

### **Paragraph 3.2.1 of the *Code of Ethics***

Estate agents and salespersons should be fully conversant with the EAO, its subsidiary legislation, this *Code of Ethics*, and other guidelines issued by the EAA from time to time and shall observe and comply with them in the course of their practice.

## **Illustration (1)**

### **Offering Loans to a Purchaser of a First Sale Property**

A licensee introduces a first sale unit to a prospective purchaser. The purchaser did not have sufficient money for the payment of the deposit on the spot. The licensee then arranged for his estate agency company to issue a few cheques for the purchaser to pay the deposits for the unit to the developer.

#### **Commentary and Suggestion:**

The licensee in the above case arranged for his estate agency company to provide loans to a prospective purchaser of a first sale unit for paying to the developer the initial deposits, thus breaching the relevant guidelines in Practice Circular (No. 13-04 (CR)). Both the licensee and the estate agency company which he worked for had failed to comply with paragraph 3.2.1 of the *Code of Ethics*.

According to the said Practice Circular, licensees must not offer loans to a prospective purchaser of first sale units, even when the prospective purchaser states that he does not have sufficient money for the payment of the deposit on the spot, and has thus requested for loans. Licensees must also not propose to make loans to a prospective purchaser, whether in order to persuade the latter to sign a preliminary agreement for sale and purchase or for any other purpose.

Under section 15 of the Practice Regulation, the employer and management of an estate agency must establish proper procedures or systems to supervise and manage his business of

doing estate agency work. If a frontline licensee commits a breach of conduct in respect of the matters abovementioned, the employer and estate agency management may be seen as not having established a proper system to manage their business. They may therefore breach section 15 of the Practice Regulation.

## **Illustration (2)**

### **Using Threatening Means to Collect Commissions**

A purchaser signed a provisional agreement for sale and purchase of a property, where it was stipulated that the purchaser was not required to pay any commission to the estate agency company. The purchaser therefore did not pay any commission. Since then, the purchaser has received threatening telephone calls demanding payment from a person claiming to be the representative of the estate agency company. Furthermore, two men visited the purchaser's office and left a note containing threats. An investigation by the Authority revealed that the estate agency company had instructed a debt-collection company to demand payment from the purchaser. However, nothing in the agreement made between the estate agency company and the debt-collection company stipulated that the debt-collection company must not use intimidation or violence when collecting debts.

### **Commentary and Suggestion:**

The licensee failed to include proper terms in the agreement with the debt-collection company and to monitor the conduct of the debt-collection company. The licensee had failed to observe the relevant guidelines in the Practice Circular issued by the Authority regarding the use of debt-collection companies to collect the outstanding agency commission from a defaulting client (Circular No. 08-04 (CR)).

Licensees are reminded that since the relationship between an estate agent and the debt-collection company is one of principal and agent and under the general principles of agency law, estate agents may be held liable for tortious acts committed by the debt-collection companies acting within the scope of their authority.

Debt-collection companies may sometimes commit offences while carrying out improper debt-collection activities, such as section 24 (Intimidation) and section 25 (Assault) of the Crimes Ordinance. If licensees assist, encourage or procure the debt-collection companies to commit these offences, they may be criminally liable for the same offences as a secondary party.

Therefore, licensees must enter into a debt collection company appointment agreement, the terms of which should include the content stated in the relevant Circular such as that the debt-collection company must not resort to intimidation or violence, whether verbal or physical, against any person. Licensees should also monitor closely the performance of the debt-collection companies. Failure to comply with the guidelines in the Practice Circular may be seen as not having established a proper system to manage a business and may therefore amount to a breach of section 15 of the Practice Regulation (which requires the management to establish proper procedures or systems to supervise and manage its estate agency business), giving rise to disciplinary action by the Authority.

## **Illustration (3)**

### **Pre-printing Extra Terms on a Prescribed Form**

A licensee entered into an Estate Agency Agreement (Form 4) with the purchaser of the property. The licensee pre-printed "1%" in the spaces for "Amount or rate of commission to be paid by vendor, if applicable" and "Amount or rate of commission to be paid by Purchaser" in Schedule 1 to the said Form 4.

#### **Commentary and Suggestion:**

The licensee failed to comply with the guidelines in the Practice Circular (No. 12-01 (CR)), which provides that licensees should not pre-print any extra terms in the agreements since the estate agency agreements are standard documents prescribed by the Authority in accordance with the Ordinance.

The forms specified in the Schedule of the Practice Regulation are prescribed for the purposes of the Ordinance. Licensees are required to use the prescribed forms when dealing with the sale/purchase/leasing of residential properties in Hong Kong. Licensees should not pre-print any extra terms on the prescribed estate agency agreements (Forms 3 – 6), and are reminded not to pre-print or pre-enter the "✓" sign in the spaces on the agreements where clients are expected to indicate their choices. Otherwise, clients may be misled into thinking that those extra terms and pre-print are part of the prescribed forms.

Any extra terms must not limit or contradict the original terms in the agreements, and should be explained to the client and agreed upon before it is added to the agreements. Licensees should also arrange for the client to initial against the terms concerned.

Actually, the law has no stipulations on the amount or the rate of commission an estate agent is entitled to. It is subject to negotiation between licensees and their client.

## **Illustration (4)**

### **Affixing an Advertisement on a Property**

A licensee affixed an advertisement “for rent/sale of shops” on the roller shutters of a vacant shop. However, the licensee had not obtained the owner/occupier’s written consent before putting up the advertisement on the shop front.

#### **Commentary and Suggestion:**

The licensee in the above case failed to abide by the guidelines in the Practice Circular (No. 09-04 (CR)) which provides: “practitioners must obtain the owner/occupier’s written consent before putting up advertising bills or posters on shop fronts, and must not display or affix advertising bills or posters in public places without the requisite permission.” Hence, the licensee was in breach of the provision stipulated in paragraph 3.2.1 of the *Code of Ethics*.

According to section 104A of the Public Health and Municipal Services Ordinance, a person displaying or affixing a bill or poster on any private land without the written permission of the owner or occupier thereof or on any Government land without the written permission of the Secretary for Food and Health commits an offence. Hence, licensees must not display or affix advertising bills or posters in public places without the requisite permission. The fixed penalty for the offence under the Fixed Penalty (Public Cleanliness Offences) Ordinance is \$1,500 and the penalty for the offence under the Public Health and Municipal Services Ordinance is a fine of \$10,000 and an additional daily fine of \$300.



Moreover, under section 14(1)(c) of the Licensing Regulation, a licensee must state clearly and conspicuously in all advertisements (pamphlets and brochures excepted) the number of his licence or Statement of Particulars of Business (SPOB) and the business name as stated in the SPOB.

## **Illustration (5)**

### **Stakeholding of Deposits**

A licensee arranged for a purchaser to enter into a provisional agreement for sale and purchase of a property. He amended the stakeholding provision to the effect that no deposit would be stakeheld by a firm of solicitors. However, the vendor had executed a mortgage deed to secure an "all monies" mortgage loan from a bank when he purchased the property. The licensee did not advise the purchaser of the possible risks in the circumstances of the case in payment of deposits directly to the vendor and of the desirability of arranging for the stakeholding of all deposits by a firm of solicitors.

### **Commentary and Suggestion:**

The licensee failed to observe the guidelines in the Practice Circular (No. 05-07 (CR)) that the licensee should "advise the purchaser of any possible risks in payment of deposits directly to the vendor and of the desirability of arranging for the stakeholding of all deposits (both the initial and further deposits) by a firm of solicitors, before arranging for the parties to sign the provisional agreement for sale and purchase ("PASP") of properties where there is an undischarged mortgage."

It is current conveyancing practice that upon the signing of a PASP, an initial deposit is invariably payable. Such initial deposit ranges from 3% to 5% of the purchase price and is usually paid directly to the vendor.

Given that some vendors may for various reasons fail to discharge the mortgage or abscond after receiving the deposit, it is important for the licensee, whether acting as a dual agent for the parties or as a single agent for the purchaser, to advise the purchaser of any possible risks in payment of deposits directly to the vendor and of the desirability of arranging for the stakeholding of all deposits (both the initial and further deposits) by a firm of solicitors, before arranging for the parties to sign the PASP of properties where there is an undischarged mortgage. The licensee should also explain to the vendor and the purchaser the implications of the stakeholding arrangement and the conditions to be fulfilled before the release of the deposits by stakeholders. As it is often difficult to ascertain whether the property is in negative equity and/or whether the vendor is able to discharge the mortgage, the licensee's above duty should apply to all cases of sale and purchase whenever there is an undischarged mortgage.