

Representation agreements

This bulletin explains what a “representation agreement” is and the specific content requirements under the legislation for both brokerage representation agreements and designated representation agreements.

Summary

Representation agreements with clients, to provide services and representation, must **clearly, comprehensibly, and prominently**, set out the required content.

These requirements are consistent with the plain language requirements that apply to disclosures, consents, and acknowledgements.

Required content includes:

- The date the agreement takes effect and the date it expires.
- The method for determining the amount of any remuneration payable to the brokerage and, for seller clients, any amounts payable to any other brokerage.
- Identification of any circumstances in which the amount of the remuneration might change, and, for each circumstance, an explanation of how it may change and whether one or more brokerages may receive remuneration.
- The method to be used for paying any remuneration payable to the brokerage.
- The services the brokerage will provide.
- Any terms related to termination, including rights and obligations.

In the case of a designated representation agreement, the agreement must also include:

- The fact that the brokerage is not providing representation.
- The name of each designated representative under the agreement.
- The services that the designated representative(s) will provide under the agreement.
- The duties of the brokerage under the agreement.
- The duty of the designated representative(s) under the agreement.

What is a representation agreement?

A “representation agreement” is a written, oral, or implied agreement between a brokerage and a person under which the brokerage and the person agree that the person will receive services from the brokerage and will receive representation from either the brokerage or a designated representative, in respect of a trade in real estate.

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There are two types of representation agreements:

- **Brokerage representation agreement:** This is a representation agreement between a brokerage and a client under which the brokerage and all of the agents employed by the brokerage represent the client.
- **Designated representation agreement:** This is a representation agreement between a brokerage and a client under which the brokerage designates one or more agents employed by the brokerage to represent the client. The brokerage and all of the other agents employed by the brokerage are not representing the client.

A representation agreement may be for a broad range of services, or it may be limited to a specific service, such as drafting an offer or showing a property.

Brokerages are prohibited from entering into an agreement with a buyer or seller for the purposes of trading in real estate if the agreement does not include the provision of representation by either the brokerage or a designated representative.

IMPLIED AGREEMENTS

A “representation agreement” includes an implied agreement between a brokerage and a person. This means that providing services or representation to a person in the absence of a written agreement will give rise to a representation agreement.

Agents must be cautious in discussions and in any efforts to help someone who is not their client. The risk is in exercising discretion or judgment, giving advice, offering opinions, or advocating on behalf of the person in an attempt to be helpful.

There are exceptions to the creation of an implied agreement. The following circumstances will not result in an implied agreement:

1. As a service provided to a client, or incidental to a service provided to a client, an agent provides assistance to another person without encouraging the person to rely on the agent’s skill or judgement in respect of a trade in real estate.
2. An agent provides general information to a person relating to the business of trading in real estate.

Contents of representation agreements

EFFECTIVE DATE AND EXPIRY DATE

The agreement must clearly state the effective date and expiry date.

The expiry date of an agreement must be displayed prominently on the first page of the agreement. Agents must ensure that the client initials the agreement next to the expiry date. This applies regardless of the duration of the agreement.

The brokerage is responsible for ensuring the agreement contains only one date on which the agreement expires.

METHOD FOR DETERMINING THE AMOUNT OF REMUNERATION PAYABLE

The agreement must clearly identify the method that will be used to determine the remuneration payable to the brokerage. For example, it may provide that the remuneration payable is a fixed amount, a percentage of the sale price, or a combination of the two.

All remuneration payable to a brokerage in respect of a trade in real estate must be an agreed amount or percentage of the sale price or rental price, or a combination of both.

If the remuneration payable in respect of a trade in real estate is expressed as a percentage of the sale price, the percentage does not have to be fixed. It may be expressed as a series of percentages that decrease at specified amounts as the sale price increases.

Brokerages are prohibited from entering into an arrangement for the payment of any remuneration based on the difference between the price at which real estate is listed for sale and the actual sale price of the real estate. A brokerage is not entitled to charge or collect any remuneration computed on this basis.

In dealing with prospective clients, agents must not suggest that remuneration is fixed or approved by RECO, any government authority, or any real estate board or real estate association. If the brokerage has a policy related to remuneration, the agent may share the brokerage's remuneration policy with the client or prospective client.

CIRCUMSTANCES IN WHICH REMUNERATION PAYABLE MIGHT CHANGE

An agreement with a client must identify any circumstances in which the amounts of remuneration payable might change and, for each circumstance, an explanation of how the amount might change and an indication of whether one or more brokerages may receive remuneration.

The purpose of these requirements is to ensure that clients are aware of the different circumstances that might arise during a transaction, understand what might be payable in each circumstance, and understand why and how the amounts might change.

Agreement with a seller client

It should be clear to the seller client what they are paying for the services and representation they will receive from the brokerage. The amount payable, if any, to compensate the buyer for their brokerage fees should not be expressed as a portion of the amount payable to the seller's brokerage for the services the seller client is receiving.

There are two common scenarios to consider in the agreement with a seller client:

1. **when the buyer is a client of a different brokerage or different designated representative**

The agreement should state the amount the seller client will be required to pay to the brokerage for the services the client will receive from the brokerage **and separately** the amount, if any, the client will offer to pay to compensate a buyer for the buyer's brokerage fees.

2. **when the buyer is a client of the same brokerage or the same designated representative (multiple representation)**

The agreement should state the amount the seller client will be required to pay the brokerage for the services the client will receive from the brokerage if they consent to multiple representation and

separately the amount, if any, the client agrees to pay the brokerage to be applied towards the buyer's brokerage fees.

Agreements with a buyer client

An agreement with a buyer client should clearly indicate the amount payable for the services and representation they will receive and how that amount might change if a seller is offering to pay an amount to cover all or a portion of the buyer's brokerage fees.

There are three common scenarios to consider in the agreement with a buyer client:

1. **when the seller is a client of a different brokerage or different designated representative**

The agreement should state the amount the buyer client will be required to pay the brokerage for the services they will receive from the brokerage.

2. **when the seller is a client of the same brokerage or designated representative (multiple representation)**

The agreement should state the amount the buyer client will be required to pay to the brokerage if the client consents to the brokerage providing services to both the buyer client and seller client in the trade.

3. **when another buyer in the same trade is a client of the same brokerage or designated representative (multiple representation)**

The agreement should state the amount the buyer client will be required to pay to the brokerage if the client consents to the brokerage providing services to more than one buyer in the trade.

METHOD TO BE USED FOR PAYING ANY REMUNERATION

The agreement should be clear about the method that will be used to pay the remuneration owing to the brokerage. For example, it may require a seller client to sign a direction authorizing the payment to be disbursed by their lawyer handling the real estate transaction or might prohibit payment by credit card.

DESCRIPTION OF THE SERVICES

The agreement must include a complete description of the services to be provided to the client.

To avoid any misunderstanding and ensure the client's expectations are met, it's important to discuss the services the brokerage can provide and the services the client needs or expects to receive. Prospective clients may assume that certain services will be provided or may not understand that they can choose to receive only certain services.

Once agreed to, the services should be clearly documented, in a comprehensible manner, in the agreement, or in a schedule to the agreement.

In the case of a designated representation agreement, the agreement should clearly identify the services to be provided by the designated representative(s) under the agreement.

TERMINATION PROVISIONS

It is expected that agreements will include termination provisions that clearly identify what will happen if the brokerage proposes to provide services to more than one client in the transaction (multiple representation), and a client declines to consent to the multiple representation. The termination provisions should be clear about what happens to the representation agreement.

For example, in the case of a designated representation agreement, a termination clause might provide that an agreement terminates completely if a client declines to consent to multiple representation, or it might provide for the client to be referred to another designated representative of the brokerage for the specific transaction, but otherwise remain subject to the terms of the agreement with the brokerage.

Brokerages should consider other circumstances that might require termination of the agreement, including circumstances in which the brokerage might be permitted to terminate the agreement.

Any termination clauses should also address the financial implications that might apply in each circumstance, including its affect on any holdover period.

Other content of representation agreements

SCOPE OF THE AGREEMENT

The scope of the agreement should be clear. If dealing with a prospective seller client, the agreement must clearly identify the property in question.

When dealing with a prospective buyer client, the agreement should, for example, identify whether services to be provided are in respect of a specific property, geographic area, or particular type of property. This should be discussed and clarified with the prospective buyer client, in addition to the effective and expiry dates, before they enter into an agreement.

Duties

The duties owed to the client should be reflected in the agreement. Specific duties to consider include:

- Promoting and protecting the best interests of the client
- Confidentiality
- Disclosure obligations (financial benefits, multiple representation, conflicts)
- Keeping the client advised of all significant steps taken in the course of representing them

In the case of a designated representation agreement, specific duties of the brokerage and the designated representative must be included. These include:

- The brokerage's duty to:
 - protect each client's confidential information, including ensuring that a designated representative does not disclose any confidential information of the designated representative's client to any other agent employed by the brokerage or other person, unless the disclosure is authorized by the client or required by law;
 - treat the interests of all the brokerage's clients that have entered into designated representation agreements in an objective and impartial manner;

- supervise every designated representative to ensure they fulfill their duties under the designated representation agreement; and
 - in the event that a designated representative is not able to represent a client, designate a different agent employed by the brokerage to be the designated representative for the client if the client so agrees.
- The designated representative's duty to:
 - protect the confidential information of every client represented by the designated representative, including by not disclosing a client's confidential information to any other agent employed by the same brokerage or any other person, unless the disclosure is authorized by the client or required by law.

Holdover clauses

Most agreements with both buyers and sellers include a holdover clause, which typically have financial implications for a client after the agreement has expired or terminated.

Holdover clauses are not required but often give rise to consumer complaints. Clients should know about and understand the implications of holdover clauses.

Agents should clearly communicate to the prospective client the existence of a holdover clause and its terms. Agents should also clearly explain holdover clauses to clients before the agreement is made to avoid any misunderstandings that might arise after the fact.

Related Information

Bulletin No. 2.2 Representation