



What Would You Do? Presentation Series: Working in Your Area of Expertise



- Good morning/afternoon and welcome to the second presentation in the *What Would You Do?* Presentation Series.
- The presentation series explores areas of risk in real estate practice, with each presentation focusing on a different area of risk.
- Today's presentation will explore the risks of acting outside your area of expertise.
- To do so, we will follow a REALTOR® through a transaction where they may be asked to act outside their area of expertise.
- We will also review two case studies involving licensees that acted outside their areas of expertise and discuss how risk could have been mitigated in both scenarios.
- The *What Would You Do?* presentation series is a joint project between the BC Real Estate Association, the Real Estate Council of BC and the Real Estate Errors and Omissions Insurance Corporation.
- This offers a 360-degree look at risk management from the perspectives of your professional association, regulator, and insurer.
- Ok, let's get started....

Setting the scene...



Shawn
(REALTOR®)

- This is Shawn. Shawn is a Realtor...

Setting the scene...

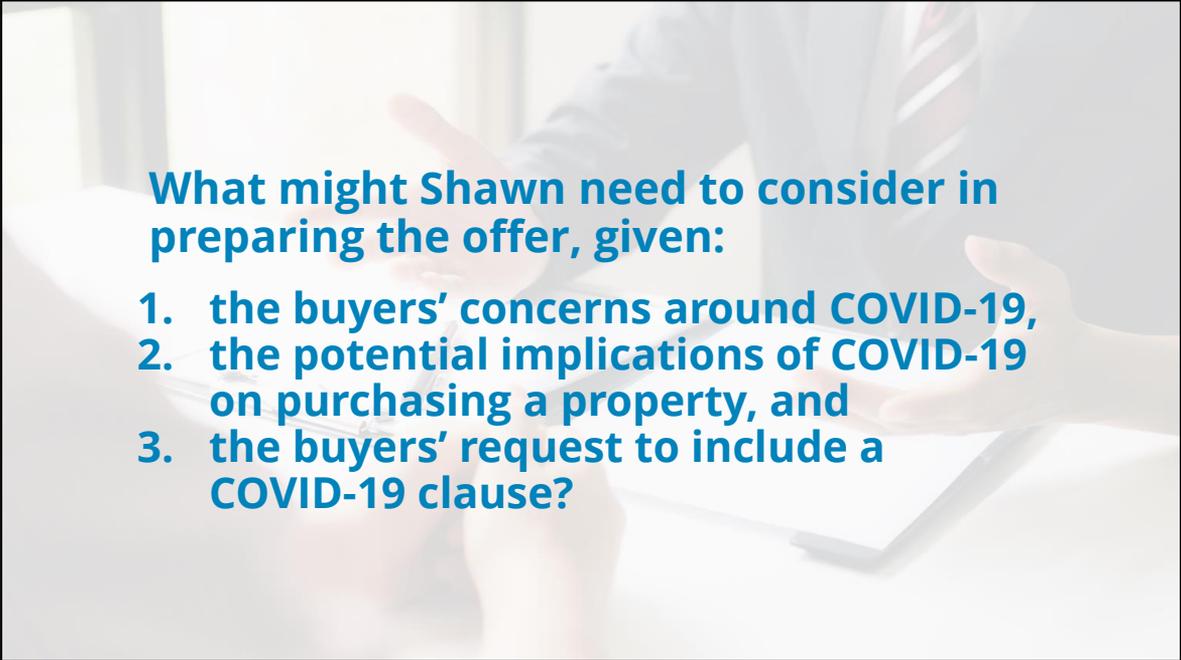


Buyers
(Shawn's Clients)



Shawn
(REALTOR®)

- ...and Shawn is representing these buyers on the purchase of their new home.
- Shawn's clients have asked him to write an offer on the home.
- They are apprehensive, however, about purchasing a home during the COVID-19 pandemic and unsure about the implications it could have on the transaction.
- To ensure they are protected, they have asked Shawn to add a clause to their offer to protect them if they could not complete due to COVID-19.

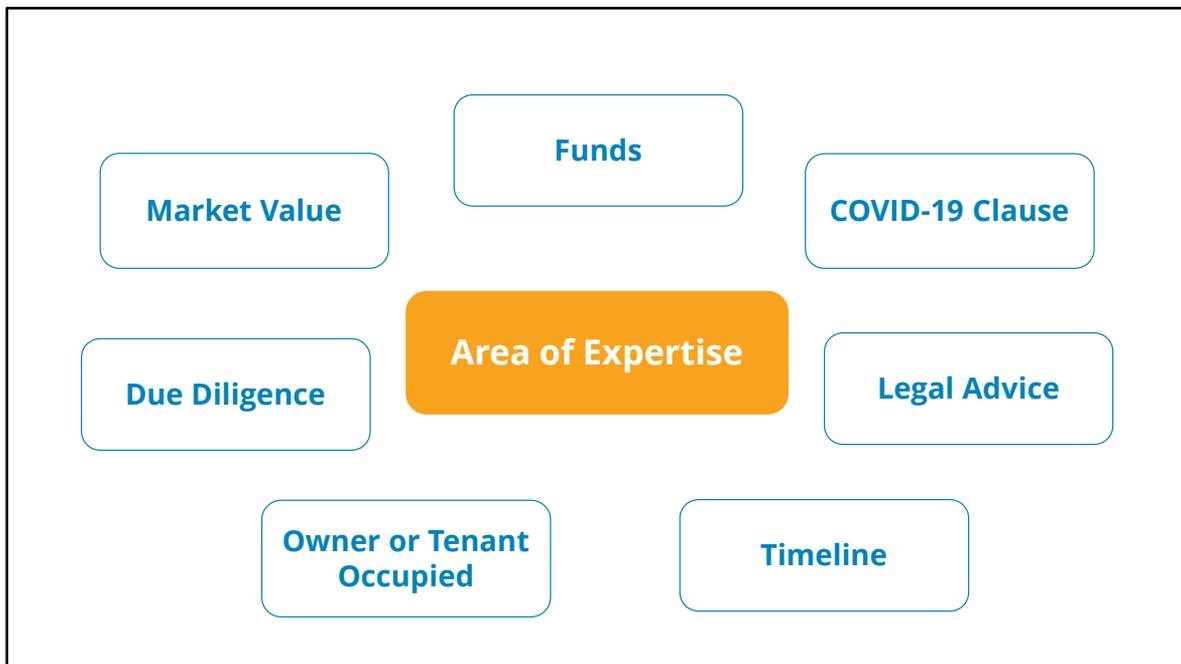


What might Shawn need to consider in preparing the offer, given:

- 1. the buyers' concerns around COVID-19,**
- 2. the potential implications of COVID-19 on purchasing a property, and**
- 3. the buyers' request to include a COVID-19 clause?**

- What might Shawn need to consider in preparing the offer, given the buyers' concerns around COVID-19, the potential implications of COVID-19 on purchasing a property and their request to include a COVID-19 clause? (***open for discussion***)

Considerations?



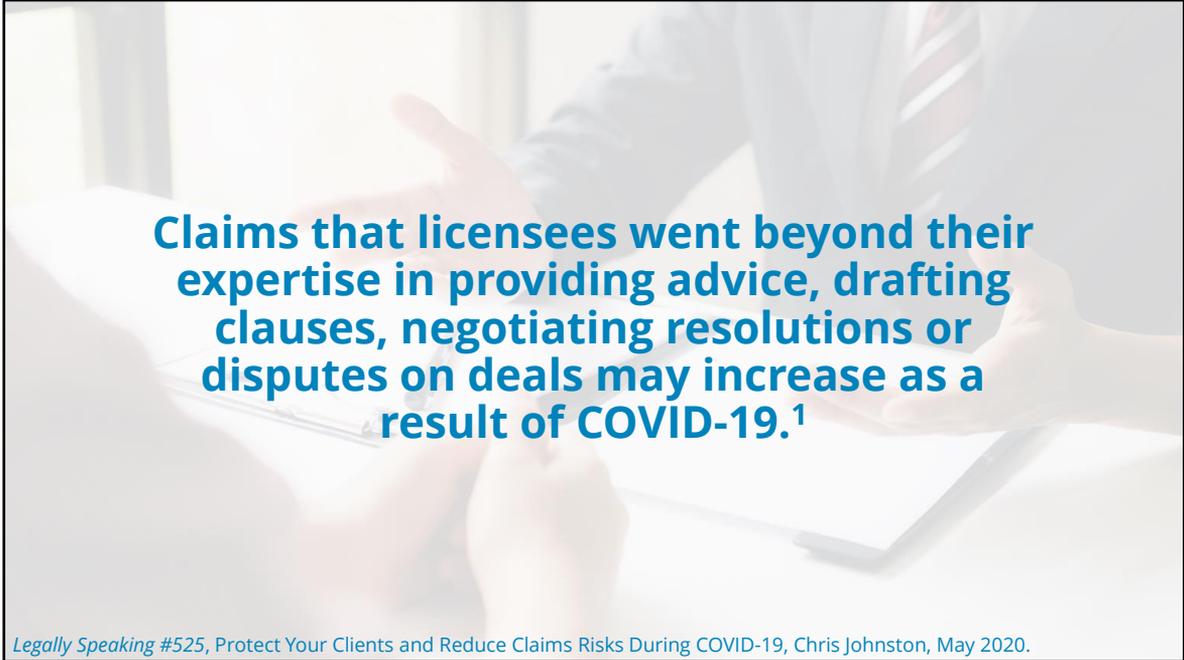
- There are a number of things Shawn should consider in preparing the offer, given the buyers' concerns around COVID-19, the potential implications of COVID-19 on purchasing a property and their request to include a COVID-19 clause.
- Some of these considerations include:
 1. **Funds** – Are the funds to purchase related to or contingent on the sale of the buyer's property? If so, are there clauses in the offer that may impact the enforceability of that contract?
 2. **Market Value** – How will Shawn advise these buyers on the market value of the home, when helping to inform them on their offer?
 3. **Due Diligence** – What are the buyers' concerns and/or due diligence they wish to explore, and is there adequate time for them to perform this due diligence?
 4. **Owner or Tenant Occupied** – Is the property owner or tenant occupied?
 5. **Timeline** – What are the preferred completion/possession and adjustment dates?
 6. **Legal Advice** – Has Shawn advised his clients to seek legal advice, as appropriate? In the time the offer is open

for consideration, is there also adequate time for the seller(s) to seek legal advice?

7. **COVID-19 Clause** – Has a lawyer drafted the COVID-19 clause? Is it specific to this transaction? Does it address the buyer's concerns?
 8. **Area of Expertise** – Where else might Shawn need to refer or advise his clients to seek professional advice?
- Do you feel that any of these may not be a consideration for Shawn? (*open for discussion*)
 - Do you feel that there are additional considerations that Shawn may need to think about? (*open for discussion*)



- If you found yourself in this situation, what would you do? (*open for discussion*)



Claims that licensees went beyond their expertise in providing advice, drafting clauses, negotiating resolutions or disputes on deals may increase as a result of COVID-19.¹

Legally Speaking #525, Protect Your Clients and Reduce Claims Risks During COVID-19, Chris Johnston, May 2020.

- These are unprecedented times with COVID-19 in real estate as with all industries.
- The principles of practice, however, remain unchanged.
- Sales are still happening, and there are still claims being made against licensees.
- The court claims against licensees that are most likely to increase as a result of COVID-19 may include:
 - Claims relating to the timing and removal of subject conditions and the ability to complete due diligence on a property;
 - Claims relating to completion/possession;
 - Claims to do with the time to effect a sale, marketing efforts made and the value achieved/paid by a seller/buyer, respectively; and
 - **Claims that licensees went beyond their expertise in providing advice, drafting clauses, negotiating resolutions or disputes on deals.**
- Complaints made to RECBC that are most likely to increase as a result of COVID-19 are similar – failure to act in a client's best

interests, failure to act with reasonable care and skill, failure to advise a client to seek advice on matters outside of the expertise of the licensee, etc.

- Let's take a closer look at the issues around licensees acting outside their area of expertise.



Acting Outside Your Area of Expertise

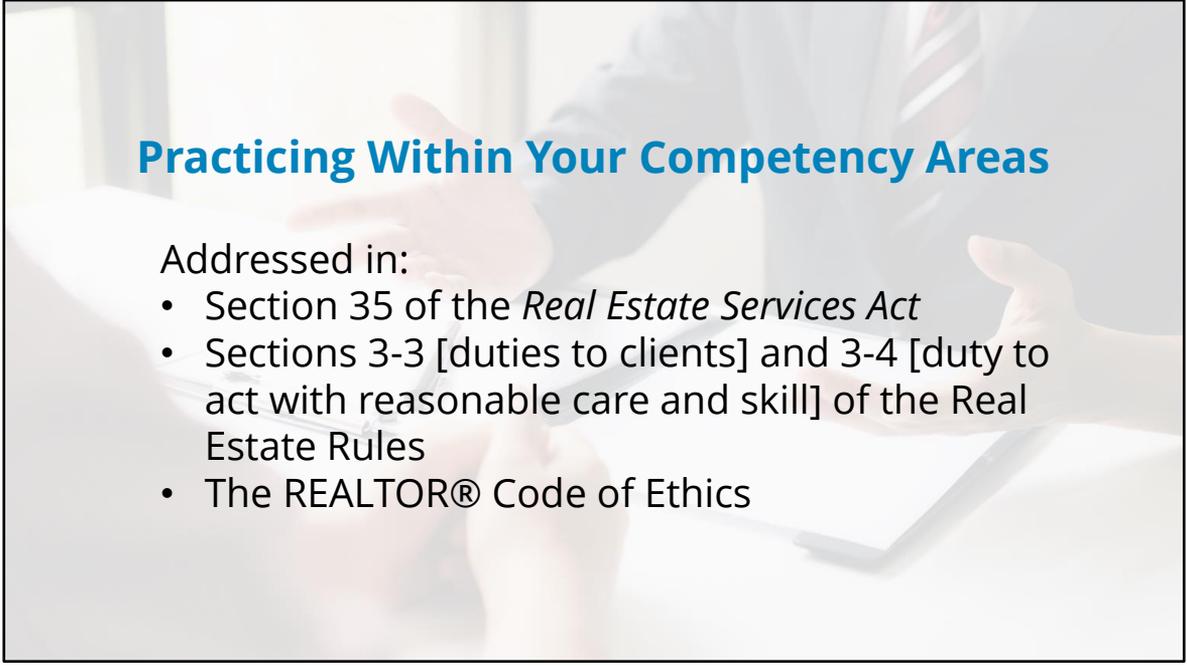
- While Realtors in BC holding a trading services licence are not restricted in the type or location of property they are listing, selling or leasing, you should think carefully before stepping outside your area of expertise into unknown pitfalls.
- If you act outside your area of expertise, you run a higher risk of making a mistake, which may lead to complaints or claims made against you.



Examples where Realtors may be found to be acting outside their area of expertise:

1. Offering advice or not referring clients to seek professional advice when and where appropriate
2. Drafting clauses
3. Residential Realtors selling commercial or business properties,
4. Being unfamiliar with property types with unique considerations such as strata or rural real estate
5. Providing services outside of their (geographic) practice area and not being familiar with zoning, bylaws, environmental issues, etc.
6. Offering services they are not licensed for such as property management

- There are a number of examples where Realtors, usually with the best of intentions, act outside their area of expertise exposing themselves to risk.
- A few examples include:
 - Offering advice outside their area of expertise or not referring clients to seek professional advice when and where appropriate,
 - Drafting clauses,
 - Residential Realtors selling commercial or business properties,
 - Being unfamiliar with property types with unique considerations such as strata or rural real estate,
 - Providing services outside of their (geographic) practice area and not being familiar with zoning, bylaws, environmental issues, etc., or
 - Offering services they are not licensed for such as property management.
- Are there additional areas where Realtors may act outside of their area of expertise? (***open for discussion***)



Practicing Within Your Competency Areas

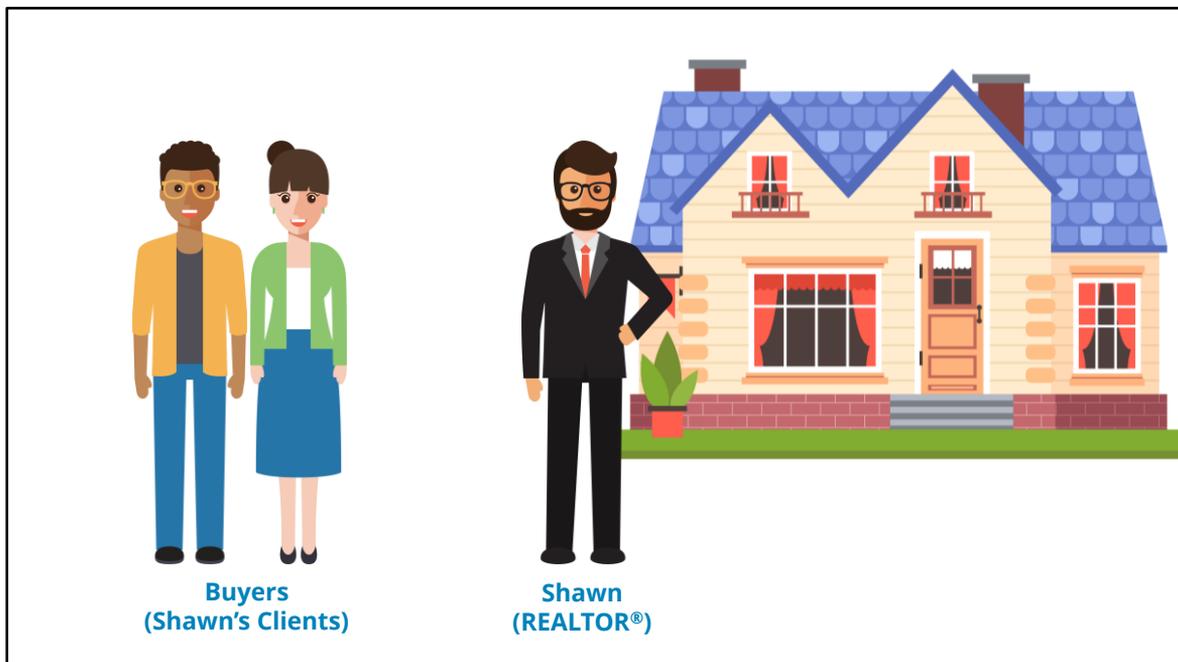
Addressed in:

- Section 35 of the *Real Estate Services Act*
- Sections 3-3 [duties to clients] and 3-4 [duty to act with reasonable care and skill] of the Real Estate Rules
- The REALTOR® Code of Ethics

- Real estate is a diverse and frequently complex industry.
- By specializing in a particular type of real estate or a specific market area, you must remain current and familiar with the unique nature of that market segment.
- Licensees are expected by the public and by the regulator to maintain a state of competency in all areas in which the licensee provides services.
- Licensees are governed by the *Real Estate Services Act* and, as such, the Real Estate Rules:
 - Licensees who demonstrate incompetence may be found to have committed professional misconduct under section 35 of the *Real Estate Services Act*.
 - One of the requirements under section 3-3 of the Real Estate Rules is to advise the client to seek independent professional advice on matters outside of the expertise of the licensee. This applies not only to professional knowledge outside of real estate, but also to real estate matters that aren't your specialty, and to issues affecting real estate in locations that you're not familiar with.
 - Section 3-4 of the Real Estate Rules states that when providing real estate services, a licensee must act honestly

and with reasonable care and skill. Where a licensee is not confident that they are able to provide the level of skill the client needs, they should refer the client to another licensee.

- Realtors must also abide by the REALTOR® Code of Ethics.
- By acting within your area of expertise you can better:
 - protect your clients, and
 - mitigate risks.



- Now that we've reviewed the rules governing Realtors and licensees in acting within their competence areas, let's revisit Shawn's situation.
- Shawn is representing these buyers on the purchase of their new home, and the buyers wish to include a clause to protect them if they cannot complete due to COVID-19.
- Although the following case studies are different from Shawn's specific situation, they offer some important insights and fact patterns where licensees have acted outside their area of expertise and may inform Shawn's decision as to how he might handle the situation.



Case Study #1: Acting Outside Your Area of Expertise - Unsubstantiated Comments

- The first case study was provided by the Real Estate Council of BC.
- In this case study, we will explore a scenario where a licensee lacked knowledge and provided unsubstantiated comments.
- We will discuss where the licensee went wrong in this situation and review the disciplinary decisions made by RECBC.
- Please note, this scenario occurred before September 30, 2016, under the old rules and disciplinary sanctions.

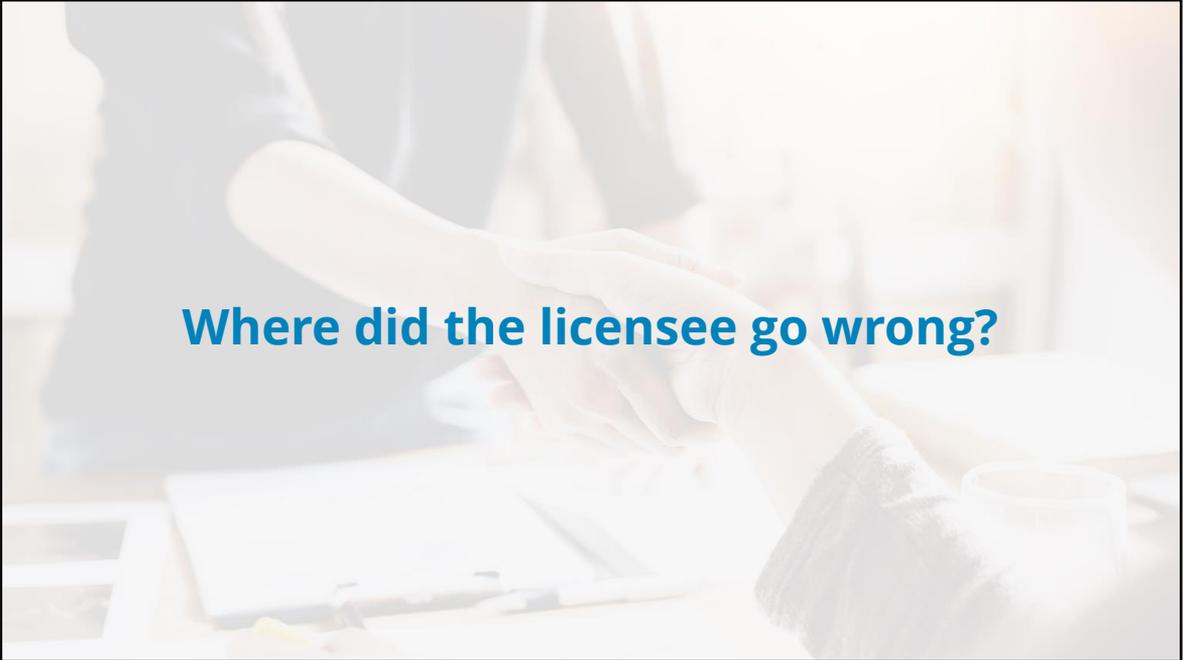
What happened?

- The licensee showed buyers a bare land strata lot
- The buyers asked the licensee if they could add some fill to the property to make it more suitable for their needs
- The licensee recalled advising that there was no wetlands covenant on the property, and she believed they could make their desired changes
- After the buyers completed their purchase, they discovered there was more to the story...

- In this case study, the licensee showed the buyers a bare land strata lot.
- The buyers asked the licensee if they could add some fill to the property to make it more suitable for their needs.
- The licensee recalled advising the buyers that there was no wetlands covenant on the property and that she believed they could work with the land and make some changes.
- After the buyers completed their purchase of the property, they engaged a contractor to infill the front part of their lot.
- The contractor declined to do so as he believed it to be wetlands.
- The buyers were advised by the District that prior to being permitted to infill and develop their lot, it was required that a riparian area regulation report be submitted at the buyers' expense, as the lot fell within the District's riparian area regulation development permit area.
- The regulation was intended to protect wetlands.
- The buyers advised the licensee of their discovery and asked her for assistance.
- Attempts were made to achieve an agreement between the developer and the buyers to trade their lot for another, in the later phase of the development; however, an agreement was not reached because of a price difference the buyers would have to

pay.

- Further, the developer offered to buy the lot back, but an agreement could not be reached.



Where did the licensee go wrong?

- So, let's talk this through. Where do you think this licensee went wrong? (***open for discussion***)

What were the results?

A RECBC discipline committee found that the licensee:

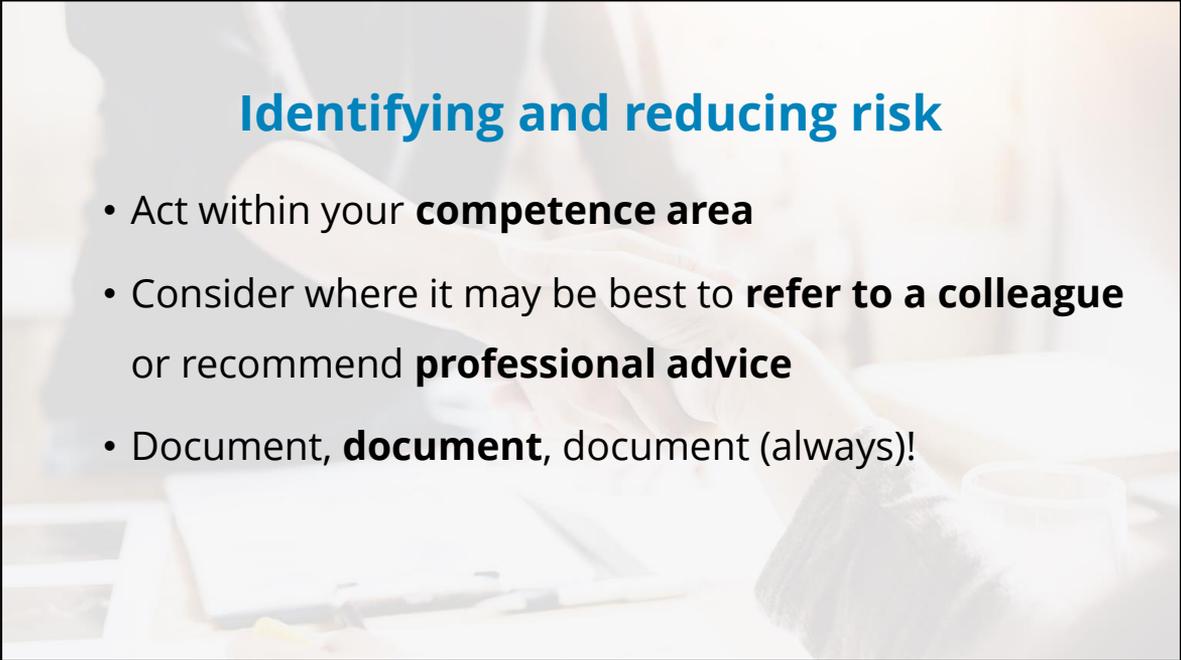
- failed to advise the said buyers to seek independent professional advice on matters outside her expertise;
- failed to use reasonable efforts to discover relevant facts respecting the property; and
- failed to make appropriate recommendations to the buyers.

- A discipline committee of the Real Estate Council of British Columbia found that the licensee:
 - failed to advise the said buyers to seek independent professional advice on matters outside her expertise by advising them that they could work with the land and make changes when asked by the buyers if they could add some fill to the property to make the property more suitable for their needs;
 - failed to use reasonable efforts to discover relevant facts respecting the property; and
 - failed to recommend to the buyers to contact the District prior to making an offer on the said property to ascertain if the plans they had for the property would be permitted, or, in the alternative, recommend to the buyers to make their offer subject to confirming that their intended house plans and infill would be permitted, contrary to section 35(1)(a) and (d) of the *Real Estate Services Act*, and sections 3-3 [duties to clients] and 3-4 [duty to act with reasonable care and skill] of the Real Estate Rules.



How could you identify and reduce risk in this scenario?

- What could you do to help identify and reduce risk in this scenario? (*open for discussion*)



Identifying and reducing risk

- Act within your **competence area**
- Consider where it may be best to **refer to a colleague** or recommend **professional advice**
- Document, **document**, document (always)!

- In order to demonstrate competence, you must be knowledgeable about local conditions that may be material to the interests of your clients, whether they are buyers, sellers, landlords, tenants or strata corporations.
- While licensees are not expected to be experts in all areas that impact real estate, they are expected to be alert to potential concerns in the areas in which they practice.
- In this situation, to reduce the risks of having a complaint brought against them, the licensee could have:
 - acted within their competence area,
 - considered where it may be best to refer to a colleague or recommend professional advice, and
 - document, document, document!



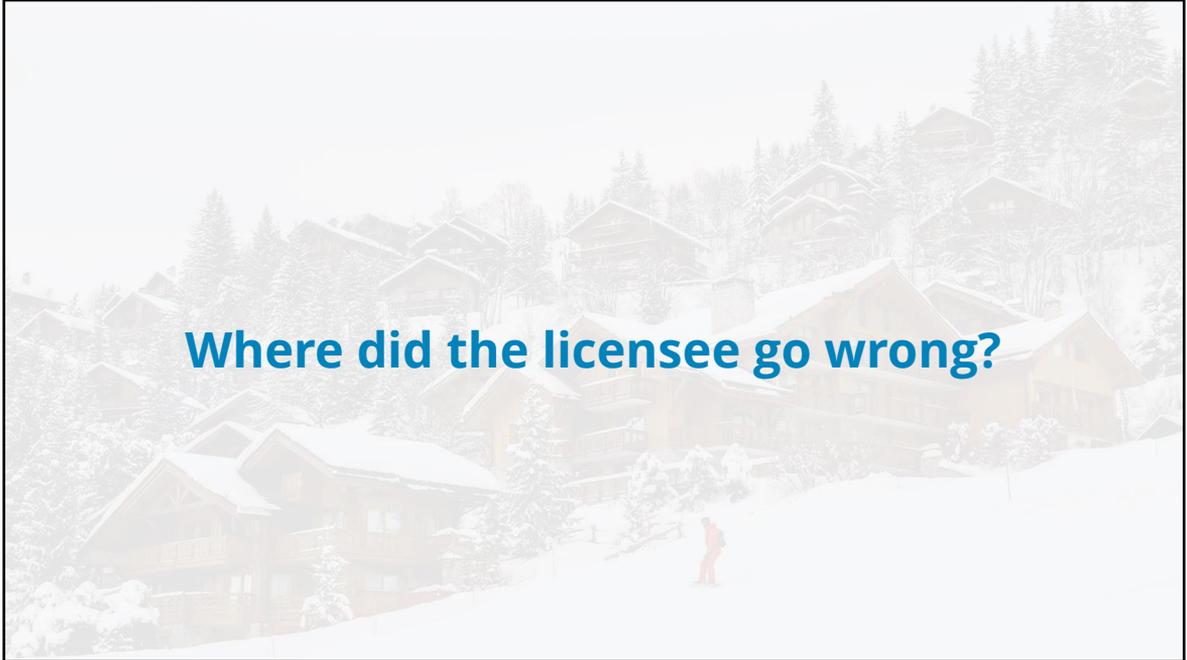
Case Study #2: Acting Outside Your Area of Expertise – Specialized Property Types

- The second case study was provided by the Real Estate Errors & Omissions Insurance Corporation.
- In this case study, we will explore a scenario where a licensee provides services for a unique and specialized property, outside their area of expertise.

What happened?

- A licensee acted for a buyer looking for a home in ski country
- The buyer was from overseas and was not present to view or inspect the property
- The licensee said he would ensure the buyer had all they needed in order to make an informed decision
- The deal completed with the buyer being unaware that they could not move into the property full-time as it had restrictions on owner usage

- In this scenario, a licensee acted for a buyer looking for a home in ski country.
- The buyer was from overseas and had not visited the slope-side community more than once.
- The buyer was not present to view or inspect the property, but the licensee said he was familiar with the area and would ensure that the buyer had all they needed in order to make an informed decision.
- The deal completed with the buyer being unaware that they could not move into the property full time as it had restrictions on owner usage.
- The buyer looked to his agent for compensation.
- The buyer's agent had never sold a property in this community and was not familiar with issues unique to it.



Where did the licensee go wrong?

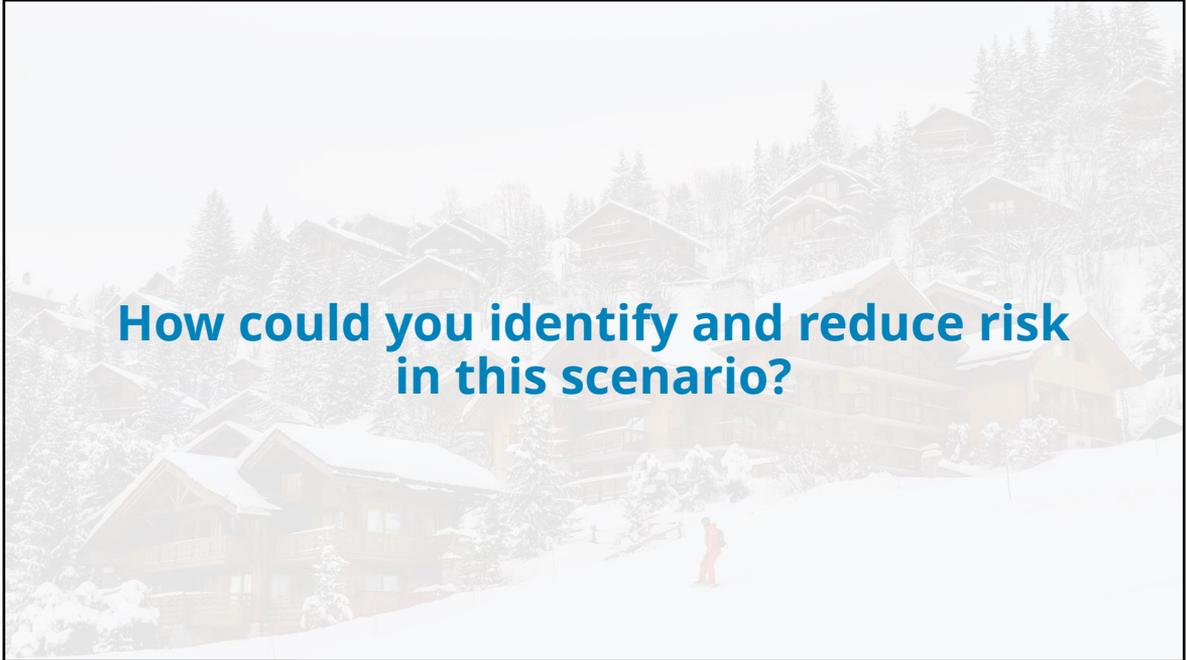
- So, let's talk this through. Where did this licensee go wrong?
(open for discussion)

What were the results?

Although this claim was resolved before it turned into litigation, the licensee lost many hours compiling documents and statements and meeting with defence counsel.

In addition, the stress of being involved in a professional liability claim should not be underestimated.

- Although this claim was resolved before it turned into litigation, the licensee lost many hours compiling documents and statements and meeting with defence counsel.
- In addition, the stress of being involved in a professional liability claim should not be underestimated.



How could you identify and reduce risk in this scenario?

- How could you identify and reduce risk in *this* scenario? (***open for discussion***)

Identifying and reducing risk

- Ensure you are competent to provide services specific to the **property type/geographic location**
- Consider whether you have the knowledge and skill to represent the client considering **standards of practice** in the profession
- Consider when your client might be best served by referring them to someone with **more knowledge and skill** to represent their interests

- Standards of practice have been rising consistently and every licensee is expected to conform to higher standards as they become the norm.
- In considering whether a licensee may have demonstrated incompetence and thereby committed professional misconduct, the standard of care of a reasonably prudent licensee is taken into consideration.
- While a real estate licence permits an individual to provide services related to trades in real estate throughout the province, that does not mean licensees are always competent to do so.
- Even in trying to assist clients, you can't afford to run the risk of trying to provide services to clients in an area of real estate you are unfamiliar with.
- Whether your prospective clients want you to help them buy or sell a type of property you haven't handled before, or they're interested in buying or selling in an area of the province that's not well known to you, think twice about trying to provide these services.
- Before agreeing to assist a prospective client, ask yourself whether you have the knowledge and skills to represent that client adequately.

- For example, the expertise necessary to sell a vacation home in ski country is not the same expertise necessary to assist in the purchase of a waterfront home on a Gulf Island.
- There are often situations where a prudent licensee should refer business to someone who is more knowledgeable in a particular market or to another licensee within the brokerage who has the knowledge and experience to assist the clients.

What should Shawn do?



Buyers
(Shawn's Clients)



Shawn
(REALTOR®)

- Now that we've reviewed two case studies, have these influenced how you feel Shawn should proceed? (***open for discussion***)

What should Shawn do?



Buyers
(Shawn's Clients)



Shawn
(REALTOR®)

- To determine how he should proceed, we first need to acknowledge that there may be different aspects to this scenario that will have an impact on Shawn's actions.
- For this scenario, however, let's focus on the clients' interest in adding a COVID-19 clause to their offer.
- Shawn has a duty to act in his clients' best interests.
- Shawn should not offer advice on matters outside of his area of expertise.
- Selling real estate during a pandemic, and drafting clauses specific to your clients' interests and transaction, is complex.
- Clients should always be referred to legal and other professionals on these topics to ensure their interests are protected.
- It is also best to have detailed and well-documented conversations in these unique times and set out the advice given to clients and the recommendations made, including when you've told clients to get legal advice.
- With COVID-19, Shawn should also review the health and transactional risks that could arise.

- When determining how best to advise on a situation, Shawn should remember that the terms of the contract will govern the relationship between parties and the facts unique to their circumstances.
- Realtors should work with their managing broker and seek legal advice as early as appropriate.

Reducing the risk of acting outside your area of expertise

- Identify and practice within your **competence areas**
- Provide **fact-based information**
- Seek **guidance** from your managing broker
- Use your **professional judgement**
- Take **extra training** or courses
- Use **reliable information** sources
- Document, **document**, document (always)!

- The public relies on Realtors' expertise.
- Therefore, Realtors should not act in situations where they are unable to render competent service.
- So, let's review ways to reduce the risk around acting outside of your competence areas:
 - Identify your competence areas and offer services within those areas.
 - Do not act in situations where you are unable to render competent service.
 - Identify what options are available given the situation.
 - Provide fact-based information vs. opinions.
 - Seek guidance from your managing broker prior to offering services outside of your competence area.
 - Use your professional judgement to help determine a course of action, such as:
 - advising clients, as appropriate, to engage professional advice (e.g., lawyers, accountants, building inspectors, etc.), and
 - referring to another colleague with the knowledge and experience to assist the client.
 - If you are considering broadening your practice, take extra

training or courses relevant to that area of practice. Look for a mentor or specialist who can help teach you the ropes. There may also be courses available to help you get started. For example, BCREA offers many courses on specialized properties including *Strata Fundamentals*, *Foreclosures and Court-Ordered Sales*, *Selling Tenant-Occupied Properties*, and *Manufactured Homes: What REALTORS® Need to Know*.

- Use other information and resources to investigate the transactions or properties you are dealing with, such as municipal/regional records, online resources or the Real Estate Council of BC's Knowledge Base.
- And, as always, document, document, document!
- Realtors who provide professional services in the areas they are competent can help protect consumers, thereby reducing the risk of consumer complaints and help ensure the integrity of the real estate profession.

Support and Resources

- BCREA Legally Speaking #525: <https://www.bcrea.bc.ca/legally-speaking/protect-your-clients-and-reduce-claims-risks-during-covid-19-525/>
- RECBC Knowledge Base: <https://www.recbc.ca/professionals/knowledge-base/guidelines/trading-services-practice-standards>
- REEOIC Risk Report: <https://www.reeoic.com/wp/wp-content/uploads/Stick-to-your-area-of-expertise.pdf>



- While this presentation considers different perspectives on how a Realtor may address situations to avoid acting outside their area of expertise, it's important to refer to these resources to help ensure compliance to practice.
- Thank you!