

SUMMARY OF THE ESTATE AGENTS' CODE OF CONDUCT

This summary deals with the provisions of the Code of Conduct that applies to estate agents as property practitioners. Note in this regard that:

1. This summary is part of our PDE examination preparation and serves as a guideline to the content of the Code, to use when writing the examination.
2. With the repeal of the Estate Agency Affairs Act, the Code of Conduct issued in terms thereof fell away on 1 February 2022 (the 'previous' or 'old Code'). A new Code of Conduct was issued – not as a separate standing Code of Conduct as in the past, but included as part of the regulations to the Property Practitioners' Act ('the PPA').
3. The new Code's provisions were largely taken from the old Code and "re-packaged", as follows:
 - (i) First, the provisions in chapter 3 of the old Code of Conduct were renamed as "**sanctionable conduct**" provisions. The sanctionable conduct provisions are not part of the new Code but are contained separately in the regulations to the PPA. See **Annexure A** hereto for these.
 - (ii) Then the remaining provisions (of the old Code) were re-produced in regulation 34.2 to 34.6 of the PPA, and were divided into two parts, namely:
 - General conduct rules that will apply to **all** property practitioners in the real estate sector; and
 - Conduct rules that will apply **only to estate agents** as property practitioners. These are the provisions that are particular to estate agents, such as the provisions relating to mandates and the duty to disclose, etc.
4. In addition, there are conduct rules "hidden" amongst other provisions in the new Act, outside of the new "Code of Conduct" provisions. These other provisions are referred to in **Annexure B** hereto.

A: WHAT IS A "CODE OF CONDUCT"?

- A Code of Conduct is, in general terms, a record of required ethical standards of conduct for persons belonging to a certain body and/or profession.
- The standards usually include generally accepted norms for good and fair behaviour and represent underlying beliefs of society regarding the way business should be conducted.
- It is crucial in business because:
 - o the image of an organisation/professional body depends to a great extent on the ethical standards that its individual members adhere to;
 - o consumers will judge the reputation of a business/profession based on its perceived values.
- The way in which estate agents practice and conduct themselves must therefore conform to ethical rules.

B: HEADINGS FROM THE CODE OF CONDUCT (TO HELP YOU SEARCH WHEN ANSWERING AN EXAM QUESTION)

	Regulation in the new Code	Old Code paragraph reference
General duty to protect the interest of members of the public	Reg 34.2	Par 2
Interest on money in trust	Reg 34.2.7 – 34.2.10	Par 9
Mandates	Reg 34.3.1	Par 3
Duty to disclose	Reg 34.3.2	Par 4
Duty not to make misrepresentations, false statements or use harmful marketing techniques	Reg 34.3.4	Par 5
Duties in respect of offers and contracts	Reg 34.4 and 34.5	Par 6
Remuneration	Reg 34.6	Par 8
Confidentiality	Reg 34.2.2	Par10

C: GENERAL DUTY TO PROTECT THE INTERESTS OF MEMBERS OF THE PUBLIC

- Reg 34.2.1 - 34.2.2 (old Code par 2, 9 and 10)
- This part of the new Code is applicable to *all* property practitioners, including estate agents.
- Under this heading in the Code, the following are highlighted:

General conduct

- Reg 34.2.1.1 - *May not do anything which is or may be contrary to the integrity of estate agents (and/or property practitioners) in general.*
This is a very general standard of conduct that is expected of an estate agent where such conduct is not otherwise specifically regulated in the Code. The Code is otherwise restricted to specific instances of conduct and omissions of an agent in the course of business activities.
- Reg 34.2.1.2 - *Must protect interests of client at all times, with due regard to interests of others.*
This clause imposes a general duty on estate agents to protect their clients' best interests at all times. For example, an agent must:
 - o use his best endeavours to perform a mandate by marketing a property;
 - o try and find a buyer for the property on the best possible terms and the best price for the seller;
 - o take reasonable steps and precautionary measures to ensure that viewers do no damage a property or remove anything on show days.
- Reg 34.2.1.3 - *shall not accept a mandate if the performance of the mandate requires specialized skills or knowledge which the agent does not have; and, may not accept a mandate if he does not have the required knowledge (ie, passed the prescribed exams) unless assisted by a person who has such knowledge.*

Degree of skill

- Reg 34.2.1.4 - *Shall not wilfully or negligently fail to perform work/duties with the degree of care/skill reasonably expected of him/her.*
 - o For example, the agent may not engage in dishonest or corrupt conduct, recklessness and/or indifference: such actions/behaviour can constitute contraventions of this clause (amongst others).
 - o The public has a right to expect good service from the agent.

Comply with laws

- Reg 34.2.1.5 – *The property practitioner (estate agent) shall comply with the Act, the regulations and any applicable By-Laws.*

Interest on trust funds

- 34.2.1.7 - 34.2.1.8 - *Shall not, in respect of trust funds received in the agent's trust account, make any arrangement for the receipt by the estate agent of interest that accrues on that money.*
- 34.2.1.9 - *Shall, before he receives any money in trust in respect of a contract of sale or lease, disclose to the parties that interest automatically accrues to the PPRA, unless there is an agreement to the contrary regarding the interest.*
- 34.2.1.10 - *Shall, if any money is invested by him in the agency trust account (whether the interest accrues to the PPRA or to the purchaser/tenant), invest the money at the best interest rate available in the circumstances at the bank where he normally keeps his trust account; and pay the full amount of the interest which accrued to the party entitled thereto.*

Confidentiality

- 34.2.2 - *No property practitioner shall, without just cause, divulge to any third party any confidential information obtained by him concerning the business affairs, trade secrets or technical methods or processes of a client or any party to a transaction in respect of which he acted as a property practitioner.*

MANDATES

Mandates generally

- Regulation 34.3, old Code par 2.
- Note that certain of the provisions in the Code of Conduct deal with **mandates in general** (including open, exclusive and exclusive sole mandates) and others deal **ONLY with SOLE MANDATES**. We have differentiated accordingly and first deal with the general provisions and then with the provisions applying to sole mandates.

Must have a mandate

- Reg 34.3.1.1 - *May not offer immovable property for sale or let, or negotiate or offer to canvas a purchaser/lease for such property **unless he has been given the mandate to do so by the seller or lessor** of the property, or his duly authorised agent.*
 - o You may not act on behalf of a seller/lessor in any way without a mandate.
- Reg 34.3.1.2 - *May not, on behalf of the purchaser or lessee, attempt to offer to purchase or lease any immovable property or negotiate in connection therewith or canvas or undertake or offer to canvas a seller or a lessor for such property **unless he has been given the mandate to do so by such prospective purchaser or lessee.***
 - o You may not act on behalf of a purchaser/lessee in any way without a mandate.

Regulation 34.3.1 (both 34.3.1.1 and 34.3.1.2) thus:

- o protects a seller's/lessor's rights regarding the sale of his home and choice of agent/agency;
- o prevents unwanted intrusion on his privacy by an unsolicited agent (and the latter's prospective purchasers); and
- o prohibits misrepresentation regarding existence of mandate.

Mandate and competing interests of clients

- Reg 34.3.1.7 - *Estate agent may not accept any mandate or instruction iro immovable property if his interest therein competes with his obligation towards an existing client in respect of the same immovable property, **without first disclosing** such interest in writing to such client*
 - o An estate agent is expected to use his/ her best endeavours in the execution of his/her mandate and to "give his/her all" for his client. He/she should be transparent where there are competing interests.

Misrepresentation regarding value or income in order to get mandate

- Reg 34.3.1.8 – May not knowingly or negligently make a **material misrepresentation** regarding likely **market value** or **rental income** to seller/lessor **in order to obtain mandate**.
 - o In other words, agent may not use/make (material) misrepresentations to induce someone to grant him a mandate.

Accepting mandate where specialized skill required

- Reg 34.3.1.9 – *A property practitioner may not accept a mandate if performance of mandate requires **specialised skill/knowledge** which the agent does not have, unless agent will be assisted by someone with the necessary skills, in which event this must be disclosed to the client.*

Regarding SOLE MANDATES

- There are provisions in the Code that apply specifically to sole mandates, IN ADDITION to the aforementioned which is relevant to all mandates generally. These are mostly self-explanatory and are:

In writing with termination date

- Reg 34.3.1.3 – All the terms of a sole mandate must be in writing (including the expiry date of the mandate, identified as a calendar date) and signed before the agent may accept it.
 - o Sole mandate must be in writing and indicate its expiry date as a calendar date.

Extension: in writing

- Reg 34.3.1.4 – May not accept a sole mandate conferring on the agent an option to extend the sole mandate or to continue to render the sole mandate services unless the client consented hereto in a separate consent (and the consent must set out the reasons and implications for this extension and the client and agent must sign the document).
 - Extensions of sole mandate allowed only where there is separate consent.

Mandate not to include Power of Attorney (unless ...)

- Reg 34.3.1.5 – May not accept a sole mandate that includes a Power of Attorney to act on behalf of the client, unless the intention and effect hereof was explained in the document embodying the mandate.
 - o Where power of attorney is included in a sole mandate, the intention and effect must be clearly explained in the mandate, ie in writing.

Sale/lease may not grant sole mandate for on-sale or on-letting

- Reg 34.3.1.6 – May not include or accept benefit of a clause in a lease/sale agreement negotiated by him, whereby a sole mandate is directly/indirectly conferred on him/her to sell/let property at a time after conclusion of the agreement.
 - Including/accepting benefit of sole mandate in a lease or sale agreement for future sale/lease of property now allowed.

Explain legal consequences of sole mandate

- Reg 34.3.1.10 – May not accept mandate unless legal implications of selling without agent's assistance or via another agency – during currency and after mandate expiry – is explained.
 - o The marketing obligations assumed by the agent must also be explained to the client and if included in the mandate, may not be printed in smaller font than the other letters used in the document.

DUTY TO DISCLOSE

- Reg 34.3.2 – 34.3.3 (old Code par 4)
- Reg 34.3.2.1 – Agent must disclose all facts material to a (prospective) purchaser & of which he/she is aware (or should reasonably be aware) AND which are or could be material to a prospective purchaser/lessee.
 - Important requirement to disclose **material** facts.
 - Important to find out what is material for the purchaser/lessee.
 - What the agent is “reasonably” aware of: the Code does not require a detailed inspection where each and every aspect of the property is listed, but definitely those that are reasonably expected, in the industry, to be disclosed.
- Reg 34.3.2.2 – Running a business under a name other than your own – If agent running business under a trade name other than his own name, disclose this fact in all correspondence, circulars and other written documentation.
- Reg 34.3.2.3 – Conflicting mandate – Do not perform a mandate if another conflicting mandate with regard to the same property exists, unless (i) this was disclosed to client in the later mandate **and** (ii) the client in the later mandate was advised that the agent will represent the client in the prior mandate.
- Reg 34.3.3 – Agent with mandate must **disclose his/her interest** when buying or selling/leasing/renting property him/herself (as this could give rise to a conflict of interest).
 - Potential for conflict of interest, hence the disclosure requirement.

NO MISREPRESENTATIONS, FALSE STATEMENTS OR USE OF HARMFUL MARKETING TECHNIQUES

- Reg 34.3.4 (old Code, par 5)

Advert gives impression that it was placed by owner

- Reg 34.3.4.1 – Estate agent may not, as estate agent, publish or cause to be published any advertisement which could create the impression that it was published by the owner, seller or lessor of immovable property, or by prospective purchaser or lessor of immovable property.
 - Clause aimed at avoiding misrepresentations: a prospective client who reacts to advertisements must know with whom he/she is dealing, ie with property owner or an estate agent.
 - Important because (i) owner generally has more information regarding the property than agent; and (ii) quoted price in agent’s advertisement includes commission whilst an advertisement by owner will not include commission.

False statements

- Reg 34.3.4.2 – May not wilfully or negligently make false statement orally or in writing (old Code, par 5.2).

Claiming to be an expert

- Reg 34.3.4.3 – May not claim to be an expert/have specialised knowledge of any aspect if this is not the case (old Code, par 5.3).

Price/rental amount in advertising

- Reg 34.3.4.4 – May not advertise property at price/rental other than agreed upon (old Code par 5.4).

Misleading conduct, marketing

- Reg 34.3.4.5.1 – May not wilfully/negligently mislead anyone regarding the property (old Code, par 5.5.1).
- Reg 34.3.4.5.2 – May not use harmful/misleading marketing techniques/methods in order to get mandate (old Code, par 5.5.2).

Misleading business names

- Reg 34.3.4.6 – May not use a business name that can cause confusion re the nature of the business carried on (old Code, par 5.6).

Notifying client of an offer received

- Reg 34.3.4.7 – May not inform a party that he has an offer in respect of a property (in respect of which he is mandated) unless the offer is in writing, signed by offeror, is to the knowledge of the agent a bona fide offer (par 5.7).

See also reg 6.1.1 and 6.2.2 – offer received must be submitted to seller/purchaser.

Affixing for sale/for hire boards

- Reg 34.3.4.8 – may not affix For Sale/Hire/Let board to a property unless seller/lessor gave consent and agent has mandate (old Code, par 5.8).
- Reg 34.3.4.9 – May not affix or erect any advertising or notice board to solicit business on local authority property without the express written approval of the local authority concerned, or if it is a contravention of local authority advertising regulations.

DUTIES IN RESPECT OF OFFERS AND CONTRACTS

- Regulation 34.4 (old Code, par 6).
- Reg 34.4.1 – Agent must present all offers to seller/purchaser, unless seller/purchaser instructs specifically to the contrary.

See also notification requirement when an offer is accepted, Reg 6.2.2. and 6.2.3.

- Reg 34.4.2 – Agent with mandate may not present competing offers to purchase the property in a way as to induce the seller to accept any particular offer without regard to the advantages or disadvantages of the other offers.
- Reg 34.4.3 – May not make changes to offer without consent of offeror 6.1.3.
- Reg 34.5.1 – Agent shall explain meaning and consequences of clauses of offer to purchase to all parties, before conclusion of agreement 6.2.1.
 - See also 3.10 in respect of sole mandates.
- Reg 34.5.2 and 34.5.3 – if agent knows an offer has been accepted, he must notify the party that made the offer (offeror) and furnish each party with a copy of the agreement.
 - See also 5.7.

REMUNERATION

- Reg 34.6 and old Code par 8.

Payment if there is suspensive or resolutive condition

- Reg 34.6.1 – Prohibits receipt of payment/benefit where sale is subject to a suspensive or resolutive condition, unless good cause exists.

Amount of commission

- Reg 34.6.2 – May not indicate that he is precluded by law from charging less than particular commission fee, or that such commission or fee is prescribed by law.

Double commission risks

- Reg 34.6.3- May not introduce a prospective purchaser/lessee to a property or to the seller or lessor thereof if he knows or has reason to believe the person has been introduced to the property by another agent (and thereby opening the seller up to a double commission claim). Does not apply if the agent informed the client of the likelihood/risk hereof and client gave written consent.

Commission/fee if client unable to pay?

- Reg 34.6.4- May not negotiate to receive a fee from conclusion of an agreement regardless of the fact that the purchaser/lessee is financially able to fulfil the obligations of the agreement – unless good reason exists and consent given.

Deductions from money held

- Reg 34.6.5 – May not arrange for deductions to be made from monies held by the estate agent, unless the agent is entitled to those funds (for example, deducting commission from a deposit held by the estate agent on date of registration of transfer) and the person paying the money is the party liable for that payment.

Early payment to seller of purchase price

- Reg 34.6.6 – May not benefit from a clause, or include a clause in an agreement which provides for payment by the estate agent to the seller of the purchase price or a portion thereof, unless good cause exists, the parties have been informed of the risks and their rights and agreed in writing to such payment.

ANNEXURE A

What is listed as sanctionable conduct in Section 82 of the Act?

“62. Sanctionable conduct

- (1) A property practitioner is guilty of sanctionable conduct if he or she or it-
 - (a) in the same transaction acts as a property practitioner on behalf of two or more persons whose interests are not in all material respects identical in respect of that transaction, and receives remuneration from all parties concerned in respect of such transaction, unless all affected persons in writing agree thereto;
 - (b) fails in respect of any act performed by him or her or it as a property practitioner to give a full and proper explanation in writing, within 30 days of being called upon by the Authority in writing to do so, to any person having a material interest in the performance of such act;
 - (c) fails to pay any money due to the Authority or in respect of the Fund within one month after such monies become due;
 - (d) fails to furnish in writing within a period determined by the Authority any information that the Authority has requested in writing and reasonably requires in order to properly exercise its powers under this Act;
 - (e) fails to comply with or contravenes any provision of the Code of Conduct;
 - (f) in his or her capacity as a director of a company, or member contemplated in paragraph (b) of the definition of “property practitioner” in section (1), of a close corporation, or trustee of a trust, which is a property practitioner and which failed to comply with section 50 or 51, did not take all reasonable steps to prevent such failure;
 - (g) carries on an undesirable practice prohibited under section 63;
 - (h) commits an offence involving an element of dishonesty;
 - (i) fails to inform the Authority within 14 days of a change in his, her or its contact details;
 - (j) differentiates, distinguishes or excludes consumers directly or indirectly on the basis of their race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth or commits a criminal offence while performing a function of a property practitioner; or
 - (k) fails to comply with or contravenes any provision of this Act.
- (2) Subsequent ratification or correction of any conduct contemplated in subsection (1) does not constitute a defence. “

ANNEXURE B

Professional Relationships

Certain provisions in the PPA place limitations on relationships that estate agents may form with third party service providers in their daily operations.

1. Relationship with the HOA, body corporate or management body of a residential property development.

- Regulation 35, in very broad terms, prohibits the management body (be it a person in control of management, or the HOA or body corporate of a residential development) from receiving money or a reward in return for granting some advantage in respect of the marketing of properties in such property development.
- It also prohibits the placing of a limitation on the sale of property in such property development. Specifically, an arrangement where property may only be sold through the managing body or a specific agency designated by the managing body, is outlawed.
- Similarly, a provision that an owner may only sell his or her property to a designated purchaser, will attract scrutiny.
- Lastly, an arrangement that provides an advantage to some estate agent(s) (or other property practitioner) over others in providing services in the development; or, where it excludes other estate agents (or property practitioners) from rendering services in the development, is prohibited as “undue business practices”.

2. Prohibition on conduct to influence issue of Compliance Certificates

An estate agent (or other property practitioner) may not offer or receive any incentive (or even influence) a person who is appointed to perform an inspection of a property for the issue of a Compliance Certificate.

3. Limitation on relationships with other industry service providers (for example mortgage originators, bridging finance suppliers, and the like)

Estate agents (and other property practitioners) may not be part of an arrangement (whether formally or not) whereby the consumer (such as a buyer or seller) is obliged or encouraged to use a particular service provider. This includes the conveyancing attorney, mortgage originator, service providers for Compliance Certificates, and the like.