

Real Estate

Continuing Professional Development



Agency agreements

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This topic replaces 'Agency agreements: Professional competence and ethics' and 'Agency agreements: Compliance requirements'

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Learning objectives

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

- define when real estate agency work begins and ends
- describe who an authorised person is
- describe what is required in an appraisal
- explain requirements for claiming commission
- explain the implications of the standard agency agreement clauses and rules 9.10 and 9.11
- describe the ethical responsibilities of a licensee under rule 9 of the Code of Conduct
- explain rights around the cancellation of agency agreements.

This topic focuses on agency agreements with vendor clients. They are the most common form of agency agreement and whilst the material is directed to vendor agreements some of the more general principles can also apply to buyer agency agreements. You will find information on agency agreements for buyers on rea.govt.nz.

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Terms used in this guide

In this guide, we will use various terms related to real estate agency work and complaints processes. This table will explain key terms

Term/abbreviation	Notes
CAC	This abbreviation stands for the Complaints Assessment Committee.
Client	A client is a person on whose behalf an agent carries out real estate agency work under a signed agreement. In this guide, we will consider that the agency has a client relationship with the seller and, therefore, that seller is their 'client', and any buyers or potential buyers are 'customers'.
Code of Conduct	We will refer to the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 as the 'Code of Conduct'.
Consumer	In the context of this guide, the word 'consumer' refers to buyers and sellers and potential buyers and sellers in the real estate sale and purchase process.
Customer	A customer is a person who is a party or a potential party to a transaction and excludes a client or potential client (as defined in rule 4.1 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012). The meaning of 'customer' depends on with whom the agency has a client relationship.
Disciplinary Tribunal	We will refer to the Real Estate Agents Disciplinary Tribunal as the Disciplinary Tribunal.
Purchaser	The person buying the property (sometimes referred to as the 'buyer')
REA	This abbreviation stands for the Real Estate Authority.
Vendor	The person selling the property (sometimes referred to as the 'seller')

The Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 (the Rules) reflect the minimum requirements that licensees must meet to demonstrate professional competence when carrying out real estate agency work.

The definition of real estate agency work and when it begins and ends

Real estate agency work

The definition of real estate agency work is found in Section 4 (Interpretation) of the Real Estate Agents Act 2008 (the Act), as follows:

real estate agency work or agency work—

(a) means any work done or services provided, in trade, on behalf of another person for the purpose of bringing about a transaction; and

(b) includes any work done by a branch manager or salesperson under the direction of, or on behalf of an agent to enable the agent to do the work or provide the services described in paragraph (a); but

(c) does not include—

(i) the provision of general advice or materials to assist owners to locate and negotiate with potential buyers; or

(ii) the publication of newspapers, journals, magazines, or websites that include advertisements for the sale or other disposal of any land or business; or

(iii) the broadcasting of television or radio programmes that include advertisements for the sale or other disposal of any land or business; or

(iv) the lending of money on mortgage or otherwise; or

(v) the provision of investment advice; or

(vi) the provision of conveyancing services within the meaning of the Lawyers and Conveyancers Act 2006

Real estate agency work begins as soon as you commence work which is aimed at bringing about a transaction.

Real estate transaction

Section 4 (of the Act) – Interpretation, sets out the following meaning:

transaction means any 1 or more of the following:

- (a) the sale, purchase, or other disposal or acquisition of a freehold estate or interest in land:
 - (b) the grant, sale, purchase, or other disposal or acquisition of a leasehold estate or interest in land (other than a tenancy to which the Residential Tenancies Act 1986 applies):
 - (c) the grant, sale, purchase, or other disposal or acquisition of a licence that is registrable under the Land Transfer Act 1952:
 - (d) the grant, sale, purchase, or other disposal or acquisition of an occupation right agreement within the meaning of the Retirement Villages Act 2003:
 - (e) the sale, purchase, or other disposal or acquisition of any business (either with or without any interest in land).
- (2) To avoid doubt, the sale, purchase, or other disposal or acquisition of shares comes within the definition of transaction in subsection (1) if, and only if, the shares entitle the holder to a licence that is registrable under Part 7A of the Land Transfer Act 1952.

It is important to understand when real estate agency work begins and ends; and to perform all duties and tasks with the professional competence, as required by the Rules, throughout the entire process.

In the past it was widely accepted that 'real estate agency work' was completed when a transaction became unconditional. However, in a decision of the High Court, *House v REAA* [2013] NZHC 1619, the judge determined that 'real estate agency work' continues until settlement of a transaction.

However, in some circumstances 'real estate agency work' can continue after settlement. For example, in a decision by the Disciplinary Tribunal [2013] READT 92 the Tribunal determined that settling a commission dispute (after settlement) is also 'real estate agency work', therefore 'real estate agency work' is not completed until that dispute is resolved.

Cases:

House v REAA [2013] NZHC 1619 / [2013] READT 92
<http://www.nzlii.org/nz/cases/NZHC/2013/1619.html>

Richardson v REAA (CAC 20006) [2013] NZREADT 92
<http://www.nzlii.org/nz/cases/NZREADT/2013/92.html>

Chaudhary v REAA (CAC 414) [2019] NZREADT 24
<http://www.nzlii.org/cgi-bin/sinodisp/nz/cases/NZREADT/2019/24.html>

Note: In certain circumstances, real estate agency work may continue after settlement.

Revision points

- Real estate agency work begins as soon as you start doing work that is intended to bring about a transaction. However, you are not entitled to carry out any marketing or advertising work until an agency agreement is signed by all parties.
- A licensee could face a complaint for failing to meet professional competence requirements in relation to any activities carried out before an agency agreement is signed.
- If a vendor has an existing agency agreement in place, it is important to remember that it might have a notice period, so any new sole agency agreement cannot commence before that date.
- In certain circumstances real estate agency work may continue after settlement. For example, in [2013] READT 92, the Tribunal determined that settling a commission dispute (after settlement) is also 'real estate agency work'. The real estate work therefore continues until all outstanding matters have been dealt with between the agency and client.

The six principles of contract and how they apply to agency agreements

Principle	Brief explanation of the meaning	Relevance in an agency relationship
Intent	The parties to the contract must have intended to enter into a legally binding relationship	The principal (client or lessor) must intend that the <i>agent</i> acts for them, and the <i>agent</i> must intend to carry out those activities
Offer and acceptance	One party makes an offer and the other party accepts it	To carry out agency work or to pay commission for the work carried out
Consideration	Both parties provide something of value - i.e. something of value changes hands	Work or payment
Capacity	The parties to the contract must have legal capacity They are in a position where they can legally enter into a contract (e.g. are old enough, of sound mind)	Client or lessor authorised authority signs Licensee (authorised authority of agent) signs
Legal purpose	The contract must be for a legal purpose because the law will not enforce an illegal act	Legal real estate transactions; licensee is licensed to carry out real estate work
Genuine consent	The parties entered into the contract under their own free will giving genuine informed consent - they were not tricked or forced into it	Conditions are reasonable and fully understood; there is no undue pressure or duress

Agency agreements

Types of agency

There are two types of agency: sole agency and general agency.

A **sole agency** gives one real estate agency the exclusive right to market and arrange the sale or lease (or purchase) of the property, space or business.

A **general agency** is not exclusive, and the client may also employ other real estate agencies, or market and arrange the sale or lease (or purchase) of the property, space or business privately. The client would need to sign an agency agreement with each different real estate agency.

Standard agency agreements

Licensees use standard agency agreements approved by their office. In turn, the agency agreements will often have been drafted:

- With assistance from legal advisors
- Based on Real Estate Institute NZ templates (REINZ)
- Following guidelines from the Real Estate Authority (REA)
- To comply with the statutory requirements under the Real Estate Agents Act 2008 (the Act)
- To comply with the client care obligations under the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 (the Rules)

Authorised persons

An agency agreement **must be in writing** and is between the real estate agent and the client.

An agent is not entitled to any commission or expenses unless a signed written agency agreement is in place.

An agency agreement must be signed by all parties or an 'authorised person' on each party's behalf.

Generally, the salesperson licensee will sign on behalf of the agency as the agency's 'authorised person'.

Generally, the client(s) will sign the agency agreement themselves, unless they have nominated an 'authorised person', such as a lawyer or person who has power of attorney

Generally, the client will sign the agency agreement themselves, unless they have nominated an 'authorised person', for example - a person who has power of attorney. Where a client has nominated an 'authorised person' to sign an agency agreement on their behalf, a licensee will confirm this by taking a copy of a signed power of attorney or another similar document. Any such documentation should be attached to the associated agency agreement.

Always check that the power of attorney, if used, has been invoked (come into force), and obtain a non-revocation confirmation from the party's solicitor, to be filed with a copy of the power of attorney form.

A power of attorney requires a Certificate of non-revocation; an enduring power of attorney requires a Certificate of non-revocation and non-suspension of the enduring power of attorney; a trustee requires a trust deed; a company director requires written authority to sign from Company Directors or company rules or a shareholder agreement; an executor of an estate requires a grant of probate.

Multiple signatories

Where a property or business has more than one owner, **all** owners must sign the agency agreement; or the licensee must obtain clear evidence of authority (in writing) that one owner has the authority to sign on behalf of the other owners, for example - power of attorney.

Where multiple signatories are entering into an agency agreement, copies of the signed document **must** be provided to **all** parties.

Capacity to sign

All signatories must have the capacity to sign, i.e., they are in a position where they can legally enter into a contract (they are old enough and of sound mind).

A professionally competent licensee who is behaving ethically must not enter into a contract with someone who does not have the capacity to sign, for example, if the person is emotionally or mentally compromised. Another example is where an executor of a deceased estate attempts to sign an agency agreement when probate has not yet been granted.

Signatory capacity labels

Several agencies are now including signatory capacity labels in their agency agreement. These labels help identify authorised signatories and required verification documentation.

The capacity labels are:

Director / Trustee / Authorised Signatory / Agent /Attorney

Furthermore, in the case of signature by:

- i. a Power of Attorney, licensees are required to attach the **Certificate of non-revocation** (ADLS form code: 4098WFP)
- ii. an Enduring Power of Attorney, licensees are required to attach the **Certificate of non-revocation and non-suspension of the enduring power of attorney** (ADLS form code: 4997WFP or REINZ): or
- iii. where the attorney signs for a trustee, a Certificate in the relevant form in Schedule 4 to the Trustee Act 1956.

Also insert the following wording for the Attorney’s Signature above:

“Signed for [full name of the donor] by his or her Attorney [attorney’s signature]”

Proof of Identity: identification and verification

Anti-money laundering – customer due diligence

Real estate agencies are ‘reporting entities’ under the Anti-money Laundering and Countering Financing of Terrorism Act 2009 (AML/CFT Act).

Agencies must carry out customer due diligence¹ (CDD) on new clients prior to entering into an agency agreement (refer section 11, AML/CFT Act – Appendix 1).

The level of CDD (Standard, Simplified, or Enhanced) must comply with the AML/CFT Act, the agency risk assessment, and associated AML/CFT programme.

For real estate agents:

The **customer** (as referred to in the AML/CFT Act 2009)

IS

The **client** (as referred to in the Real Estate Agent Act 2008)

¹ Standard customer due diligence (refer ss 14 to 17 of the AML/CFT Act)
Simplified customer due diligence (refer ss 18 to 21 of the AML/CFT Act)
Enhanced customer due diligence (refer ss 22 to 26 of the AML/CFT Act)

Sections 11 (1) & (2) of the AML/CFT Act sets out the obligations and requirements for reporting entities to conduct customer due diligence on:

- A customer i.e. vendor or lessor
- Any beneficial owner of a customer ('or nominee'; beneficiaries; company director)
- Any person acting on behalf of a customer, for example *power of attorney*



Questions

Read the following statements and decide whether they are true or false.

1. An agency agreement is between the salesperson licensee and the client.

<input type="checkbox"/>	True	<input type="checkbox"/>	False
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2. Where a client has nominated an 'authorised person' to sign an agency agreement on their behalf, a licensee will confirm this by taking a copy of a signed power of attorney or other similar document. Any such documentation should be attached to the associated agency agreement.

<input type="checkbox"/>	True	<input type="checkbox"/>	False
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3. A professionally competent licensee who is behaving ethically must not enter into a contract with someone who does not have capability to sign, for example, if the person is emotionally or mentally compromised.

<input type="checkbox"/>	True	<input type="checkbox"/>	False
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4. Signatory capacity labels are now required to be included in all agency agreements. They help with accurately identifying authorised signatories and associated required verification documentation.

<input type="checkbox"/>	True	<input type="checkbox"/>	False
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Appraisals

An appraisal of land or business must be provided in writing to a client by a licensee (refer rule 10.2).

10.2 An appraisal of land or a business must—

- (a) be provided in writing to a client by a licensee; and
- (b) realistically reflect current market conditions; and
- (c) be supported by comparable information on sales of similar land in similar locations or businesses.

Licensees must ensure that the written appraisal is carried out for ALL sectors of real estate and provided to the client prior to an agency agreement being signed.

The appraisal must not only reflect current market conditions (10.2 (b)) but also be supported by comparable information on sales of similar land in similar locations or businesses (10.2 (c)), in order to provide the client with quality data that helps them to make an informed decision about the estimated value of the land, property or business they are looking to sell. The comparable sales data is compared to the subject property and appropriate adjustments are made as to value to demonstrate sales that are either superior, inferior, or similar to the subject property.

This means a licensee must exercise skill, care, competence and diligence when compiling the appraisal (refer rule 5.1).

Where no directly comparable or semi comparable sales data exists the licensee must explain this, in writing, to a client (refer rule 10.3).

10.3 Where no directly comparable or semi comparable sales data exists, a licensee must explain this, in writing, to a client.

Rule 10.3 does not mean that the licensee is not required to complete an appraisal where 'no directly comparable or semi comparable sales data exists'. A licensee must still compile an appraisal based on whatever sales data is available to them (for example - sales data may be more than 6 months old), and then provide written explanation to the client as to how the sales data available applies to the subject property, space or business.

(Refer to a recent case: *Quiambao & Wan v REAA (CAC 518) & L & G Barker* [2020] NZHC 371.)

Once again, the comparable sales data is compared to the subject property and appropriate adjustments are made as to value to demonstrate sales that are either superior, inferior, or similar to the subject property.

A licensee must ensure the information contained in the written appraisal is relevant and accurate; and complies with the overarching requirement of rule 6.4.

6.4 A licensee must not mislead a customer or client, nor provide false information, nor withhold information that should by law or in fairness be provided to a customer or client.

Remember, the licensee must help the client to be equipped with quality information, so a robust discussion can be made in order to finalise an agreed advertised price; which in turn should reflect the pricing expectations agreed with the client (refer rule 10.4).

10.4 An advertised price must clearly reflect the pricing expectations agreed with the client.

Methods of sale, or offering of property, space or business and licensee benefits

Licensees must make clients aware of the various possible methods of sale or offering of property, space or business and how the chosen method could impact on the individual benefits that the licensee may receive.

Because clients rely on the advice of licensees, it is important that clients are able to evaluate the information they are given and understand how the licensee will benefit from the decisions they make about the method they choose. For example, a higher share of the commission received from a property listed for sale by auction (refer rule 10.5).

10.5 Before a prospective client signs an agency agreement, the licensee must explain to the prospective client how choices that the prospective client may make about how to sell or otherwise dispose of his or her land or business could impact on the individual benefits that the licensee may receive.

In accordance with a licensee's fiduciary duty to their client (refer rule 6.1), it is important to advise on methods of sale that will best suit your client's interests, not your own.

Commission and marketing or advertising

Before an agency agreement is signed, licensees must advise and explain to the client the circumstances in which the client could be liable to pay full commission to more than one agent in the event a transaction is concluded.

9.10 A licensee must explain to a prospective client that if he or she enters into or has already entered into other agency agreements, he or she could be liable to pay full commission to more than one agent in the event that a transaction is concluded.

When an agency agreement is cancelled the licensee must give the client a list of customers who, if the client sells to, may entitle that agency to a commission.

This obligation is specified in Rule 9.11.

9.11 On cancellation of an agency agreement being given or received by the agent under the agreement, the agent must advise the client, in writing, of the name of each customer (if any) in respect of whom the agent would claim a commission, were the customer to conclude a transaction with the client.

Under Section 126 an agent is not entitled to any commission or expenses unless a written and signed agency agreement is in place.

Section 126(2) states that a copy of the signed agreement must be given to the client or lessor within 48 hours of signing unless there are reasons outside the agent's control that prevent this.

126 No entitlement to commission or expenses without an agency agreement

(1) An agent is not entitled to any commission or expenses from a client for or in connection with any real estate agency work carried out by the agent for the client unless—

(a) the work is performed under a written agency agreement signed by or on behalf of—

- (i) the client; and
- (ii) the agent; and

(b) the agency agreement complies with any applicable requirements of any regulations made under section 156; and

(c) a copy of the agency agreement signed by or on behalf of the agent was given by or on behalf of the agent to the client within 48 hours after the agreement was signed by or on behalf of the client.

(2) A court before which proceedings are taken by an agent for the recovery of any commission or expenses from a client may order that the commission or expenses concerned are wholly or partly recoverable despite a failure by the agent to give a copy of the relevant agency agreement to the client within 48 hours after it was signed by or on behalf of the client.

(3) A court may not make an order described in subsection (2) unless satisfied that—

- (a) the failure to give a copy of the agreement within the required time was occasioned by inadvertence or other cause beyond the control of the agent; and
- (b) the commission or expenses that will be recoverable if the order is made are fair and reasonable in all the circumstances; and
- (c) failure to make the order would be unjust.

(4) This section overrides subpart 5 of Part 2 of the Contract and Commercial Law Act 2017.

Note: Rule 10.6(a) specifically links with the requirements of rule 10.2 (written appraisal).

Rule 10.6 sets out what specifically needs to be explained before an agency agreement is signed. In relation to the commission payable and marketing and advertising, which include:

- 10.6** Before a prospective client signs an agency agreement, a licensee must explain to the prospective client and set out in writing—
- (a) the conditions under which commission must be paid and how the commission is calculated, including an estimated cost (actual \$ amount) of commission payable by the client, based on the appraisal provided under rule 10.2:
 - (b) when the agency agreement ends;
 - (c) how the land or business will be marketed and advertised, including any additional expenses that such advertising and marketing will incur;
 - (d) that the client is not obliged to agree to the additional expenses referred to in rule 10.6(c):
 - (e) that further information on agency agreements and contractual documents is available from the Authority and how to access this information.

Material particulars included in the agency agreement

All material particulars (relevant details and information, when the agency agreement ends (refer rule 10.6(b)) must be explained and included in or attached (for example - required forms, marketing plan, property description) to an agency agreement **before** the licensee submits the document to the client(s) or lessor(s) for signing (refer rule 9.9).

- 9.9** A licensee must not submit an agency agreement or sale and purchase agreement or other contractual document to any person for signature unless all material particulars have been inserted into or attached to the document.

Agency agreement must disclose rebates, discounts, and commissions

Non-disclosure of rebates, discounts, and commissions that the agent may receive when the agent incurs expenses on behalf of the client by an agent to their client, may result in the agent not being able to receive payment for those expenses.

Rebates and discounts may include, for example, discounts received on advertising, incurred on behalf of the client or lessor.

128 Agency agreement must disclose rebates, discounts, and commissions

(1) An agent is not entitled to any expenses from a client for or in connection with any real estate agency work carried out by the agent for the client in connection with a transaction unless the agency agreement under which the agent performs that work contains a statement that—

(a) identifies the source of all rebates, discounts, or commissions that the agent will or is eligible to receive in respect of those expenses; and

(b) specifies the estimated amount of those rebates, discounts, or commissions (to the extent that the amount can reasonably be estimated).

(2) This section does not limit the liability of any person under the Secret Commissions Act 1910.

Under s129 and s156 of the Real Estate Agents Act 2008 Regulations were enacted to prescribe the manner and form that disclosure under s128 is to be affected. Regulation 4 of the Real Estate Agents (Duties of Licensees) Regulations 2019 provides:

4 Agency agreement must contain statement by agent relating to rebates, discounts, and commissions

(1) An agency agreement must contain a statement by the agent relating to rebates, discounts, and commissions.

(2) The statement described in subclause (1) must be in form 1 of the Schedule.

Form 1

Agent's statement relating to rebates, discounts, and commissions

Section 128, Real Estate Agents Act 2008

Note: This form must be included in every agency agreement.

1. I, the agent, confirm that, in relation to any expenses for or in connection with any real estate agency work carried out by me for the client(s) in connection with the transaction covered by this agency agreement, -

**(a)* I will not receive, and am not entitled to receive, any rebates, discounts, or commissions.

**(b)* I will receive, or am entitled to receive, the rebates, discounts, and commissions specified below.

* Select the paragraph that applies.

2. *Omit this paragraph if you selected paragraph 1(a) above. If you selected paragraph 1(b) above, provide the specified details for each rebate, discount, or commission.*

Expenses to be incurred	Provider of rebate, discount, or commission	Amount of rebate, discount, or commission
<i>[specify goods or services to which rebate, discount, or commission relates]</i>	<i>[specify name of person or organisation]</i>	<i>[\$[specify actual or estimated amount* (including GST)]</i>

*Estimates must be clearly marked as such.

Date:

Signature:

(agent)

Note: Expenses means any sum or reimbursement for expenses or charges incurred in connection with services provided by an agent in the capacity of an agent.

Source:

<http://www.legislation.govt.nz/regulation/public/2009/0281/latest/DLM2372545.html>

A copy of Form 1 can also be found on the REA website link below:

<https://www.rea.govt.nz/assets/Uploads/Resources/Forms/Licensing-forms/Form-1-Agents-statement-relating-to-rebates-etc.pdf>



Questions

Answer the questions below by selecting the correct answer.

5. Which rule is this?

'Where no directly comparable or semicomparable sales data exists, a licensee must explain this, in writing, to a client.'

<input type="checkbox"/>	Rule 10.3	<input type="checkbox"/>	Rule 10.4
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6. Which rule is this?

'A licensee must exercise skill, care, competence and diligence at all times when carrying out real estate agency work.'

<input type="checkbox"/>	Rule 5.1	<input type="checkbox"/>	Rule 5.2
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7. There is a direct correlation between a written appraisal and commission as set out in the following two rules.

<input type="checkbox"/>	Rule 10.3 & Rule 10.6(b)	<input type="checkbox"/>	Rule 10.2 & Rule 10.6(a)
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Read the following case study and answer the questions that follow.

Case study 1

A complaint was made to the Real Estate Authority in regard to a property that was owned by a company. The Complainant and her ex-partner were the directors and equal shareholders (50/50) of the company. The Complainant and her ex-partner had separated and were at the end of the process of negotiating the resolution of relationship property matters between them.

The Complainant alleged the Licensee had listed and marketed the property without obtaining her authority as a director and half owner.

NOTE: during the inquiry, the Complaints Assessment Committee became aware the Licensee had not completed a Comparative Marketing Appraisal (CMA) for the property.

Background:

The Licensee entered into a listing [agency] agreement with the Complainant's ex-partner, to whom he had previously sold the property two years prior. No CMA was completed.

On the same day the Licensee introduced a potential buyer from Japan, and subsequently sent property details to another potential buyer from America.

At this point, the Complainant discovered the property was being marketed without her permission and contacted the Licensee and the Agency concerned.

The Licensee responded to the Complainant informing her that he was advised to continue with marketing and sale of the property by her ex-partner.

Complaint number: C20896

You can read about this complaint and decision in the REA decisions database at rea.govt.nz.

While it is not completely clear from the decision, the Complainant was the co-director of the company which owned the property, and the Licensee was therefore required to obtain the Complainant's authorisation prior to listing the property. Licensees should take extra care when listing property in the context of a relationship break-up to ensure the party instructing them is properly authorised to do so.

Note the following comments made by the Committee:

[Para 3.5] 'The Listing authority shows the name of the ex-partner as the sole vendor and the Company name. When listing a property for sale a search of the title should always be done. This would have provided the Licensee with evidence of the current owner, which was the Company. A simple free search of the Companies Register [on-line: refer url link below] would have provided the Licensee with the details of the shareholders and directors of the Company. The Committee considers that this is a basic step which should be taken on every occasion a property held by a Company is listed.'

[Para 3.8] 'The Committee was concerned that the Licensee continued to pursue the US offer even after he was contacted by the Complainant and the position made clear.'

Approved guide – residential property

Section 127 of the Real Estate Agents Act 2008 requires a licensee to provide a client with an approved guide **before** signing an agency agreement for residential property and to obtain signed acknowledgement from the client that they have been given the approved guide.

127 Approved guide to be provided before agency agreement for residential property signed

(1) An agent must not enter into an agency agreement with a person for the sale of residential property unless the agent or a licensee on the agent's behalf—

- (a) has provided the person with a copy of the approved guide before the agreement is signed by or on behalf of the person; and
- (b) has received a signed acknowledgement from the person that the person has been given the approved guide.

(2) In this section—

approved guide means a guide that—

- (a) is about the sale of residential property;
- (b) has been approved by the Authority for the purposes of this section

residential property does not include any property that—

- (a) has been developed with other properties in a continuous area; and
- (b) is proposed to be sold or otherwise disposed of by a vendor who also proposes to sell or otherwise dispose of, or who has sold or otherwise disposed of, some or all of those other properties.

(3) A contravention of this section does not affect the validity of the agency agreement.

Read the following case study and answer the questions that follow.

Case study 2

A Complaints Assessment Committee laid a charge of misconduct before the Real Estate Agents Disciplinary Tribunal.

It was noted that the Licensee had previously been charged with misconduct or unsatisfactory conduct on eight occasions since 2011 (including the three cases currently before the READT).

Present Case: The Licensee was charged over three complaints in 2015 (C07072, C06292, and C07275) in respect of CAC cases in relation to residential property and subsequent charges of unsatisfactory conduct for breaches made between August 2014 – April 2015.

The Licensee denied all particulars of the charge.

It was noted that all three charges were highly similar to each other, involving:

- Failure to provide written appraisals
- Failure to provide the REAA Guides (refer section 127 of the Act - Approved guide to be provided before agency agreement for residential property signed)
- Failure to provide written marketing plans
- Failure to ensure essential particulars were included in listing [agency] agreements

Evidence from the Licensee – at the time of the hearing, the licensee held an agent's licence but during the period of offending, he held a salesperson's licence. He stated that during a period of his offending over five years he had "*no effective supervision and support*" whilst being "*frantically busy*". He asserted this was the root cause of his breaches. He was selling a large number of properties and was earning "*over a million dollars a year*".

Complaint: [2016] NZREADT 72

You can read about this complaint and decision in the REA decisions database at rea.govt.nz.

Note the comments included in the decision:

- [Para 20] ‘...referred to [the Licensee’s] previous disciplinary history...in respect of conduct that is similar to his conduct in the present case...directly relevant to the Tribunal’s penalty decision in this case, and are a highly aggravating factor... [the licensee] failed to learn from his previous disciplinary sanctions, and had persevered with the same cavalier approach towards his clients and customers...’
- [para 21] ‘...the [Committee] submitted that when [the Licensee’s] present conduct is viewed in the context of his previous disciplinary history, nothing less than the cancellation of [the Licensee’s] licence would adequately protect the public...his continued breaches show he lacks insight into his conduct and is unable or unwilling to comply with the duties and obligations required of licensees...’
- [Para 27] ‘... do not accept that any lack of supervision, management oversight, or systems within an agency ameliorates [the Licensee’s] conduct to any great extent...’
- [Para 31] ‘...the number of charges [the Licensee] has faced since mid-August 2011 over the course of his engagement by two agencies, and the fact that he has been ordered to complete courses of training on three occasions, on three different aspects of real estate agency work, causes the Tribunal to have grave concerns as to [the Licensee’s] competence to carry out real estate agency work to the standard required within the industry...’

Read the following case study and answer the questions that follow.

Case study 3

A Complaints Assessment Committee (CAC) heard a case brought by a complainant in relation to the listing and sale of their property which comprised 0.8245 hectares of land and a house built in 2006, part of which was designed and used for bed and breakfast accommodation. In the rateable valuation document dated February 2013, the capital value (land and improvements) of the property was \$1.1 million.

Prior to marketing the property, the vendors obtained a market valuation from a registered valuer; the market value was assessed at \$1.13 million.

The Complainants met with the Licensee (who held a branch manager's licence) at their property to discuss listing it for sale.

The Complainants subsequently signed a sole agency agreement with the Licensee. The agency agreement stated the duration of the sole agency, that commission would be \$35,000 (estimated on the basis of the rateable value of \$1.1 million), and marketing costs were estimated at \$3,828.15 for a six-week marketing period.

The Licensee brought an offer of \$1.050 million to the Complainants, which they rejected. The offer was increased to \$1.075 million, which they also rejected.

The same day the latest offer was rejected, the Licensee phoned the Complainants and asked if he could bring his partner to view the property, which they agreed to.

The Licensee subsequently made a written offer to the Complainants for \$1.1 million, sent via email. The sale and purchase agreement had a line drawn through the box which stated that the sale was no longer by the X Realty Group Limited, and the words 'Private Sale' had been inserted.

The Complainants signed the offer and returned it to the Licensee. The agreement was settled, and no commission was charged to the complainants.

Four months following the sale, the Licensee 'on-sold' the property for \$1.4 million after carrying out some renovation work on it.

The Complainants allege the following:

- Breach of section 134 – the licensee:
 - failed to obtain the Complainants' informed consent to continue to act for them when he had a conflict of interest
 - did not obtain consent in writing on the prescribed form, as required by section 134 (Form 2 of the Schedule to the Real Estate Agents (Duties of Licensees) Regulations 2009)
 - failed to explain the existence and nature of his conflict of interest

- failed to explain to the Complainants that he would be in possession of information that the Complainants would expect to be confidential
- Breach of section 135 – the licensee:
 - failed to provide the Complainants with a written independent valuation
 - failed to provide a written (or any) appraisal of the property
 - failed to advise how properties referred to in documents provided to them had been selected and how that information could be reflected in the price for the property (comparable data included 12 properties, of which only two were in the same geographical area of the subject property)
 - failed to act in the best interests of his clients, the Complainants

Complaint: [2017] NZREADT 6

You can read about this complaint and decision in the REA decisions database at rea.govt.nz.

Ethical responsibilities of the licensee

While gaining listings is essential to real estate agency business, it is vital that real estate agencies and licensees operate ethically in all aspects of their work.

The following rules highlight the importance of ethical behaviour and have relevance when working with a prospective client who is about to sign an agency agreement.

9.2 A licensee must not engage in any conduct that would put a prospective client, client, or customer under undue or unfair pressure.

For example, licensees must avoid creating an unreasonable sense of urgency that impacts on the prospective client’s ability to think clearly about the agreement or prevents them from having enough time to seek appropriate legal or technical advice and so on.

9.8 A licensee must not take advantage of a prospective client’s, client’s, or customer’s inability to understand relevant documents where such inability is reasonably apparent.

For example, do not sign documents with a prospective client who is under the influence of alcohol, medication or other substances. Advise that someone who is clearly having problems understanding (such as an elderly person who seems confused, or someone who is not familiar with the language being used) seeks the additional advice they may need.

9.12 An agent must not impose conditions on a client through an agency agreement that are not reasonably necessary to protect the interests of the agent.

This is a consumer protection measure that places an obligation on the real estate agency to ensure that only the legitimate interests of the agent are protected by the terms of the agency agreement.



Questions

Read the following statements and decide whether they are true or false.

8. Rule 9.2 is designed to ensure licensees avoid creating an unreasonable sense of urgency that negatively impacts on the prospective client's ability to think clearly.

<input type="checkbox"/>	True	<input type="checkbox"/>	False
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9. Rule 9.12 is designed to ensure that written terms and conditions are fair and ethical.

<input type="checkbox"/>	True	<input type="checkbox"/>	False
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10. Rule 9.2 only applies when a licensee is entering into an agency agreement with a prospective client or lessor.

<input type="checkbox"/>	True	<input type="checkbox"/>	False
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Advising about double commissions

Before an agency agreement is signed, licensees must advise and explain to the client the circumstances in which the client could be liable to pay full commission to more than one agent in the event a transaction is concluded.

9.10 A licensee must explain to a prospective client that if he or she enters into or has already entered into other agency agreements, he or she could be liable to pay full commission to more than one agent in the event that a transaction is concluded.

When an agency agreement is cancelled the licensee must give the client a list of customers who, if the client sells to, may entitle that agency to a commission.

This obligation is specified in Rule 9.11.

9.11 On cancellation of an agency agreement being given or received by the agent under the agreement, the agent must advise the client, in writing, of the name of each customer (if any) in respect of whom the agent would claim a commission, were the customer to conclude a transaction with the client.

Standard clauses for residential and rural agency agreements

Residential property means any property used, or intended to be used, exclusively or principally for residential purposes.

The Real Estate Agents Authority together with the Real Estate Institute of New Zealand (REINZ) have developed standard clauses for residential and rural agency agreements. These clauses create greater certainty around the cancellation of agency agreements and when an agent is entitled to the commission.

Use of the standard clauses in residential and rural agency agreements is voluntary. However, REA recommends that all real estate agents in the residential and rural sectors use them. REA also encourages other sectors of the real estate industry to include these clauses in their agreements.

REA is promoting the use of the standard clauses by publishing the names of agencies that have agreed to include them in their agency agreements on its website.

The link to this is:

<https://www.rea.govt.nz/assets/Uploads/2020-07-03-Standard-Clauses-List.pdf>

When is an agency entitled to commission under standard clauses?

Under the standard clauses, the agency's right to claim commission only arises in the following situations:

In the case of a sole agency - the vendor or client enters into a sale and purchase agreement during the sole agency period and that agreement is unconditional or becomes unconditional later.

In the case of a general agency - the vendor or client enters into a sale and purchase agreement during the general agency period with a purchaser introduced by that general agent (or where the agent has been instrumental in the sale) and that agreement is unconditional or becomes unconditional later. Seven (7) days' written notice is required to cancel a general agency agreement.

In the case of either a sole or general agency – residential

In residential transactions, if the vendor sells the property privately within 6 months of the agency coming to an end (either sole or general agency), to a person introduced by the agency or where the agency was instrumental in the sale, the vendor is liable to pay the agent commission. A private sale beyond 6 months of the agency agreement ending to a person introduced by the agent does not incur an obligation to pay commission.

In the case of either a sole or general agency – rural

In rural transactions, if the vendor sells the property privately within 12 months of the agency coming to an end (either sole or general agency), to a person introduced by the agency or where the agency was instrumental in the sale, the vendor is liable to pay the agent commission. A private sale after 12 months of the agency agreement ending to a person introduced by the agent does not incur an obligation to pay commission.

When does an agency's entitlement to commission under standard clauses end?

As well as scenarios concerning subsequent private sales outlined above, under the standard clauses an agency is **not** eligible to claim commission if the vendor enters an agency agreement with a new agency, **and** that new agency facilitates a sale to a buyer the original agency introduced to the property during their listing period **and** the sale takes place within 6 months (for residential) or 12 months (for rural) after the end of the original agency agreement.

Impact of changes in the standard clauses and Rules 9.10 and 9.11

Some agents are using the standard clauses, and some are not. Agents have no control over any previous agency agreement already signed. It is best practice to obtain a copy of the previous agency agreement before proceeding with entering into a new agency agreement and cancelling the existing.

(refer to a recent case: *Deng v REAA (CAC 1901) [2020] NZREADT 7*)

Licensees need to continue to comply with Rule 9.10 which states that a licensee must explain to a prospective client that if he or she enters into or has already entered into other agency agreements, he or she could be liable to pay full commission to more than one agent if a transaction is concluded.

In the same way, under Rule 9.11, every licensee who is served with a cancellation notice must comply with this rule and advise the client, in writing, of the name of each customer (if any) in respect of whom the agent would claim a commission, were the customer to conclude a transaction with the client. This applies to ALL real estate sectors, including residential.

Agencies using the standard clauses have a right to claim commission related to any sale and purchase agreement entered into during the term of their agency. Entitlement to commission relating to those agreements only applies when those agreements become unconditional during or after the term of the agency.

The Fair Trading Act 1986 covering unfair contract terms

The Fair Trading Act 1986 covers unfair contract terms in standard form consumer contracts. Clauses contrary to the interests of the consumer cannot be used in agency agreements, which are considered standard form consumer contracts.

Relevant sections covering unfair contract terms include the following:

- The Commerce Commission can apply to the court for a declaration that a term in a standard form consumer contract is unfair (refer section 46H).
- Under section 26A, if the court decides that a term in a standard form consumer contract is an unfair contract term, the business is prohibited from including the term in a standard form contract or from applying, enforcing or relying on the term.

A contract term may be considered unfair if: the term would cause a significant imbalance in the parties' rights and obligations arising under the contract; the term is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term; and the term would cause detriment (financial or otherwise) to a party if the term were applied, relied on, or enforced (section 46L of the Fair Trading Act).

Examples of contract terms that may be regarded as unfair when used in a standard form consumer contract are provided in section 46M of the Fair Trading Act.

These provisions underpin rule 9.12 which says that an agent must not impose conditions on a client through an agency agreement that are not reasonably necessary to protect the interests of the agent.



Questions

Read the following statements and decide whether they are true or false.

11. Before an agency agreement is signed, licensees must advise and explain to the client the circumstances in which the client could be liable to pay full commission to more than one agent in the event a transaction is concluded (refer rule 9.10).

<input type="checkbox"/>	True	<input type="checkbox"/>	False
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12. In residential transactions, if the vendor sells the property privately within 12 months of the agency coming to an end (either sole or general agency), to a person introduced by the agency or where the agency was instrumental in the sale, the vendor **is liable to pay** the agent commission.

<input type="checkbox"/>	True	<input type="checkbox"/>	False
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13. Use of the standard clauses in agency agreements is an example of prudential ethics as these clauses help to reduce ambiguity around cancellation for clients and clarify entitlement to commission.

<input type="checkbox"/>	True	<input type="checkbox"/>	False
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Cancellation of agency agreements

Section 130 of the Real Estate Agents Act allows clients who have signed a sole agency agreement to change their mind and cancel the agreement by 5pm on the first working day after they have been given a copy of the signed agreement.

Cancellation must be in writing (by letter, fax or email to the agent).

However, if any work is carried out before the agreement is cancelled which results in the sale of the property, the terms of the agency agreement will be legally binding. This means the client must still pay the agent any commission earned.

130 Client may cancel a sole agency agreement by 5pm next working day

- (1) A client who is party to a sole agency agreement with an agent may, by 5pm on the first working day after the day on which a copy of the agreement is given to the client under section 126(1)(c), cancel the agreement by written notice to the agent.
- (2) A notice under subsection (1) may be served by fax or email.
- (3) Subsection (1) has effect despite any provision to the contrary in any agreement.
- (4) Even though a sole agency agreement has been cancelled, an agent may rely on that agreement if, before that cancellation, —
- (a) the agent carries out any agency work in accordance with the agreement; and
 - (b) that agency work enables the conclusion of a contract that effects a transaction to which the agreement relates.

Unsolicited approach (uninvited direct sale)

Under section 36M(1)(a) of the Fair Trading Act 1986, a client approached under the classification of *uninvited direct sales* has the right to cancel an agency agreement within 5 working days after the date on which the client receives a signed copy of the agreement.

The clause in the agency agreement allowing cancellation until 5pm the next working day must be varied prior to signing to reflect the clients right to cancel within five working days (refer section 36L Fair Trading Act – Disclosure requirements relating to uninvited direct sale agreements).

Cancellation of sole agency agreement for residential property after 90 days

If the sole agency agreement is for a residential property and is for a term longer than 90 days, the client or the agent can cancel the agreement **after** 90 days or at any time after that (refer section 131 of the Real Estate Agents Act below).

131 Parties may cancel sole agency agreements in respect of residential property 90 days after the agreement is signed

- (1) Any party to a sole agency agreement that relates to residential property and is for a term longer than 90 days may, at any time after the expiry of the period of 90 days after the agreement is signed, cancel the agreement by written notice to the other party or parties.
- (2) If the parties to a sole agency agreement to which subsection (1) relates agree in writing to renew the sole agency agreement, the signing of the renewal agreement is, for the purposes of that subsection, taken to be the signing of a new sole agency agreement.

(3) For the purposes of subsection (1), a sole agency agreement is signed when it is signed by or on behalf of the client or if there is more than 1 client, when the agreement is signed by the last client.

(4) A notice under subsection (1) may be served by fax or email.

(5) This section has effect despite any provision to the contrary in any agreement.

(6) In this section, *residential property* does not include any property that—

(a) has been developed with other properties in a continuous area; and

(b) is proposed to be sold or otherwise disposed of by a vendor who also proposes to sell or otherwise dispose of, or who has sold or otherwise disposed of, some or all of those other properties.

Roll-over clause provisions

Until recently, many agency agreements contained a clause (often known as a *roll-over* clause) which turns the sole agency automatically into a general agency after a certain period has elapsed (for example, 90 days).

This meant that clients had to cancel the general agency agreement after the 90-day period had lapsed if they no longer wanted to work with that agency.

There is no *roll-over clause* in the standard clauses.

Note: In a **residential** agency agreement, a roll-over clause provision could be an example of an unfair contract term in an agency agreement under section 46M of the Fair Trading Act 1986, a breach of rule 9.12, and a breach of section 131 of the Real Estate Agents Act.



Questions

Read the following statements and decide whether they are true or false.

14. Under Section 130 a client has the right to cancel an agency agreement within 5 working days after the date on which they receive a copy of the agreement.

<input type="checkbox"/>	True	<input type="checkbox"/>	False
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15. Section 131 of the Real Estate Agents Act applies to all agency agreements.

<input type="checkbox"/>	True	<input type="checkbox"/>	False
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16. A 'roll over' clause provision could be an example of an unfair contract term in an agency agreement under section 46M of the Fair Trading Act 1986 and a breach of rule 9.12 of the Rules.

<input type="checkbox"/>	True	<input type="checkbox"/>	False
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Ensuring the vendor or lessor is aware of licensee disclosure obligations

Disclosure of defects

Licenses must ensure that their client (vendor or lessor) is aware of the licensee's disclosure obligations to customers (purchasers or lessees) under rule 10.7 (disclosure of defects).

10.7 A licensee is not required to discover hidden or underlying defects in land but must disclose known defects to a customer. Where it would appear likely to a reasonably competent licensee that land may be subject to hidden or underlying defects, a licensee must either—

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

Clients who direct that information about defects be withheld must be made to understand that the licensee is required to comply with rule 10.7 and 10.8 and will no longer be able to act for the clients.

10.8 A licensee must not continue to act for a client who directs that information of the type referred to in rule 10.7 be withheld.



Questions

Read the following statements and decide whether they are true or false.

17. Rules 10.7 and 10.8 cover requirements relating to disclosure of a client's personal information.

<input type="checkbox"/>	True	<input type="checkbox"/>	False
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18. A prudent licensee will ensure that in all situations where a defect needs to be disclosed to a customer, the licensee confirms the disclosure in writing.

<input type="checkbox"/>	True	<input type="checkbox"/>	False
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Appendix 1 – Section 11, Anti-money Laundering and Countering Financing of Terrorism Act 2009

11 Customer due diligence

(1) A reporting entity must conduct customer due diligence on—

- (a) a customer:
- (b) any beneficial owner of a customer:
- (c) any person acting on behalf of a customer.

(2) For the purposes of subsection (1)(b), a customer who is an individual and who the reporting entity believes on reasonable grounds is not acting on behalf of another person is to be treated as if he or she were also the beneficial owner unless the reporting entity has reasonable grounds to suspect that that customer is not the beneficial owner.

(3) The type of customer due diligence that must be conducted by a reporting entity is, -

- (a) in the circumstances described in section 14, at least standard customer due diligence
- (b) in the circumstances described in section 18, at least simplified customer due diligence
- (c) in the circumstances described in section 22, enhanced customer due diligence

(4) A reporting entity that is required to conduct customer due diligence in circumstances described in sections 14, 18, and 22 is not required to obtain or verify any documents, data, or information that it has previously obtained and verified for the purposes of carrying out customer due diligence in accordance with this Act, unless there are reasonable grounds for the reporting entity to doubt the adequacy or veracity of the documents, data, or information previously obtained.

(5) Nothing in subsection (4) affects the obligation to conduct ongoing customer due diligence in accordance with section 31.

(6) Subsections (1) and (3) and sections 14 to 31 do not apply in relation to the provision of services by a reporting entity to a customer that, in relation to that reporting entity, are not, under section 6(4), activities to which this Act applies.