

## Circular

Circular No. 08-03 (CR)

- **Practitioners are under a duty to avoid conflict of interest**
- **Practitioners must make a disclosure of interests in the property concerned to their clients**

### Disclosure of interests by agent

Under common law, an agent owes a fiduciary duty to his client. Since the agency relationship is one of trust and confidence, the agent must not allow any personal interest (including the interest of the agent himself or that of his close relatives) to conflict with his duties to the client. Where any potential conflict arises, the agent should make a full disclosure to the client of all relevant facts, so as to give the latter an opportunity to decide whether to continue with the proposed transaction or with the appointment of the agent. Otherwise, he will be in breach of his fiduciary duty and is liable to account for any profit that he has made from such transaction in addition to other remedies available to the client for the agent's breach of duty.

Generally, an estate agent may not purchase or rent property from his client, and he may not sell or let his own property to his client unless he has made a full disclosure of all the relevant facts to his client before entering into any agreement with his client and has obtained his client's informed consent to such a transaction.

Sections 36(1)(a)(vi) and 36(3) of the Estate Agents Ordinance (EAO) require the estate agent or salesperson concerned to disclose to a client full particulars of any pecuniary or other beneficial interest which such estate agent or salesperson has in the property concerned, together with particulars of any benefit, including any commission or any interest of any kind whatever in such property, whether monetary or otherwise, which will accrue to such estate agent or salesperson should the property be disposed of.

Moreover, Section 3(2)(a) of the Estate Agents Practice (General Duties and Hong Kong Residential Properties) Regulation (Practice Regulation) requires completion of the relevant estate agency agreement in accordance with its directions and instructions. Under the respective Clause 9 of the Estate Agency Agreement for Sale of Residential Properties in Hong Kong (Form 3) and the Estate Agency Agreement for Leasing of Residential Properties in Hong Kong (Form 5), and under the respective Clause 5 of the Estate Agency Agreement for Purchase of Residential Properties in Hong Kong (Form 4) and the Estate Agency Agreement for Leasing of Residential Properties in Hong Kong (Form 6), the person signing the agreement on behalf of the estate agency must disclose the pecuniary or other beneficial interest which the following party has in the property concerned:

1. him or his nominee; or
2. his specified relative (meaning his spouse, parent, child, brother or sister), or any nominee of his specified relative; or
3. the estate agency or any employee/substantial shareholder/partner/director of the estate agency

Particulars of such interests (if any) must be specified in Schedule 3 (applicable to Form 3 and Form 5) and Schedule 4 (applicable to Form 4 and Form 6).

Furthermore, under Paragraphs 3.6.1 and 3.6.2 of the Code of Ethics, estate agents and salespersons should avoid accepting an appointment involving a property in which they have a beneficial interest. They shall, in the event of possible or potential conflict of interest such as dual agency, disclose to their clients that they are acting for both sides. Any pecuniary or other beneficial interests in relation to the property shall be disclosed fully to all parties concerned.

Practitioners must observe the aforesaid common law duty and sections of the EAO, Practice Regulation and the Code of Ethics. Non-compliance of the same may result in disciplinary action.

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