

TRESA video series: Part 2 Transcript

Disclosures, Consents, Acknowledgements, and Contents of Representation Agreements

Introduction

Welcome to another video in the TRESA series.

The video series has been developed to help salespersons and brokers understand the key changes coming to the laws that regulate trading in real estate in Ontario.

This video deals with new requirements affecting disclosures, consents, and acknowledgements, and new requirements related to the content of representation agreements.

Disclosures, consents, and acknowledgements

There is a new section under TRESA regulations that applies to all disclosures, consents, and acknowledgements, other than those made to the registrar or brokerages.

The purpose of the new requirements is to promote clarity in communications. Clear communication supports informed decisions and enhances consumer protection and professionalism.

The specific provision requires all disclosures, consents, and acknowledgements to be written in plain language that is both clear and concise. I emphasize **plain language, clear and concise**.

The disclosures, consents and acknowledgments must also be presented in a way that brings the reader's attention to the information that is required to be conveyed.

In the case of disclosures, the word "disclosure" must appear **prominently**.

Remember, it is not enough to simply provide your client with a disclosure. It's important to have a discussion with your client to explain the information being disclosed, why it matters to them, and how it might affect their decisions. This is the basis of informed decision making.

The new content requirements apply to specific disclosures under TRESA and to some new disclosures introduced under TRESA as well.



While I will not speak about every disclosure requirement under TRESA, there will be material available in the TRESA Explained section of the RECO website that provides more detail.

As I review each of the disclosures, consents, and acknowledgements, keep in mind that the plain language and other requirements I have just mentioned will apply.

Multiple representation

Disclosure requirements related to multiple representation are not new. I want to take this opportunity to clarify the nature of multiple representation, as well as the disclosure requirements.

Remember that brokerages are **prohibited** from representing more than one party to a trade **unless**:

- the required disclosure is made,
- the registrant makes best efforts to obtain the client's acknowledgement that the disclosure was received, and
- each of the clients or potential clients consents to multiple representation.

It's important that registrants help their clients fully understand the implications of multiple representation, and that they are not required to consent if they don't agree.

When a brokerage engages in multiple representation, its loyalty to its clients is divided. It can no longer act in the best interests or promote and protect the best interests of each of its clients in the trade.

The brokerage can't offer advice on matters such as the amount the clients should offer or accept. The brokerage can't offer any advice to one client that might not be in the best interests of the other client.

When clients consent to multiple representation, the changes in the client relationship and restrictions on advice that can be provided in multiple representation represent significant risks.

Multiple representation disclosure

For this reason, the disclosure must include information about:

The **differences** in the duties and obligations owed to the clients, and any differences in the services the brokerage would provide, if the brokerage represented only one client in the trade as compared to if it represented more than one client in the trade.



Clients need to see the **difference** between sole representation and multiple representation to fully appreciate what multiple representation means. It is not enough to simply tell the client what the duties, obligations, and services will be in multiple representation.

The disclosure must also identify whether there is any change in the remuneration arrangements because of the multiple representation. That is to say, will they be paying the same amount to the brokerage or will the amount owed change and if so, how they will change.

Disclosure timing

The timing of the disclosure is also important.

While a representation agreement might make a client aware that multiple representation could arise, this does not represent a disclosure of the fact that it has arisen. And the client's acknowledgement that the situation might arise does not represent the client's consent to multiple representation.

As soon as a brokerage is aware that it is in multiple representation, it must make full disclosure to each of the clients involved. The brokerage can't take any further steps on behalf of any of the clients until the disclosure is made and a decision has been made whether they consent, in writing.

To make an informed choice, clients need to understand the nature of the situation they will be in. Is the brokerage proposing to represent the seller and the buyer in the same trade? Is the brokerage proposing to represent multiple buyers in the same trade? Is the brokerage proposing to represent the seller and multiple buyers in the same trade?

A client might choose to consent to some of these situations, but not to others. It might depend whether they are the seller or a buyer for example. The details and circumstances matter.

If this changes, for example if the seller and buyer client consent to multiple representation and the brokerage subsequently finds itself with another buyer client interested in its seller client's property, all of the clients will need to consent to that situation. Again, they might consent if there is the seller and only one buyer, but not if there are multiple buyer clients.

Clients versus prospective clients

RECO understands that brokerages often find themselves with more than one client in respect of a specific trade. For example:



- One or more of its buyer clients express an interest in a property listed by the brokerage, or
- More than one of its buyer clients express an interest in the same property listed by another brokerage.

Let's talk about the difference between those situations, involving existing clients, and situations involving prospective clients.

A brokerage **knowingly** entering a client relationship that results in multiple representation assumes an additional risk.

Even if proper disclosures are made and the necessary consents are obtained, the initial client might later consider the brokerage's actions to have been in conflict with its duty of undivided loyalty and its duty to act in their best interests.

Taking on a client, when the brokerage knows or ought to know that it will result in a multiple representation situation, is not in the best interests of the client.

Multiple Representation (when the brokerage is representing a seller and one or more buyers)

Finally, there is an additional disclosure requirement that applies when a brokerage is representing a seller and one or more buyers in the same trade. In this situation, the brokerage must also disclose this fact to every other buyer who makes a written offer – **as soon as possible** after receiving a written offer – and **before** any offer is accepted.

Registrants must make best efforts to obtain a written acknowledgement that the disclosure was received.

Conflicts of interest

Under the new Code of Ethics regulation, which we discuss in more detail in another video, there is a new disclosure requirement related to conflicts of interest.

Registrants are **prohibited** from providing services to a client, or continuing to provide services to a client, where the interests of the registrant conflict or may conflict with the interests of the client **unless** certain steps are taken.

A registrant **must**:

- **disclose** to the client or prospective client any transaction or relationship that gives rise to or could reasonably be expected to give rise to a conflict of interest,



- **advise** the client or prospective client to seek independent professional advice with respect to the disclosure made about the conflict or potential conflict,
- **take all reasonable steps** to ensure that the client or prospective client has demonstrated a reasonable understanding of the conflict or potential conflict of interest, and
- **obtain consent** in writing from the client or prospective client to the provision of the registrant's services despite the conflict or potential conflict of interest.

One question we've been asked is how a registrant can ensure a client has demonstrated a reasonable understanding of the conflict or potential conflict.

First, confirm whether they've sought the independent professional advice that was recommended. While they aren't required to do so, seeking independent advice suggests an appreciation of the significance of the conflict or potential conflict.

You might also consider asking the client to explain the conflict to you in their own words, as they understand it. If the client is able to do so, this supports a conclusion that they understand the conflict.

Direct or indirect financial benefit

Financial benefits are often considered a conflict or potential conflict of interest.

Under TRESA, registrants are still required to disclose any direct or indirect financial benefit that they, or a person related to them, might receive from another person in connection with services they provide to a client.

The disclosure must be made **as soon as possible** after a registrant knows or ought to know of the financial benefit. The disclosure obligation applies where there is **a possibility** of a financial benefit being provided – not only to financial benefits that are received.

An example of a direct benefit might be the payment of a referral fee from a third party, such as a home inspection company, to the registrant or to a person related to the registrant.

Remember, a related person refers to familial relationships such as a spouse or child, and to relationships with other legal entities such as a personal real estate corporation or a business owned by a registrant.

An example of an indirect benefit might be an offer from the home inspection company to waive any fees on a home inspection done for a property that the registrant's child is interested in purchasing.



The obligation for written disclosure applies regardless of what form the financial benefit takes. It might be cash, a gift, or another type of compensation, such as making a payment to a third party for the registrant or offering a free service to the registrant.

Common examples of financial benefits that must be disclosed include:

- Remuneration the brokerage is collecting under an agreement with another person, other than the client, in respect of the same trade.
- Referral fees paid by property inspectors, mortgage lenders, lawyers, or appraisers.
- Payments from third parties who are providing incidental services, such as a moving company, home stager, or contractor.

There is no requirement for consent. What matters is that the client is aware of the financial benefit the registrant or a person related to registrant might receive, so they can effectively assess the advice.

The disclosure obligation is about full disclosure and transparency. Clients should know what the benefit might be, including its value, and what the relationship is between the person providing the financial benefit to the registrant or a person related to the registrant.

The specific information to be disclosed includes:

- the value of the benefit,
- details on who will receive the benefit,
- the relationship between the registrant and the person providing the benefit, and
- the relationship between the registrant and a related person when the related person will receive the benefit.

Materials facts

Registrants are still required to disclose all material facts relating to the acquisition or disposition of real estate, to their client, as soon as possible.

There is a **new** obligation for registrants to **advise** their client to consider whether the material facts affect their decision to acquire or dispose of the property.

This advice would be provided with the disclosure of the material facts, so that an acknowledgement that the disclosure was made, would also apply to the client having been advised to consider the facts when deciding whether to acquire or dispose of the property in question.



Facts a seller is legally obligated to disclose

Another new section explicitly deals with facts a seller is legally obligated to disclose. The new section serves two purposes.

First, **if the registrant knows** of a fact that the seller is legally obligated to disclose, the section requires that they must disclose that fact to every potential buyer.

Second, it serves as a reminder to explain to seller clients, as part of the discussion about the property, their legal obligation to disclose certain information to buyers. And also make it clear to a seller that they cannot ask the registrant to withhold that information from buyers.

If a seller asks you to withhold this information from potential buyers, you must refuse and explain why. And if the seller insists, you should refuse to represent them.

Property information statement

If a registrant has a seller as a client and the seller has prepared a written statement about the property that is intended to provide information to buyers about the real estate, the registrant must disclose the existence of the written statement to every buyer who expresses an interest in the real estate.

If a buyer asks for a copy of the statement, the registrant must provide it as soon as possible after the request is made.

To be clear, this applies if the seller prepared the statement with the intent that it be shared with buyers. This would apply whether the disclosure statement was prepared with or without the real estate agent's assistance. The requirement does not apply, however, to information a seller shares with their registrant to assist the registrant to sell the property but was not intended to be shared with potential buyers.

The seller's intention should be clearly documented, to avoid any misunderstandings.

Summary: Disclosures, consents, and acknowledgements

This video has highlighted aspects of some key disclosure, consent, and acknowledgement requirements under TRESA. New and revised Bulletins RECO is preparing will provide additional information.

Registrants are reminded that the objective of the enhanced disclosure, consent and acknowledgement requirements is to promote clear and timely communication of information, to support clients in make informed decisions.



It's also about professionalism. That is, registrants providing the information a client needs, in a way that brings the information to the client's attention, and in a way that the client can understand.

Next, we'll cover the required content of representation agreements.

Contents of representation agreements

As with the disclosure requirements we just reviewed, representation agreements must clearly, comprehensibly and prominently, set out specific required content.

Much of the required content is currently required. For example:

- The date the agreement takes effect and the date the agreement expires.
- The services that will be provided under the agreement.
- The method for determining the amount payable to the brokerage, and in the case of the seller the amount payable to any other brokerage.
- The method to be used for paying the brokerage.

New content and form requirements are as follows:

- The expiry date must be displayed prominently on the first page of the agreement and must be initialled by the client. The information must appear, regardless of the length of the agreement. This now applies even if the agreement is for a period of six months or less, or even just a few days.
- Terms related to the termination of the agreement, if any, must be included. Brokerages should consider termination provisions related to multiple representation and what happens if their client refuses.
- The terms should also include the brokerage's termination rights, if they want the ability to terminate an agreement.
- The agreement must identify circumstances in which the remuneration amounts might change. For each circumstance, an explanation of how the amount might change and an indication of whether one or more brokerages might receive remuneration.

With respect to the changes dealing with remuneration, the purpose of the changes is to make it clear to clients what they are responsible for paying in different circumstances.

Representation agreements are currently structured in a way that commits a client to paying a certain amount to the brokerage in exchange for the services being provided. In



the case of some seller representation agreements, they often identify the amount of money they will pay the buyer's brokerage under specific circumstances.

Additional information and clarity with respect to payment provisions is also required under TRESA.

Let's use the seller client as an example and consider what information should be in the representation agreement.

- The agreement is to set out the amount the seller is required to pay to their brokerage for services being provided to them. This should not include an amount that might be payable to the brokerage for the purpose of paying another brokerage – it should stand alone.
- The agreement is to set out the amount the seller is required to pay the brokerage representing the buyer, if anything. The money is being paid by the seller, but conveyed through the seller's brokerage.

It's not for the seller's brokerage to decide how much it will pay to the buyer's brokerage. To be clear, this should be expressed as an additional amount a seller is agreeing to pay, if the buyer is represented by a different brokerage, rather than a portion of a total amount they are obligated to pay their own brokerage.

- The agreement is to set out the amount the seller is required to pay their brokerage, if their brokerage also represents the buyer in the transaction. The agreement should be clear on what the seller is required to pay to the brokerage in a multiple representation situation.
- Finally, the agreement is to set out the amount the seller is required to pay their brokerage, if the buyer is a self-represented party. This might be the same amount the seller is required to pay for being represented by the brokerage, but if not, it should be clear about how and why any additional amount is payable.

The objective is to have clear disclosure at the outset of the client relationship. Explaining the different situations and how they might impact how much the seller client will have to pay under the representation agreement supports a client's understanding of their financial obligations.

Summary

In this video, we covered:

- Disclosures, consents, and acknowledgements required under TRESA, and
- The content of representation agreements.



We encourage you to view other videos that cover:

- The elimination of customer relationships,
- Changes to how client and representation agreement are defined,
- Rules related to interactions with self-represented parties,
- The mandatory *RECO Information Guide*,
- The mandatory *RECO Information and Disclosure to Self-Represented Party Form*,
- The new Code of Ethics,
- Changes to the Discipline Committee's powers and scope of authority, and
- Other key changes including the disclosure of the content of competing offers.

The videos in this series, bulletins, and other related information are available on RECO's website in the TRESA Explained section.

Thank you for watching.