



地產代理監管局
ESTATE AGENTS AUTHORITY

Illustrations to *Code of Ethics*

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Foreword

As property transactions may involve complicated procedures, licensees must possess the relevant professional knowledge and act with integrity when handling property transactions. The Estate Agents Authority (“the Authority”) has long been committed to improving and enhancing the professional standards and conduct of the trade. The *Code of Ethics* was promulgated by the Authority for the purpose of providing guidance and directions in the conduct of estate agency practice. Failure by licensees to observe and comply with the *Code of Ethics* may render them not being fit and proper persons under the Estate Agents Ordinance to hold a licence, which in turn may affect their eligibility to hold or continue to hold their licences. Disciplinary action may be taken against them.

The Authority compiled this “Illustrations to *Code of Ethics*” for licensees’ reference with an aim to enhance licensees’ understanding of the *Code of Ethics* through real-life examples. It enables the licensees to get a better grasp of the requirements of the *Code of Ethics* and reminds them to adopt proper and ethical practices for handling property transactions so that the standard of services and conduct of the trade can be raised further.

Estate Agents Authority
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Disclaimer

This “Illustrations to *Code of Ethics*” is for general reference only. It does not constitute legal or professional advice. Readers are strongly advised to seek legal advice on matters encountered in specific situations. Unless otherwise specified in this “Illustrations to *Code of Ethics*”, the “Commentary and Suggestion” provided therein is intended to describe the state of law and practice as of May 2013. The Authority shall not be held liable for any loss or damage incurred or suffered in connection with, arising from, or due to reliance on the whole or any part of this “Illustrations to *Code of Ethics*”.

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Table of Contents

	Page
Paragraph 3.1.1 of the <i>Code of Ethics</i>	
Illustration (1) Procuring Illegal Letting	07
Illustration (2) Infringing the Law regarding Road Traffic	10
Illustration (3) Protection of Personal Data	13
Paragraph 3.2.1 of the <i>Code of Ethics</i>	
Illustration (1) Offering Loans to a Purchaser of a First sale Property	17
Illustration (2) Using Threatening Means to Collect Commissions	19
Illustration (3) Pre-printing Extra Terms on a Prescribed Form	21
Illustration (4) Affixing an Advertisement on a Property	23
Illustration (5) Stakeholding of Deposits	25
Paragraph 3.2.2 of the <i>Code of Ethics</i>	
Illustration (1) Failing to Verify the Legal Capacity of a Purchaser	28
Illustration (2) Deed of Gift	30
Illustration (3) Accepting a Deposit Before Issuance of Pre-sale Consent	32
Illustration (4) Proper Capacity of the Landlord	34
Paragraph 3.3.1 of the <i>Code of Ethics</i>	
Illustration (1) Subletting without a Landlord's Consent	37
Illustration (2) Deceiving a Client to Enter into a Tenancy Agreement	39
Illustration (3) Passing a False Offer to a Client	41
Illustration (4) Misrepresentation on Permitted User	43
Illustration (5) Failing to Advise a Purchaser on a Confirmor Sale	45

	Page
Paragraph 3.4.1 of the <i>Code of Ethics</i>	
Illustration (1) Providing Misleading Information on a Mortgage Loan	48
Illustration (2) Failing to Carry Out a Land Search for a Non-self-contained Unit	50
Illustration (3) Failing to Deal with Building Orders in PASP	52
Illustration (4) Arranging the Signing of a PASP with the Property Price Left Blank	55
Illustration (5) Proof of Proper Authorisation	57
Paragraph 3.5.1 of the <i>Code of Ethics</i>	
Illustration (1) Providing an Incorrect Property Age	60
Illustration (2) Failing to Exercise Due Diligence to Verify the Information on Floor Area	62
Illustration (3) Misrepresentation on the Location of the Refuse-collection Point	65
Illustration (4) Changing the Terms of a PASP Without the Parties' Consent	67
Illustration (5) Failing to do a Land Search	69
Paragraph 3.6.1 of the <i>Code of Ethics</i>	
Illustration (1) Leasing Own Property to a Client	72
Paragraph 3.6.2 of the <i>Code of Ethics</i>	
Illustration (1) Failing to Disclose a Relationship with a Vendor	75
Illustration (2) Failing to Disclose Dual Agency	78
Paragraph 3.7.1 of the <i>Code of Ethics</i>	
Illustration (1) Injuring the Reputation of Another Estate Agency	80

		Page
Paragraph 3.7.2 of the <i>Code of Ethics</i>		
Illustration (1)	Fighting in Public Places	82
Illustration (2)	Failing to Honour a Promise of a Cash Incentive	84
Illustration (3)	Improper Handling of Client Money	85
Illustration (4)	Acquisition of Old Buildings	87
Illustration (5)	Insulting Another Estate Agent in a Public Place	89
 Paragraph 3.7.3 of the <i>Code of Ethics</i>		
Illustration (1)	Refusal to Return a “Certificate of Availability for Sale”	91
Illustration (2)	Copying Listings Information without Permission	92

Notes:

All references to:

1. “Authority” shall mean the Estate Agents Authority.
2. “Ordinance” shall mean the Estate Agents Ordinance.
3. “Practice Regulation” shall mean the Estate Agents Practice (General Duties and Hong Kong Residential Properties) Regulation.
4. “Licensing Regulation” shall mean the Estate Agents (Licensing) Regulation.
5. “*Code of Ethics*” shall mean the *Code of Ethics* issued by the Estate Agents Authority.
6. “Practice Circular” shall mean the practice circulars issued by the Estate Agents Authority.
7. “Land search” refers to the land register of a property in the Land Registry.

Paragraph 3.1.1 of the *Code of Ethics*

Estate agents and salespersons shall refrain from activities during their practice which may infringe the law.

Illustration (1)

Procuring Illegal Letting

A licensee arranged for a landlord and a tenant to enter into a tenancy agreement for a property under the Home Ownership Scheme ("HOS"), despite the existence of alienation restrictions in respect of the property. The licensee only told the landlord and the tenant that the property was subject to alienation restrictions. However, he did not tell the parties that it was illegal to proceed with the proposed letting. As a result of the letting, the landlord was convicted under section 27A of the Housing Ordinance and was ordered to pay a heavy fine. The licensee was penalised by the Disciplinary Committee as he had failed to refrain from activities during his practice which may infringe the law.

Commentary and Suggestion:

According to sections 17B and 27A of the Housing Ordinance, for a flat currently subject to restriction on alienation, any agreement or other instrument purporting to sell, let or otherwise alienate the flat shall be void, and any person entering into such agreement or other instrument commits an offence. The person who commits the offence is liable to a fine of \$500,000 and to imprisonment for one year. A licensee who aids or abets the commission of the offence may be guilty of the same offence.

The licensee knew that the letting would amount to illegal alienation under the Housing Ordinance. However, he thought that it would be sufficient just to remind his clients that the property was subject to alienation restrictions and he did not know that by arranging for his clients to enter into a tenancy

agreement of the HOS flat still subject to alienation restriction would lead to serious consequences. The licensee thus failed to comply with paragraph 3.1.1 of the *Code of Ethics*. To avoid the aforesaid activities which may infringe the law, licensees should, before arranging for clients to enter into a tenancy agreement, ensure that the alienation restriction on the property had been discharged.

Under the Practice Circular in relation to disposition of HOS flats in the open market (Circular No. 04-03 (CR)), the Authority has reminded licensees to refrain from any illegal act in the handling of flats subject to restriction on alienation under the Housing Ordinance. Licensees are further reminded that according to the Housing Ordinance, flats under the Home Ownership Scheme, the Private Sector Participation Scheme and the Tenants Purchase Scheme of the Hong Kong Housing Authority are subject to restriction on alienation (including sale, lease or re-mortgage) unless and until such restriction is lifted. The conditions for the lifting of restriction are provided for in the Schedule to the Housing Ordinance.

While a flat is subject to restriction on alienation, the owner shall not alienate, convey, charge or part with possession of the flat, nor enter into any agreement purporting to do so. However, in the case of a sale, the parties may enter into an agreement for sale and purchase (including provisional agreement for sale and purchase), provided that such agreement contains a special condition providing for the premium as assessed by the Director of Housing to be paid to the Hong Kong Housing Authority prior to the assignment and within 28 days of the date of the agreement or within such period as may be otherwise stipulated by the Director.

Furthermore, in cases where it is intended to modify a provisional agreement for sale and purchase standard-form by incorporating the special condition mentioned above, given that such modification involves the parties' rights and liabilities and may also affect other terms and conditions in the agreement (such as those relating to the completion date, etc), the matter should therefore be handled by a lawyer.

Illustration (2)

Infringing the Law regarding Road Traffic

A senior police inspector saw a licensee approaching vehicles waiting at a red traffic light and canvassing drivers and passengers by showing them promotional leaflets for a residential development. The licensee first approached a vehicle waiting in the slow lane. He then moved onto another vehicle in the fast lane. When the traffic light turned green, the drivers in those vehicles drove off but the licensee remained wandering on the carriageway. As a result, a vehicle approaching in the slow lane had to move to the fast lane to avoid running him down.

The senior inspector asked the licensee to return to the pavement and told him that his behaviour amounted to an offence under the Road Traffic Ordinance.

Commentary and Suggestion:

In this case, the licensee soliciting business on the carriageway would undoubtedly endanger himself and other road users. The licensee failed to avoid infringing section 48 of the Road Traffic Ordinance which says: "A pedestrian who in using any road, or a person who by driving a rickshaw on any road, negligently endangers his own safety or that of any other person commits an offence and is liable to a fine of \$500". The licensee thus failed to comply with paragraph 3.1.1 of the *Code of Ethics*.

Licensees shall refrain from activities during their practice which may infringe the law. Licensees shall also abide by the law and avoid doing any acts which may endanger their own safety or that of any other person.

The employer and management of an estate agency must establish proper procedures or systems to supervise and manage estate agency work. If a frontline practitioner 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 would therefore be in breach of section 15 of the Practice Regulation.

Hence, it is the responsibility of the management of estate agency companies to maintain effective control of their staff deployed to locations for the promotion of the first sale of units in a residential development, including the site of the development, and the sales office and its vicinity (hereinafter collectively referred to as “the first sale sites”).

According to the guidelines in the Practice Circular regarding the maintenance of order at first sale sites (Circular No. 10-02 (CR)), estate agency companies must:

- Appoint a controller to oversee staff deployed to first sale sites.
- Compile a list of the staff deployed and keep a daily register.

- Ensure that all staff who are deployed to the first sale sites must wear an estate agent card and staff card.
- Ensure their staff not to solicit business at railway stations.
- Ensure their staff not to solicit business at shopping malls or housing estates without the requisite permission.
- Ensure their staff not to intercept vehicles or distract drivers.
- Ensure their staff not to place any items such as advertising hoardings, banners, etc which may obstruct public places.
- Ensure their staff not to be over-aggressive: e.g. stalking or persistent solicitation.
- Ensure their staff not to quarrel or fight with others.

Illustration (3)

Protection of Personal Data

After the completion of a sale and purchase transaction, a licensee demanded his purchaser client to pay the outstanding commission. Dissatisfied with the services, the purchaser refused to pay any commission to him. The licensee therefore issued a demand letter to the purchaser for the outstanding commission. The licensee also sent a copy of the demand letter to the principal of the school where the purchaser worked in order to press the purchaser to pay the commission. The letter contained the address, the purchase price of the property concerned, and the amount of the outstanding commission payable by the purchaser.

Commentary and Suggestion:

In this case, the licensee used personal data for other purposes without the prior consent of the purchaser. He was therefore in breach of the Data Protection Principles under the Personal Data (Privacy) Ordinance (“PDPO”) and failed to comply with paragraph 3.1.1 of the *Code of Ethics*.

Licensees should observe the following when using a client’s personal data:

- Use the personal data collected from a client only for purposes relating to the discharge of estate agency work for that client.

- Unless clients expressly and voluntarily consent, no personal data of clients should be disclosed to another estate agency or used for their own private purposes.
- Should not sell or transfer personal data of clients to a third party for monetary or in-kind gain or otherwise, unless they have informed the clients in writing of the kinds of personal data to be sold or transferred and to whom their personal data will be sold or transferred, obtained their prior written and voluntary consent for such sale or transfer and complied with the relevant requirements in the PDPO.
- When introducing other services to clients, e.g. legal or mortgage services, obtain their express and voluntary consent before transferring their personal data to the service suppliers, such as legal firms or financial institutions.
- When collecting an individual's personal data from a source other than the individual himself, e.g. the personal data of the registered owners of properties obtained through the Land Registry, the source of the information may specify the purpose for which the personal data may be used and the use of personal data beyond the specified purpose may breach the PDPO.
- Provide clients with a written privacy policy statement ("PPS") stating the kinds of personal data held, the main purposes of using the personal data, and practices related to the personal data, such as the retention period and security measures in place.

- The PPS and privacy practices should generally be made available to clients by, for example, displaying them on the company's website.
- The employer and management of an estate agency should provide training to staff on the company's policies and practices on personal data privacy and protection, and updates of requirements and guidelines issued by the relevant authorities.

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.

Paragraph 3.2.2 of the *Code of Ethics*

Estate agents and salespersons should keep themselves informed of any laws, government regulations, essential facts and developments in the real estate market in order to be in a position to advise their clients in a responsible manner. They should strive to provide services and opinions based on knowledge, training, qualifications and experience in the real estate business.

Illustration (1)

Failing to Verify the Legal Capacity of a Purchaser

A licensee acted for both the vendors and the purchasers in a sale and purchase transaction. The two purchasers involved were a mother and her son.

A few days after the signing of the provisional agreement for sale and purchase ("PASP"), the licensee arranged for the parties to meet together to discuss the purchaser's request to delete the mother's name from the PASP. The vendors agreed. As a result, the son who was then under 18 became the sole purchaser of the property.

Subsequently, despite repeated requests from the vendors' solicitors, the purchaser refused to add an adult purchaser to the formal agreement for sale and purchase. Eventually the purchaser rescinded the purchase.

Commentary and Suggestion:

Licensees should be aware that an agreement may be void due to a signatory being a minor. Minors are those who are under 18 years of age. The law seeks to protect them from the consequences of making contracts too lightly due to their lack of legal capacity.

In this case, the licensee did owe a duty of care towards the parties and it was a licensee's duty to take all practical steps to ascertain that the contracting parties had full legal capacity for entering into a contract. To do so, the licensee should check their identification documents, such as identity cards. That was a basic step in the conveyancing procedure. As the licensee failed to verify the legal capacity of the purchaser and arranged for the vendors to enter into a PASP with a purchaser under 18 years of age, he thus failed to comply with paragraph 3.2.2 of the *Code of Ethics*.

Licensees should keep themselves informed of any laws, government regulations, essential facts and developments in the real estate market in order to be in a position to advise their clients in a responsible manner. They should strive to provide services and opinions based on knowledge, training, qualifications and experience in the real estate business.

Illustration (2)

Deed of Gift

A licensee arranged for a purchaser client to enter into a provisional agreement for sale and purchase of a residential property with the vendor. The land search of the property showed that the vendor had acquired the legal ownership of the property by way of gift three years ago. However, the licensee did not explain to his purchaser client the risks in purchasing a property involving a deed of gift. The purchaser was therefore unable to obtain sufficient mortgage loan to complete the purchase of the property and the deposit was forfeited to the vendor in the end.

Commentary and Suggestion:

The licensee was not aware of the problems which may be caused by a deed of gift. He therefore failed to advise his client properly. Hence, he was in breach of paragraph 3.2.2 of the *Code of Ethics*.

A deed of gift is an instrument which effects the transfer of legal ownership of a property from the owner (donor) by way of gift to the donee.

Under the Bankruptcy Ordinance (Cap. 6), a deed of gift/assignment at nil consideration may be set aside by the trustee in bankruptcy in cases where the donor/assignor is adjudged bankrupt and he has, during the period of five years ending with the day of the presentation of the bankruptcy petition on which the donor/assignor is adjudged bankrupt, made a gift or entered

into a transaction receiving no consideration, unless the person, whether or not he is the person with whom the donor/assignor in question entered into the transaction, acquires the property in good faith and for value.

A purchaser's title to a property may therefore be adversely affected if the previous assignment in favour of the vendor/vendor's predecessor-in-title has involved a deed of gift/assignment at nil consideration and the deed of gift/assignment at nil consideration is made within five years from the date of the purchaser's acquisition of the property. The risks of purchasing properties involving such a deed of gift/assignment at nil consideration include the purchaser not being able to obtain any or sufficient mortgage loan to complete the purchase and to prove good title in the resale of the property.

According to the Practice Circular on deed of gift/assignment at nil consideration (Circular No.13-01 (CR)), if it is revealed from the land search of the property that a deed of gift/assignment at nil consideration has been registered against the property and the deed of gift/assignment at nil consideration was made less than five years from the date of the land search, then licensees should (i) inform their clients of the existence of the deed of gift/assignment at nil consideration; (ii) alert their clients that the title of the property may be affected by the deed of gift/assignment at nil consideration; (iii) that the purchaser may not be able to obtain sufficient mortgage loan to complete the purchase of the property; and (iv) advise their clients to seek legal advice on the effect of the deed of gift/assignment at nil consideration and the risks of selling/purchasing the property before they enter into any agreement for sale and purchase of the property.

Illustration (3)

Accepting a Deposit Before Issuance of Pre-sale Consent

A licensee procured the prospective purchasers to make deposit payments before the pre-sale consent in respect of a first sale development ("the Development") was issued by the Lands Department.

Commentary and Suggestion:

The Lands Department Consent Scheme is a system put in place to regulate the sale and purchase of uncompleted buildings and to ensure orderly sale of the same. Before arranging for the sale and purchase of an uncompleted unit under the Scheme, licensees should check if the Lands Department has issued the relevant "Consent to Sell" as no preliminary agreement, or any other document, whether it is stated to be binding or not, shall be signed before the "Consent to Sell" has been given. Moreover, the developer or the estate agent are not allowed to receive any deposit or "reservation fee" before the developer has obtained the "Consent to Sell".

By procuring a potential purchaser to make payment to the developer of the Development as a deposit for purchasing units in the Development, the licensee failed to keep himself informed of the requirements under the Lands Department Consent Scheme, thus he was in breach of paragraph 3.2.2 of the *Code of Ethics*.

According to the Practice Circular in relation to the conduct of promotional activities and the provision of property information for the first sale of residential properties (Circular No. 13-04 (CR)), even if the relevant consent letter has been issued, licensees must not solicit or accept any money, whether described as a deposit or not, from a prospective purchaser without the vendor's authorisation. Moreover, licensees (whether they are appointed by vendor as its sales agent or otherwise) must not solicit or accept any general expression of intent to purchase any residential property (whether or not accompanied by a payment of money) before the relevant price lists for such properties are made available to the general public or any specific expression of intent to purchase a particular residential property (whether or not accompanied by a payment of money) before the sale of the property has commenced.

Illustration (4)

Proper Capacity of the Landlord

A licensee arranged for the director of a company (“the Company”) to sign a provisional tenancy agreement (“PTA”) in the capacity of the landlord while the registered owner of the property was the Company. The licensee had made such an arrangement because he did not realise that a limited company and its director were separate legal entities.

Commentary and Suggestion:

The landlord of the property was the Company and so the licensee should have named the Company as the landlord in the PTA and arranged for the director to enter in the PTA as the representative of the Company. The licensee had failed to keep himself informed of the fundamental legal principle that a limited company and its director were separate legal entities and was thus in breach of paragraph 3.2.2 of the *Code of Ethics*.

According to the Practice Circular (No. 09-06 (CR)) on signing of provisional agreement for sale and purchase (“PASP”)/PTA by a limited company, an individual who purports to sign a PASP/PTA for and on behalf of a limited company shall only do so with the requisite authority. Failure on the part of the licensee to verify the proper authority of the signatory may expose the limited company and the other contracting party to risks. The risks would include the limited company’s denying the signatory’s authority to represent the company to deal with the transaction concerned, and the other contracting party may suffer a loss as a result.

The capacity of a signatory who purports to act for and on behalf of a limited company can be ascertained from:

- Searches of local companies as well as those foreign companies registered under the Companies Ordinance conducted at the Companies Registry showing the number and name(s) of directors of the limited company; and/or
- Authorisation documents issued by the limited company, such as board resolutions or powers of attorney.

In preparing the PASP/PTA when a party(ies) is/are (a) limited company(ies), licensees should take the following steps:

- Verify the identity of the signatory and ascribe his name legibly below his signature.
- Append the chop of the limited company or write the words "For and on behalf of (name of the company)" at the signature clause.
- Advise clients to make payments to the company direct, such as by drawing cheques/cashier orders in favour of the company and not to the signatory personally.

Paragraph 3.3.1 of the *Code of Ethics*

Estate agents and salespersons shall, in the course of business, provide services to clients with honesty, fidelity and integrity. They should protect their clients against fraud, misrepresentation or any unethical practices in connection with real estate transactions.

Illustration (1)

Subletting without a Landlord's Consent

A licensee acted for the landlord, Tenant A and Tenant B. He arranged for Tenant A to sublet a property to Tenant B. Tenant B subsequently found that the subletting was in breach of the non-alienation clause of the tenancy agreement entered into between the landlord and Tenant A, and without the consent of the landlord. The licensee admitted to Tenant B that he was in fact aware that the landlord objected to the subletting. The landlord later applied to the Lands Tribunal and recovered possession of the property. Both Tenant A and Tenant B were evicted from the property before the expiry of the terms of the tenancy agreement and the sub-tenancy agreement.

Commentary and Suggestion:

In this case, the licensee was aware that the landlord objected to the subletting. He nevertheless arranged for Tenant A to sublet the property to Tenant B. His behaviour resulted in all his three clients suffering loss. He thus failed to provide services to clients with honesty, fidelity and integrity.

Licensees handling subletting properties should review the tenancy agreement between the principal landlord and the principal tenant to see if there is any restriction on subletting and whether prior consent for subletting has to be obtained from the principal landlord. Apart from that, licensees should also pay attention to the following:

- The terms of the sub-tenancy agreement between the principal tenant and the sub-tenant shall be subject to the terms of the tenancy agreement between the principal landlord and the principal tenant. The tenancy period under the sub-tenancy agreement shall not exceed that under the original tenancy agreement;
- In Part C of the Leasing Information Form (Form 2), enter the details of the original tenancy agreement including the parties thereto, the rental period and any other information the sub-tenant should know such as the area for subletting; and
- Comply with section 9 of the Practice Regulation when issuing advertisements for subletting properties including:
 - (a) Not to advertise at a rental or on terms different from those instructed by the principal tenant;
 - (b) To state expressly in the advertisement that the property is to be sublet; and
 - (c) To remove all advertisements as soon as is practicable after the property is no longer available for subletting, or when the relevant estate agency agreement is terminated (whichever is earlier).

Illustration (2)

Deceiving a Client to Enter into a Tenancy Agreement

A licensee acted for both the landlord and the tenant. Despite rounds of negotiation, the landlord refused to accede to the tenant's request that a dishwasher be provided. Being anxious to close the deal, the licensee in the name of the landlord bought a dishwasher for the tenant out of his own pocket. However, he did not seek the landlord's approval beforehand. He then swapped certain pages of the tenancy agreement before arranging for the landlord and the tenant to sign two different versions of the tenancy agreement forms. The one signed by the tenant stipulated that the landlord was responsible for supplying a dishwasher but the one signed by the landlord did not have such a provision. Later on, the tenant found that the dishwasher was not working and needed repair. The licensee's misconduct came to light when the tenant asked the landlord to repair the dishwasher.

Commentary and Suggestion:

In this case, it was obvious that because the licensee was eager to conclude the deal, he not only bought the dishwasher out of his own pocket but he also swapped pages of the tenancy agreement and arranged for the landlord and the tenant to sign the tenancy agreement in two different versions. He thought that this would not be found out. Actually this was indeed a serious mistake which might cause loss and damage to his client.

Licensees should provide services to clients with honesty and fidelity. They should not act fraudulently in a bid to conclude the deal expeditiously. The licensee concerned should discuss frankly with the transacting parties. Even if he wishes to buy the dishwasher out of his own pocket, he should seek the transacting parties' consent beforehand. Otherwise, he would suffer from serious consequences when the matter comes to light.

Furthermore, a tenancy agreement is a legally binding document. The terms and conditions of a tenancy agreement should clearly reflect the intent of both parties and the agreement should be signed only after both parties understand and agree to the terms and resolve any disagreement through negotiation. In arranging for the parties to sign the tenancy agreement in duplicate (i.e. two copies of the tenancy agreement), the licensee should ensure that the terms in the two copies which are to be kept respectively by the landlord and the tenant are the same so as to avoid any dispute arising from any discrepancy between the two copies of the tenancy agreement.

Illustration (3)

Passing a False Offer to a Client

A licensee falsely told the vendor that the purchaser offered to purchase a property for \$1,330,000. The licensee suggested to the vendor that if the purchaser was willing to buy the property for \$1,350,000, the vendor would pay \$10,000 to the licensee as remuneration, on top of the original commission of \$13,500. In fact, the purchaser had offered to purchase the property at \$1,350,000 all along, and had never made any offer of \$1,330,000.

Commentary and Suggestion:

In this case, the licensee passed a false offer to his client for his own commission benefit. He thus failed to provide services to clients with honesty, fidelity and integrity, contrary to the paragraph 3.3.1 of the *Code of Ethics*.

The licensee had not conveyed the offer of the purchaser immediately and accurately to the vendor and, therefore, had also breached section 11(e) and 11(f) of the Practice Regulation. Section 11(e) states that a licensee shall “present an offer to a client for acceptance as soon as is practicable after receiving it”, while section 11(f) stipulates that a licensee shall “inform a client of all offers received in the order he receives them and present them in an objective and unbiased manner”.

Besides, in this case, the licensee asked for extra commission from the vendor client. As the agent of his employer, the licensee who, without lawful authority or reasonable excuse, solicits or

accepts any advantage as a reward for doing or forbearing to do any act in relation to his principal's affairs, may commit an offence under section 9 of the Prevention of Bribery Ordinance (cap.201). The penalty is a fine and imprisonment.

Licensees should bear in mind not to exploit advantages in a deal at the expense of a client's interests, or he would be subject to legal liability.

Illustration (4)

Misrepresentation on Permitted User

An elderly woman wanted to purchase a home for herself with her savings. She was introduced by a licensee to a property which contained a toilet as well as bathing and cooking facilities. The licensee assured her that the property could be used as domestic accommodation although he knew that it was a commercial unit. The licensee arranged for the woman to sign a provisional agreement to purchase the property.

In fact, the property was not a domestic unit. The occupation permit restricted its permitted use to “office for non-domestic use”.

Commentary and Suggestion:

In this case, the licensee was aware that the permitted user of the property was “office for non-domestic use”. He however told the client that the property could be used for domestic purposes. This was certainly a misrepresentation. The licensee failed to provide services to his client with honest, fidelity and integrity and to protect his client against fraud, misrepresentation or any unethical practices in connection with real estate transactions. The licensee thus failed to comply with paragraph 3.3.1 of the *Code of Ethics*.

Licensees should provide property information to clients with honesty and fidelity.

To verify the permitted user of a property, licensees can examine the occupation permit by conducting a land search through the Land Registry and/or obtaining the same from the Buildings Department. For residential properties, they may also obtain such information from the Property Information Online (PIO) service provided by the Rating and Valuation Department. The PIO provides property information such as saleable area, age and permitted occupation purposes for most of the residential properties in Hong Kong.

Illustration (5)

Failing to Advise a Purchaser on a Confirmor Sale

A licensee acted for both parties in a sale and purchase transaction. The purchaser was a first-time home buyer and appeared to be very nervous about the transaction. To avoid creating unnecessary anxiety which might upset the transaction, the licensee, knowing that the vendor was only selling the property as a confirmor, told the purchaser that the vendor was the property owner. The licensee did not provide the purchaser with any land search of the property. Nevertheless, the purchaser later found out that the owner was not the property owner, and was selling the property only as a confirmor.

Commentary and Suggestion:

The licensee in this case concealed to the purchaser the fact that the vendor was actually selling the property as a confirmor although he was aware of it. This is obviously a misrepresentation. He thus failed to provide services to clients with honesty and fidelity, contrary to the provision stipulated in paragraph 3.3.1 of the *Code of Ethics*.

When handling transactions where a property is sold by a confirmor, licensees should carry out a land search of the relevant property before arranging for the confirmor and the sub-purchaser to enter into a sub-sale agreement. The agreement for sale and purchase entered into between the vendor and the confirmor should also be examined to determine the terms of the

agreement, including but not limited to any restriction on sub-sale. Besides, licensees should also pay attention to the following:

- The sub-purchaser would normally have no opportunity to inspect the relevant property before he/she enters into the sub-sale agreement. Licensees should alert the sub-purchaser to the risks of no inspection and try to arrange for an inspection before completion.
- Licensees should explain to the sub-purchaser that the terms of the sub-sale agreement are subject to those of the original agreement for sale and purchase. For example, if the confirmor has accepted any structural alteration in the original agreement, the sub-purchaser has to accept the same under the sub-sale agreement. Attention should be paid to whether the balance of purchase price payable by the sub-purchaser is sufficient to cover the balance of purchase price payable by the confirmor under the original agreement.
- Licensees should explain to the sub-purchaser that if the confirmor is unable to complete, the transaction may be delayed or fall through. In such an event, the sub-purchaser will not be able to purchase the property and may have to resort to legal proceedings to obtain the refund of the deposits and any damages.
- The sub-purchaser may request the confirmor to execute an irrevocable power of attorney so that in the event that the confirmor is unable to complete, the sub-purchaser may complete the transaction as the attorney of the confirmor. The sub-purchaser should be advised to seek legal advice.

Paragraph 3.4.1 of the *Code of Ethics*

Estate agents and salespersons, in engaging and accepting an appointment as an agent, should protect and promote the interests of their clients, carry out the instructions of their clients in accordance with the estate agency agreement and act in an impartial and just manner to all parties involved in the transaction.

Illustration (1)

Providing Misleading Information on a Mortgage Loan

A licensee acted for both the vendor and the purchaser in a residential property transaction and the property concerned was subject to a tenancy. Before the signing of the provisional agreement for sale and purchase, the licensee assured the purchaser that he could definitely obtain a 70% mortgage loan.

The purchaser later enquired with three banks for a 70% mortgage loan but was rejected by all of them. Finally, the purchaser was only granted a mortgage loan equivalent to 50% of the purchase price.

The licensee told the purchaser that he could definitely obtain a 70% mortgage loan from a bank. But in fact, the Government had already announced that mortgage loans of properties subject to a tenancy were capped at 50% of the purchase price.

Commentary and Suggestion:

In this case, the licensee made a representation about a mortgage loan without a proper basis. The licensee failed to protect and promote the interests of his client and thus failed to comply with paragraph 3.4.1 of the *Code of Ethics*.

Licensees should not hastily provide mortgage information to clients, assure a prospective purchaser that he will be able to obtain a mortgage loan, or make any guarantees on the terms of mortgage loans.

Licensees who provide information to prospective purchasers concerning payment methods or mortgage plans must ensure that such information is accurate and that they have taken all reasonable steps and exercised all due diligence to verify such information.

Besides, as there is a great variety of mortgage payment schemes, licensees should remind prospective purchasers to seek information directly from the bank or the developer concerned if they have any questions.

In fact, the Hong Kong Monetary Authority, which aims at ensuring the stability and smooth operation of the banking system, has from time to time issued guidelines to banks on the property mortgage lending services and credit assessment. A professional licensee must be aware and keep abreast of the relevant policies on mortgages.

Generally, different banks have different policies and considerations for different types of properties. The purpose of the mortgaged property, that is, whether the property is being self-occupied or has been brought for investment, will also affect the terms on which the loan is granted.

Illustration (2)

Failing to Carry Out a Land Search for a Non-self-contained Unit

A licensee acted for both the landlord and the tenant in a leasing transaction. The property was not a self-contained unit (i.e. not an independent dwelling with separate cooking facilities and bathroom).

The licensee did not carry out a land search for the property at the Land Registry. Without the land search documents, the licensee failed to spot the several notices and closure orders issued under the Crimes Ordinance and registered at the Land Registry. The tenant was eventually forced to leave the property.

Commentary and Suggestion:

Under section 13(4) of the Practice Regulation, as the agent acting for the landlord, the licensee should have carried out a land search in respect of the property and supplied the same to the tenant immediately before the signing of the tenancy agreement. Licensees shall carry out a land search of the property concerned so as to ascertain whether there are any subsisting encumbrances such as court orders or mortgage etc. on the property so as to give appropriate advice to client(s).

In this case, the licensee mistakenly thought that section 13(4) of the Practice Regulation was not applicable to non-self-contained units, and did not carry out a land search for the property at the Land Registry. Hence, the licensee failed to ascertain before the

landlord and the tenant entered into the tenancy agreement that a closure order to close the property had already been made by the court. The licensee thus failed to protect and promote the interest of his client and was in breach of paragraph 3.4.1 of the *Code of Ethics*.

Where a person is convicted of an offence under section 139, 143, 144 or 145 of the Crimes Ordinance, the court has the power to make a closure order on the property affected under section 153B of the Crimes Ordinance. Section 153B provides that any property subject to a closure order will be closed for six months, and that it will be an offence for anyone to enter the property or to interfere with anything used to close the property without lawful authority or reasonable excuse.

Illustration (3)

Failing to Deal with Building Orders in PASP

A licensee acted for both the vendor and the purchaser in the sale and purchase of a residential flat. The land search records showed that the property was subject to two orders issued by the Building Authority relating to an earth-retaining structure. The vendor told the licensee that he had paid his share of expenses for the remedial work to the Incorporated Owners. Before the signing of the provisional agreement for sale and purchase ("PASP"), the vendor instructed the licensee to specify in the PASP that the sale was on an "as is" basis, which the licensee did. However, the licensee did not mention the two orders in the PASP.

Thereafter, the vendor and the purchaser had serious disagreement over, among other things, whether any money (and if so, how much) should be set aside for the compliance of the two orders. As no agreement could be reached on this issue, the sale and purchase fell through with the vendor paying a hefty compensation to the purchaser.

Commentary and Suggestion:

The fact that the licensee had not advised the vendor on the effects of the two orders and provided for the compliance of the same in the PASP had prejudiced the vendor's interest in that the vendor was bound to give something which he could not possibly give, namely, a good title to the property. The licensee failed to advise or cause the parties to ascertain or apportion their

respective liabilities towards the discharge of the two orders in the PASP; the licensee thus failed to comply with paragraph 3.4.1 of the *Code of Ethics*.

According to the guidelines in the Practice Circular regarding the proper steps to take when dealing with properties which might have authorised building works (UBW) or building order (Circular No. 07-05 (CR)), licensees should do the following to protect their clients' interests when dealing with properties:

Land Search

Licensees should carry out land searches against the properties concerned and the land search records should be carefully checked to see if any order issued by the Building Authority requiring demolition/alteration of UBW has been registered and, if so, whether the order has been complied with. Licensees should also specify the particulars of such an order in Part 1 of the Property Information Form (Form 1) used in the sale and purchase of residential properties in Hong Kong. Clients, vendors and purchasers alike, should be informed of the results of the land search accordingly.

Vendor's Statement in Form 1

The vendor's statement (Form 1, Part 2) makes provision for the vendor of a residential property to supply particulars of any structural additions or alterations to the property. As a first step to ascertain whether a property contains any UBW, licensees should try their best to urge their vendor clients to provide the information requested in Form 1, Part 2.

Remind Clients of Risks Involved

If a licensee has actual knowledge of the existence of UBW or building order in or against a property to be sold and purchased by his client, the licensee should remind his client of the risks involved in the purchase of such property. Such risks would include the risk of the Government exercising its right of re-entry hence rendering the title of the property defective; the risk of the Government issuing an order requiring the owner to remove the UBW within a specified period and, on the owner's failure to do so, carrying out the demolition/alteration works required and forcing a sale of the property to recover the cost of works; and the risk of not being able to obtain any or sufficient bank mortgage loan to complete the purchase of the property.

On the other hand, the licensee should remind his vendor client that unless otherwise agreed in the agreement for sale and purchase of the property, the purchaser is entitled to rescind the purchase and claim damages for breach of contract on the ground that UBW or the building order may render the title defective.

In view of the risks involved, licensees should remind their vendor and purchaser clients to seek legal advice before proceeding with the transaction to sign the PASP.

Illustration (4)

Arranging the Signing of a PASP with the Property Price Left Blank

A licensee asked a prospective purchaser to sign a provisional agreement for sale and purchase and to write a cheque for the deposit, so as to facilitate the negotiation with the vendor. The licensee prepared a provisional agreement for sale and purchase ("PASP"), on which the space for the property price and the dates of payment were left blank when the prospective purchaser signed it. The prospective purchaser requested the licensee to let him know as soon as the vendor reverted with an offer, and explained that he needed to understand all the details of the transaction before deciding whether to purchase the property or not.

A few days later, the prospective purchaser, upon calling the licensee, found out that the vendor had already signed the PASP. The prospective purchaser did not know the transaction details beforehand, nor did the licensee contact him to obtain his confirmation in advance. The prospective purchaser asked immediately for the PASP and the deposit cheque to be returned to him. Eventually, the transaction fell through.

Commentary and Suggestion:

Some licensees may think that arranging for purchaser clients to unilaterally sign a provisional agreement with spaces of essential terms (e.g. price, deposits, completion date, etc) left blank would facilitate them to negotiate with the vendor, and some

purchasers also consent to such an arrangement. However, this would not be regarded as a reasonable excuse as such an arrangement would put the purchaser at risk.

In this case, by arranging for the purchaser client to sign a PASP with the important terms such as the property price and dates of payment left blank and failing to ascertain whether the purchaser client agreed with all the terms of the PASP before concluding the deal with the vendor for the purchaser client, the licensee failed to protect her client's interests, and thereby failed to comply with paragraph 3.4.1 of the *Code of Ethics*.

According to the guideline in the Practice Circular (No. 03-02 (CR)): "Practitioners should refrain from asking their clients to unilaterally sign any provisional agreement with many spaces left blank where the essential terms of the transaction (e.g. price, deposits, completion date, other conditions) have not been agreed on". A PASP is a binding document and, if not handled properly, would give rise to disputes and complaints and may even affect the transaction. Licensees should abide by the guidelines set out in the aforesaid Circular.

Illustration (5)

Proof of Proper Authorisation

A licensee acted both for the vendors and the purchaser in a residential property transaction. The vendors were a couple. The licensee arranged for the purchaser to sign a provisional agreement for sale and purchase (“PASP”) first. Later, when the purchaser received the PASP, he noticed that one of the vendors had signed the agreement in her own capacity as well as on behalf of the other vendor. The purchaser was not shown or given any document showing proper authorisation for the signing of the PASP. The purchaser later noted that the vendors’ solicitors did not cash his cheque for the deposit. The vendors neither proceeded with the signing of the formal agreement for sale and purchase nor paid any compensation to the purchaser. They argued that the PASP was ineffective as it was not properly signed by all of them.

Commentary and Suggestion:

In this case, the licensee explained that in arranging for the signing of the PASP, he did not expect that only one of the vendors had actually shown up for the signing of the PASP. However, the licensee did not ask the vendor attending the signing of the PASP to produce any authorisation from the absent vendor. Hence, the licensee failed to protect his client’s interest for he failed to ensure that the signatory had been properly authorised to sign on behalf of the absent vendor in the transaction; the licensee thus failed to comply with paragraph 3.4.1 of the *Code of Ethics*.

According to the Practice Circular on proper authorisation by absent contracting party (No. 06-02 (CR)), before the licensee accepts any appointment of agency and/or deals with any person claiming to be the authorised representative of the absent contracting party (“the representative”) in a sale or purchase transaction, the representative must be able to produce a power of attorney duly executed by the absent contracting party authorising the representative to enter into the transaction concerned and to execute the relevant document, including but not limited to the estate agency agreement, for and on his behalf. It is insufficient and highly risky simply to request the representative (whether a co-owner or otherwise) to sign a declaration to the effect that he has or will have proper authorisation from the absent contracting party and that he will be personally responsible for all consequences.

According to section 12(7)(b) of the Practice Regulation, a licensed estate agent shall ensure that the identity of the vendor and of the owner of the residential property concerned are the same or, if they are different, that the vendor has authority to sell the property before releasing any deposit money to the vendor.

Paragraph 3.5.1 of the *Code of Ethics*

Estate agents and salespersons shall, in fulfilling their duties, exercise due care and due diligence.

Illustration (1)

Providing an Incorrect Property Age

A licensee acted for both the vendor and purchaser in a residential property transaction. The licensee arranged for the purchaser to inspect the property twice. The licensee informed the purchaser that the age of the property was 15 years during both inspections. In the second inspection, the licensee showed a copy of the land search of the property and pointed to the record of the Deed of Mutual Covenant (“DMC”) as proof of the age of the property.

The purchaser then signed a provisional agreement for sale and purchase for the property with the vendor and also paid the vendor a deposit of \$300,000. The purchaser later discovered from the occupation permit of the property that the age of the property was 26 years.

The purchaser thus decided not to proceed with the purchase. The deposit was forfeited to the vendor.

Commentary and Suggestion:

In this case, before providing information to his client regarding the age of the property, the licensee did not exercise due care and due diligence to verify the accuracy of the information, and had thus caused loss to the purchaser. The licensee therefore failed to comply with paragraph 3.5.1 of the *Code of Ethics*. The licensee had hastily inferred the age of the property by the date of the DMC of that property. However, a DMC does not have to

be entered into until there is a sale of the units of the building to different owners. A DMC may be entered into a few years or a few decades after the occupation of the building. In fact, it is not difficult for licensees to ascertain the age of a property. Generally, information concerning the age of a property can be ascertained from the occupation permit issued by the Buildings Department or through the Property Information Online service provided by the Rating and Valuation Department.

Under section 36(1)(a)(i) of the Ordinance, every licensed estate agent who acts for a vendor (or landlord) is required, for as long as he so acts, to have in his possession or control certain prescribed information as regards every property in relation to which he has entered into an estate agency agreement. The prescribed information that is required is:

- In the case of a sale and purchase of a residential property in Hong Kong, the prescribed property information to be included in Part B of Part 1 of the Property Information Form (Form 1), e.g. ownership, encumbrances, floor area, year of completion, user restriction, terms of Government lease etc.; and
- In the case of a lease of a residential property in Hong Kong, the prescribed property information to be included in Part B of the Leasing Information Form (Form 2) e.g. ownership, encumbrances, floor area, year of completion, user restriction, restrictions on leasing etc.

Illustration (2)

Failing to Exercise Due Diligence to Verify the Information on Floor Area

A licensee informed his purchaser client during the inspection of a two-room residential property that the floor area of the property was 815 square feet. Subsequently, the purchaser entered into a provisional agreement for sale and purchase with the property owner through the arrangement of the licensee.

Later on, the purchaser discovered from various sources that the floor area of the property she bought was smaller than what the licensee had told her. It turned out that the licensee had actually inferred the floor area of the property from the area information records of other two-room units on different floors of the same building.

However, according to the information of the Rating and Valuation Department (“RVD”), the saleable area of the property is 520 square feet whereas the saleable area of other two-room units on different floors is about 620 square feet.

Commentary and Suggestion:

In this case, the licensee should have obtained the area information of the property through the Property Information Online service of the RVD or the agreement for sale and purchase of the first assignment of the property registered in the Land Registry (“first agreement”), and should have provided that information to the purchaser. Before taking reasonable steps to

verify the related information, the licensee should not have hastily inferred that the floor area of the property was the same as that of other units on different floors of the same building. The licensee thus failed to comply with paragraph 3.5.1 of the *Code of Ethics*.

Providing accurate property information to a client is one of the most important duties of licensees. Under the Practice Regulation, licensees are required to complete a Property Information Form (Form 1) in the case of a sale and purchase, or a Leasing Information Form (Form 2) in the case of a lease in accordance with the directions and instructions specified in the forms. For the purpose of completing the floor area information of the property in Part B of the forms, licensees are required to obtain the saleable area of the property provided by the RVD or as stipulated in the first agreement. If the saleable area of the property cannot be obtained from either the RVD or the first agreement, licensees should tick the relevant box in the forms stating that no such information can be obtained from either the RVD or the first agreement.

As set out in the Practice Circular regarding the provision of floor area information for second-hand residential properties (Circular No. 12-02 (CR)), licensees are required to follow the guidelines below in the provision of floor area information of a property:

- (a) If the saleable area of the property can be obtained from either the RVD or the first agreement, licensees must, before providing any other floor area information of the property,

provide the saleable area of the property and clearly state that the floor area so provided is the saleable area of the property;

- (b) Licensees may provide the gross floor area or other floor area information of the property if:
 - (i) the saleable area of the property has been provided in compliance with paragraph (a) above; or
 - (ii) the saleable area of the property (e.g. village type houses) cannot be obtained from either the RVD or the first agreement; and
- (c) In either case as mentioned in paragraph (b) above, the licensee concerned must also, upon the Authority's request, produce evidence to substantiate that the gross floor area or other floor area information of the property was obtained from a reasonable source or there was a proper basis upon which he could rely for supplying such information.

Licensees must exercise due care and due diligence to ensure that any information they provide is not false or misleading.

The management of an estate agency should establish proper procedures or systems to supervise and manage its estate agency business to ensure that its staff comply with the guidelines above.

Illustration (3)

Misrepresentation on the Location of the Refuse-collection Point

A couple asked a licensee to look for a rental residential property. The licensee arranged for them to view a flat twice. During the inspections, the couple repeatedly asked the licensee whether the podium of the block was being used to collect refuse. The licensee, without verification, claimed that the podium was for the temporary parking of refuse-collection vehicles only and that the refuse-collection point was in another block of the housing estate. In fact, the refuse-collection point was on the podium floor of the block in question.

Commentary and Suggestion:

In this case, although the tenants asked the same question repeatedly indicating that the location of the refuse-collection point was of great concern to them, the licensee did not take any steps to verify the information but gave an incorrect answer. In fact, he could have examined the Deed of Mutual Covenant in respect of the property or enquired with the management office of the building to ascertain the location of the refuse-collection point. The licensee did not exercise due care and diligence in fulfilling his duties, and he thus failed to comply with paragraph 3.5.1 of the *Code of Ethics*.

Licensees are responsible for providing accurate property information to clients. Consumers looking for a home rely heavily on the information provided by licensees. The Authority reminds

licensees that when clients raise any questions about the properties, they should exercise due care and due diligence to ascertain the requested information and if they are not sure about the answer, they should tell their clients so and they must not provide information which may be inaccurate or unclear.

Illustration (4)

Changing the Terms of a PASP Without the Parties' Consent

A licensee acted for both the purchaser and the vendor. He first arranged for the purchaser to sign a provisional agreement for sale and purchase ("PASP"), which contained the provision that should the purchaser fail to complete the transaction, the deposit shall be forfeited to the vendor but the vendor shall not sue the purchaser for any liabilities or damages. However, when the licensee later discussed the PASP with the vendor, the licensee, at the request of the vendor, amended the aforesaid provision to provide for specific performance in the event of a breach. The licensee arranged for the vendor to sign the amended PASP and passed the purchaser's \$300,000 deposit cheque to the vendor. Meanwhile, the purchaser changed his mind and stopped payment of the cheque. This led to litigation between the two parties.

Commentary and Suggestion:

Under common law, agents have the responsibility to protect their client's interests. Licensees should therefore exercise due care when arranging for clients to enter into a PASP.

A PASP is a legally binding document. The terms and conditions of a PASP should clearly reflect the intent of both parties and the agreement should be signed only after both parties have understood and agreed to the terms. In the case of dual agency, licensees should exercise due care in protecting the interests of

both. They should therefore ascertain whether both parties have agreed to the terms and obtain their written consent to the agreement. If either the purchaser or the vendor would like to amend the terms of a PASP, licensees should act in an impartial manner and advise both parties of the pros and cons of such amendment. They should understand their client's needs and resolve the matters through negotiation.

In this case, the amendment of such a term to the PASP was a significant change, as the liabilities of both the purchaser and vendor had totally changed. The licensee should have obtained the prior consent of the purchaser before making the amendment and to avoid any unnecessary dispute in the future, he should also have arranged for the purchaser to initial against the amendment before passing the deposit to the vendor. However, the licensee failed to exercise due care and diligence in the aforesaid transaction, and thereby failed to comply with paragraph 3.5.1 of the *Code of Ethics*.

Illustration (5)

Failing to do a Land Search

A couple appointed a licensee to help them purchase a residential property. The licensee acted for both the vendor and the purchasers in the transaction. During the process, the wife clearly instructed the licensee twice to check whether there had ever been any deaths at the property. The licensee told her that no deaths had ever occurred at the property. In fact, a death certificate of a former owner of the property was registered in the land register of the property. The copy of that death certificate stated that a few years earlier, the former owner jumped from the property and died. The purchasers also found the relevant news in newspapers.

Commentary and Suggestion:

In this case, the licensee did not conduct a land search and supply a copy of the land search to the purchasers immediately before the provisional agreement for sale and purchase (“PASP”) was entered into, and thus failed to comply with section 13(4) of the Practice Regulation. In addition, he did not verify whether there had been a death at the property according to the purchasers’ instruction when fulfilling his duties, and therefore failed to observe paragraph 3.5.1 of the *Code of Ethics*.

The provision of accurate and up-to-date property information to the client is an important duty of licensees. A licensee who acts for the vendor/landlord must take the following steps according to the Practice Regulation:

- Obtain the prescribed property information;
- Complete Form 1/Form 2 and provide it to clients;
- Carry out a land search immediately before entering into an agreement for sale and purchase or a tenancy agreement and supply a copy of the land search to the purchaser/tenant of the property.

Moreover, any statements provided to clients concerning a property must be accurate and based on facts. A licensee should enquire into any matter when asked by a client and report the result to the client for his consideration.

In fact, if the licensee had conducted a land search of the property, he could have found that a death certificate of the former owner was registered with a memorial number in the land registry of the property. The licensee might apply for a copy of the death certificate to find out the detail of the owner's death and tell the client about it.

Paragraph 3.6.1 of the *Code of Ethics*

Estate agents and salespersons should avoid accepting an appointment involving a property in which they have a beneficial interest.

Illustration (1)

Leasing Own Property to a Client

Mr C was looking for a flat to rent. He learnt that the lease of his friend's flat would soon expire and that his friend would move out. His friend told him to contact a licensee who would help arrange the leasing of the flat to him. Over the phone, the licensee told Mr C that the landlord was living overseas and he had full authority to handle the leasing of the flat. After negotiation, the licensee arranged for Mr C to sign a tenancy agreement and Mr C also paid a commission to the licensee for arranging the tenancy agreement.

Throughout the transaction, the licensee did not disclose to Mr C that he was in fact the landlord of the property.

Commentary and Suggestion:

In this case, the licensee was Mr C's agent and at the same time the landlord of the property. He failed to avoid accepting an appointment involving a property which he had a beneficial interest and thus failed to comply with paragraph 3.6.1 of the *Code of Ethics*.

According to the guidelines in the Practice Circular regarding disclosure of interests by an agent (Circular No. 08-03 (CR)), licensees should refrain from handling a property transaction to which he is an interested party (i.e. a vendor, purchaser, landlord or tenant) unless he has fully disclosed all the relevant facts to his client and has obtained the client's informed and written consent to handle such a transaction.

In the aforesaid circumstances, the licensee should have disclosed to Mr C that he was in fact the landlord of the property and he was therefore not able to act for him. The licensee should also have advised Mr C to instruct other agents to act for him. In addition, the licensee should not have accepted the appointment by Mr C in order to avoid any conflict of interest.

Paragraph 3.6.2 of the *Code of Ethics*

Estate agents and salespersons shall, in the event of possible or potential conflict of interest (such as representing both the vendor and the purchaser), disclose to their clients that they are so acting. Any pecuniary or other beneficial interests in relation to the property shall be disclosed fully to all parties concerned.

Illustration (1)

Failing to Disclose a Relationship with a Vendor

A licensee was the sole proprietor of an estate agency firm. A purchaser looked for a residential property through the firm. The purchaser eventually entered into a provisional agreement for sale and purchase with a vendor of a residential property through the arrangement of the licensee.

Before the signing of the provisional agreement for sale and purchase of the property, the licensee told the purchaser that the vendor was a company ("ABC Limited"). The licensee was in fact the director and shareholder of ABC Limited. However, she did not disclose the same to the purchaser.

Commentary and Suggestion:

In this case, the licensee failed to disclose to the purchaser her relationship with the vendor. The licensee thus failed to comply with paragraph 3.6.2 of the *Code of Ethics*.

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 the 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 will be 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, a licensee 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 Ordinance 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 residential 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.

Besides, a licensee who enters into an estate agency agreement on behalf of an estate agency with his client in compliance with the Practice Regulation must disclose the pecuniary or other beneficial interest which the following party has in the property concerned:

- Him or his nominee; or
- His specified relative (meaning his spouse, parent, child, brother or sister), or any nominee of his specified relative; or

- The estate agency or any employee/substantial shareholder/partner/director of the estate agency.

Particulars of such interests (if any) must be specified in the estate agency agreement.

Illustration (2)

Failing to Disclose Dual Agency

A purchaser bought a residential property from the vendor through a licensee. Some disputes arose between the licensee and the purchaser during the course of the transaction and the purchaser discovered that the licensee had failed to disclose to him that the licensee also acted for the vendor in the transaction.

Commentary and Suggestion:

Where a licensee acts for both parties, he should disclose to his clients that he is so acting in order to enable his clients to be alerted of the same. Where the licensee and his clients have entered into Form 3, 4, 5 or 6, such disclosure should be fully made in the Forms. On such a form, the licensee has to state if the agency is single or dual or potentially dual.

Failure to disclose to a client his dual agency relationship or failure to disclose pecuniary or other beneficial interests in relation to the property is a breach of paragraph 3.6.2 of the *Code of Ethics*.

In fact, according to section 36(1)(a)(vii)(A) of the Ordinance, a licensed estate agent shall, as regards a particular property in relation to which he has entered into an estate agency agreement and acts both for the vendor and for the purchaser, inform both of such clients that he is so acting.

Paragraph 3.7.1 of the *Code of Ethics*

Estate agents and salespersons shall not seek unfair advantage over, nor injure directly or indirectly the reputation of, nor publicly disparage the business practice of other agencies.

Illustration (1)

Injuring the Reputation of Another Estate Agency

A vendor appointed Agent A to act as his exclusive agent in the sale of a property. Agent B had a client who would like to purchase the property. In order to induce the vendor to sell the property to his purchaser client through his estate agency, Agent B sent a fax to the vendor with remarks which were injurious or defamatory to the reputation of Agent A.

Commentary and Suggestion:

In this case, Agent B's remarks that Agent A was incapable of managing its estate agency business had injured the reputation of Agent A. Agent B thus failed to comply with paragraph 3.7.1 of the *Code of Ethics*.

Fair competition is an essential element for the efficient working of markets. For the purpose of ensuring fair competition, certain unscrupulous business practices, such as misleading consumers or disparaging competitors, should be prohibited.

Licensees should not do any act which is defamatory or injurious to the reputation of other licensees.

According to section 8(4) of the Practice Regulation, a licensee shall not solicit instructions from a vendor/landlord if the licensee is aware that the property is subject to an exclusive agency agreement with another licensee, unless the vendor/landlord has been advised that he may be liable for payment of additional commission if he enters into a second estate agency agreement concerning the property.

Paragraph 3.7.2 of the *Code of Ethics*

Estate agents and salespersons should avoid any practice which may bring discredit and/or disrepute to the estate agency trade.

Illustration (1)

Fighting in Public Places

An estate agent saw a female employee of a rival estate agency removing the publicity leaflets that the agent's company had placed on windshields of the cars in a parking lot and replacing them with flyers belonging to the rival estate agency. The agent retaliated by removing them from the cars. Both sides traded insults. The female agent claimed that the agent in question had slapped her on the face. The agent was subsequently charged with common assault and was convicted. He was fined \$1,000 and ordered to pay costs of \$2,000.

Commentary and Suggestion:

Although the estate agent submitted that he was only trying to protect himself from being attacked by the rival estate agent, he had indeed slapped the rival estate agent on the face in the midst of verbal altercations in a public place. The agent's behaviour was considered improper and injurious to the reputation of the trade, and he had breached paragraph 3.7.2 of the *Code of Ethics*.

Licensees should not quarrel or fight with other estate agents, salespersons or passers-by. Licensees should note that according to section 39 of the Offences Against the Person Ordinance, any person who is convicted of an assault occasioning actual bodily harm shall be guilty of an offence triable upon indictment and shall be liable to imprisonment for three years. Licensees should also note that under section 40 of the same ordinance, any person who is convicted of a common assault shall be guilty of

an offence triable either summarily or upon indictment and shall be liable to imprisonment for one year.

Licensees should always act in a professional manner with dignity and avoid any practice which may bring disrepute to the estate agency trade.

Illustration (2)

Failing to Honour a Promise of a Cash Incentive

A licensee was working for an agency company that was appointed by a developer to promote the sale of units in a new development. The licensee offered to provide to a customer a cash incentive equivalent to 1.5% of the purchase price if the customer were to purchase one through the licensee's company. He however failed to honour the promise of a cash incentive.

Commentary and Suggestion:

Luring potential clients into engaging a licensee's service by the promise of a cash rebate and then subsequently renegeing on the promise would undermine confidence in and bring disrepute to the estate agency profession. The licensee failed to observe paragraph 3.7.2 of the *Code of Ethics*.

According to the Practice Circular (No. 13-04 (CR)), licensees must inform prospective purchasers of the details of any incentive schemes which may be offered to purchasers and state clearly whether the incentives are offered by the vendor or their estate agency company. Licensees must set out in writing any promise of incentives, including any gifts, discounts or rebates they have made to prospective purchasers, and stipulate clearly the terms and format of the incentives offered.

Estate agency companies must issue clear guidelines on the offer of incentives to prospective purchasers, maintain close supervision of their staff to ensure adherence to the guidelines, and establish proper procedures for fulfilling the incentives promised.

Illustration (3)

Improper Handling of Client Money

A licensee arranged for a prospective purchaser to sign a provisional agreement for sale and purchase ("PASP"), and to pay a provisional deposit of \$10,000 in cash. The next day, before the vendor accepted his offer, the purchaser informed the licensee that he had decided not to buy the property and demanded the return of his deposit money. However, the licensee demanded the purchaser to sign a document admitting that the PASP was unilaterally cancelled by the purchaser, or otherwise the licensee would not return the deposit money. The purchaser disagreed. Finally, the licensee only returned the deposit money with the intervention of the police.

Commentary and Suggestion:

The licensee in the above case had no right to withhold his client's deposit money or to make him sign any inequitable document. His behavior harmed the professional image of the trade, bringing disrepute to the trade as a whole, thus failing to comply with paragraph 3.7.2 of the *Code of Ethics*.

Licensees may sometimes handle cash or cheques drawn in favour of their company which they receive or hold on behalf of their clients, e.g. funds from a prospective purchaser/tenant for transfer to the owner of a property as initial deposit once an agreement is reached. At common law, a trust relationship arises when the owner of the funds entrusts his funds to a trustee for managing the same. A licensee, as trustee, owes fiduciary duties to the owner of the funds, i.e., the client on whose behalf he is

holding the funds. Under section 12(3) of the Practice Regulation, a licensed estate agent shall deposit all moneys received or held for or on account of a client in a trust account maintained at an authorised institution (a bank, restricted licensed bank or deposit-taking company as defined in the Banking Ordinance). This is to prevent an estate agent from mixing its client's moneys with its own moneys. Licensees are liable to repay to their clients moneys received or held on behalf of their clients and must not use the moneys from a trust account to pay for the company's expenses or for other purposes. They must not deduct or withhold part or all of such moneys to set off any commission.

Illustration (4)

Acquisition of Old Buildings

A licensee approached flat owners of an old building for a discussion on the acquisition of the building for redevelopment but one of the flat owners repeatedly declined the licensee's offer. The licensee later issued a letter to that owner, claiming that 85% of the owners of the building had entered into an agreement to sell their units. In fact, only 60% of the undivided shareowners had sold their units in the building when the letter was issued.

Commentary and Suggestion:

The statement in the licensee's letter was made without proper basis. The licensee made an exaggerated statement in order to induce the flat owner to sell his flat. The licensee's conduct harmed the professional image of the trade, bringing disrepute to the trade as a whole, thus failing to comply with paragraph 3.7.2 of the *Code of Ethics*.

Licensees must not exercise any undue influence on a vendor when soliciting the vendor to sell his flat or when negotiating with the vendor on the terms for the sale of his flat. Licensees must not conduct themselves in any way which may cause annoyance to the vendor: for example, persistent solicitation despite the vendor's express indication that he is not interested in selling his flat. Licensees must not harass the vendor or use any other improper tactics, such as pestering the vendor with persistent phone calls at unreasonable hours to exert pressure on

the vendor to sell. Where the vendor is an elderly person, licensees must advise the vendor that he should be accompanied by a family member or close relative when negotiating for the sale of his flat. Such advice must be recorded in writing.

In recent years, there has been an increase in the number of acquisitions of flats in old buildings. Licensees engaging in such activities must comply with the *Code of Ethics* and the relevant Practice Circulars. Non-compliance of the above may be subject to disciplinary actions.

Illustration (5)

Insulting Another Estate Agent in a Public Place

Agent A from estate agency Company A accompanied his clients to view a property. After that, they passed by the shop of estate agency Company B. Agent B of Company B came out to approach the clients and attempted to hand them some advertising leaflets. An argument between Agent A and Agent B thus ensued and then escalated. Agent B scolded Agent A with abusive and foul language in front of the clients.

Commentary and Suggestion:

The dispute in the case took place in a public place and in the presence of the clients. The abusive and foul language used by Agent B gave an unpleasant impression to the public that there was a lack of courtesy and mutual respect in the estate agency trade. Their behavior not only demonstrated disrespect for their clients but also brought disrepute to the trade. The licensees therefore did not comply with paragraph 3.7.2 of the *Code of Ethics*.

Competition amongst licensees is always intense, and in particular, for those working in adjacent shops. Licensees should pay attention to the public image of the trade and should show mutual respect by avoiding offensive arguments in a public place and in the presence of clients.

Licensees shall bear in mind that they should not only raise their competence, but also enhance their standards of ethics and conduct so as to earn the respect of fellow practitioners and the general public.

Paragraph 3.7.3 of the *Code of Ethics*

Estate agents and salespersons should adhere to the principles of fair competition and refrain from restrictive business practices.

Illustration (1)

Refusal to Return a “Certificate of Availability for Sale”

A licensee entered into a non-exclusive estate agency agreement with a vendor who intended to sell his property under the Home Ownerships Scheme (“HOS”) Secondary Market Scheme. The agreement contains a clause which required the vendor to deposit with the licensee his “Certificate of Availability for Sale” for a period of six months. During the said period, another licensee introduced a purchaser to the vendor with a view to purchasing his HOS property. The vendor is required to produce to the other licensee the “Certificate of Availability for Sale” before he could enter into a provisional agreement for sale and purchase. He demanded the return of the “Certificate of Availability for Sale” but the licensee refused to hand it over to him.

Commentary and Suggestion:

In this case, the licensee refused to hand over the “Certificate of Availability for Sale” to the vendor, so that no other licensee could act for the vendor, notwithstanding that the vendor had not appointed him as an exclusive agent. The act amounted to a breach of the principle of fair competition. The licensee thus failed to comply with paragraph 3.7.3 of the *Code of Ethics*.

Good and fair business practices would increase consumers’ confidence and a favourable environment for business would promote economic development.

Licensees should adhere to the principles of fair competition and refrain from restrictive business practices.

Illustration (2)

Copying Listings Information without Permission

Two licensees copied listings information from the computers of an agency without their employer's permission. They were allegedly engaged in the transfer of clientele or listings without their employer's permission.

Commentary and Suggestion:

Some licensees have transferred clients or listings belonging to their employer to another estate agency without their employer's permission. In most cases, these licensees obtain higher rates of commission or other benefits from the other estate agency while their employer suffers a loss of commission as a result of the transfer.

The conduct of the licensees in the case above had not only damaged the trust between their employer and them, but also restricted open and fair competition among members of the trade, thus failing to comply with paragraph 3.7.3 of the *Code of Ethics*.

An employee owes a duty of loyalty and fidelity to his employer under common law and may be sued for damages by his employer for breach of the duty. A licensee may also commit a criminal offence of "access to computer with criminal or dishonest intent" under the Crimes Ordinance in transferring clients or listings belonging to his employer to another estate agency (whether or not owned by him) without his employer's

permission. The employee licensee may also commit an offence under the Prevention of Bribery Ordinance depending on the circumstances of the case. If the employee licensee obtains an “advantage” in relation to his employer’s affairs or business and without the permission of his employer, he may commit an offence under section 9(1) of the Prevention of Bribery Ordinance. Those offering such an advantage to the employee licensee may commit an offence under section 9(2) of the Prevention of Bribery Ordinance.

Information about clients and listings is regarded as an asset of estate agency firms. Without their employer’s permission, licensees should not copy such information for use other than in the course of business. If they do, they may breach the *Code of Ethics* and be subject to disciplinary sanctions.

Moreover, under the Personal Data (Privacy) Ordinance, it is an offence for a person to disclose any personal data of a data subject obtained from a data user without the latter’s consent and with an intent to obtain gain or cause loss to the data subject. It is also an offence if the unauthorised disclosure, irrespective of its intent, causes psychological harm to the data subject. The maximum penalty for these two new offences is a fine of \$1,000,000 and imprisonment for five years.

