



What Would You Do? Presentation Series: Implied Agency



- Good morning/afternoon and welcome to the first presentation in the *What Would You Do?* Presentation Series.
- This presentation series will explore different areas of risk in real estate practice, with each presentation focusing on one area of risk.
- Today's presentation will explore implied agency.
- To do so, we will follow a REALTOR® through a transaction where it may be easy to fall into an implied agency relationship.
- We will also review two case studies involving implied agency and discuss how risks could have been mitigated in these 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 will offer a 360-degree look at risk management from the perspectives of your professional association, regulator, and insurer.
- Ok, let's get started....

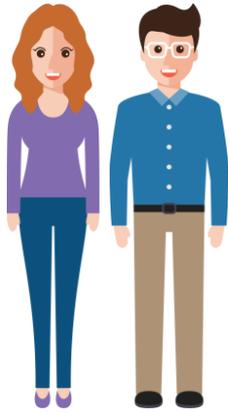
Setting the scene...



Kelly
(REALTOR®)

- This is Kelly! Kelly is a REALTOR®.

Setting the scene...



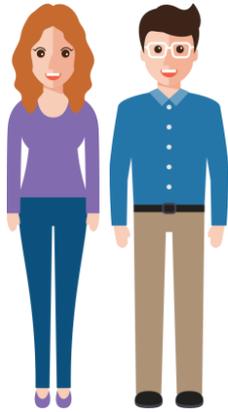
Sellers
(Kelly's clients)



Kelly
(REALTOR®)

- Kelly is representing these sellers on the sale of their home.

Setting the scene...



Sellers
(Kelly's clients)



Kelly
(REALTOR®)

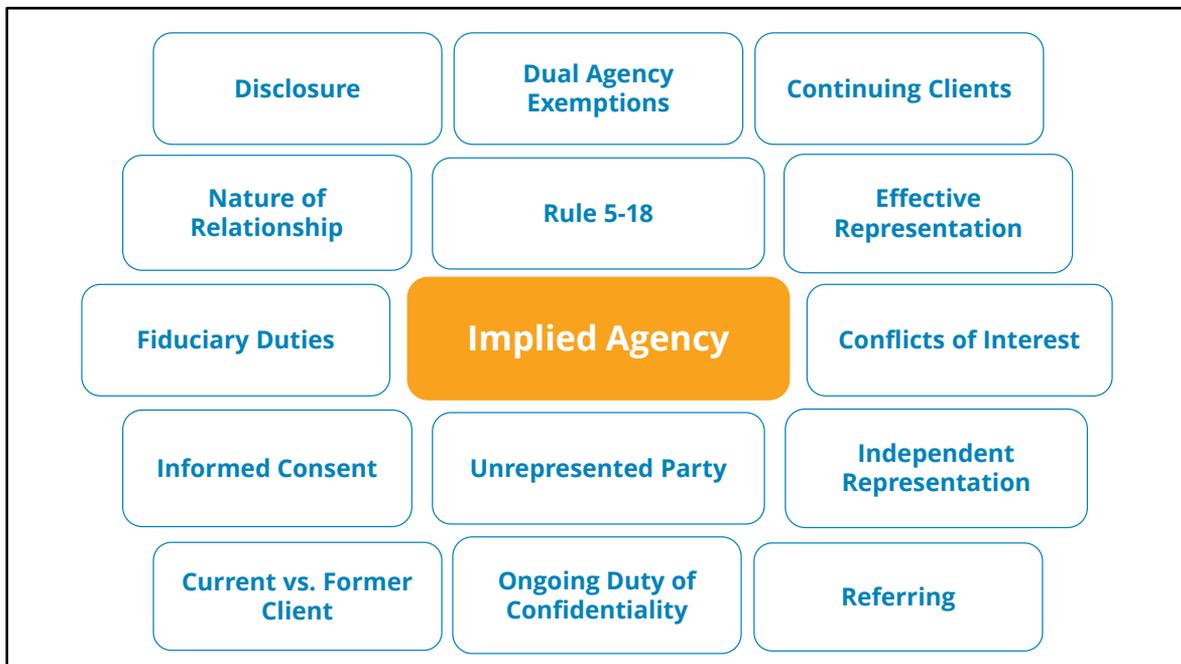


Prospective Buyer
(Kelly's client)

- One of Kelly's clients is interested in purchasing the home.

Considerations?

- What might Kelly need to consider in deciding how to proceed? (*open for discussion*)



- There are a number of things Kelly should consider when dealing with clients with competing interests.
- Let's review these considerations:
 1. Disclosure
 2. Nature of the Relationship
 3. Fiduciary Duties
 4. Informed Consent
 5. Current vs. Former Client
 6. Dual Agency Exemptions
 7. Rule 5-18
 8. Unrepresented Party
 9. Ongoing Duty of Confidentiality
 10. Continuing Clients
 11. Effective Representation
 12. Conflicts of Interest
 13. Independent Representation
 14. Referring
 15. Implied Agency
- Do you feel that any of these may not be a consideration for Kelly? (**open for discussion**)
- Do you feel that there are additional considerations that Kelly may need to think about? (**open for discussion**)



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

First, let's review how Kelly becomes the agent for her client...



Prospective Buyer
(Kelly's client)



Kelly
(REALTOR®)

- Before we go any further, let's review how Kelly becomes an agent for her client...
- The obvious answer is through a contract – such as a Listing Contract or Buyer's Agency Exclusive Contract.
- But keep in mind that an agency relationship may also be created by conduct, when a Realtor's actions lead the consumer to believe that the Realtor is acting as their advocate.
- This is sometimes called "implied agency."

First, let's review how Kelly becomes the agent for her client...



**Prospective Buyer
(Kelly's client)**



**Kelly
(REALTOR®)**

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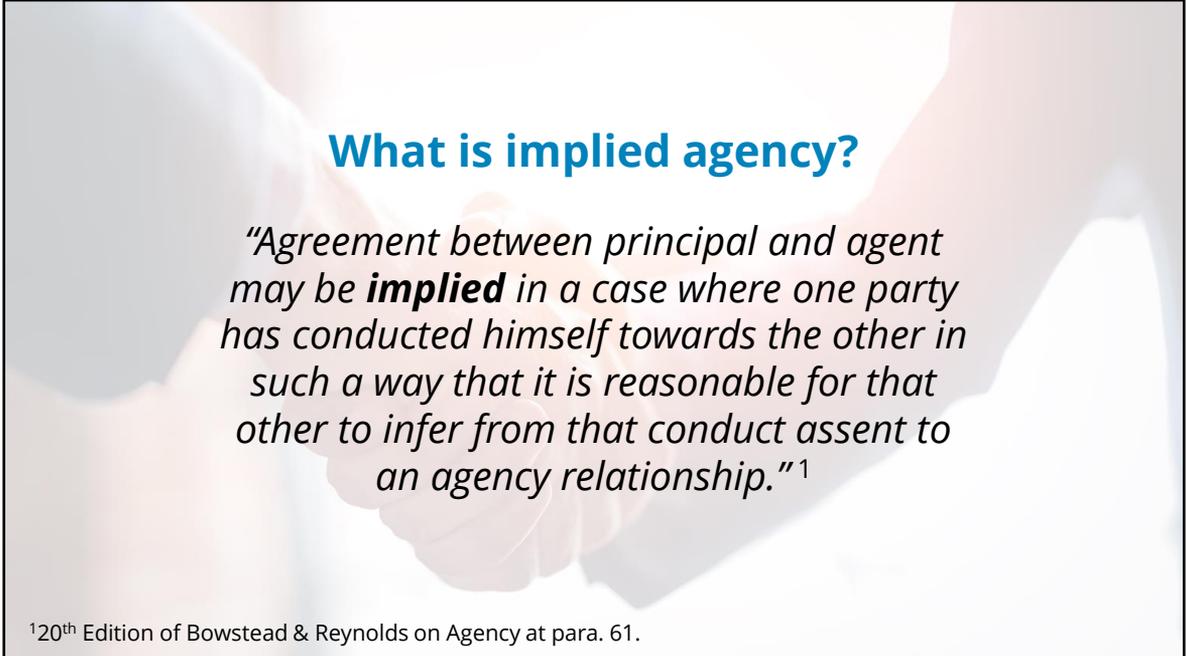


Prospective Buyer
(Kelly's client)



Kelly
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- But keep in mind that an agency relationship may also be created by conduct, when a Realtor's actions lead the consumer to believe that the Realtor is acting as their advocate.
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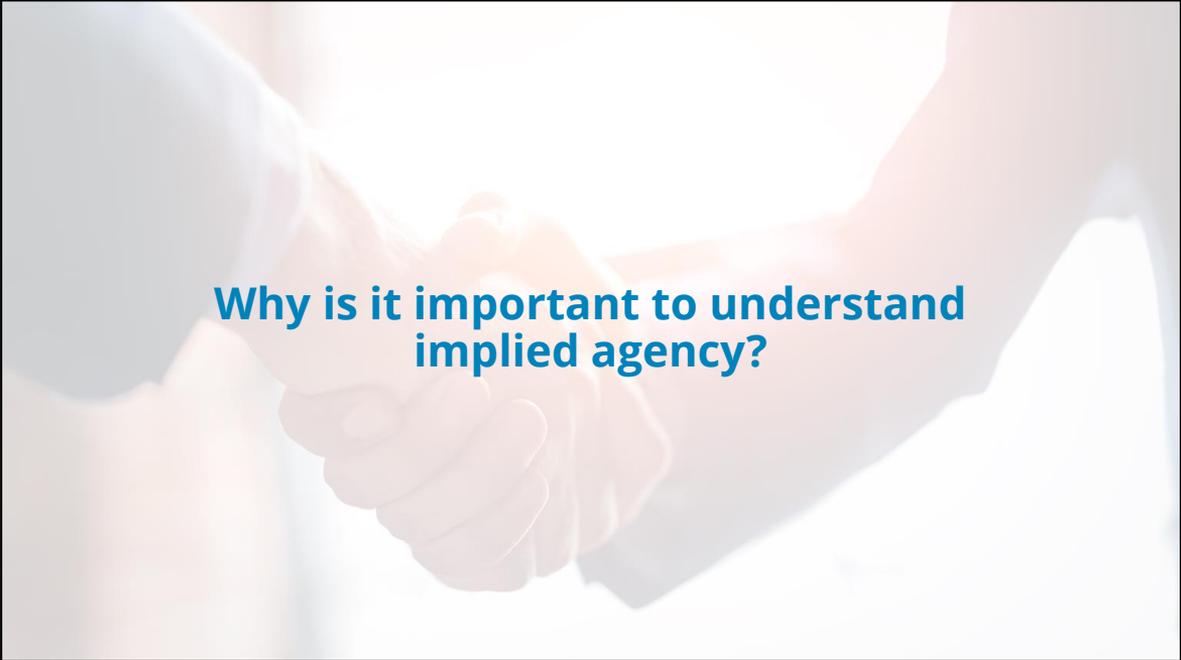
A background image showing several hands of different skin tones shaking together in a firm grip, symbolizing agreement or partnership. The image is semi-transparent and serves as a backdrop for the text.

What is implied agency?

*“Agreement between principal and agent may be **implied** in a case where one party has conducted himself towards the other in such a way that it is reasonable for that other to infer from that conduct assent to an agency relationship.”¹*

¹20th Edition of Bowstead & Reynolds on Agency at para. 61.

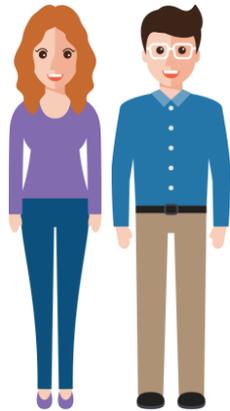
- But what exactly constitutes “implied agency”?
- An “*agreement between principal and agent may be **implied** in a case where one party has conducted himself towards the other in such a way that it is reasonable for that other to infer from that conduct assent to an agency relationship.*”
- In other words, “implied agency” occurs when an agency agreement is entered into based on conduct alone.



Why is it important to understand implied agency?

- A Realtor acting on behalf of a person who is not otherwise represented may be found to be acting as the party's agent if their actions would lead the party to believe that the Realtor was acting as their advocate.
- An implied agency relationship may be found to exist, even where the Realtor did not intend to act as the party's agent.
- In any transaction that involves an unrepresented party, if the Realtor does not intend to act in an agency relationship, the Realtor must confirm with that party that they are being treated as an unrepresented party, not a client.
- It is also important that the conduct of the Realtor is consistent with such statements.
- Giving a consumer advice can create an agency relationship that you didn't intend – so be sure that you are clear with yourself and with consumers about whether they are your client.

Let's recap...



Sellers
(Kelly's clients)

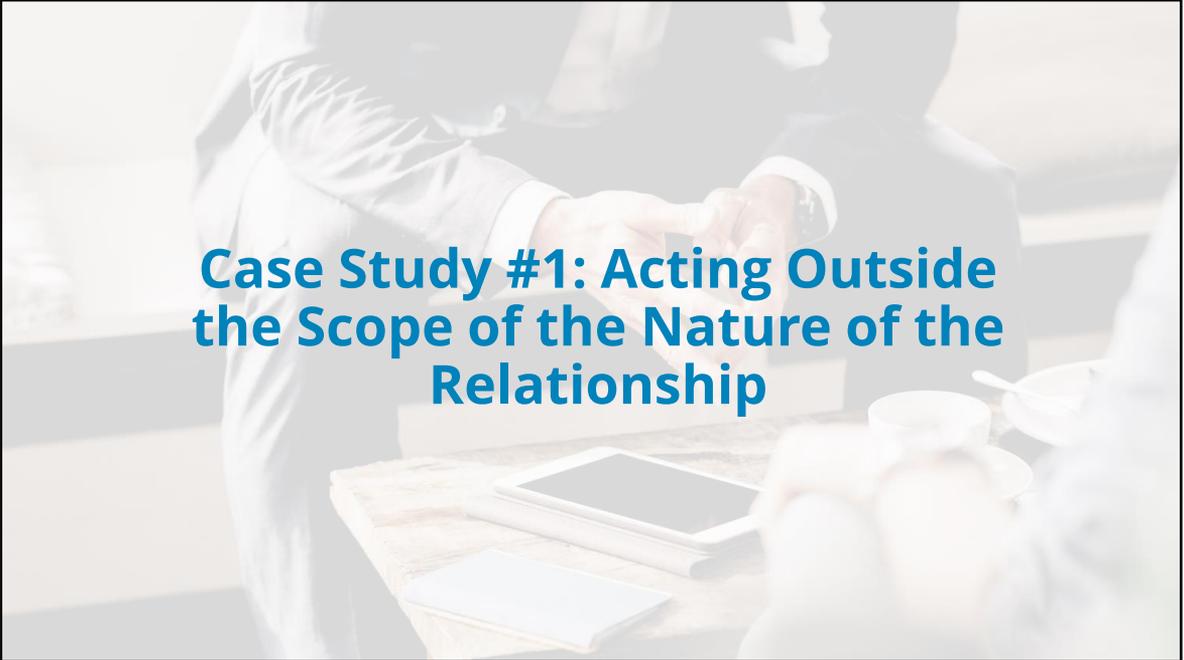


Kelly
(REALTOR®)



Prospective Buyer
(Kelly's client)

- Now that we've reviewed implied agency, let's revisit Kelly's situation.
- Kelly is representing these sellers on the sale of their home, and one of her clients is interested in purchasing the property.
- To help Kelly avoid an implied agency situation, let's explore a couple of case studies.
- Although the following scenarios are different from Kelly's situation, they offer some important insights and fact patterns about implied agency and breach of fiduciary duties and may inform Kelly's decision as to how she might handle the situation.



Case Study #1: Acting Outside the Scope of the Nature of the Relationship

- The first case study was provided by the Real Estate Council of BC.
- In this case study, we will explore a scenario of a no agency relationship, the actions of the licensee, where the licensee went wrong in this situation and the disciplinary decisions made by the Council.
- Please note, this scenario occurred before June 15, 2018, under the old rules & disciplinary sanctions.

What happened?

- The licensee was the listing agent for the seller of the property.
- A prospective buyer contacted the licensee about the property.
- The licensee and the buyer agreed to enter into a “customer” relationship (i.e., unrepresented party).
- During the transaction, the licensee advised the buyer on numerous aspects of the transaction.

- In this scenario, the licensee was the listing agent for the seller of the property.
- A prospective buyer (the “buyer”) contacted the licensee about the property. The buyer wanted the licensee to prepare an offer for the property.
- After discussion, the licensee and the buyer agreed to enter a “customer” relationship (i.e., the licensee would deal with the buyer as an unrepresented party).
- On the same day, the buyer told the seller he intended to build a new house on the property.
- A few days later, the buyer signed a Working with a Realtor (Designated Agency) brochure, showing that the buyer had a customer relationship with the licensee.
- The effect of establishing such a relationship with the buyer was to preclude the licensee from offering agency services, including such matters as recommending or suggesting a price to the buyer, and from negotiating on the buyer’s behalf.
- Throughout the transaction, the licensee proceeded to advise the buyer about the amount of his offer and other aspects of the transaction including the reasonableness of the seller’s asking price, the opportunities associated with building a new house on the property, and the licensee’s negotiations with the seller to reduce the price.
- In doing so, the licensee provided services associated with a client rather than a customer relationship despite what had been represented in the Working with a Realtor (Designated Agency) brochure.
- The licensee also provided inaccurate responses to the buyer’s questions regarding the title to the property and failed to address the status of the tenant on the property in the offer.



Where did the licensee go wrong?

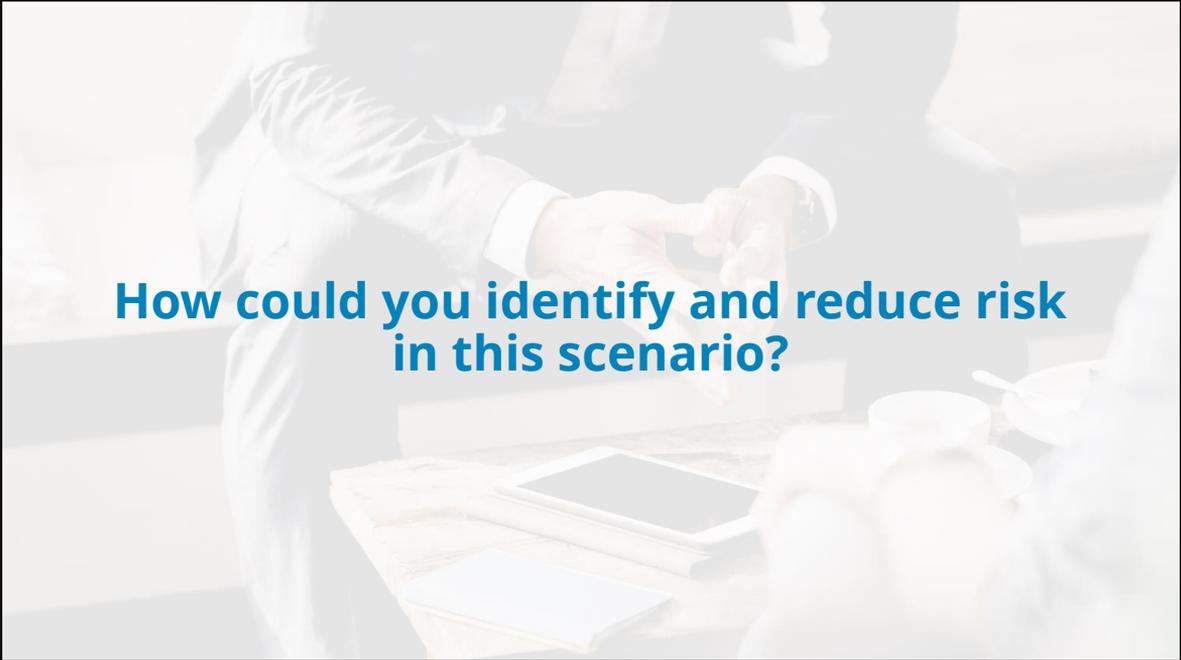
- So, let's talk this through. Where did this licensee go wrong? (***open for discussion***)

What were the results?

A RECBC discipline committee found that the licensee failed to take reasonable steps to avoid a conflict of interest when she established an implied client relationship with the buyer of the property while also in a client relationship with the seller.

In addition, the discipline committee also found that the licensee failed to act with reasonable care and skill contrary to section 3-4 of the Real Estate Rules.

- A discipline committee of the Real Estate Council of BC **found that the licensee failed to take reasonable steps to avoid a conflict of interest when she established an implied client relationship with the buyer of the property while also in a client relationship with the seller**, contrary to section 3-3(i) [Duties to clients] of the Rules.
- In addition, the discipline committee also found that the licensee failed to act with reasonable care and skill contrary to section 3-4 of the Rules.
 - in connection with her knowledge about the title to the property including when she responded to the buyer's inquiry about the existence of an easement on the property; and
 - when she failed to include a provision in the contract which addressed the status of an existing tenant at the property when she knew or ought to have known that there was a tenant at the property and that the status of the tenant needed to be addressed in the contract.



How could you identify and reduce risk in this scenario?

- What could you do to help identify and reduce risk in a situation where a no agency relationship should be offered? (***open for discussion***)

Identifying and reducing risk

- Discuss the **nature of the relationship** at the onset
- Seek **informed consent** from the consumer
- Act within the **scope** of the nature of the relationship
- Consider where it may be best to **refer to a colleague**
- Document, **document**, document!

- To identify risk in this scenario, let's start by establishing the risks of entering into a no agency relationship:
 - only being able to offer limited services to an unrepresented party,
 - acting outside of the nature of the relationship, and
 - implied agency.
- Now that we've established the risks, how might you reduce these risks?
 - Discuss the nature of the relationship at the onset,
 - seek informed consent from the consumer,
 - act within the scope of the nature of the relationship,
 - consider where it may be best to refer to a colleague, and
 - document, document, document!



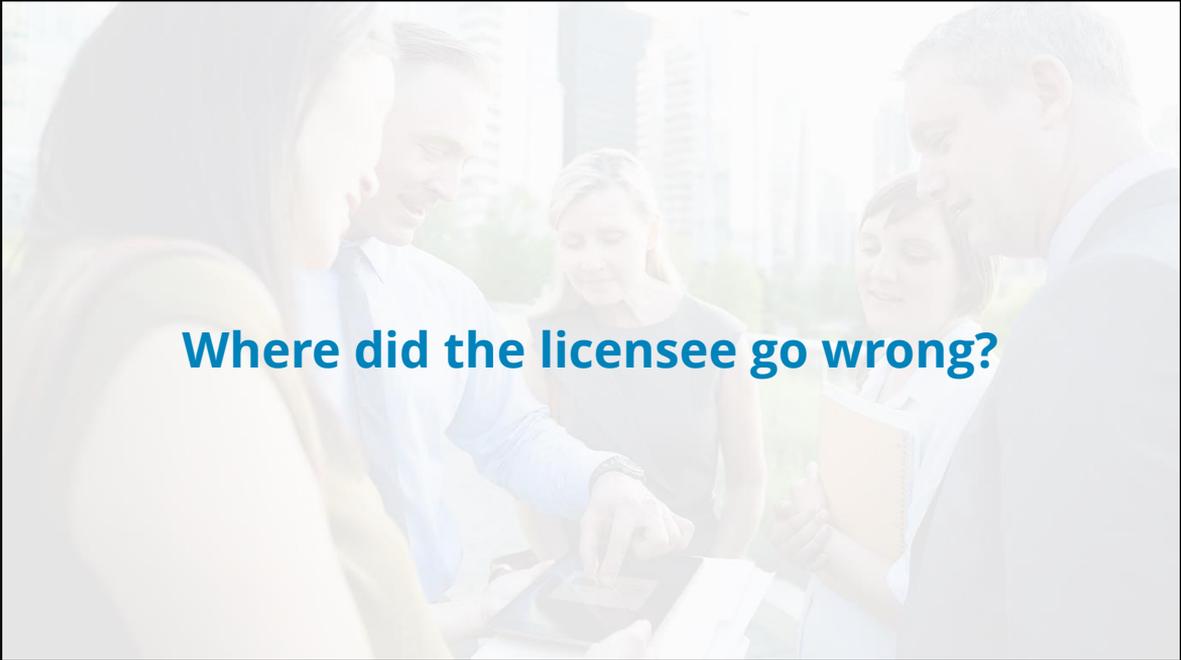
Case Study #2: Establishing the Nature of the Relationship

- The second case study was provided by the Real Estate Errors & Omissions Insurance Corporation.
- In this case study, we will explore a scenario involving implied agency as it pertains to dealing with former and current clients, and properties for sale by owner (FSBO).

What happened?

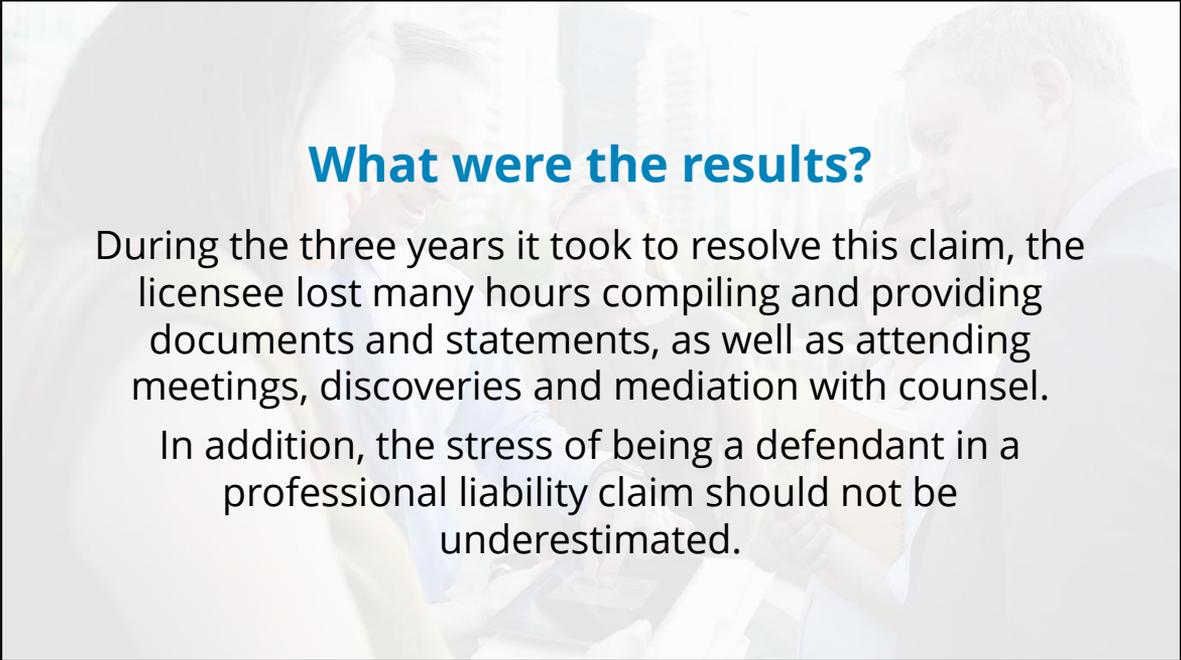
- Owners in a strata complex approached the licensee to help them find potential developer buyers.
- No formal agency relationship was entered into.
- After several years without purchase, the licensee stopped looking for an interested buyer.
- A year later, a developer approached the licensee to purchase the complex.
- They entered into an agency relationship and the licensee began negotiating on behalf of the developer.

- In this scenario, the owners of units in a strata complex decided to engage with potential developers for the sale of the complex.
- The owners approached the licensee to help them identify potential developer-buyers.
- No formal agency relationship was entered into, but the licensee indicated that she was happy to help and ready to assist.
- The licensee obtained information from the owners about the price they were willing to accept.
- After several years, no buyer had entered into contracts for the purchase of the strata units and the licensee stopped looking for an interested buyer.
- A year later, the licensee was approached by a developer interested in purchasing the complex.
- The licensee entered into a Buyer's Agency agreement with the developer and began negotiating with the owners.
- The developer, through the licensee, made offers to purchase the strata units, and transactions were scheduled to close.
- Before closing, several owners decided that they would not complete, asserting that the contracts were void due to the licensee's breach of fiduciary duty.



Where did the licensee go wrong?

- Where did the licensee go wrong here? What factors might have led the owners to believe the licensee was acting as their agent?
 - The owners initially approached the licensee for help and provided her with confidential information about the price they were willing to accept.
 - The licensee did not clarify what her role was and who she was acting for, both when she started looking for a developer-buyer and later when she began acting for the developer who bought the units.



What were the results?

During the three years it took to resolve this claim, the licensee lost many hours compiling and providing documents and statements, as well as attending meetings, discoveries and mediation with counsel.

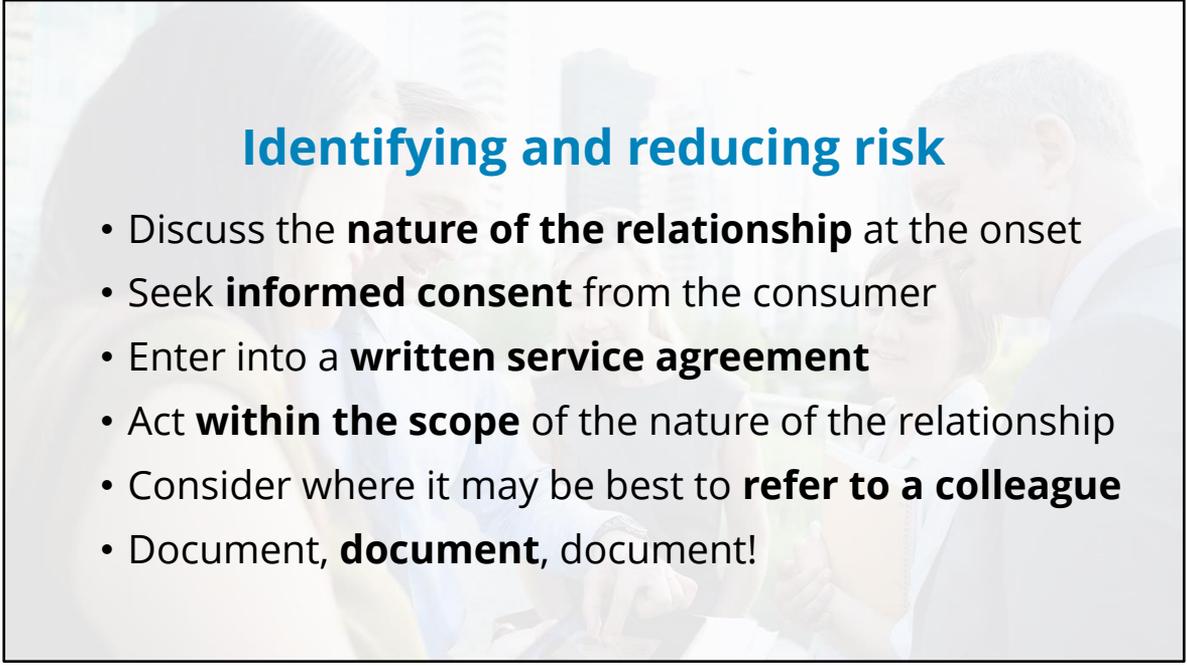
In addition, the stress of being a defendant in a professional liability claim should not be underestimated.

- During the three years it took to resolve this claim, the licensee lost many hours compiling and providing documents and statements, as well as attending meetings, discoveries and mediation with counsel.
- In addition, the stress of being a defendant in a professional liability claim should not be underestimated.

A group of five business professionals (three men and two women) are gathered around a table, looking at a tablet device. They appear to be in a collaborative meeting or discussion. The background shows a modern office building with large windows. The image is overlaid with a semi-transparent white box containing text.

How could you identify and reduce risk in this scenario?

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

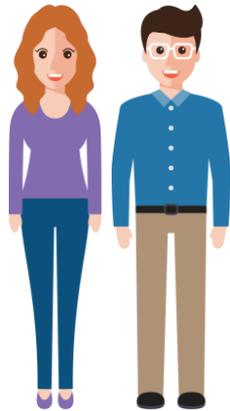


Identifying and reducing risk

- Discuss the **nature of the relationship** at the onset
- Seek **informed consent** from the consumer
- Enter into a **written service agreement**
- Act **within the scope** of the nature of the relationship
- Consider where it may be best to **refer to a colleague**
- Document, **document**, document!

- To identify and reduce risk in this situation, Realtors may want to consider the following:
 - Is this a situation where a licensee should have offered a buyer an agency relationship, given her previous relationship to the owners?
 - What are the risks of working with current and former clients?
- How might you reduce the risk?
 - Discuss the nature of the relationship and Privacy Notice & Consent at the onset (in this case, with the owners),
 - seek informed consent from the consumer in establishing the nature of the relationship,
 - enter into a written service agreement,
 - act within the scope of the nature of the relationship,
 - consider where it may be best to refer to a colleague (for example, when dealing with former & current clients), and
 - document, document, document!

What should Kelly do?



Sellers
(Kelly's clients)



Kelly
(REALTOR®)



Prospective Buyer
(Kelly's client)

- Now that we've reviewed two case studies, one involving implied agency and another involving breach of fiduciary duties, have these influenced how you feel Kelly should proceed? (open for discussion)
- To determine how she should proceed, we first need to acknowledge that there are different options available to Kelly and her clients in the way that this scenario might be handled.
- Kelly's actions will also be influenced by additional facts that we don't have. For example, is the buyer a current client or a former client?
- Lastly, Kelly needs to consider her risk tolerance for representing a party in the transaction, given the risks of falling into implied agency, and/or breaching her fiduciary duties.

An illustration within a black rectangular border. On the left, a woman with long brown hair in a purple top and blue jeans stands next to a man in a blue shirt and brown pants. In the center, a woman with her hair in a bun, wearing a grey suit, stands next to a wooden sign on a post that says "FOR SALE" in red letters. To the right, a man in a grey suit stands in front of a house with a red roof and a chimney. The background is a plain light color.

What should Kelly do if the seller is her current client and the buyer is her *former* client?

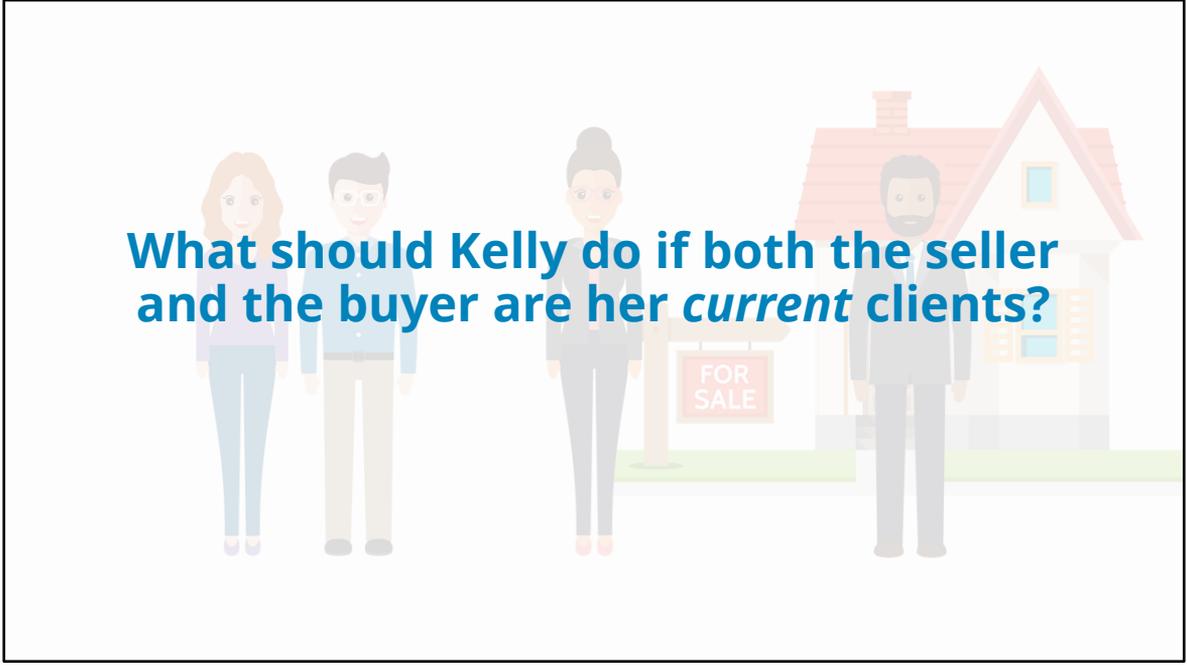
- What should Kelly do if the seller is her current client and the buyer is her *former* client?

An illustration depicting a real estate transaction. On the left, a woman with long brown hair and a man in a blue shirt and brown pants stand together. In the center, a woman with her hair in a bun and a man in a dark suit stand together. To the right is a house with a red roof and a chimney, with a 'FOR SALE' sign in front of it. The background is a light green and white gradient.

What should Kelly do if the seller is her current client and the buyer is her former client?

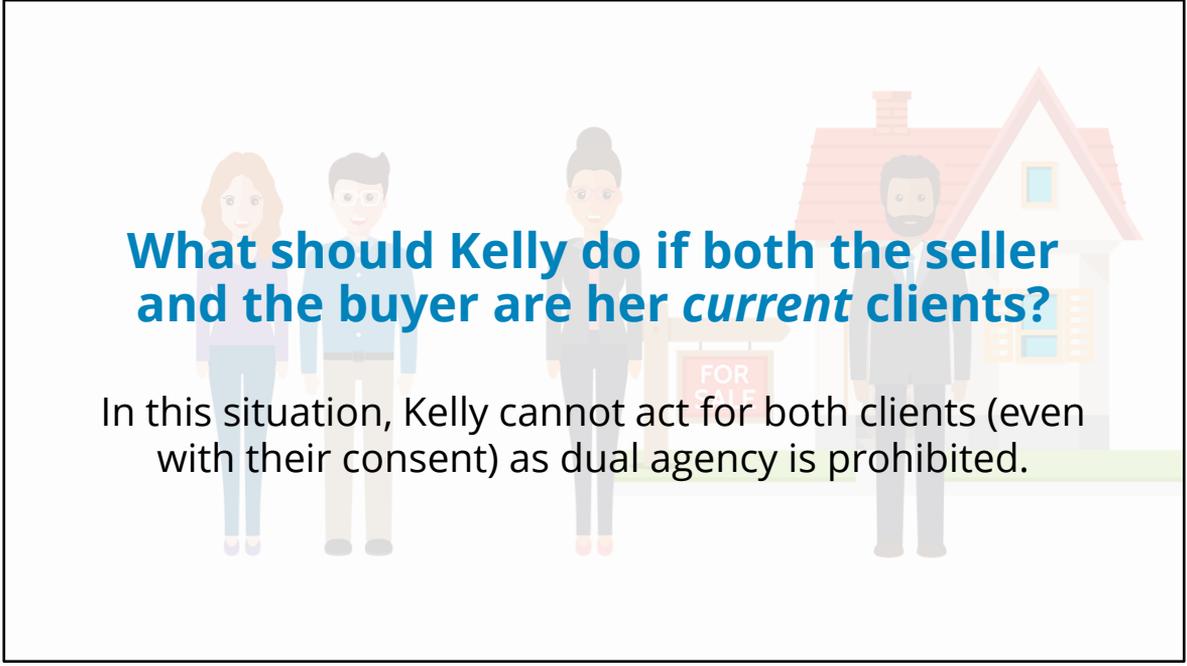
This situation requires Kelly to use her professional judgement.

- This is a situation that requires Kelly to use her professional judgement.
- Remember, Kelly has an ongoing duty of confidentiality towards her former client: she cannot share any confidential information she learned while acting as an agent for her former client (such as their motivations, needs, or financial information).
- At the same time, she has a duty to act in her current client's best interests and to disclose any material information to them.
- Kelly should consider:
 - If she can still effectively represent her current client?
 - If she received confidential information from her former client that would be relevant to her current client so that her ability to represent her current client is impaired?
- Kelly should ask herself these questions regardless of whether her former client is represented or unrepresented in the current transaction.
- If she is satisfied that she can continue to act for her current client, she'd need to tell her current client that:
 - The potential buyer is her former client, and
 - she will not be able to disclose any confidential information she received from her former client while acting as their agent.
- If her former client is unrepresented in the current transaction, remember that she must make the Disclosure of Representation in Trading Services and the Disclosure of Risks to Unrepresented Parties.
- Kelly should also consider the risks of falling into an implied agency situation should she decide to deal with a former client as an unrepresented party in a transaction.



What should Kelly do if both the seller and the buyer are her *current* clients?

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What should Kelly do if both the seller and the buyer are her *current* clients?

In this situation, Kelly cannot act for both clients (even with their consent) as dual agency is prohibited.

- In this situation, Kelly cannot act for both clients (even with their consent) because it would amount to dual agency, which is prohibited.
- Under [Rule 5-18](#), Kelly may resolve the conflict in one of two ways:
 - **Option 1:** Stop representing both the buyer and the seller in the transaction, and refer each of them to independent real estate professionals; or
 - **Option 2:** Continue representing only one of the clients in the transaction, provided both the buyer and seller agree that you can do so in a form approved by Council.
- This could mean referring the released party to a colleague who could represent their interests.
- Remember, Kelly has an ongoing duty of confidentiality towards her released client: she cannot share any confidential information she learned while acting as an agent for the released client (such as their motivations, needs, or financial information).
- At the same time, she has a duty to act in her current client's best interests and to disclose any material information to them.
- Kelly must consider:
 - Can she effectively represent her continuing client?
 - Did she receive confidential information from the released client that would be relevant to her continuing client so that her ability to represent her continuing client is impaired?



- Unless Kelly refers both parties off, she runs the risk of creating an “implied agency” relationship with the buyer in both of these scenarios.
- An agency relationship may be created by conduct when a Realtor’s actions lead the consumer to believe that the Realtor is acting as their advocate.
- Therefore, giving advice can create an agency relationship that you didn’t intend – so be sure that you are clear with yourself and with consumers about your role and the duties you owe.
- Ensuring that consumers are well-informed and well-protected requires may help to reduce risk.

Reducing the risk of falling into implied agency

- Identify what **options** are available given the situation
- Use your **professional judgement**
- Discuss and establish the **nature of the relationship**
- Discuss **potential conflicts** with consumers and develop a strategy for handling these conflicts
- Act **within the scope** of the nature of the relationship
- Document, **document**, document!

- So, let's review ways to reduce the risk of falling into implied agency:
 - Identify what options are available given the situation,
 - use your professional judgement to help determine a course of action,
 - discuss the nature of the relationship and Privacy Notice & Consent at the onset,
 - discuss potential conflicts with consumers and develop a strategy for handling potential conflicts,
 - seek informed consent from the consumers in establishing, by way of a written service agreement, the nature of the relationship. This will ensure everyone is clear on roles and responsibilities,
 - act within the scope of the nature of the relationship, and
 - document, document, document!
- Realtors who fulfill their disclosure obligations by obtaining informed consent can reduce their risk of consumer complaints and help ensure the integrity of the real estate profession.

Support and Resources

- BCREA *Legally Speaking* #503: <https://www.bcrea.bc.ca/legally-speaking/implied-agency-if-it-quacks-like-a-duck-it-may-be-a-duck/>
- RECBC Knowledge Base: <https://www.recbc.ca/professionals/knowledge-base/knowledge-base-search?search=implied%20agency>
- REEOIC Risk Reports: <https://www.reeoic.com/licensees/news/risk-report-archives>



- While this presentation considers different perspectives on how a Realtor may address situations to avoid implied agency, it's important to refer to these resources as well to help ensure compliance to practice.
- Thank you!