

## TRESA video series: Part 3 Transcript

### **Content of competing offers, access to real estate, new Code of Ethics regulation, and changes affecting brokerages**

#### **Welcome**

Welcome to the TRESA video 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.

#### **Overview**

This video deals with:

- Sharing the content of competing offers,
- Access to real estate,
- The Discipline Committee under TRESA,
- The new Code of Ethics regulation, and
- Changes affecting brokerages.

#### **Content of competing offers**

A change most of you will have heard about relates to sharing the content of competing offers.

Though the change permits a registrant to share the contents of offers under specific circumstances, this should not be confused with an “open offer process”.

What it does do is remove the prohibition on sharing the content of offers, allowing registrants, with the seller’s written direction, to share the content of offers with every person making one of the offers.

This is not unique to Ontario. Most jurisdictions allow the seller to determine whether they will share the content of offers.

A seller may direct that all of the content or only parts of the content of offers be shared.



However, registrants are prohibited from sharing the personal information of the person making the offer or any information that would identify the person making the offer.

Registrants must follow the instructions of their seller client, including any change in the instructions.

### **Content of offers (seller's rep)**

For example, a seller client might instruct their registrant to share the content of offers and, a few days later, change their mind and instruct their registrant not to share the information. It's also possible a seller might instruct their registrant not to share the content of the offers and change their mind once the offers have been received.

Registrants representing a seller client should advise the seller about the benefits, risks, and impact of changing their minds.

There are no rules regarding how or when a seller's decision to share the content is communicated to potential buyers who might submit an offer. There is also no requirement for advance notice as the seller is under no obligation to provide instructions prior to receiving offers. As I mentioned, the seller could change their mind at any point.

### **Content of offers (buyer's rep)**

For these reasons, a registrant representing a buyer client should advise their client that a seller may or may not decide to share the substance of offers submitted before their client makes an offer.

They should also advise their client that a seller is free to decide to share or not share at any point in the process.

If a buyer client doesn't want to participate in a process where the content of offers might be shared, the registrant might recommend including a clause in the offer addressing this.

Registrants are still required to communicate the number of competing offers to every person making one of the competing offers.

### **Access to real estate**

A new provision in the legislation prohibits registrants from providing any person with access to real estate unless a registrant is present with the person.

Though this has always been an obligation, it has now been specifically included in the law.



Registrants are being entrusted with what is to many clients, their most valuable asset. Registrants are expected to exercise care, both when granting access and when they are granted access to a property.

Clients should understand and agree to how and when access will be granted to their property and who will be in attendance.

Some clients may prefer that their registrant be present to safeguard their property while others have access, even if another registrant might be present. In fact, a client might reasonably assume that you will be present at all showings of their property.

Remember, clients are entrusting you to look after their interests and their property. The most effective way to do that is to be there when others are accessing the property.

Confirming your client's preference in advance will help to avoid any misunderstandings.

## **Lockboxes**

While password protected lockboxes may facilitate access to properties, registrants need to exercise care when providing the code to other registrants, including being clear about any terms that must be followed when accessing the property.

For example, the lockbox password should only be provided on the condition that the registrant receiving the password remains present with their client at all times while their client is in the home, and, on the condition that the password will not be provided to any other person.

Access to a property without a registrant present must **never** be provided without the written consent of the owner of the property. There are **significant risks** associated with unaccompanied access and the client should be aware of this before they consent. To be very clear, written consent must be obtained for **each instance** of unaccompanied access.

## **New Code of Ethics**

Let's talk about the new Code of Ethics regulation. Most of the provisions of the Code of Ethics under REBBA are moved to other regulations. Some are simply moved to another regulation without changes. Some were moved and amended.

The new Code of Ethics regulation focuses on what are more clearly ethical obligations.

Before we discuss the new Code, there are changes to the Discipline and Appeals Committees that provide some additional context.



## **Discipline Committee under TRESA**

The Discipline Committee continues under TRESA, but the Appeals Committee does not. Appeals of Discipline Committee decisions will be to the Licence Appeal Tribunal. The Licence Appeal Tribunal already hears appeals of proposals to revoke, refuse or suspend registrations under REBBA and it will continue to hear such matters under TRESA.

The Discipline Committee under TRESA has the authority to deal with allegations of breaches of the legislation, not just the Code of Ethics. This means the Registrar can refer a broader range of matters to the Discipline Committee, including matters involving provisions of the Code of Ethics regulation under REBBA that are moved to other regulations.

The Discipline Committee also has new powers. Under TRESA, the Discipline Committee has the authority to suspend, revoke, or apply conditions to a registration if it determines that it is the most appropriate course of action.

## **Transition**

It's important to note that there will be a transition period.

Alleged misconduct that occurred prior to Phase 2 changes taking effect, will be addressed under REBBA as it read before that date.

The new rules will apply to misconduct that occurs on or after the effective date.

With this in mind, let's look at the new Code of Ethics in more detail.

## **Section 1: Integrity, honesty, good faith, etc.**

Section 1 of the new Code is familiar. It requires that, in carrying on business, a registrant shall act with courtesy, honesty, good faith and integrity in relation to every person the registrant deals with.

## **Section 2: Unprofessional conduct, etc.**

Section 2 of the new Code deals with unprofessional conduct. It's expanded to address conduct that would reasonably be regarded as:

- being disgraceful, dishonourable, unprofessional, or unbecoming a registrant; or
- likely to bring the sector into disrepute or to undermine public confidence in the regulation of registrants under the Act.



We often talk about professionalism. This provision is about protecting and enhancing the reputation of the profession and the regulation of it.

### **Section 3: No counselling contraventions**

The concept in Section 3 is new. It explicitly prohibits counseling, advising, or knowingly assisting a person to contravene the Act, the regulations or any other law that is applicable to a trade in real estate or that is relevant to carrying on a registrant's business.

### **Section 4: Fraud**

Section 4 addresses fraudulent behaviour, which is not new, but the reference to fraud is now separated from errors, misrepresentations, and unethical practices. Registrants must not engage in or be a party to fraud.

### **Section 5: Misrepresentations, etc.**

The prohibition of misrepresentation in Section 5 is not new. Registrants are required to make best efforts to ensure that any representations are accurate and are not misleading **and** must not engage in or be a party to misrepresentation or any unethical practice.

### **Section 6: No discrimination, etc.**

Section 6 is a new provision that prohibits discrimination. Registrants are expected to treat every person in a manner that would comply with the Human Rights Code.

### **Section 7: Intimidation, coercion, etc.**

Section 7 continues requirements in the REBBA Code of Ethics, prohibiting abuse and harassment, and broadens it to prohibit conduct that is intimidating, coercive, or would be considered undue pressure.

### **Section 8: Best interests**

Section 8 deals with best interests. Registrants are still required to promote and protect the best interests of their clients.

There is also a new requirement that applies if a registrant believes that their client's ability to understand information or make decisions relevant to a trade in real estate may be impaired. In that case, registrants are required to make reasonable efforts to ensure that the client understands the information and appreciates the reasonably foreseeable consequences of the decision.



This might require obtaining appropriate support for a client, such as a translator if language is a barrier. It might involve suggesting they speak to their lawyer, another professional, or a family member.

It might also involve having a client explain to you, in their own words, their understanding of the information you have shared and how it might impact a decision they make.

## **Section 9: Conscientious and competent service, etc.**

Section 9 will be familiar. In carrying on business, a registrant must:

- provide conscientious, courteous and responsive service to clients and demonstrate reasonable knowledge, skill, judgment and competence in providing such service; and
- demonstrate reasonable knowledge, skill, judgment and competence in providing opinions, advice, assistance or information to any person.

## **Section 10: Dealings with self-represented parties**

Section 10 is new. It addresses dealing with self-represented parties, covered in the first video in this series. As a reminder, registrants must not, in respect of a trade:

- provide services, opinions, or advice to a self-represented party; or
- encourage a self-represented party to rely on the registrant's knowledge, skill, or judgment.

If you haven't watched the video in this series that deals with the elimination of customer relationships, changes to client relationships, and self-represented parties, I encourage you to take the time to watch it.

## **Section 11: Services from others**

Section 11 relates to "services from others".

Registrants are still required to advise a person to obtain services from another person if they are not able to provide the services with reasonable knowledge, skill, judgment and competence or they are not authorized by law to provide the services.

In that situation, registrants are still prohibited from discouraging a person from seeking the services of another person.



## Section 12: Confidentiality

Section 12 is new and addresses confidentiality. Except as is otherwise authorized or required by law, a registrant must not disclose to a third party any confidential information of a client without the client's written consent.

Confidentiality is key component of client relationships and continues after the client relationship ends.

## Section 13: Conflicts

Section 13 is new and deals with conflicts of interest. We discussed this in the context of disclosures, consents, and acknowledgements in another video in this series.

Registrants are prohibited from providing services, including representation, 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** the registrant has:

- **disclosed** the conflict or potential conflict,
- **advised** the client or prospective client to seek independent professional advice with respect to the disclosure,
- **taken 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
- **obtained consent in writing** from the client or prospective client to provide services despite the conflict or potential conflict of interest.

While section 13 deals with the disclosure of conflicts and the need to obtain the client's consent, promoting and protecting the best interests of clients includes avoiding conflicts of interest. Section 13 is intended to apply to situations that are unavoidable.

## Section 14: Dealing with clients of other registrants

Section 14 is not new, in that registrants are still required to communicate information through the registrant representing a person unless the other registrant has consented in writing to communicating directly with their client.

## Section 15: No obstruction

Section 15 of the Code, "no obstruction", is new.



Registrants are prohibited from obstructing or attempting to obstruct the administration or attempted administration of the legislation.

This includes not obstructing or attempting to obstruct a person from making a complaint to RECO.

It also includes not obstructing or attempting to obstruct RECO from receiving accurate or complete information in respect of a complaint.

While registrants are permitted to engage in mediation or settlement discussions, negotiations, or other attempts to resolve disputes, any agreement to resolve a dispute **must not** include a requirement to withdraw or refrain from making a complaint to RECO.

Similarly, registrants are prohibited from inducing or attempting to induce a person to withdraw a complaint about a registrant.

## **Section 16: Duty to ensure compliance**

Section 16, the duty to ensure compliance, is not new.

Brokerages are still required to ensure that every salesperson and broker the brokerage employs carries out their duties in compliance with the Code. And the broker of record must ensure that the brokerage complies with the Code.

That's a summary of the content of the new Code. As I mentioned, many of the provisions under the REBBA Code of Ethics are moved to other regulations. This means the obligations, as they were or they have been amended, continue to apply.

## **Changes affecting brokerages**

There are also some changes that affect brokerages.

### **Unclaimed trust funds**

All unclaimed trust funds, including trust funds held on behalf of a person who cannot be located, are to be submitted to RECO after two years.

### **Notification of financial circumstances**

Under TRESA, brokerages are required to promptly notify the Registrar, in writing, if any of the following circumstances occur:

- The brokerage's liabilities exceed the realizable value of its assets, or the brokerage is unable to pay its liabilities as they become due.





- An insolvency proceeding is commenced by or against the brokerage or the brokerage is aware that an insolvency proceeding is imminent.
- A court order or judgment is made against the brokerage in relation to:
  - trading in real estate, or
  - misappropriation, fraud or breach of trust.

## **Shortfall and missing property**

Brokerages are now required to notify RECO of any instances of shortfalls in the trust account and any missing property held in trust.

RECO is working on establishing a process for this that will minimize the burden on brokerages reporting.

## **Additional records**

Under TRESA, brokerages must make records that are reasonably required for the conduct of the brokerage's business of trading in real estate, in addition to records explicitly required to be made under the legislation. This is simply good business practice.

## **Information to RECO**

RECO will have the authority to request information from registrants or a group of registrants for purposes related to the legislation. This may include a request for information about trades in real estate, if the purpose of the collection is to:

- exercise a power or duty related to the administration of the legislation
- further regulatory oversight, including assessing trends in the information that may impact compliance and enforcement activities
- further consumer education and awareness regarding the advancement of consumer protection and a fair, safe, and informed real estate market, or
- further registrant education and awareness regarding roles and responsibilities under the Act and the regulations.

For example, RECO may begin collecting information related to the number and type of transactions, details of money held in trust, and other information, to support a risk-based approach to regulation and to fulfill its regulatory oversight obligations.

This type of information might also inform policy decisions and regulatory reforms in the future.



RECO will provide brokerages with advance notice of the information it intends to collect, and the form in which it must be provided.

## **Summary**

In this video, we covered:

- Sharing the content of competing offers,
- Access to real estate,
- The new powers and scope of authority of the Discipline Committee under TRESA,
- The new Code of Ethics, and
- Changes affecting brokerages.

## **Other videos in this series**

I 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 *RECO Information Guide*,
- The *Information and Disclosure to Self-Represented Party* form,
- Disclosures, consents, and acknowledgements required under TRESA, and
- The content of representation agreements.

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.