<u>Guidance Document on necessity for brokerage agreements</u>

The Real Estate Board is issuing this guidance document to provide information and general guidance to the public, helping its licensees understand the requirements of § 54.1-2137 of the Code of Virginia.

To ensure that the Real Estate Board's broker and salesperson licensees comply with **§ 54.1-2137. Commencement and termination of brokerage relationships**, the Board directs licensees to review the following information.

The following are relevant excerpts from the *Code of Virginia*:

§ 54.1-2137. Commencement and termination of brokerage relationships.

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B. Brokerage agreements shall be in writing and shall:
1. Have a definite termination date; however, if a brokerage agreement does not specify a definite termination date, the brokerage agreement shall terminate 90 days after the date of the brokerage agreement;
2. State the amount of the brokerage fees and how and when such fees are to be paid;
3. State the services to be rendered by the licensee;
4. Include such other terms of the brokerage relationship as have been agreed to by the client and the licensee; and
5. In the case of brokerage agreements made in conjunction with the client's consent to dual representation, the disclosures outlined in subsection A of § 54.1-2139 must be provided.

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§ 54.1-2137. Commencement and termination of brokerage relationships.
A. The brokerage relationships set forth in this article shall begin when a client engages a licensee and continue until (i) completion of performance under the brokerage agreement or (ii) the earlier of (a) the expiration date agreed upon by the parties, or (b) any mutually agreed upon date.

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§ 54.1-2130. Definitions.
As used in this article: …
"Brokerage agreement" means the written agreement creating a relationship between a client and a licensee, specifying whether the licensee will act as an agent or independent contractor. "Brokerage relationship" refers to the contractual relationship between a client and a licensee engaged to procure a seller, buyer, option, tenant, or landlord to sell, buy, exchange, or rent real estate on behalf of the client.

"Client" means a person who has entered into a brokerage relationship with a licensee.

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"Customer" means a person who has not entered into a brokerage relationship with a licensee but for whom the licensee performs ministerial acts in a real estate transaction. Unless a brokerage relationship is established, the person is presumed to be a customer, not a client, of the licensee.

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" Ministerial acts" refers to routine acts that a licensee can perform for a person, which do not involve discretion or the exercise of the licensee's judgment.

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The Code of Virginia requires a written brokerage agreement when a brokerage relationship is created. A licensee must use judgment to determine when a customer's intent to enter into a brokerage relationship is established. If the party expects the licensee to provide advice or counsel requiring judgment or discretion for procuring a seller, buyer, option, tenant, or landlord, a written brokerage agreement is required. If the party has engaged the licensee to procure a seller, buyer, option, tenant, or landlord ready, able, and willing to sell, buy, option, exchange, or rent real estate, a brokerage relationship is established, requiring a written agreement.

Below are some examples of situations which require the licensee to use his judgment to determine the party's intent:

- Many acts may be ministerial or require a written brokerage agreement depending on the party's intent. For example, showing a house may be ministerial if the licensee is gathering information on the market. However, if the party asks the licensee to show real estate with the intent to procure someone ready, able, and willing to sell, buy, option, exchange, or rent real estate, a brokerage relationship exists, requiring a written agreement.

If a party requests a licensee to provide MLS search results without the intent to engage the licensee for procuring a seller, buyer, option, tenant, or landlord, a written brokerage agreement is not necessary. However, if the party requests MLS search results with the intent to engage the licensee for such purposes, a written brokerage agreement is required

- If a party asks the licensee for general information about items such as tax rates, HOA dues, schools, or typical features of property in the area, these acts are likely ministerial. However, if the party inquires about specific properties with the intent to have the licensee procure someone ready, able, and willing to sell, buy, option, exchange, or rent real estate, or if the party asks for the licensee's opinion on those features or properties, then a brokerage relationship is established, requiring a written brokerage agreement.

- Many licensees may perform marketing activities to encourage a party to engage them for procuring a seller, buyer, option, tenant, or landlord ready, able, and willing to sell, buy, option, exchange, or rent real estate. For example, if a party asks the licensee for a valuation or MLS search for informational purposes and does not yet intend to engage the licensee to procure a buyer or seller, a written brokerage agreement is not necessary. However, if the party intends to use the valuation or analysis to have the licensee procure a buyer for the real estate, a written brokerage agreement is required.

    - A licensee may provide marketing materials and a competitive market analysis to a prospective seller who is interviewing to retain a licensee to sell their property, without the necessity of a written brokerage agreement.

The party's intent can change during the performance of ministerial acts by the licensee. The licensee must recognize when the intent shifts from customer to client and ensure the party signs a written brokerage agreement before performing any non-ministerial acts. Brokers should have policies in place to guide licensees, based on the firm's business practices, to determine when a written brokerage agreement is necessary and how to properly obtain such agreements.