

## Real Estate Agents: Statutory Duties



By **Brian Madigan LL.B.**

There are some basic duties that are owed by an agent to his principal. They have been part of the law of agency for thousands of years and more recently (the last 500 years) are part of the **common law**.

The **duties** owed by the agent are:

- Disclosure
- Competence
- Obedience
- Accounting
- Confidentiality
- Loyalty

In addition, there are some specific duties that have been legislated for real estate agents. They appear in both the *Real Estate and Business Brokers Act* and the regulations passed pursuant to the Act, and in particular the *Code of Ethics*.

In short order, they are:

- Exhibit Fairness, Honesty and Integrity
- Act in Best Interests of the Client
- Provide Conscientious and Competent Service
- Possess Education and Experience to Provide Opinions
- Recommend Services From Competent Third Parties

### **Fairness, Honesty**

**3. A registrant shall treat every person the registrant deals with in the course of a trade in real estate fairly, honestly and with integrity.**

A registrant means either a brokerage or the sales force (who may be registered as brokers or sales representatives). This particular duty is owed to everyone, the principal (whether client or customer), the broker, the other agent, the other party to a transaction, all advisors to any party, and any third party members of the public. Basically, there are no exclusions here.

### **Best interests**

**4. A registrant shall promote and protect the best interests of the registrant's clients.**

This is the primary duty to the principal. The agent must place the principal's interest above his own, or anyone else's.

### **Conscientious and Competent Service**

**5. A registrant shall provide conscientious service to the registrant's clients and customers and shall demonstrate reasonable knowledge, skill, judgment and competence in providing those services.**

This provision deals with the issue of how to provide the service and to whom. Here, clients and customers are treated in the same manner. The agent is to demonstrate:

- 1) reasonable knowledge,
  - 2) reasonable skill,
  - 3) reasonable judgment, and
  - 4) reasonable competence
- in providing the real estate services.

Or, it could mean:

- 1) reasonable knowledge,
  - 2) skill,
  - 3) judgment, and
  - 4) competence
- in providing the real estate services.

The issue under consideration is whether the additional word "reasonable" adds or subtracts some level of obligation in the circumstances. No matter how this adjective is to be interpreted by the Courts, knowledge, skill, judgment and competence are duties that are owed to the principal.

### **Providing opinions, etc.**

**6. (1) A registrant shall demonstrate reasonable knowledge, skill, judgment and competence in providing opinions, advice or information to any person in respect of a trade in real estate.**

**(2) Without limiting the generality of subsection (1) or section 5,**

**(a) a brokerage shall not provide an opinion or advice about the value of real estate to any person unless the opinion or advice is provided on behalf of the brokerage by a broker or salesperson who has education or experience related to the valuation of real estate; and**

**(b) a broker or salesperson shall not provide an opinion or advice**

**about the value of real estate to any person unless the broker or salesperson has education or experience related to the valuation of real estate.**

Really, this is somewhat straightforward. The brokerage is under a duty to select a competent individual, and the individual is also under to duty to ensure that he or she is competent to provide such advice.

Who is the principal? It could be “any person”, but, you will notice that it is limited to a “trade in real estate”, which is a defined term under the Act.

The subject matter of the duty is any:

- Opinion
- Advice, or
- Information

So, that would certainly cover legal advice, tax advice, accounting advice, environmental advice, fire safety advice, compliance with regulations, guidelines, covenants, building quality and condition, surveys and land descriptions etc. Actually, anything related to real estate is covered here.

More specifically, it is assumed under the Act that real estate agents will be asked about the valuation of a property. The Act goes on to provide that the agent must have either education or experience. In my view, both would be appropriate, but let’s not rock the boat here, one or the other is at least a good starting point. And, the decision about the education “or” experience requirement is a judgment call by the brokerage and the sales representative.

Nevertheless, anyone offering an opinion, advice, or information should expect (if there were a problem and they were sued) to be cross-examined concerning both their education and experience.

### **Services from others**

**8. (1) A registrant shall advise a client or customer to obtain services from another person if the registrant is not able to provide the services with reasonable knowledge, skill, judgment and competence or is not authorized by law to provide the services.**

**(2) A registrant shall not discourage a client or customer from seeking a particular kind of service if the registrant is not able to provide the service with reasonable knowledge, skill, judgment and competence or is not authorized by law to provide the service.**

Notice that this time, the principal must be either a client or a customer. Under part 1) there is a positive duty imposed to recommend the services of a third party

in two instances and they are:

- 1) circumstances in which the real estate agent is not able to provide the services due to the lack of reasonable knowledge, skill, judgment and competence, and
- 2) circumstances where it would be clearly illegal to do so. Two such examples might be expressing an opinion on title contrary to the *Solicitors Act* or expressing an opinion on the structural integrity of a building contrary to the *Engineers Act*.

In respect to this category, it is clearly a matter of judgment by somebody, either the brokerage or the sales agent. The second category is simply a legal matter. You can't practise law or engineering.

Part 2) is a rather odd provision. You might think that agents should encourage clients to seek outside assistance. It's obviously in their best interests to do so. But the provision simply states that they should not "discourage". It's phrased in the negative. Again, the relevancy of competency comes into consideration as well as the matter of transgressing the authority and proper competencies of other professional bodies. To me, this seems like an odd approach. I would have drafted the legislation to create a positive duty and have left it at that. This extra negative provision can do nothing other than weaken the intent of part 1), the positive duty.

There are other duties and obligations imposed on both brokerages and their sales forces whether they be brokers or sales representatives under the *Real Estate and Business Brokers Act*. As well, other legislation imposes other duties and obligations. All of these statutory duties are in addition to the common law obligations.

*Brian Madigan LL.B., Realtor is an author and commentator on real estate matters, Coldwell Banker Innovators Realty*  
905-796-8888  
[www.OntarioRealEstateSource.com](http://www.OntarioRealEstateSource.com)