

BEST PRACTICES FOR:

Trademarks

What is a Trademark?

A trademark is a word or a symbol that is used to distinguish the products or services of one person or organization from those of another in the marketplace.

How is a Trademark Registered?

Trademarks are registered in accordance with the provisions of the *Trademarks Act*. This legislation sets out the structure and rules regarding the registration and enforcement of trademark rights.

What are the Rules for the Correct Use of Trademarks?

Always use capital letters for: REALTOR® or REALTORS® with the ® logo

- However, this format is only required for the first use in any publication.
- ***In subsequent uses***, the word can be spelled with only the “R” capitalized and without the ® logo within that publication.

Always capitalize the “S” in “System” in the phrase “MLS® System”

Always use the ® registration mark

Always use the term “MLS® System” when referring to the co-operative system of a Board or an Association

Always use one of the following acceptable trademark ownership statements:

- Not every real estate Salesperson is a REALTOR®. REALTORS® are Members of the Canadian Real Estate Association (CREA)
- I’m more than a real estate Salesperson, I’m a REALTOR®
- The trademarks of REALTOR®, REALTORS® and the REALTOR® logo are controlled by CREA and identify real estate professionals who are Members of CREA

Never alter or distort the words or symbols

Never combine any other words or designs

Never use MLS® as a noun, it must be an adjective

- **WRONG:** I placed a Listing on MLS®
- **RIGHT:** I placed a Listing on TREB’s MLS® System

Here are some common questions:

Q) Why is it important to enforce trademarks?

A) After a trademark is registered, it must be enforced. Otherwise, anyone could use it and you may lose the exclusive rights to the trademark.

Q) Who enforces trademark infraction?

A) As trademarks are part of the REALTOR® Code of Ethics, it is the responsibility of the Board to enforce infraction against their own Members on behalf of CREA. If there is a violation with the public, such as on a public website, CREA would enforce it.

Coming Soon Signs

When deciding whether to post a “Coming Soon” sign, remember: advertising cannot be false, misleading or deceptive.

To ensure you comply with REBBA 2002 Code of Ethics, as well as Board/Association MLS® Rules and Policies, and the CREA Trademarks, you must display the following information on your sign in a clear and prominent fashion:

- The registered name of your Brokerage and its designation
- Your name, as registered with RECO, along with your designation
- The MLS® logo ONLY if the property is an active listing on Board/Association’s MLS® System and it complies with CREA’s Trademark Guidelines with the exception of the two cases below:
 - If the property is not yet an active MLS® Listing but is to be listed on Board/Association MLS® System at a future date, the sign could indicate this by saying “Coming Soon to Board/Association’s MLS® System”.
 - If the Seller signs an Exclusive Listing Agreement, the MLS® logo must not be visible on any “For Sale” sign placed on the property.

Here are some common questions:

Q) Can the Seller place a “Coming Soon” sign on their property without a written agreement?

A) Yes. However, since there is no contract in place, another Salesperson could approach the Seller and place them under contract. It would not be interference.

Q) What is wrong with a Salesperson just having a banner that says “Coming Soon” affixed to a sign?

A) This could be considered false, misleading or deceptive under REBBA 2002. Any “Coming Soon” banner or sign must indicate to what or to where the property associated with the sign will be coming. The proper way to state this is by saying “Coming Soon to Board/Association’s (ei. TREB’s MLS® System.”

Q) If my sign states “Board/Association (ei. TREB’s) MLS® System,” do I have to have an Exclusive Listing Agreement and a MLS® Listing Agreement in place?

A) You could have the Sellers sign two Listing Agreements or the Sellers could sign one Listing Agreement as an Exclusive and use the Schedule to Listing Agreement (Form 203) to indicate that the Exclusive Listing Agreement will become an MLS® Listing Agreement effective on a specified date. However, it must be a 60-day Agreement to be entered into the MLS® System. Please keep in mind that the policy of your Brokerage may dictate how these agreements are handled.

Q) If my sign states “Coming Soon to Board/Association MLS® System,” when must I place it on Board/Association’s MLS® System?

A) Board/Association’s MLS® Rule states: In all instances when an MLS® Listing Agreement commences, the Listing Brokerage shall process the MLS® Listing through Board/Association’s MLS® System within two (2) days following the commencement date of the MLS® Listing Agreement.

Offers Received by Listing Brokerages

According to **Section 35.1 of REBBA 2002**, a Brokerage acting on behalf of a Seller must retain, for the period of time prescribed (detailed below), copies of all written Offers that it receives to purchase real estate or copies of all other prescribed documents related to those Offers.

- This legislation applies to every Offer received on behalf of Brokerage Seller client and not just to multiple Offer situations.
- The legislation requires the Agreement of Purchase and Sale (APS) to be in writing and signed by the Buyers.
- Listing Brokerages receiving the APS on behalf of the Seller must keep a copy (electronic or hard copy) of the APS or a copy of the completed OREA Form 801 Offer Summary Document, (Form 801) or equivalent, for the following period of time:
 - **An unsuccessful APS**, or Form 801 (or equivalent) must be retained in its entirety for **one year**.
 - **A successful APS** must be retained, in its entirety, by the Listing Brokerage for six years.
- The legislation does not apply to properties for LEASE.

Here are some common questions:

Q) What do I need to do if the Offer is countered back to the Buyer?

A) When the APS is countered back to the Buyer from the Seller, you'll need to retain an Form 801 or a copy of the APS. The first Form 801 (or equivalent) or APS must stay with the Listing Representative.

All Offers presented, or Form 801, (or equivalent), are one-way documents from the Buyer's Representative to the Seller's Representative. They are never to be returned to the Buyer's Representative.

Important: After each APS has been presented to the Seller, the Listing Salesperson must keep the APS or Form 801 (or equivalent), whether accepted, countered back or declined.

Q) What happens when the Co-operating Salesperson only brings one copy of the Offer to the presentation?

A) The Buyer's Representative should always produce extra copies of the APS, because when the APS has been presented to the Seller, the Listing Salesperson must retain a copy of the APS and/or Form 801 (or equivalent).

Q) What is required to prove that the Buyer's Representative has a signed Agreement of Purchase and Sale?

A) Form 801 (or equivalent) can be used as evidence that there is a written, signed APS from the Buyer to the Seller. By signing Form 801, the Buyer is directing the Co-operating Salesperson to submit the form prior to the Offer being presented as evidence that there is actually a written, signed APS. This should not create a privacy issue because the Buyer has consented for their Representative to submit Form 801 prior to the APS.

Q) What happens if the Buyer's Representative refuses to use Form 801?

A) An email could be sent to the Listing Salesperson as proof there is a signed Offer.

Q) What happens if the Buyer wishes not to present an offer?

A) Any Buyer has the right to not present their offer even if Form 801 (or equivalent) has been received by the Listing Salesperson prior to the Offer presentation.

Where the existence of an Offer has already been conveyed and when it is not presented, the situation should be documented in the comment section of the Offer Summary Document (or equivalent) by the Listing Salesperson, for example, Offer not presented as it was withdrawn before receipt due to Buyer not wanting to be in competition with other Buyers.

In this case, the exact number of documents, either the Agreements of Purchase and Sale or Form 801 (or equivalent) must represent the total number of Agreements of Purchase and Sale that were received on behalf of the Seller.

Avoiding Contracts

According to Section 7 – Dealings with Other Registrants – of the REBBA 2002 Code of Ethics:

(1) A registrant who knows or ought to know that a person is a client of another registrant shall communicate information to the person for the purpose of a trade in real estate only through the other registrant, unless the other registrant has consented in writing.

(2) If a broker or salesperson knows or ought to know that a buyer or seller is a party to an agreement in connection with a trade in real estate with a brokerage other than the brokerage that employs the broker or salesperson, the broker or salesperson shall not induce the buyer or seller to break the agreement.

Here are some common questions:

Q) Can a Buyer approach a new Salesperson and be released from a Buyer Representation Agreement (BRA) with their existing Brokerage if they are unhappy with them?

A) A Buyer can be released from a BRA if the Buyer and a person authorized to bind their current Brokerage sign a Form 301 - Cancellation of Buyer Representation Agreement, or another form of release.

However, the Salesperson cannot suggest this course of action when they are approached by the Buyer. This could be deemed to be interference by inducing the Buyer to breach the BRA.

Q) If the Seller enters into a new MLS® Listing Agreement with another Salesperson and places the property on the MLS® System, would this be interference?

A) The Listing would be considered a duplicate listing and would be deleted from the MLS® System. The action could also be considered to be interference of a contract.

Q) There may be a situation when the property has been listed on the MLS® System but the Seller is no longer happy with the services of the Listing Salesperson. If the Seller were to contact another Salesperson and inquire about their services, would that Salesperson be allowed to discuss their services with the Seller?

A) Yes, provided the Seller made the initial contact and they only discuss what services the Salesperson would provide. The Salesperson must make it clear to the Seller that the Seller's contract with another

Salesperson cannot be discussed. If discussion around the current contract takes place, this discussion could be deemed interference and could put the Salesperson in violation of the REBBA 2002 Code of Ethics.

The Competition Bureau has made it clear to real estate professionals that Sellers can contact anyone at any time; however, Salespeople cannot contact a Seller who is under contract.

Tip: Obtain a written statement from the Seller saying they made the initial contact as a form of protection for the Salesperson.

Q) If the property is listed and the Seller is not satisfied with the Listing Brokerage and their services, can the Seller sign a Listing Agreement with a new Brokerage while the first Agreement is still in effect?

A) If the Seller has agreed in writing and is willing to pay all fees relating to the two Listings as per agreement, then the Seller can sign a second Listing Agreement. However, the Salesperson of the second Listing Agreement would not be allowed to place the Listing on the MLS® System until the first Listing Agreement expires, as TREB does not allow duplicate listings.

Q) A property was listed by the owners but they defaulted on their mortgage. Now, the property is in the hands of the Mortgagee (bank) who then lists with another Brokerage. Is this considered a duplicate Listing or interference?

A) This would not be a duplicate Listing nor would it be interference of the first contract as the property has been taken over by the Mortgagee as a power of sale. The name of the Mortgagee would be in the Seller's field, meaning there would be two different Sellers.

Q) On November 16, the Seller signs and dates an MLS® Listing Agreement with Salesperson "A" to commence December 1. The Seller is approached by Salesperson "B" on November 17. Salesperson "B" tells the Seller he has a potential Buyer and asks if his Buyer could view the property. The Seller agrees to allow the Buyer to view the property and the Buyer, who likes the property after viewing it, asks Salesperson "B" to prepare an Offer. The Offer is presented and accepted. Would this be considered interference of the contract that the Seller signed on November 16 stating the MLS® Listing was to commence on December 1?

A) No, as the Seller has only signed an MLS® Listing Agreement. There is no Exclusive Agreement in place; therefore, this would not be interference of the contract as the MLS® Listing Agreement is not to commence until December 1.

Q) If an owner has their property listed for LEASE, and another Salesperson contacts the owner to list the property for SALE, would that be interference?

A) Yes, as RECO considers this as the same trade in accordance with Section 7 of the Code of Ethics.

Handling Pre-Emptive Offers

When a Seller signs an MLS® Listing Agreement, they may stipulate that they do not wish to review Offers until a certain date. The Listing Salesperson would ask for this information in writing, using OREA Form 244, Seller's Direction re: Property/Offer. (Form 244) The Listing Salesperson would then indicate in the Brokerage Remarks field on the MLS® System: "No Presentation of Offers Until ____."

However, there may be cases where a Buyer will not want to wait until the date specified to submit an offer on the property. In this case, the Co-operating Salesperson would prepare an Offer with an irrevocable date prior to the indicated Offer Presentation date and inform the Listing Salesperson.

In this case, the Listing Salesperson is obligated to convey this information to the Seller, while reminding the Seller of their initial direction upon establishing the Listing Agreement. If a Co-operating Salesperson prepared an Offer before the presentation date, the Seller has the right to consider that Offer (when indicated in writing in Form 244).

If the Seller opts to change the presentation date, the Listing Salesperson must get this direction in writing. The Listing Salesperson then has an obligation to amend the MLS® Listing, and should inform each Salesperson who has registered an Offer, each Salesperson who has shown the property, and each Salesperson who has a confirmed appointment to show the property of the new presentation date and time.

Here are some common questions:

Q) Is it true that the Seller cannot change their mind once they've given a direction to view Offers only on a certain date?

A) No, the Listing Salesperson should inform the Seller of the possibility of pre-emptive Offers at the time of the Listing Agreement. The Seller has the right to change their mind, provided they do so in writing.

Q) When a Seller changes their mind, how should they indicate this in writing?

A) An email from the Seller would suffice. They should state that they understand the situation and have decided to review Offers prior to the date previously specified, or as directed in Form 244.

Q) How should the Listing Salesperson handle a situation where a Co-operating Salesperson phones to indicate they have a pre-emptive Offer?

A) This would be contingent on whether the Listing Salesperson discussed entertaining Offers before the specified date with the Seller. This is why it's so crucial to discuss the pros and cons of establishing an Offer date with your Seller prior to listing and you should always advise your client of any new developments.

Q) Often language such as: "Offers to be presented on (date), the Seller reserves the right to review pre-emptive Offers" appears in the Brokerage Remarks field. What is the purpose of this wording?

A) A Listing that contains wording similar to the above allows for the Seller to consider an Offer prior to the chosen Offer date. This is likely the result of a Listing Salesperson discussing the Seller's options with them prior to listing the property.

Q) Currently, some Listings contain a statement in the Brokerage Remarks field such as: "Offer presentation (date), Seller reserves the right to review pre-emptive Offers without notice." This type of statement claims that the Listing Salesperson would not have to notify other Brokers and Salespeople if the Seller changes their mind and reviews a pre-emptive Offer. Is this allowed?

A) As much as a Listing Salesperson takes direction from the Seller, they have to be sure to fully inform their Seller of the effects of not informing other interested buyers of a pre-emptive offer. If a Seller or Listing Salesperson were to do so and a consumer or registrant complained to RECO, depending on the circumstances, this might be considered a violation of the REBBA 2002 Code of Ethics.

Commission Rebate to Clients and Customers

Under the Real Estate and Business Brokers Act, 2002 (REBBA 2002), Brokerages cannot provide any form of compensation to an unregistered third-party for activities that would be considered to be in furtherance of a trade. It is essential that registrants comply with REBBA 2002 and its regulations, no matter what marketing strategy they employ. If a registrant rebates part or all of a commission, they must comply with REBBA 2002.

Here are some important issues that registrants should be aware of:

1. Commission arrangements binding on the Brokerage

Commission arrangements negotiated by Brokers and Salespersons are binding on the Brokerage. If commission rebates are being offered, the details should be reviewed and approved by the Broker of Record as all trades are in the name of the Brokerage.

2. Commission rebate agreement

A Commission agreement with a client or customer must comply with the requirements of sections 11, 13, 14 and 15 of the Code of Ethics. Keeping written records of all aspects of the transaction, including the rebate, will help protect all parties if a dispute arises. Changing or confirming the commission after the original agreement requires appropriate documentation, presented to the client or customer for signature.

3. Advertising commission rebates

When advertising a commission rebate, the terms of the rebate must be clearly stated. For example, the advertisement must include the amount of the rebate and when it is to be paid. If there are any restrictions, conditions or limitations on the rebate, they must be clearly specified. As with any advertisement, it cannot be false, misleading or deceptive.

4. Providing rebates may have tax implications

Rebates to customers and clients may be issued in different ways, including:

- The Brokerage issuing a payment directly to the customer or client; and

- The Salesperson or Broker issuing a payment directly to the customer or client

No matter which method is used, there may be income tax or HST implications. If you are considering offering rebates you should contact your tax specialist, accountant or the Canada Revenue Agency to determine the tax implications for you, your clients and your customers. You should advise your clients and customers that there may be tax implications and to seek professional advice.

Commission rebates are a legitimate marketing tool and a way for registrants to differentiate themselves in the marketplace.

However, registrants have a duty to ensure that the promotion, documentation and delivery of the rebate complies with REBBA 2002. Failure to do so could result in disciplinary action. In addition, Brokerages may establish their own policies and rules regarding rebates over and above REBBA 2002 requirements.

Multiple Offers

Multiple Offer situations require you to act with fairness, openness and transparency in your interactions with all parties and within your legal and ethical duties. It is also important for you to remember whom you represent. Below are some common Multiple Offer situations that provide context on what to do when in a similar situation:

Situation 1: Disclosure of Multiple Offers

Martha (Listing Salesperson) has received confirmation in writing of four Offers on her listing at 1450 Don Mills Road. She asks her Broker of Record, John, if she has to disclose to all Salespeople that have registered Offers, the number, name and Brokerage of each Salesperson who has registered an Offer.

John's reply to Martha would be that she has to disclose in writing only the number of Offers (Section 26 of the Code of Ethics). Neither privacy legislation nor the Code of Ethics permit or require any other disclosure.

Martha notified all four Salespeople as instructed by John. An hour later, Martha received confirmation from one of the competing Salespeople that her Buyer was not going to participate. Martha again approached John to ask if she had to provide written disclosure to the three remaining Salespeople and advise them of the change in the number of Offers. John's reply was "yes."

Martha informed the three Salespeople that the presentation would take place at 6:00 p.m. at her office. At 5:30 p.m., she received a call from another Salesperson who informed her that he had a signed Offer from his Buyer. Martha called John for advice. John advised Martha to first share the new offer with the Seller and to recommend to the Seller that the Offer presentation be postponed until 9:00 p.m. Postponement would allow all four Buyers to review their Offers. John stressed that this action would be beneficial to the Seller and would also be fair and transparent to all parties involved.

If the Seller were to insist on going forward with the presentations as scheduled, then Martha would have to do so. However, it is recommended that this direction be documented as a complaint could be sent to RECO stating that you were not fair in dealing with the situation.

Situation 2: Handling Your Own Offer & Commission Reductions

Charles, a new Salesperson, has his own Offer on a property he has listed at 12 Broad Street but also has two Offers from two different Co-operating Salespeople. Charles also has a commission arrangement with his Sellers, whereby he would reduce the total commission payable if he double-ended the Listing on 12 Broad Street. He calls Rosemary, his Broker of Record, to ask how he should handle the situation.

Rosemary instructed Charles to advise the two other Salespeople that there were a total of three Offers to be presented and that one of the Offers was his own. She also reminded him that under Section 25 of the REBBA 2002 Code of Ethics, Charles also has an obligation to inform the Salespeople of the amount of the commission reduction, e.g., 1%.

Situation 3: Handling Commission Reductions

John has three Offers registered on a property he has listed and one of the Co-operating Salespeople has informed John that he only wants 1.5% of the 2.5% commission that the Listing Brokerage is offering should his offer be accepted. John calls his Broker of Record, Sally, to ask how he should handle this situation.

Sally explained that if the Brokerage representing the Seller and the Seller agree to commission terms that may affect whether one Offer would be accepted over another, then the Brokerage representing the Seller must disclose the details of such terms to anyone who makes a written Offer to buy.

It is also possible that a Co-operating Brokerage representing a potential Buyer will propose to reduce its commission to make the Buyer's Offer more attractive. This may cause a reduction in the total commission payable to the Brokerage representing the Seller. By accepting the Buyer's Offer, the Seller will receive a higher "net" value for the property than they would receive if they paid the commission that was originally agreed to.

In the case of any commission reduction, RECO's position is that detailed disclosure must be made to everyone who has made a written Offer. The disclosure must be made before any Offer is accepted and at the earliest practicable opportunity.

Multiple Offers and Commission reductions are all part of the following REBBA 2002 Code of Ethics:

- #3 Fairness, honesty, etc.
- #4 Best interests
- #5 Conscientious and competent service, etc.
- #10 Information before agreements
- #16 Disclosure before multiple representation
- #17 Nature of relationship
- #25 Agreements relating to commission
- #26 Competing offers

Stigmatized Property

Materials Facts - RECO Code of Ethics

21. (1) A Broker or Salesperson who has a client in respect of the acquisition or disposition of a particular interest in real estate shall take reasonable steps to determine the material facts relating to the acquisition or disposition and, at the earliest practicable opportunity, shall disclose the material facts to the client.

A material fact is something that:

Could affect a “reasonable person’s decision” to purchase or sell a property;

May influence what price to offer or to list at; or

May influence what conditions are attached to any agreements of purchase and sale.

RECO is often asked for a list of facts that would be considered material. But what is a material fact to one Buyer or Seller may not factor into another client’s decision-making process for many different reasons, not the least of which is the intended use of the property.

Issues that are often considered to be material facts include:

- The type of insulation and wiring (knob and tube wiring, for example)
- The type of plumbing (Kitec pipes, for example)
- A history of flooding, structural damage or fire
- Renovations made to the property and whether they were conducted with a permit
- Property taxes
- Whether a property had been used as a grow-op or for other illicit purposes
- Any rights-of-way, allowances or restrictions regarding use of the property.
- Existence of nearby businesses or facilities that may impact quality of life (e.g., prisons, quarries, industrial facilities, airports, rail lines, etc.)

From RECO’s perspective, a registrant’s obligation is twofold:

1. Take reasonable steps to determine the material facts; and
2. Promptly disclose those facts to the client

DEALING WITH “STIGMA”

In the context of real estate, a “stigma” is a non-physical, intangible attribute of a property that may elicit a psychological or emotional response on the part of a potential Buyer. There may have been an event or circumstance that occurred in or near the property that does not affect the property’s appearance or function, but might be considered by some as emotionally disquieting. Unlike a latent or patent defect, which may exist at a property, there is nothing physically observable or measurable associated with a stigma.

The Real Estate and Business Brokers Act, 2002 (REBBA) does not define “stigma”, but examples may include:

- The property was used in the ongoing commission of a crime (e.g., drug dealing, chop shop, brothel);
- A murder or suicide occurred at the property;
- The property was previously owned by a notorious individual (e.g., organized crime leader, known murderer);
- There are reports that the property is haunted;
- A former grow-op which has been remediated according to the local health or building authority

The relevance and impact of a potential “stigma” or any other such non-physical circumstance may be determined by a Buyer’s personal values and perceptions, ethnic background, religion, gender, age and other individual concerns. Given all the possible occurrences or circumstances that might exist for a given Buyer to consider a property to be “stigmatized,” it is impossible for registrants to determine in advance what these might be. Again, communicating openly and early is key.

Registrants representing the Buyer are advised to discuss their specific needs or requirements and any concerns and issues related to purchasing a property. In its communications to consumers, RECO advises Buyers to carefully consider the areas of concern they may have and to discuss them with their real estate professional to ensure the necessary inquiries will be made to avoid purchasing a property they will not feel comfortable living in.

STIGMAS ARE DIFFERENT FOR DIFFERENT PEOPLE

The following questions and responses may demonstrate the difficulty, in practical terms, of defining a stigma. For example, think about the possible responses to this question: Would it matter to you if a death had occurred in a property you were interested in buying? Some would say “yes, absolutely!” However, consider the following situations:

- Would it matter if the death was from natural causes, or accidental, versus being caused by a violent act or suicide?
- Would it matter if it was a crib death of an infant?
- Would you be as concerned by a death that occurred 20 years ago as you would with a recent one?

These examples illustrate how difficult it is to clearly define what constitutes a “stigma.” What one person might find completely unacceptable may not be of any concern to another.

When representing a Buyer, it is the obligation of a Registrant to use their best efforts to identify properties that meet the Buyer’s criteria and to generally promote and protect the interests of the Buyer.

Taking a proactive, communicative and well-documented approach to stigmatizing issues will minimize the risk of Buyers being uncomfortable with their home and filing a complaint, failing to complete a transaction or initiating a lawsuit.

Professionals Utilize Best Practices



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