



## Real estate brokers have no professional ethics!

... one might think so, because unfortunately, even our industry has a few bad apples.

In this informational brochure, learn how to identify serious brokers.

Unfortunately, ordinary retailers and self-appointed agents can be found all over the real estate business, substantiating the preconceived notions that exist against this industry in some cases. Brokers who operate professionally, however, observe strict ethical principles and consistently comply with legal guidelines and professional codes of conduct. The following discussion provides an overview of the basic legal framework and ethical rules that have been established by professional associations and their organizations.

### The broker observes the rules of professional conduct.

Based on international practices and conventions, rules of professional conduct\* were drawn up that have been in effect since 2007.

These encompass the following points:

1. General regulations and principles on: professionalism, diligence and responsibility, quality standards, independence, professional confidentiality, account-ability, client funds, prevention of conflict of interests, duties of the financial intermediary, attention to specialized laws, disclosure obligations toward the Swiss Real Estate Association (SVIT Schweiz).
2. Principles of business operations, specifically with respect to commissions, logos and advertising.
3. Conduct toward members, including the issues of fairness and collegiality, sanctions, procedures and closing provisions.

Brokers who are subject to the Real Estate Association must always adhere to the rules of professional conduct in the execution of their business endeavors. Moreover, when promulgating the rules of professional conduct for all of Switzerland, the Real Estate Association took all precautions so that the education and training of brokers were elevated to professional status and expanded. Thus, business ethics, respectability and seriousness attained a major and decisive role for the broker. Serious brokers will aim to distinguish themselves from „ordinary agents“. In addition to compliance with professional standards, there is also an Arbitration Tribunal that client or broker can summon, and that addresses gross violations of professional standards.

### Legal guidelines

Even legislation, particularly OR 413 et seqq., and the judiciary govern the following important aspects of real estate agency law:

### Restrictions on dual agency („double-ending“)

A constantly recurring issue is whether the broker can collect commissions from buyer and seller without their knowledge. This practice would damage the image of the broker, and in certain cases it is illegal.

Brokers working in earnest will clearly distance themselves from dual agency (commonly referred to as „double-ending“). Depending on the nature of the listing assignment, according to current jurisprudence, brokers are prohibited from acting on behalf of both contract parties. Indeed, they will contractually assure the Principal (the

client) that they are not operating any covert dual agency. Nonetheless, if brokers wish to obtain payment from the other party, they must immediately notify their client (the Principal) of this.

### **Acceptance of client funds**

In principle, real estate brokers are not subject to the Money Laundering Act, since they only act as agents between buyer and seller, and not as financial intermediaries. According to the Professional Standards, the broker must prevent the comingling of client funds with his own assets, and hold them in separate bank or postal accounts in the name of the client. These separately held client funds must be invested a manner that allow the client to recover these funds at any time.

### **Return of reserve deposits**

In the sales process, the issue may arise of reserve deposit payments, which have to be paid by the buyer to the seller prior to recordation. Especially when it comes to new construction projects of condominium units, creditors demand a certain number of purchase commitments (depending on the financial standing of the issuer) before discussing the terms of a construction loan. Even in the sales process for existing properties, reserve contracts are increasingly being concluded.

Although these contracts (without public recordation) are subject to private law and do not have a public law character, reserve contracts in the real estate industry are becoming increasingly common, and are binding on the buyer—at least in moral terms. According to a very old Federal Supreme Court ruling, today as well we must still assume that a contractually agreed forfeiture of money cannot be enforced in all cases, and that the seller can only invoice a potential buyer for his documented costs and expenditures if the Buyer backs out of the deal. In principle, the seller can also withdraw from a reserve contract and sell the property to another interested party.

In the real estate industry, there are divergent opinions with regard to what rules apply to the acceptance of reserve payments. If the broker accepts the funds, then this begs the question of whether he can pass these on to the seller, or if he is entitled to retain them to cover his commission claims. Legally, the claim to a contingency fee would become enforceable only upon recordation of the

purchase & sale agreement. Depending on the situation, however, buyers prefer to remit the reserve payment to a broker who is acting in earnest and in a fiduciary capacity. Getting the reserve funds back from the seller immediately may prove to be difficult. On the other hand, some buyers prefer to pay the money directly to the owner, because they do not feel certain that the funds will set aside by the real estate broker in a fiduciary manner.

### **Termination of broker agreements**

Legally speaking, broker agreements are agreements according to Art. 394 CO et seqq., and can be cancelled at any time - except for „unlawful dismissal.“ The right of termination is mandatory, and cannot be contractually excluded or limited. Even broker agreements entered for fixed terms can be revoked at any time.

The right of termination may be exercised by either contract party, thus the broker may also exercise this right. One must give consideration to „unlawful dismissal,“ which entails damages compensation payments. With regard to „unlawful dismissal,“ there are two points in time that specifically merit consideration:

1. Termination during the broker's preparatory phase, i.e., if the broker invested time and/or money in the preparation of a sales mandate, and had no opportunity to effectuate the sale due to the (premature) termination. In this case, the broker can invoice for expenditures made.
2. Termination in the event a buyer exists, i.e., if the broker found a willing potential buyer under the terms and conditions established by the client. In this case, the broker's claim to payment remains intact, even if the sale did not transpire until after the brokerage agreement was terminated.

### **Real Estate Association's Arbitration Tribunal.**

SVIT passed a set of Rules of Arbitration which any member may stipulate with their clients in the agreement. By doing so, disputes can be resolved swiftly and for a minimal expense by the Arbitration Tribunal.

## Tip: Review your broker's professional expertise!

There are many, many people calling themselves real estate professionals who have property for sale. Yet as in other industries, not all self-appointed „experts“ are truly in a position of offering professional support. Brokers can put themselves in a professional light, vis-à-vis the client,

only through training, experience and serious business conduct. One can differentiate among the various market participants in qualitative terms. The following criteria and questions are intended to help a client assess brokers in terms of their qualities and their professional business conduct.

## B R O K E R C H E C K L I S T

- Given a sales mandate, is the broker capable of disclosing the property value in a brief assessment, and substantiating the potential sales value?
- Does the broker handle other clients in the market territory, which would result in synergies for the sale or lease property?
- Is the broker able to explain the pros and cons of a property from the perspective of a potential buyer or tenant, and point out potential difficulties in the sales and leasing process?
- Does the broker have local market expertise? In this regard, it is indispensable that professionals have made their mark not only with appraisals, but also with a successful sales and leasing record.
- Does the broker have a mastery of real estate marketing? Does the broker know how a defined market is developed with suitable marketing measures, in order to reach potential buyers or tenants for the property?
- Is the broker acknowledged as a fellow professional in the respective region? What do other market participants - like banks, notaries or attorneys - have to say about him/her?
- As a professional, does the broker possess a basic business education, a professional diploma, such as certification as a real estate trustor, broker or appraiser with nationally recognized professional identification, and possess multi-year, successful professional experience in the real estate industry?
- Is the broker associated with a professional association, such as SVIT or the USPI in Romandie? If possible, a broker should be member of the SMK (the Swiss Chamber of Brokers).

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Claude A. Ginesta is a federally licensed real estate fiduciary (registered with the SVIT, the Swiss Federation of Real Estate Fiduciaries) and owner and CEO of Ginesta Real Estate AG. The company was founded in 1944 and specializes in the sale of properties. With offices in Küsnacht, Zürich, Winterthur, Horgen, St. Moritz and Chur, the company operates as real estate broker throughout Switzerland for properties located across the country.

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