to report.

The Rules, on the other hand, make explicit mention of the duty to report. Section 29, which contains a number of responsibilities for representatives and associate brokers, states that they must promptly notify their managing broker on learning of conduct that they consider may be:

- professional misconduct;
- conduct unbecoming a licensee; or
- improper or negligent conduct.

Section 29 does not simply focus on breaches of RESA, and includes the duty to report breaches of other legislation. For example, what would you do if you found out that another member of your brokerage was engaging in email marketing activities that breach Canada’s anti-spam legislation? Under section 29, such a breach could fall under the category of incompetence or improper conduct, and in either case, it must be reported to your managing broker.

As a final point, the duty to report under section 29 applies to a licensee’s own conduct, the conduct of others acting on the licensee’s behalf, and the conduct of anyone acting on behalf of or within the brokerage (e.g., other licensees and unlicensed assistants). In short, section 29 applies to any misconduct within a licensee’s brokerage and requires representatives and associate brokers to report the misconduct to their managing broker.

The Duty to Report as an Ethical Duty

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

There is no explicit duty in the Rules for licensees to report the misconduct of those outside of their brokerage. Despite this, and for all of the reasons discussed earlier in this chapter relating to public protection, public confidence and trust in the profession, and maintaining the overall integrity and reputation of the profession, licensees have a broader ethical duty to report the misconduct of any licensee, whether they

are a member of their brokerage or not. Under this ethical duty, licensees have a responsibility to report the conduct of any licensee:

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

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

If faced with a situation that requires reporting potential misconduct by individuals outside of one's brokerage, the licensee should start by talking to their managing broker, who can help determine how to report the matter to BCFSa.



ALERT

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

What to do When Unsure of Whether to Report

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

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

If the answers to any of these questions is "yes," the licensee should report the misconduct to their managing broker. The licensee and their managing broker may wish to consult with BCFSa for further guidance about the conduct observed and the requirements for licensees.

Another helpful approach is for the licensee to put themselves in the position of a member of the public and think about what their reaction would be if they became aware that another licensee learned of the potential misconduct and chose not to report it. Would this help or hurt the profession's reputation? If in doubt about whether reporting is necessary, the licensee should err on the side of caution and report the matter. The concept of "reasonable and informed third party" that was discussed earlier can also be applied here.

Where to Report Misconduct

In most cases, reports of misconduct should be directed to one's managing broker. Under RESA, managing brokers are responsible for exercising the rights, and performing the duties, of the brokerage, and for the control and conduct of the brokerage's real estate business. It is useful to think of a managing broker as the captain of the ship (i.e., the brokerage) – they must be kept apprised of all significant issues on board the ship.

The fact that misconduct should generally be reported to one's managing broker does not preclude or prevent the licensee from reporting misconduct directly to BCFSa. Direct reporting to BCFSa may be necessary if:

- another licensee's conduct presents such a great risk to the public that immediate action by BCFSa is necessary (e.g., a licensee has misappropriated, or stolen, a client's money); or
- the licensee's managing broker is not immediately available, and the misconduct is of a serious nature.

Furthermore, a licensee should report directly to BCFSa if:

- they have concerns about how their managing broker is handling, or has handled, an instance of misconduct;
- it is the managing broker who has committed the professional misconduct; or
- for any other reason, they would feel more comfortable reporting to BCFSa rather than to their managing broker.

BCFSa's Anonymous Tip Line

In addition to handling formal, written complaints, BCFSa maintains an anonymous tip line where licensees and members of the public can report suspicious activity or unethical conduct by licensees or employees of brokerages by telephone or by submitting an online tip form. Licensees must remember that, if they choose to make an anonymous report to BCFSa, they must provide sufficient information for BCFSa to begin an investigation, as BCFSa will be unable to contact them for more details.

HANDLING REPORTS OF MISCONDUCT AS A MANAGING BROKER

Section 28 of the Rules contains a number of responsibilities of managing brokers, including that they must take “reasonable steps” to deal with any matter relating to professional misconduct, conduct unbecoming a licensee, or improper or negligent conduct that is committed by those acting on behalf of, or associated with, their brokerage.

After collecting all of the facts about the incident, managing brokers must consider those facts and the relevant context. A breach of the Rules might reflect an inadvertent error or a lack of awareness of certain professional obligations. If no risk of harm to the public results, it may be appropriate to deal with the issue with the licensee or employee directly, without reporting the matter to BCFSa. However, in other cases, particularly where the conduct has the potential to do harm to the public or hurt the reputation of the industry, such as in the case of ethical breaches, it is appropriate to report the matter to BCFSa.

Managing brokers have a range of options available to them to deal with issues of misconduct in their brokerage, such as:

- speaking to BCFSa for guidance;
- addressing the issue with:
 - the licensee or employee involved in the potential misconduct;
 - the consumer(s) impacted by the misconduct;
 - the managing brokers of the other licensees and employees involved;
 - others in the brokerage who were not involved in the misconduct; and
 - the brokerage's legal counsel to determine what legal risks may be associated with the conduct;
- reporting the matter directly to BCFSa;
- cancelling the employment or independent contractor relationship with the licensee or employee;
- reviewing and updating the brokerage's policies and procedures to address the unacceptable conduct;
- creating brokerage training that focuses on discouraging the inappropriate behaviour; and
- offering to compensate those who have suffered damages with respect to the misconduct.

One point should be made clear: the decision to report is separate from any decision regarding compensation provided to a client who has been harmed. In other words, even if the matter has been “made right” with the client, the obligation for reporting the matter still stand.

A FRAMEWORK FOR ETHICAL DECISION MAKING

To meet a licensee's professional obligations, ethical decision-making is essential. Ethical decision making will also add long-term sustainable value for clients, consumers, and the public in general. Sometimes, the course of action to take is clear, but other times it can be ambiguous, particularly when there are many perspectives or competing obligations and interests.

Ethical decision-making cannot be achieved through the application of a simple formula. Good ethical decision-making comes from a foundation of solid professional judgement that must often be exercised in situations where there is no clear guidance.

It is important to recognize that not all ethical dilemmas are major events or situations. Ethical decision-making is something that one does on an ongoing, day-to-day basis as one makes both large and small decisions. It is the foundation of providing excellent service to clients. As such, it forms the cornerstone of professional practice.

The following framework can help a licensee be systematic and purposeful in determining the best way to address ethical dilemmas when they arise.

1. Consider the situation and identify the potential ethical issues

- What are the relevant facts (who, what, when, where, why, how)?
- What are the ethical issues at play?
- What are my legal obligations and broader ethical expectations and obligations?

2. Identify the stakeholders

- Who is my client and what duties do I owe them? What do they need/expect from me?
- Is there anyone else to whom I owe duties?
- Who else is impacted by the current situation and/or will be impacted by the decision I make?
- Who do I need to confer with and/or inform of the situation?

3. Specify feasible alternatives for evaluation

- What courses of action are possible in the situation?
- Are there short-term and long-term considerations that are relevant?

4. Evaluate each alternative in terms of ethical consequences

- Would I be acting in compliance with the Rules?
- Would I be meeting the broader ethical expectations and obligations?
- Would any potential changes in facts or circumstances impact my evaluation?

5. Make and justify your choice

- Can I justify my decision in terms of ethical consequences and compliance with the Rules?
- Do I have an implementation and communications plan in place? Who do I need to inform of the situation and of my decision?
- Do I have any reporting obligations as a result of my decision?
- Have I documented my decision-making process in the event that I am called upon to justify my decisions?



As a Licensee...

Throughout the decision-making process, there are a number of resources that you should consult:

- official resources, including:
 - the Rules and the Regulation;
 - the Knowledge Base; and
 - Practice Standards Advisors;
- unofficial resources, including:
 - lawyers;
 - senior licensees; and
 - mentors.

Importantly, if you are a representative or associate broker, your managing broker is a crucial resource to help put ethics at the forefront of your daily decision making.

ETHICAL CODES OUTSIDE OF RESA AND THE RULES

While the focus of this chapter was on professionalism and ethics in the context of RESA and the Rules, as a professional, you may also be required to abide by standards of practice or codes of ethics by the professional associations of which you are a member. For example, many licensees are also members of a local real estate board. Every Canadian real estate board is bound to adopt and enforce the Canadian Real Estate Association's REALTOR® Code.

The REALTOR® Code includes three parts: the Preamble, the Code of Ethics, and the Standards of Business Practice. The Preamble introduces the REALTOR® Code and explains its function. The Code of Ethics reinforces the commitment of REALTORS® to professional competent service, absolute honesty and integrity in business dealings, utmost civility, co-operation with and fairness to all, and personal accountability through compliance with the Standards of Business Practice. It ends with the obligation for REALTORS® to observe the spirit of the Code in all of their activities by following the Golden Rule: "Do unto others as you would have them do unto you." The Standards of Business Practice are comprised of twenty-nine articles that set out specific rules of conduct. There are a set of interpretations accompanying each article. The REALTOR® Code establishes obligations that may be higher than those mandated by law (e.g., the common law, RESA, the Rules). However, in a conflict between the REALTOR® Code and the law, the obligations imposed by the law take precedence.

Other relevant ethical codes for licensees, depending upon their memberships to various associations, include the Code of Professional Conduct of the Real Estate Institute of British Columbia, the Real Estate Institute of Canada Code of Professional Standards, the Professional Association of Managing Agents Code of Conduct, and the Strata Property Agents of BC Code of Ethics.

These ethical codes may also be used by a court to inform the applicable standard of care in a negligence case against a licensee.

CONCLUSION

Ethics and professionalism are extremely important for real estate licensees. Real estate licensees who behave ethically and professionally earn the trust of the public with their honesty and integrity. It is especially important for licensees to maintain this trust, as self-service options for real estate transactions are becoming increasingly available. The public turns to real estate professionals as trusted advisors, but without faith that licensees will act ethically, the value of paying for real estate services may not be recognized. Licensees are not only responsible for ensuring their own behaviour is ethical, but also for maintaining the integrity of the entire profession. This includes the ethical duty to report the misconduct of other real estate professionals. Therefore, it is important that licensees are aware of the ethical standards imposed by RESA and the Rules.

When making decisions in your professional life, it is useful to think about them in a structured way. This chapter introduced a framework for ethical decision making that includes some important questions for you to consider at each step of the process.

Ultimately, the professional obligations placed upon licensees are designed to ensure that the public is protected when working with licensees. The obligations ensure that all those who are entrusted by the public maintain the values of the profession, and those who do not are prevented from continuing to practice. When consumers feel secure and protected, the profession as a whole benefits. Licensees are able to practice in a profession that is well-respected and trusted. In other words, when the public is protected, everyone wins.

