

# Brokerage Compliance Audits

## 10 Common Issues

### 1. The registrant has not obtained copies of any documents authorizing a person to sign on behalf of someone else.

There are several documents that can be used to grant a person the legal authority to sign documents on behalf of someone else. These documents include Powers of Attorney; Letters Probate or Letters of Administration with respect to estates; or simple, written statements indicating that the writer is granting a named person legal authority to sign documents on the writer's behalf. When a registrant allows a person to sign documents on behalf of a client, the registrant should take steps to ensure that the person signing actually has the legal authority to sign documents on the client's behalf. These steps include viewing a copy of the document granting the signing authority and keeping a copy of the document on the real estate file. If a registrant reviews the document and is not sure that the document permits a person to sign on the client's behalf, the registrant should consult legal counsel.

When a registrant is representing a corporation, the registrant should be obtaining copies of the Corporate Registry Profile or some other documentation confirming that the individual with which the registrant is dealing is authorized to make decisions and sign documents on behalf of the corporation.

### 2. Signatures that do not indicate if they were signed in the morning or evening.

The majority of standard forms used in real estate transactions include a space where buyers and sellers are asked to note the time the document was signed. In many cases, the documents involved in the transaction are time sensitive. For example, an offer to purchase a property is only open for acceptance until the time indicated in the offer. If the offer is not accepted within the allotted time, the offer expires and can no longer be accepted by the seller. While other documents do not include an expiry date, noting the time they were signed provides important information about the timeline of a transaction.

The forms call for the registrant or the person signing to indicate whether the time of signing was in the morning or evening, but this is not always done. It is very common to see forms that note that a party signed at 8:45, but do not indicate if it was 8:45 a.m. or 8:45 p.m.

### 3. The "6/4/2" commission notation.

Section 57(2)(d) of *The Real Estate Act* specifies that an agency agreement must show the total amount of commission, as a lump sum or as a percentage, to be paid

to the brokerage. It is important that the commission payable be expressed in a manner that complies with this requirement and that is understood by the person signing the agency agreement. While notations such as “6/4/2” are common among registrants, the meaning may not be as clear to members of the public. It is the registrant’s responsibility to ensure that the client understands how commission will be calculated and, in case there is disagreement about the commission owing, the registrant would be well-advised to make sure the contract is quite clear with respect to the calculation of commission.

Notations such as “6/4/2” are extremely common on agency agreements in some markets, but this is not a sufficiently clear statement of the commission payable.

#### 4. **A lack of witness signatures.**

Wherever it is called for by a form, the signature of a party to a trade in real estate should be witnessed by another person. A witness’ signature is intended to provide a measure of security. The witness signs his or her name to indicate that he or she was present to observe the party sign the document. This provides independent confirmation that the party named in the document was the one to sign it.

If there are two buyers signing an offer, the witness to the buyers’ signatures should sign the offer twice, as witness to each buyer’s signature, even if the witness was present while the buyers signed the document at the same time.

Section 57 and 58 of the *Act* specifically state that agency agreements, offers, counter offers and amendments must be signed “in the presence of a witness”. This means that a person who signs these documents as a witness must be physically present at the time the document is signed by the buyer or seller. The same holds true when a client is signing documents electronically. The person signing as a witness must be physically present with the client when he or she affixes an electronic signature to the document.

Regardless of the capabilities of electronic signature software, sections 57 and 58 of the *Act* explicitly require that certain documents be executed in the presence of a witness.

#### 5. **An improperly worded condition regarding the Property Condition Disclosure Statement.**

It is not uncommon to see the following condition regarding a Property Condition Disclosure Statement 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.

## **6. Offers must include the name and address of the buyers and sellers.**

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).

Offers to purchase that do not include an address for the buyer are not compliant with s. 58 of the *Act*.

## **7. Handwritten additions to typed documents are not initialled by the parties.**

When handwritten material is added to a typed document, all parties should initial the additions to make it clear that they are aware of, and agree to, the handwritten items.

The purpose of having the parties initial handwritten additions is to make it clear that the parties are aware of, and consent to, the inclusion of the handwritten items in the contract of purchase and sale. Without the parties’ initials, it could appear that some material was added to the document without the parties’ knowledge after the document was signed.

## **8. The standard FINTRAC forms were not provided.**

The federal government has mandated that real estate agents must comply with the provisions of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*. The legislation is enforced by the Financial Transactions and Reports Analysis Centre of Canada (“FINTRAC”). A registrant’s duties under the *Act* include reporting suspicious transactions and client identification. Failure to comply with the FINTRAC requirements can result in administrative monetary penalties or criminal penalties.

The Commission does not regulate the completion of FINTRAC forms, but the absence of these forms is raised in the compliance audit process to ensure brokerages are aware of their obligations under the federal legislation.

## **9. The contracts of purchase and sale include terms and conditions that are not clear or that contain errors or contradictory information.**

It is important to remember that a Contract of Purchase and Sale is a contract. All of

the terms and conditions of the agreement and the rights and obligations of the parties are contained in this document. If a contract is clear and comprehensible to the parties, it is less likely that there will be any future disputes about what each party is entitled to and obligated to do pursuant to the agreement. As the individuals responsible for drafting the Contract of Purchase and Sale, the responsibility for ensuring that the written agreement accurately and coherently sets out the deal the parties intended to make lies with the registrants involved in the transaction.

It is not uncommon to find two terms in different places in the contract of purchase and sale that contradict one another. In other cases, the terms or conditions do not include sufficient detail to clarify the rights and obligations of each of the parties to the contract. For example, a term allowing the seller to leave certain items at a property after possession should be clear as to what those items are and where and how they are to be stored and should include a deadline by which the seller is expected to remove the items.

Sometimes the drafting of an item in a contract of purchase and sale does not make it sufficiently clear whether the item is to be considered a term or a condition. For example, consider the following sentence: “The seller is to provide a completed Property Condition Disclosure Statement to the buyer on or before January 8, 2020.” Is this item a term or a condition? Sometimes, the placement of the item in the contract can provide a clue as to how it should be interpreted. If the item is in paragraph 2.2(b) of the Residential Contract of Purchase and Sale with the other conditions it may be more likely that it is intended to be a condition; if it is included on an attached Schedule “A”, it may be more likely that it was intended as a term.

However, the reliability of this method is jeopardized by the fact that it is extremely common for registrants to include terms in paragraph 2.2(b) of the Residential Contract of Purchase and Sale with the conditions rather than adding another page to the contract by putting the term on a schedule.

#### **10. Unless the buyer directs otherwise, all reports or inspections selected on the Ancillary Services form should be included as terms or conditions on the offer.**

Buyers are expected to carry out their own due diligence before purchasing a property. Typically, buyers will hire professionals to conduct an inspection of a property or obtain copies of reports relating to a property in order to gather information about the property. The buyer’s goal is to find out if there are any issues with the property that would require repair or that would deter the buyer from purchasing the property.

The purpose of the Ancillary Services form is to make buyers aware of the inspections and reports they can request when purchasing a property. As such, it is important that the Ancillary Services form be provided to the buyer before he or she makes an offer to purchase so that the offer can be made subject to the completion or receipt of the selected inspections and reports. All services and reports selected

on the Ancillary Services form should be included as conditions on the offer to purchase unless the buyer directs otherwise.