

# Real Estate

## Continuing Professional Development

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# Ethics

**Name:**

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## Learning outcomes

At the end of this topic, you will be able to:

- explain key concepts related to ethics
- explain how ethics are applied in day to day agency work
- describe ethical considerations in disclosure situations
- explain the obligations of licensees in reporting misconduct or unsatisfactory conduct.

## Introduction

Ethics refers to 'doing what is legally and morally right'. We will be looking at ethics in terms of 'culture and conduct' and how we can be proactive in promoting good consumer outcomes.

In recent times regulators, industry bodies and consumer groups have become interested in 'culture and conduct' issues across a range of industries. Examples are the Australian Royal Commission on banking and the FMA/Reserve Bank culture and conduct review. As a result, there has been recent media and public interest in 'culture and conduct', and industries are under increased scrutiny in these areas.

'Conduct' is how people behave. Organisations have standards, systems, processes and controls to support appropriate behaviour. However, beyond these organisational guidelines and rules, individuals need to understand what conduct is expected by the industry and the public. They need to make ethical decisions to behave in a way that meets those expectations.

The key to good conduct is making sure the consumers (both clients and customers) are at the centre of decisions made and steps taken. In real estate agency work the licensee's aim should be to deliver good outcomes for clients and customers.

'Culture' is the shared behaviours, values and norms of the individuals and groups within an organisation. This culture filters down through the organisation from directors, management and partners to staff, contractors and others associated with the organisation.

The culture of an organisation affects the conduct of individuals and teams within the organisation. The culture influences how people identify, understand, discuss and act on ethical issues. The culture of an organisation is about more than just meeting legal requirements - it is also about meeting ethical (moral) requirements. The organisation needs to strike a balance between the requirement for the business to make money and meeting legal and ethical (moral) requirements.

'Culture' goes beyond organisational level. At an industry level, there is a culture. The public has a perception of what the culture of an industry should be and how individuals in that industry should behave.

**Note:** In this topic we will use the term 'client' or 'vendor' to name the person selling a property, and we will use the term 'customer' or 'buyer' to name the person buying a property.



## Questions

1. List **three** words you think a member of the public would use to describe how a real estate licensee should behave.

2. List at least **three** traits you want to be attributed to you as a real estate licensee.

3. How would you describe the culture of your company or business in a few words?

Read the following scenario and answer the questions that follow.

(**Note:** Fictional names have been used for the purpose of making the case easier to follow.)

## Case study 1

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A case against the defendant, a salesperson licensee, Sarah, was taken to the Disciplinary Tribunal. The case related to two transactions and referred to a third. The three transactions are summarised below.

### *Property A*

The CMA prepared by the listing licensee, another licensee, Dee, indicated a selling range of \$710,000 to \$730,000 for this property. Mrs Anderson purchased this property for \$715,000 from Dee.

Mrs Anderson then instructed Sarah to immediately on sell the property for a fixed commission of \$10,000. Sarah provided an estimated selling range of between \$800,000 and \$900,000. The property was on sold to Mr and Mrs Brown for \$899,000. Sarah prepared the agreement for sale and purchase and the buyer told her that a finance condition was not required as she had received pre-approval for finance.

Mrs Brown was a friend of Mrs Anderson's.

### *Property B*

Another agent had a property listed in another suburb. The CMA prepared by the listing licensee, Grant, recommended a sale price between \$745,000 and \$780,000. This property was purchased by Mr Anderson (husband of Mrs Anderson above) for \$820,000.

Sarah was instructed by Mr Anderson to on sell the property to Mr and Mrs Brown for \$1,190,000 on the same day. Sarah drew up the sale and purchase agreement and received a commission. However, she did not provide Mr Anderson with a CMA or carry out any marketing work in relation to the property as the parties had already agreed on the price. Mr and Mrs Brown made an application to a bank for finance, submitting a copy of the sale and purchase agreement to the bank. The lending manager at the bank considered the estimated selling range to be between \$691,667 and \$832,330. She approached Sarah's branch manager, expressing her concern at the variation between the sale price and the licensee's assessment of the value of the property. The buyers subsequently decided to obtain finance elsewhere.

### *Property C*

The listing licensee, Nane, had provided a CMA indicating a sale price between \$710,000 and \$730,000. Mr Anderson purchased this property for \$780,000.

Mr Anderson then instructed Sarah to on sell the property on the same day to Mr Jones (Mr Anderson's brother) for \$1.1 million. Sarah prepared the sale and purchase agreement and received a commission. Again, the licensee did not provide Mr Anderson with a CMA or carry out any marketing work in relation to the property.

The READT (disciplinary tribunal) considered there were two unusual aspects to the transactions for Property B and Property C:

- significant over market prices were obtained for the properties

- the licensee was not involved in facilitating negotiations about price and representing the vendor's interest in that regard.

They stated that the pattern of dealings involving Mr Anderson and the associated persons amounted to mortgage fraud schemes.

The licensee's defence was she did not know what mortgage fraud was. She agreed there was something "strange" about the transactions that the parties were entering. However, she could not think of any way in which her involvement in the transactions violated her obligations as a real estate licensee. The defence asserted that she was not personally involved in the apparently dishonest scheme, and the only payment received for the transaction was commission.

**Complaint number: C16991**

Date: 24 October 2018

You can read about this complaint and decision in the REA decisions database which you can find at the top of the homepage at [rea.govt.nz](http://rea.govt.nz)

**Note:** This case is currently on appeal to the High Court.



## Questions

4. What were the ethical dilemmas the licensee faced?

5. What actions should the licensee have taken in these circumstances?

## Concepts related to ethics

The law may specify what must be done, or what can't be done, and provides penalties for breaches. The Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 set **minimum standards** that licensees must observe. We will refer to these rules as the Client Care Rules. However, the law focuses on actions and outcomes rather than values, and rules can be misused.

The real estate industry has professional guidelines to promote ethical behaviour (such as those produced by REA and REINZ on various aspects of agency work), but it is not possible to develop guidelines for all situations.

Real estate agencies need to demonstrate ethical behaviour at an organisational level and encourage ethical behaviour in their licensees by:

- establishing and maintaining appropriate standards of behaviour and practice in the agency's relationships with stakeholders inside and outside the agency
- ensuring the agency, its licensees, and its support staff always demonstrate respect for the law, together with expertise, efficiency and courtesy
- ensuring licensees take part in continuing professional development.

Note: 'Stakeholders' refers to any person with an interest or concern in the business. In the real estate industry, this would include the board of directors, management, partners, staff, contractors, clients, customers, banks, insurance companies and affiliated professional bodies.

Beyond legal requirements and professional and organisational guidelines, licensees need to act in accordance with ethics (moral rules).

*Ethics are about a choice in how we behave, in terms of the moral rules of the community - both the real estate community and the wider general public community.*

Next, we'll look at various concepts that relate to ethical behaviour.

### Intent

Moral intent is the desire to act ethically when facing a decision. If a licensee understands the ethical aspects of a decision and has the knowledge to make the right choice, he or she still needs to *want* to do the right thing. In REA disciplinary decisions, the intent of a licensee is considered carefully when rulings and orders are made. For example, in a situation where information about a property was not disclosed to a customer, did the licensee intend to keep the information from the customer, or was the omission unintentional through a lack of knowledge or experience (meaning the issue is one of competence)?

*A licensee's intent in actions taken in their agency work should centre on ensuring good consumer outcomes.*



## Integrity

When a licensee acts with integrity they follow their moral or ethical principles and do the right thing consistently, even if they are not being observed. Having integrity means being true to yourself and not taking actions that discredit you. Examples of acting with integrity may include not letting someone else take the blame for something you did or keeping to your word if you promise to do something.

## Being fair

The requirement for fairness in real estate agency work is outlined in Rule 6.2 under the heading 'Standards of Professional Conduct' in the Client Care Rules.

A licensee must 'deal fairly with all parties engaged in a transaction'. This means the licensee must deal fairly with the buyer, as well as the vendor. Usually it is the vendor with whom there is a contractual arrangement through the agency agreement, so the vendor is the client. If the licensee is engaged as a 'buyer's agent' the client is the buyer and, if so, the buyer is paying the commission. However, in most cases the client is the vendor. In this case, Rule 6.2 says that the agent must deal fairly with **all parties**.

Rule 6.4 also relates to fairness, specifically in terms of providing information to parties; not misleading them, providing false information or withholding information 'that should in law or in fairness be provided' to them.

Dealing fairly with customers involves

- full disclosure of all material facts related to the property sale, excluding the client's confidential personal information (which can only be disclosed if consent is given in writing)
- not misleading a prospective customer, by doing (or not doing) something, or saying (or not saying) something, even if it would benefit their client.

Dealing fairly includes passing on information that is not required by law, but it would be unfair not to tell the customer or client.

Note that a licensee's disclosure obligation to a customer continues until settlement.

## Professionalism

Professionalism is about how you conduct yourself as you carry out agency work. It means carrying out your work in such a way that others see you as competent, reliable and respectful. This is what is expected by real estate consumers.

Being professional in the real estate industry includes

- presenting yourself professionally - in appearance and attitude
- understanding and following the fiduciary duties to your clients
- understanding and following the duty of care to customers
- being organised, disciplined, prepared and trustworthy
- responding to queries in a timely and appropriate way
- being civil, kind, ethical and responsive in business dealings
- delivering consistently high-quality work and results
- following the lawful instructions of clients

- having the education, knowledge and experience necessary to achieve the results a consumer wants -in other words being competent in your role.

In addition to these listed traits, professionalism includes the qualities expected of a competent, trained, experienced and skilled real estate professional in their particular role (for example a salesperson, branch manager or agent).

As a professional, if a licensee becomes aware of conduct that seems 'odd' or 'not right', they should speak with their supervising agent or branch manager, or another senior supervisor or manager at the agency if more appropriate.

Acting in a professional way includes how you interact with, or refer to, colleagues. An example is how you approach clients who have an agreement with another agency. You can approach another agent's client to find out the expiry date of the sole agency. **However, you must not undermine their relationship with the current listing agency, and you must not make negative comments about how the property has been listed or about the listing agent.** This behaviour could be regarded as being a breach of Rule 6.3 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012.

You may be approached by a vendor who wants to sign a sole agency agreement with you while they have an existing sole agency agreement with another agency. REA recommend you don't take on this vendor as a client until their existing agreement ends.

### Conflict of interest

A conflict of interest is a situation where a person has competing loyalties or interests and serving one could compromise the other. Rules 9.14 (not attracting more than one commission in the same transaction) and 9.15 (not engaging in activity that would or could compromise the discharge of the licensee's obligations) lay down restrictions and requirements that must be met by licensees to avoid conflict of interest.

Rule 9.14 means a licensee must not be employed by both a vendor and buyer, or lessor and lessee, who are involved in the same transaction.

Rule 9.15 means a licensee must avoid conflict of interest that can occur through involving themselves in other activities when working on a real estate transaction. For example, this could arise if the licensee provides advice in an area from which they may benefit (such as providing advice on who to use for building inspections while also having a financial interest in a building inspection company).

There is a significant conflict of interest if a licensee wants to buy property (or a business) that has been listed with their agency, because it is the licensee's responsibility under the contract of agency to achieve the best possible outcome for the client, and that includes achieving the best possible price.

If the licensee wants to buy the property themselves, they will not want to pay a high price, so the solution is to:

- disclose the situation to the client, and
- establish the market price.

In most cases both parties will be satisfied with agreeing to the market price. The vendor, realistically, can only expect a market price, and as the buyer, the licensee should expect to pay market price. Sections 134 and 135 of the Act ensure that this happens.



## Key points

- The law and best practice guidelines are not enough on their own to ensure good customer outcomes. Licensees also need to act in an ethical way (according to moral rules) as required by the industry and the public.
- Behaving ethically involves licensees making choices in how they behave.
- Every action has intent. The intent in any action by a licensee must be to ensure good outcomes for consumers (clients and customers).
- Behaving with integrity means licensees follow their moral and ethical principles consistently and do not act in ways that discredit themselves.
- Being fair means 'doing the right thing' by people, e.g.
  - telling them everything you should tell them, and
  - not hiding information that could be important to them, and
  - not misleading them in any way, and
  - giving them time to make decisions.
- Licensees need to be fair to both clients and customers in their real estate agency work.
- Behaving in a professional way means displaying the traits that the public and the industry expect of a real estate professional.
- A conflict of interest is a situation where a licensee has conflicting interests and loyalties. If a licensee finds themselves in this situation it must be disclosed to all parties as soon as the licensee becomes aware of it.

Read the following scenario and answer the questions that follow.

## Case study 2

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A case against a licensed agent was taken first to a Complaints Assessment Committee and then to the Disciplinary Tribunal under appeal.

The licensed agent (the 'licensee') approached the two directors of the company that owned the property the case relates to. The licensee offered to list the property for lease. Early in the discussions, the licensee indicated his interest in leasing the property (through his company). At this time the directors raised a concern that there could be a potential conflict of interest. However, both directors signed an agreement to lease with the licensee as the lessee.

The licensee learned that the directors had struggled to find a tenant for the property for some time. He negotiated a lease for his own company. This included two months free rent and early access to the property. The licensee advised the directors that they did not need to get lawyers involved, and that lawyers would be an unnecessary expense.

The licensee intended to use the property as the premises for a property management business. However, it was unclear whether the body corporate for the building in which the property was situated would permit the property to be used for that function. The agreement to lease did not include any clause that made the agreement conditional on the property being able to be used as the licensee intended.

When issues with the use of the property arose, the licensee claimed he would cancel the lease, alleging that the issues with the permitted use of the property had not been disclosed to him. There was no clause in the lease to deal with the possibility that the lessee (the licensee) would not be able to operate a property management business from the property.

In the course of the Complaints Assessment Committee hearing the licensee explained that he did not obtain a registered valuation (as required when leasing a property listed by his own agency) because one of the directors was a "seasoned investor". He also explained that prior to any listing verbally being agreed between the parties the agency was changed from a sole to a general agency. He said he was not sure the "disclosure to seller's provision" applied in the circumstances.

The Complaints Assessment Committee found that the licensee had acted where he was in a clear conflict of interest.

They found he

- was in breach of Rule 10.6, and
- failed to provide an accurate copy of the agency agreement to the directors as soon as practicable after it was signed, as required under Section 132 of the Real Estate Agents Act 2008, and
- failed to comply with Sections 134 and 135 of the Act, and
- was in breach of rules 5.1, 6.1 and 9.15.

The committee's findings were upheld by the Disciplinary Tribunal.

**Complaint number: C09716**

Date: 26 April 2017

You can read about this complaint and decision in the REA decisions database which you can find at the top of the homepage at [rea.govt.nz](http://rea.govt.nz)



### Questions

6. Why was there a conflict of interest in this situation?

7. Explain two negative effects on the clients as a result of the conflict of interest.

8. When considering this case, the Committee had to consider the licensee’s intent, as this impacts on their decision and any orders made.

If you were in the Committee’s position, would you have considered the licensee’s actions deliberate (actions with intent) or unintentional?

Give a reason or reasons for your answer.

## Ethics in day to day agency work

Ethics are an integral part of a licensee’s day to day agency work. They relate to their dealings with those external to the agency (for example the public, clients, customers and professionals such as lawyers or accountants) and those inside the agency.

Some potential clients are researching licensees online by reading social media and internet references before engaging their agency and this licensee to undertake any real estate agency work for them.

If you have a personal social media page (such as Facebook), what this page says about you will reflect on your personal brand, your agency brand, and the industry.

Research by Facebook reveals that the average number of “friends” per Facebook user is about 130, although the number of active friends ranges between 50 and 150. If a consumer posts details of a negative experience with a real estate licensee on their own Facebook page, and they have 120 active users, this post would potentially be seen by 120 people. And some of those 120 contacts would probably share the post with others. Here is a table showing the potential speed of connections.

Potential client	Potential client spreads to their contacts	And they spread to their contacts...	And they spread to their contacts...
1 person	120 people	120 x 120 =14,400 people	14,400 x 120 = 1,728,000 people = 1.7 million people

From the table above you can see that if one potential client shares a negative comment to 120 contacts, this comment can be quickly distributed to many people.

Your reputation is your personal brand. The reputation you build will affect how many referrals you receive, and the results of your marketing campaigns.



## Tip

Search social media posts and the internet for information on yourself, as if you were a prospective client. What do you think you might find? What did you find?

It is important to remember that your conduct will impact on the reputation of your colleagues and the company you are engaged by. Vendors will often follow a licensee or an agency on social media, so the reputation of the company brand is your business. You have an obligation to others to behave in an ethical manner.

The experience of the buyer is also important. When they are looking to buy or sell in the future, they are likely to take into consideration their experience as a buyer in previous transactions. Buyers with whom you've developed good relationships may well become clients in the future, and your best source of referrals.

You must be mindful of how you conduct yourself in your day to day agency work. Behaviour that would have a negative impact could include disclosing private information to a person not permitted to receive it (for example a friend) or applying pressure on a buyer by implying there is a multi-offer situation when there isn't.

Ethical behaviour also relates to your dealings with your own colleagues. The way you conduct yourself in your dealings with colleagues contributes to your reputational brand. The relationships you build both with contacts inside your agency and with those you deal with externally are crucial to how you and your agency are perceived.

For example, when you are introducing buyers to properties that were listed by someone else in your office, ask whether the person is dealing with any other licensee. Your agency may have a specific policy around situations such as this.

Multiple offer situations are also situations where ethical considerations come into play. If your colleagues have potential buyers for the property that you have listed, you must be fair to them and their buyers.



## Key points

- A licensee's conduct affects their personal brand, their company's brand and how the industry is perceived.
- How individual licensees are portrayed in social media and the internet will have an impact on their personal brand and their company's brand.
- Relationships built with contacts both inside and outside a licensee's agency impact on the licensee's personal brand and the company brand.
- A licensee's conduct impacts on future business for them personally, and future business for their company.

Read the following scenario and answer the questions about the situation.

(**Note:** Fictional names have been used for the purpose of making the case easier to follow.)

### Case study 3

A case against a licensee, Peter, was taken to the Disciplinary Tribunal. The case related to the sale of a property in a deadline sale process.

Complainants 1 and 2 entered into an agency agreement with the agency. The method of sale was a deadline private treaty sale. The appraisal for the property states an appraised price of \$1.1 million. The agency agreement does not state a price but has a website search price range of \$900,000 to \$1.2 million.

The Complainants' understanding in choosing a deadline sale marketing strategy was that there would be no price disclosure, and no upper limit would be set. They understood that the agreed web site search range did not limit a sale price and would not be discussed.

The Complainants said they set their expectations at \$1.2 million and above and it was made very clear to the Licensee 1 that they would not accept anywhere near \$1.1 million. They did not give the licensee permission to disclose a price or price range to anyone.

In the days before the deadline sale closing date, another licensee working with a buyer, Gavin, asked Peter for a 'rough ballpark' lowest to highest price. Peter gave a sale range of \$1.1 million to \$1.2 million, which implied that the Complainants would accept a sale of \$1.1 million.



The Committee found that Peter had breached Rules 6.1, 6.2 and 9.1, and that the breach constituted unsatisfactory conduct.

Following the above finding, the licensee was given the opportunity to make submissions to the Committee prior to orders being made. The licensee submitted that disclosure of price was a promotional opportunity, not a representation to a buyer. It would have been a marketing bonus at no cost to the Complainants and no further action was taken by Gavin's prospective buyer in any case.

The licensee was ordered to pay the REA a fine of \$2,500.

**Complaint number: C26010**

Date: 24 April 2019

You can read about this complaint and decision in the REA decisions database which you can find at the top of the homepage at [rea.govt.nz](http://rea.govt.nz)



## Questions

9. How did Peter breach rules 6.1, 6.2 and 9.1?

10. What negative effect could Peter's actions have had on the client?

11. What could Peter have said to Gavin (who was working with the buyer) to ensure he acted in an ethical way when he was asked for a 'rough ballpark' lowest to highest price?

## Consumer focus in the sales process

One of the keys to providing consumer-centred services is ensuring consumers understand the products and services they are receiving.

Clients need to know what services they are receiving under their contract of agency. For example, they need to know details of advertising costs and any additional costs that would be incurred if they chose to sell by auction or other methods of sale.

Customers across all real estate sectors need to know what is included in the sale.

Residential customers need information such as included chattels and fixtures and the land area. Also, if the property being sold is a unit title property, the customer needs to understand that they may need to pay an ongoing fee to the body corporate and that the occupiers will need to be provided with the body corporate rules and follow them. All this information must be approved by the client prior to release to the market via information packs or similar.

If a customer asks about a boundary, licensees should make enquiries and either confirm where the boundaries are or advise the customer to obtain a surveyor's advice. Other situations where the licensee might have a duty to take either of these steps include where there is no clearly marked fence, where the fence does not appear to be on the boundary, where boundaries appear to be in bushland or where a title is limited as to parcels. A licensee is not required to verify the boundary or be liable for failure to do so in every case where there is no apparent cause for concern. If there are queries over the boundary then the purchaser should have the property surveyed. However, licensees must not mislead or deceive or hide anything from the customer.

Within the commercial environment, customers must be satisfied regarding a wide range of issues. Essential elements of a customer's due diligence include the net lettable area, car parking, lease documentation, operating expense schedules and Council compliance and consent. Recent requirements in terms of reporting on a building's seismic performance and the presence of asbestos are now also commonplace. In addition, the specialist nature of many buildings may well require further compliance or regulation relating to both Government and Council requirements. Compliance issues need to be considered regarding buildings used for hospitality, liquor licensing, childcare centres, other education facilities and places where the public gather.

With rural sales what is also important is what is “not included” in the sale. There may be some fixtures and chattels that the client intends to take with them when they move. Examples are portable yards or loading races, or a washdown pump and hoses from the dairy shed or the shearing plant and wool-press from the shearing shed. Sale agreements and information provided by the agent to customers must be aligned. If information provided says something is included and it is not there at the time of settlement, this will usually bring animosity and court action.

Disclosure is important to the customer’s understanding of the property. The licensee needs to disclose facts/issues that are relevant to the sale of the property that could affect the customer’s decision to buy. The consumer must know what they are buying to be able to make an informed decision.

## Disclosure obligations

Disclosure means giving information to the parties involved in a transaction.

Licensees have disclosure obligations to both clients and customers to meet the requirements of consumer protection law, the Client Care Rules, and ethical obligations.

The fiduciary relationship is one of utmost trust between the parties and requires each party to give full disclosure to the other. This fiduciary relationship is reserved for the client. The licensee must always act in the best interest of their client.

As a professional, the licensee must establish clarity of material facts related to the property sale, and the associated obligations for disclosure of those material facts to potential buyers (customers).

Licensees are required to disclose any defects they know of, or should be aware of, such as a leaky roof, asbestos ceilings or subsidence. Issues with documentation, such as defects in the title should also be disclosed. A licensee can’t give buyers or vendors incorrect or misleading information and can’t withhold information that must be shared by law or in fairness. This may include a situation such as a high-rise apartment building scheduled to be built on a neighbouring section.

These issues (such as defects, irregularities in documentation or proposed developments) must be disclosed in agreement with the vendor.

Regardless of whether the disclosure is likely to impact on the price the client will get for the property, the potential buyers have a right to know these ‘material facts’.

Ethical considerations are involved in the decision whether to disclose or not. It is important to take emotion out of the decision to disclose. Licensees need to consider whether it is ethically right to disclose, in other words, does the customer have a right to know this information?



## Questions/ Discussion

(Note: In face to face sessions this may be carried out as a group discussion.)

Read Scenario 1 and write down what action (if any) you, as licensee, should take with respect to the potential buyer.

### Scenario 1

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You are marketing a property in a hilly suburb of a provincial town.

You know that in heavy rain, a few years ago, several neighbouring properties suffered slips and lost some of their back sections into the gully below. You are aware that subsidence has been a problem on this side of the street over the years.

You are conducting a private viewing of the property with a potential buyer. At the viewing you notice a series of wide cracks in the blocks in the retaining wall at the back of the section, between the property and the gully. The region has suffered a lot of heavy rain over the previous month.

The potential buyer is very interested in the property. He doesn't appear to have seen the cracks in the wall, as he is focused on the view, which he is very enthusiastic about.

Read Scenario 2 and write down what action (if any) you should take with respect to the buyer.

## Scenario 2

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You are marketing a property in a new suburb that backs onto a reserve.

Being a local, you are aware that the council has money put aside to build a cycleway through the suburb, and that the proposed route runs along the back-fence line on the north side of the property. The proposal was in the local papers about eighteen months ago but there has been no public comment since that time.

You are approached by a couple who have recently emigrated from England and want to arrange a private viewing of the property.

The living area of the home is on the north side of the property and flows out through stacker doors to a well-appointed outdoor area and back yard. At the viewing the couple seem keen on the house, and comment that the aspect that attracts them most is the privacy and quietness of the back yard.

Read Scenario 3 and write down what you should do (or have done) with respect to the vendor.

## Scenario 3

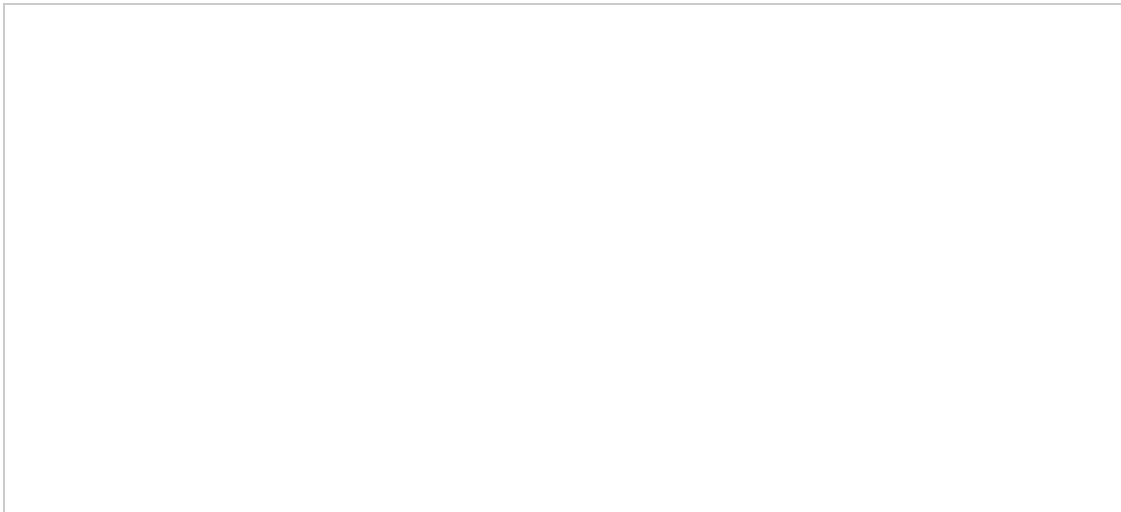
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You have a well-publicised profile in your selling area as a high-achieving salesperson. You have established your business to the point where you employ two licensed salespeople as assistants to do most of the 'leg work' for you, such as running open homes and contacting potential buyers.

You are approached by a widower who would like you to sell their home in a desirable part of the suburb, after seeing your recent agency sales award publicised in the window of your branch. They sign an agency agreement with your company, with you as listing licensee.

George, your assistant, runs the first open home at the property. He also carries out the follow-up phone calls and updates the vendor. The same happens at the following two open homes.

After the third open home, the vendor complains to George that he had expected you to be the front-person for the open homes, and that he had signed the agency agreement with your company because of your sales reputation. He said that it seemed you were just a 'figurehead' and he felt that was dishonest. George responds that you have many other commitments, and you only undertake agency work three days a week and don't work weekends.



### **Licensee obligations in relation to disclosure of defects**

Rule 6.4 clarifies what is required in terms of giving information (in terms of not misleading, providing false information or withholding information from the parties).

Rule 10.7 requires the disclosure of known defects to a customer. It says that where it would appear likely to a 'reasonably competent licensee' that land may be subject to hidden or underlying defects, a licensee must either:

- obtain confirmation from the client, supported by evidence or expert advice, that the land in question is not subject to defect; or
- ensure that a customer is informed of any significant potential risk so that the customer can seek expert advice if the customer so chooses.

It is vital that licensees talk with the client before disclosing information about the property or business being marketed. Disclosure cannot be made without the client's informed consent. 'Informed consent' means the clients understand what they are consenting to and the implications of that disclosure.

It is essential for licensees to obtain written confirmation from the client verifying that the client has given informed consent to disclose property related information. If the client refuses to give their consent, under Rule 10.8 the licensee must stop working for the client.



## Key points

- Being customer-centred includes ensuring consumers understand the products and services they are receiving.
- Licensees need to disclose information that the customer has a right to know in order to make an informed decision whether to buy.
- If the property has defects, the customer must be told.
- Disclosure cannot be made without the client's informed consent. It is best practice to get this consent in writing.

Read the following scenario and answer the questions that follow.

(**Note:** Fictional names have been used for the purpose of making the case easier to follow.)

### Case study 4

A case against a licensee salesperson (Erica), her branch manager (Ken) and their agency was referred to a Complaints Assessment Committee by the Real Estate Authority (REA). The case related to a property that Erica had listed. Offers were made by three prospective buyers (Buyer 1 – John, Buyer 2 – Alfraz, Buyer 3 – Mark) prior to the successful offer by the Buyer 4 – the Complainants (Billy and Reena).

A sole agency agreement was signed between the vendor and the agency on 28 August. The Council property file was applied for on 28 October.

A few months later, on 10 January of the following year, an offer by John was declined by the vendors. A month later, on 11 February, a Building Inspector undertook a building inspection of the property for Alfraz and prepared a report. This report recommended a range of remedial or preventative work be undertaken in various parts of the property and suggested that possible weathertightness concerns should be investigated. It also pointed out that no code compliance certificate (CCC) had been issued in relation to various alterations (undertaken in 2004) and that a sink had been installed without a consent having first being obtained.

The Complainants (Billy and Reena) requested a copy. Erica said she could not provide a copy of the report but that they could purchase a copy.

On 26 February the vendor advised Erica that she had met with her trustees and had discovered there was no CCC issued for the 2004 work on the property.

On 2 March the vendor emailed the licensee a copy of the Building Report - it is a matter of dispute whether the licensees provided the complainants with the report in a timely manner. Therefore, no finding was made against the licensees in relation to this building report.

On 7 April the council wrote a letter to the vendor outlining the reasons that the CCC had not been issued. It listed several items that were non-compliant with the building code and that a new building consent would be required to address areas of non-compliance. The letter said that the Council would require an invasive weather-tightness report by a registered building surveyor, and a structural report from a chartered professional engineer.

On 12 April the complainants (Billy and Reena) emailed an unconditional offer to the licensee, advising that they had budgeted \$5,000-\$6,000 for work to obtain a CCC. They advised the licensee as follows, "Happy for the inclusion in the agreement for the acceptance of no code of compliance being granted for the attic conversion."

On 12-13 April Mark emailed Licensee 1 requesting to view the Council letter dated 7 April, *noting that it lists the building consent issues*. Licensee 1 advised that the vendor's solicitor would be sending a copy to Mark's solicitor.

On 14 April the complainants (Billy and Reena) signed a sale and purchase agreement for the property. This was a 'back-up' offer.

On 17 April Mark emailed Ken with concerns regarding the Property. The text of the letter is as follows:

*Hi X*

*We have a contract on the above [Property] which has a due diligence clause ending this coming Tuesday 19th April XXXX. During this due diligence phase, we have uncovered some disturbing discrepancies with regards the boundary, Council building compliance and potential weather-tightness. We requested both with [Erica] and through our lawyer to extend the due diligence period as a weather-tightness building inspection report had yet to be carried out by [the vendor] on request from the Council. Our application appeared to be ignored by the agent and [the vendor's] lawyer as a backup offer was in the pipeline. On contacting both the Compliance Officer at the Council and the building inspector who provided the original buyers report, we have been advised that the repair bill could cost over \$150,000 and require the building to be stripped back and re-clad. There existed a Council letter (7th April 2016) detailing a recent house inspection by the council which uncovered serious issues that needed remedial repair and specialist investigation!*

*Our concern is that the information presented to us by third parties (known by either the agent and/or [the vendor]) was not passed onto the potential back-up buyer. Now that this*



*back-up offer is in place; we have been left with little choice in what we can do moving forward.*

*I can only profess that we are not unkind or awkward people, but we have a predicament. If we go unconditional on Tuesday, [the vendor] will face a serious warranty default which could result in our withholding a substantial sum of money on settlement unless compliance is achieved. This could have been avoided.*

*What is your view on what would be the best outcome for [the vendor] and how can we prevent a substantial loss? I believe the back-up offer party should be brought up to speed and fully informed....”*

On 17 April Ken made Erica aware of the above email.

On 19 April, as a result of Mark’s offer not proceeding, the complainants’ (Billy and Reena’s) sale and purchase agreement became unconditional.

On 17 May the Complainants saw the Council letter dated 7 April for the first time at the pre-purchase inspection. The buyer settled with \$15,000 being held back from the purchase price of \$780,000 for required work on the Property.

In August the Complainants laid a complaint with REA, essentially about Licensee 1 withholding information from them about the overall condition of the Property.

In the hearing, the salesperson licensee’s response to the complaint of withholding information from the Complainants or misleading them was to deny this. She pointed out that one of the Complainants is a very experienced builder who undertakes building inspections, and the Complainants indicated that they would undertake their own building inspection. She said that she did not read the 7 April letter until settlement, when it was first seen by the Complainants.

The branch manager licensee acknowledged receiving the 17 April letter from Mark. He also said that the complainants were verbally advised about there being no CCC for alterations for the Property but was unable to provide documentation to support this.

The Committee found that the salesperson (Erica) had engaged in unsatisfactory conduct. They found she breached rules 5.1, 6.2, 6.3 and 6.4. They also found that the branch manager (Ken) had engaged in unsatisfactory conduct relating to supervision and involving a breach of Rule 5.1.

The Committee censured both Erica and Ken and ordered each of them to pay a fine of \$7,500. The Committee also censured the agency and ordered it to pay a fine of \$15,000.

**Complaint number: C16450**

Date: 19 November 2018

You can read the full text regarding this complaint and decision in the REA decisions database which you can find at the top of the homepage at [rea.govt.nz](http://rea.govt.nz)



## Questions

12. The Committee found that the licensee had breached rules 5.1, 6.2, 6.3 and 6.4 in relation to the Council letter dated 7 April and Buyer 3's email. How did the licensee breach Rule 6.2 and 6.4 in this regard?

13. What should the licensee salesperson have done once she became aware of the existence of the council letter?

14. What negative effect could the licensee's actions have had on the Complainants?

## Obligations to report conduct of another licensee

### Reporting of misconduct

Under Rule 7.2 of the Client Care Rules, as a licensee, if you have reasonable grounds to suspect another licensee of misconduct you **must** submit a report to REA:

- Rule 7.2 – A licensee who has reasonable grounds to suspect that another licensee has been guilty of misconduct must make a report to the Authority.

Note that Rule 7.2 imposes a *positive obligation* on a licensee who suspects another licensee of misconduct to report such conduct. This is because it is a serious offence.

**If you are aware of misconduct and do not report it, you have breached the rules yourself.**

### Reporting of unsatisfactory conduct

Under Rule 7.1, if you have reasonable grounds to suspect that another licensee has been guilty of unsatisfactory conduct you **may** make a report to REA:

- Rule 7.1 – A licensee who has reasonable grounds to suspect that another licensee has been guilty of unsatisfactory conduct may make a report to the Authority.

Note that a licensee may make a confidential report to REA when unsatisfactory conduct by another licensee is suspected. In other words, it is not compulsory. However, as discussed earlier, the culture of the industry and the perception of the industry by the public are impacted by unsatisfactory behaviour of individual licensees.

## Identifying misconduct and unsatisfactory conduct

It's important that you can identify behaviour that might be unsatisfactory conduct or misconduct, but you don't need to decide which category it falls in.

### What might unsatisfactory conduct look like?

Unsatisfactory conduct may be conduct that does not comply with legal requirements, is of a standard that is below what the public have a right to expect, demonstrates negligence or a lack of competence, or breaches professional standards of best practice.

Unsatisfactory conduct is defined in Section 72 of the Real Estate Agents Act as carrying out real estate agency work that:

- falls short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee; or
- contravenes a provision of this Act or of any regulations or rules made under this Act; or
- is incompetent or negligent; or
- would reasonably be regarded by agents of good standing as being unacceptable.

Examples of unsatisfactory conduct could include:

- not disclosing a known defect in a property to a potential buyer
- providing incorrect information about a property to a potential buyer
- breaching the conflict of interest provisions of the Act (relating to Sections 134 to 137).

### What might misconduct look like?

Misconduct can be defined as conduct that would reasonably be regarded by licensees or members of the public of good standing as disgraceful or seriously incompetent or negligent.

Misconduct is a wilful or reckless breach of a regulation or rule relating to real estate agency work. This can include a licensee's conduct when they are carrying out real estate agency work, or personal behaviour that may reflect on the licensee's suitability to hold a licence.

Misconduct is a far more serious offence than unsatisfactory conduct. Penalties can include loss of licence, and possible damages of up to \$100,000. In simple terms, it is an inability to undertake real estate agency work due to serious incompetence or deliberate decisions to break the rules and the law.

Examples of misconduct could include:

- fraud
- falsifying documents or records
- multiple serious issues within one real estate transaction.

### Reporting conduct to REA

REA can't look at commission disputes, residential property management disputes (unless they involve dishonesty), and most employment-related issues.

REA recommends you try to resolve issues such as the following before reporting to REA: minor advertising issues and other agents approaching your vendor during a listing. As discussed in section on 'Professionalism' earlier in this guide, professionalism includes the way licensees interact with, or refer to, colleagues. Licensees must not undermine another agency's relationship with their client or make negative comments about how the property has been listed or about the listing agent.

**Note:** Before you make a report to REA regarding unsatisfactory conduct or misconduct, you should discuss this with your manager or supervisor (unless it is inappropriate to do so).

### What guidance is available?

Given the information you have on misconduct and unsatisfactory conduct, consider how a 'reasonably competent licensee' knowing all the relevant facts would view the conduct.

REA recommend you call and discuss the matter with them confidentially before you put a report in writing. They can talk to you about the reporting process, whether a report is required, and about what information would help them to investigate the matter.

### **What do REA do when you make a report?**

When REA receives a report of misconduct or unsatisfactory conduct, their Early Resolution Team will review it. If necessary, the report is passed to their investigations team. If you provide your details, they will contact you to talk about their process for dealing with reports.

### **How do you make a report in writing?**

You can fill out an online form using a link on the REA website if you would like to put your report in writing.

You don't need to provide your contact details, but this may limit the actions REA can take. It can also affect REA's ability to investigate the matter. If you don't provide your details, you should consider keeping evidence of your report so you can show you have carried out your obligations under Rules 7.2 and 7.3 of the Act.

### **What might the outcome be?**

If the report is investigated and is sufficiently serious, it may result in a finding of unsatisfactory conduct.

If the matter involves potential misconduct, the Complaints Assessment Committee (CAC) can lay charges against the licensee with the Real Estate Agents Disciplinary Tribunal (READT). The READT considers matters relating to misconduct.

For more information on the reporting process [www.rea.govt.nz](http://www.rea.govt.nz) .

## **Reporting conduct for an 'improper' purpose**

There needs to be a sound basis for any complaint made. Rule 7.3 states that the complaints or disciplinary process must not be used, or threatened to be used, for an 'improper' purpose.

A licensee can't threaten to report another licensee in order to obtain something from them (for example, "If you don't give me half the commission, I'll report you to the REA"). Effectively, Rule 7.3 says that a licensee can't blackmail another licensee by threatening to report them.

A vexatious complaint refers to one that is brought solely to cause annoyance, inconvenience or expense to the person complained about. It may be intended for the purpose of harassment. A frivolous complaint refers to one which doesn't have any serious purpose or merit. For example, the complaint might be "The salesperson always dresses badly, his shoes never match his suit. It makes the industry look bad".



## Key points

- A licensee who has reasonable grounds to suspect that another licensee has been guilty of unsatisfactory conduct **may** report this to REA.
- A licensee who has reasonable grounds to suspect that another licensee has been guilty of misconduct **must** report this to REA.
- Before you make a report to REA regarding unsatisfactory conduct or misconduct, you should discuss this with your manager or supervisor (unless it is inappropriate to do so).
- REA recommends you call and discuss the matter with them before you put a report in writing.
- If you decide to put your report in writing, there is an online form on the REA website for this purpose.
- REA's disciplinary process must not be used for 'improper use' (for example, used to blackmail another licensee).



## Putting my learning into practice

How has this topic improved your knowledge and understanding of 'Ethics'?

Describe at least one change you will make to the way you work as a result of this topic.