

## New REALTOR® Disclosure Forms – Release Date: July 18, 2017

### New forms:

- REALTOR® Disclosure to an Unrepresented Person
- REALTOR® Disclosure to a Represented Person

### Background:

When a REALTOR® is directly or indirectly involved in a real estate trade with another person, the REALTOR® is required to disclose certain information.

In 2016, when AREA was revising the Purchase Contracts, the former Standard Clauses and Phrases guide (now Guide to Supplementary Clauses) was reviewed. Within that guide were two sample disclosure clauses. These clauses were insufficient to cover off all the disclosure requirements expected of AREA members.

Specific disclosure requirements are found in:

- REALTOR® Code, Article 11
- *Real Estate Act*, Rules 62 and 63
- Other applicable *Real Estate Act*, Rules (41(e), 41(f), 42(a), 42(c), 42(d), 42(g))

### Case Law:

In addition to rules that apply to REALTORS®, the decisions of courts should be considered whenever REALTOR® liability is impacted. AREA found that the courts can hold a REALTOR® to a higher standard than other industry rules. The following cases both deal with a REALTOR® buying a property from a seller who was represented by another brokerage and where the REALTOR® subsequently resold the property. The outcomes were quite different based on whether the intent to sell was disclosed or not.

Westrheim et al v. Gao et al, 2007 BCSC 274: *Note: Intention to resell was not disclosed.* A REALTOR® who failed to disclose in writing her intention to resell the property was found to be in breach of fiduciary duties to the seller, even though the REALTOR® was the buyer and the seller had their own brokerage representation. The REALTOR® buyer substantially renovated the property and resold it approximately 3 months later.

Trynchy v. Gabriel, 2012 ABQB 682: *Note: Intention to resell was disclosed.* This case dealt with a REALTOR® who bought from the seller, and later resold the property at a profit. The seller was represented by another brokerage. In this case, for various reasons, the judge found no fiduciary duty for the REALTOR® to the seller. The judge noted that the plaintiffs knew the REALTOR® intended to sell the property for a profit (or loss) as this was disclosed in the contract.

These cases demonstrate the importance of disclosing that the property may be resold, at a profit. The new disclosure forms provide this high standard of disclosure.

### Why Two Forms?

RECA's Rules require different levels of disclosure depending on whether the other party is unrepresented or represented, with an additional requirement if the brokerage is in a conflict of interest because it represents both parties. Because of the different levels of disclosure required, AREA produced two forms:

- REALTOR® Disclosure to an Unrepresented Person
- REALTOR® Disclosure to a Represented Person

### How does this affect my practice?

The forms are intended to make disclosure as easy as possible. The fill-in-the-blank format will help ensure a REALTOR® does not miss making one of the required disclosures. Best practice for use is:

- **Determine your situation** - is the other party unrepresented or represented? Is the other party a brokerage client?
- **Fill in the applicable blanks**, inserting "N/A" in blanks that do not apply to indicate that they were not mistakenly missed.
- **Honour the other party's right** to "*seek legal or independent advice*" by structuring the timing of the Purchase Contract to allow time for this important task.
- **Protect yourself** by ensuring the other party's signature on the disclosure form is dated prior to their signature on the Purchase Contract. This will show there was time to consider the disclosure prior to forming the contract.