Is my behaviour acceptable? Part 2

Last week, we started discussing practical case studies relating to the Code of Conduct, which we continue with this week.

Agent A does a listing presentation for the seller. At the end of the presentation, the potential seller thanks Agent A for their presentation and says to Agent A, that he (the seller), will also be meeting with Agent B and will then decide which direction that the seller wants to follow. Two days later, Agent A calls the seller and the seller tells Agent A, that he has given a sole mandate to Agent B. Agent A is absolutely furious. After all, he (Agent A), put a lot of effort into the listing presentation. It took three weeks to pin the seller down to agreeing to meet and worst of all, Agent A used to work in partnership with Agent B, until Agent B left and went to another agency and there is still a dispute between Agent A and Agent B over a particular client and who was actually entitled to the commission. Agent A's principal had decided that Agent A was not entitled to a split of the commission, as the mandate had been given to the agency before A and B started working together. Agent A is now really upset – he didn't get the mandate and worst of all, he lost it to his former partner, Agent B!

Agent A decides that he and the potential seller seemed to have a good relationship, so he decides to list the property anyway on various online advertising portals. Agent A thinks to himself – "I'll show everyone here who is the best agent! I'll sell the property, the seller will be happy and Agent B gets nothing! Ha ha, that's fabulous! And my principal will love me."

Agent A lists the property online using the photos and information that he already had at his disposal. Two weeks later, Agent A receives a phone call from the seller. The seller tells Agent A that he was looking at his property online and he noticed that Agent A had listed the property without a mandate and without any permission from the seller. The seller says, "Please explain yourself Agent A?", to which Agent A responds, "I know that you gave a sole mandate to Agent B, but I can still list your property as an open mandate, which you can cancel at any time."

The duties and ethical responsibilities of property practitioners are contained in the Code of Conduct. Before we refer to the relevant Regulations (Reg) in the Code of Conduct that relate to this case study, let us distinguish between an open and sole mandate.

An open mandate is a mandate that the client, let us say the potential seller of a property in this case, may give to any number of property practitioners. This means that the client could appoint more than one property practitioner to market their property for sale. Such a mandate is not required to be in writing (more about this later). A sole mandate is defined in the Regulations to the Property Practitioners Act as a mandate incorporating an undertaking on the part of the person giving the mandate, not to confer a similar mandate on another property practitioner before the expiry of a determined or determinable period.

Regulation 34.3.1.3 says that a property practitioner may not accept a sole mandate or the extension of the period of an existing sole mandate, unless –

Regulation 34.3.1.3.1 all the terms of such mandate (or extension, as the case may be), are in writing and signed by the client in a manner acceptable in law, including by way of an

electronic signature as permitted under the Electronic Transactions and Communications Act, 2002...

Hence, a sole mandate must be in writing.

Section 67 of the Property Practitioners Act says:

S67(1) A property practitioner must—
(a) not accept a mandate unless the seller or lessor of the property has provided him or her with a fully completed and signed mandatory disclosure in the prescribed form; and
(b) provide a copy of the completed mandatory disclosure form to a prospective purchaser or lessee who intends to make an offer for the purchase or lease of a property.

If a property practitioner cannot accept a mandate without a completed mandatory disclosure form which would be in writing, how would one do this with an open mandate which is given verbally? It would therefore seem, that all mandates, open or sole, would need to be in writing!

In terms of Regulation 34.3.1.1, as a property practitioner, you may not offer any property for sale or to let or negotiate in connection therewith, if you do not have a mandate to do so from the seller or lessor.

In this case, it is quite clear, Agent A is contravening the Code of Conduct by listing the property without a mandate from the seller to do so and Agent A is certainly mistaken if he believes that he has an open mandate!

Look forward to another case study next week.

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