

Brokerage Audits - Common Issues

1. Missing *Limited Dual Agency Acknowledgement* forms.

While this is not a mandatory form, **Bylaw 716** requires that a registrant who intends to accept remuneration from more than one party to a transaction make a written disclosure of this intention to all parties. They need not use the *Limited Dual Agency Acknowledgement* form, but they must disclose their intention to collect the full commission as representative of both the sellers and the buyers.

Aside from Bylaw 716 issues, making some sort of written disclosure of dual agent status is a good practice for registrants. They can be sure that all parties are aware that they are representing the buyer and the seller and have some protection in the event one of the parties later claims they were not aware of the dual agency.

2. Registrants representing builders in sales using non-compliant contracts of purchase and sale.

Bylaw 730(a) provides that the Residential Contract of Purchase and Sale (RCPS) is a mandatory form for all residential properties except new condominiums. As such, registrants representing home builders or clients who are purchasing new residential properties other than condominiums must use the Residential Contract of Purchase and Sale, even if the home builder involved in the transaction has developed its own contract of purchase and sale. If the builder wishes to use its own contract, we suggest making the builder's contract a schedule to the RCPS and indicating which of the contracts will take precedence if there is a conflict between the two.

The Condominium Property Act sets out its own requirements for valid contracts of purchase and sale, but nothing in that Act contradicts the provisions of *The Real Estate Act*, specifically the requirements in **section 58 of the Act** for valid offers to purchase. Registrants representing new condominium builders are not excused from the requirements of *The Real Estate Act* because they are using the builder's forms.

3. Single signatures where two or more are required.

The signatures of all parties to a transaction must be obtained on all documents generated in the course of that transaction. For example, failure to obtain the signatures of all owners of a property on a Seller's Brokerage Contract violates the requirement in **Bylaw 727** that a registrant obtain written authorization from the owner(s) of a property before advertising the property for sale. In the past, failure to obtain the signature of all owners on documents led to legal issues when the owners of the property who had not signed the documents refused to complete the sale of the property.

4. Obtaining copies of Powers of Attorney or other documents purporting to grant a signing authority.

When a registrant allows a person to sign on behalf of a client, the registrant should take steps to ensure that the signer has the legal authority to sign on behalf of the client. For example, if a property owner's son is signing documents on behalf of the property owner under a Power of Attorney, the registrant representing the property owner should have a copy of the Power of Attorney on file.

5. Registrants failing to complete due diligence.

While title searches are not mandatory elements of a trade in real estate, consulting the title to confirm the identity and number of registered owners and the presence of any mortgages, liens or other impediments on title at the outset of the transaction allows the registrant to avoid unpleasant surprises later on in the negotiations. The Commission does not regulate the use of FINTRAC forms, but registrants are expected to comply with all applicable legislation. Keeping copies of title searches and completed FINTRAC forms on the transaction file will show that the registrant is complying with their obligation to take all reasonable steps.

6. Correcting mistakes or making changes to the Contract of Purchase and Sale.

If a registrant wants to make a correction on a document, the error should be crossed out, the correction written above, below or beside the error and all parties to the contract should initial beside the correction. These initials prove that the parties are aware of and agree to the correction. If a change is required to a document, the best practice is to use an amendment. Registrants should never white-out or erase anything on a document.

7. Commission payable should be set out clearly on Brokerage Contracts.

The commission payable is often expressed as a series of numbers e.g. "6/4/2". While registrants know that this notation typically means "6% of the first \$100,000 of the sale price, 4% of the second \$100,000 of the sale price and 2% of the balance", this may not be as obvious to members of the public.

Other ways commission payable can be clarified include the use of a "%" or "\$" to indicate whether the commission is a percentage of the sale price or a flat fee, and a note that taxes will be added to the commission payable.

The more clearly the commission payable is expressed on the contract, the lower the likelihood of misunderstandings or clients claiming they did not understand how commission would be calculated.

8. Offers must include the name and address of buyer(s), seller(s) and brokerage(s).

Section 58 of the Act requires that an offer to purchase clearly show the names and addresses of the buyer and seller and the name, address and telephone number of the brokerage(s). While many contracts of purchase and sale (including the mandatory RCPS) have marked spaces for this information, it is frequently not filled in.

9. Civic addresses and legal land descriptions should be provided consistently.

Though civic addresses and legal land descriptions can be written out in several ways, it is important to maintain consistency in form across all paperwork relating to a transaction. For example: 123 Avenue Street NW and 12-28-15 W2. Both civic address and legal land description should be included to indicate total land entitlement.

10. The condition regarding the Property Condition Disclosure Statement incorrectly including a term.

It is not uncommon to see the following condition regarding a Property Condition Disclosure Statement (PCDS) on an offer to purchase: "Subject to the buyer receiving a satisfactory Property Condition Disclosure Statement, that will be incorporated into and form part of the contract, on or before [date]".

The portion of this condition that states that the PCDS will be "incorporated into and form part of the contract" is actually a term. As the buyer no doubt intends the representations made by the seller in the PCDS to continue to apply after the transaction is complete, this statement should not be included in a condition that must be removed before the transaction can be completed. A more appropriate way to deal with the PCDS is to write a condition requiring that the buyer be presented with a satisfactory PCDS by a specified date and a term indicating that the PCDS will be incorporated into and form part of the Contract of Purchase and Sale.

11. Legibility of documents

Documents make up the written record of the transaction maintained by the brokerage. Registrants should ensure that any handwriting on documents is legible and that the copies are not faded, blurry, crooked or cut off. It is important that the documents are legible in the event that a question, dispute or complaint arises after the fact. Illegible documents also make it difficult to complete a proper audit of the transaction, as it is nearly impossible to read the documents to establish whether or not they are compliant with legislation.

12. The best practice is to have all parties sign the Notice to Remove Conditions.

While it is not necessary for sellers to sign the Notice to Remove Conditions, having all parties to a transaction sign all relevant documents to acknowledge receipt is a best practice.