CHAPTER 16 – CO R/E COMMISSION POSITION STATEMENTS

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HOMEBUILDER'S EXEMPTION FROM LICENSING

Corporations which build structures on land it owns may sell the land and building together without licensing, provided that the sales are made by corporate officers or regularly salaried employees. The land and building must be sold as a unit and the building must not have been previously occupied. This exemption is usually referred to as the **homebuilder's exemption**. Since employees who sell must be regularly salaried employees, the question often arises as to what a regular salary is. This is the position of the Commission: 12-61-101(4)(j) C.R.S., among other requirements, requires that a corporation use "regular salaried employees" to sell or negotiate the sale of real property.

It is the position of the Commission that the phrase, "regular salaried employees" means that:

1. The salary must be an actual and stated amount and must not be a draw or advance against future commissions.
2. The salary must be regularly paid (i.e., weekly, monthly, etc.).
3. Although the amount of salary may vary, an employee must be paid at least the prevailing federal minimum wage.
4. The corporation should deduct amounts for state and federal withholding taxes, FICA taxes, and other commonly deductible expenses which the corporation would employ with respect to other employees.

Payment of a commission, in addition to a regular salary, will not invalidate the exemption if the above guidelines are met.

POSITION ON EARNED FEES (Revised 10/03/2017)

Commissions:

Section 12-10-217(1)(l), C.R.S., of the license law forbids a broker from paying a commission or valuable consideration, for performing brokerage functions, to any person who is not licensed as a real estate broker. Brokerage functions include negotiating the purchase, sale or exchange of real estate. *See* section 12-10-201(6)(a), C.R.S. Pursuant to Colorado case law, “negotiating” means “the act of bringing two parties together for the purpose of consummating a real estate transaction.” *Brakhage vs. Georgetown Associates, Inc*., 523 P. 2d 145, 147 (1974). Therefore, any unlicensed person who directly or indirectly brings a buyer and seller together, is negotiating and would need a broker’s license in order to be compensated. This includes, but is not limited to, such activities as referring potential time-share purchasers to a developer or referring potential purchasers to a homebuilder.

Referral Fees:

Section 12-10-304(1), C.R.S., permits a real estate broker to pay a referral fee if it is not prohibited by the federal "Real Estate Settlement and Procedures Act of 1974" ("RESPA") and reasonable cause for payment exists. Reasonable cause exists when:

1. An actual introduction of business has been made;
2. A contractual referral fee relationship exists; or
3. A contractual cooperative brokerage relationship exists.

Section 12-10-304(2)(b)(III), C.R.S., defines a referral fee as "any fee paid by a licensee to any person or entity, other than a cooperative commission offered by a listing broker to a selling broker or vice versa." Payment for providing a name to a licensed broker is not specifically addressed in Colorado statute. However, it would be illegal to pay such a fee to anyone performing acts that require a license (*e.g.*., negotiating, listing, and contracting). Care should be taken. At best, the unlicensed referrer can have no active involvement in the transaction beyond merely giving to a licensee the name of a prospective buyer, seller or tenant. If the payment is simply for the referral of a name to a licensee, with no further activity on the part of the referrer, and the referrer is not a provider of a settlement service, the Commission will not consider it to be a violation of the license law. Complaints and inquiries are dealt with on a case-by-case basis.

In real estate transactions involving federally related mortgage loans, Section 8 of the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. §§ 2601 et seq., governs the payment of referral fees. Pursuant to 12 U.S.C. § 2602(1) of RESPA, the term "federally related mortgage loan" is defined to include:

1. any loan (other than temporary financing such as a construction loan) which--
    a. is secured by a first or subordinate lien on residential real property (including individual units of condominiums and cooperatives) designed principally for the occupancy of from one to four families, including any such secured loan, the proceeds of which are used to prepay or pay off an existing loan secured by the same property; and
        i. is made in whole or in part by any lender the deposits or accounts of which are insured by any agency of the Federal Government, or is made in whole or in part by any lender which is regulated by any agency of the Federal Government; or
        ii. is made in whole or in part, or insured, guaranteed, supplemented, or assisted in any way, by the Secretary or any other officer or agency of the Federal Government or under or in connection with a housing or urban development program administered by the Secretary or a housing or related program administered by any other such officer or agency; or
        iii. is intended to be sold by the originating lender to the Federal National Mortgage Association, the Government National Mortgage Association, the Federal Home Loan Mortgage Corporation, or a

financial institution from which it is to be purchased by the Federal Home Loan Mortgage Corporation; or

iv. is made in whole or in part by any "creditor", as defined in section 103(f) of the Consumer Credit Protection Act (Federal Statute, 15 U.S.C. § 1602(f)), who makes or invests in residential real estate loans aggregating more than $ 1,000,000 per year, except that for the purpose of this Act, the term "creditor" does not include any agency or instrumentality of any State.

RESPA and Commission Rule 6.21 prohibit the payment or receipt of referral fees and kickbacks which tend to increase unnecessarily the costs of settlement services. As part of this prohibition, any referral of a settlement service, including real estate brokerage services, is not compensable. Thus, an individual or company is not allowed to pay another individual or company for the referral of settlement business. Moreover, it is not appropriate for a settlement service provider to pay a broker, or offset a broker's expenses, for lead generation. The Commission views this as payment for the referral of business, which would be a violation of Rule 6.21. Additionally, Section 12-10-217(10), C.R.S., requires the Commission to refer such issues to the Consumer Financial Protection Bureau forinvestigation as a potential violation of RESPA.

RESPA, however, does permit:

1. A payment to an attorney at law for services actually rendered:
2. A payment by a title company to its duly appointed agent for services actually performed in the issuance of a policy of title insurance;
3. A payment by a lender to its duly appointed agent or contractor for services actually performed in the origination, processing, or funding of a loan;
4. A payment to any person of a bona fide salary or compensation for goods or facilities actually furnished or for services actually performed;
5. A payment pursuant to cooperative brokerage and referral arrangements or agreements *between real estate brokers* (all parties must be acting in a real estate brokerage capacity);
6. Normal promotional and educational activities that are not conditioned on the referral of business and that do not involve the defraying of expenses that otherwise would be incurred by persons in a position to refer settlement services or business incident thereto; or
7. An employer's payment to its own employees for any referral activities.

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Administrative Fees:

As a result of the United States Supreme Court's decision (in Court Case: *Freeman v. Quicken Loans, Inc*., 132 S. Ct. 2034, 2012 U.S. Lexis 3940 (2012)) real estate brokers may charge administrative fees, either for services performed by the broker or the real estate brokerage, in addition to the broker's commission. In *Quicken Loans*, the Supreme Court held that while RESPA prohibits the splitting of fees if the charges are divided

between two or more persons (i.e. settlement service providers) and the fee was paid for services not actually performed, dividing or splitting fees amongst a single settlement service provider is not prohibited. The Commission considers a real estate broker and his or her licensed broker-employer (or brokerage) to be a single provider of settlement services and fees may be split amongst them.

POSITION STATEMENT CONCERNING RULE 6.15 ("SIGN CROSSING")

Commission Rule 6.15, commonly referred to as the "sign-crossing" rule, states as follows:

6.15.A. "Brokers will not negotiate a Listing Contract directly with a Consumer for compensation from said Consumer if such Broker knows the Consumer has an unexpired Listing Contract with another Brokerage Firm granting said Brokerage Firm an exclusive contract."

6.15.B. "However, if a Broker is contacted by a Consumer who is currently subject to an exclusive Listing Contract, and the Broker has not initiated the discussion, the Broker may negotiate the terms upon which to take a future Listing Contract or, alternatively, may take a Listing Contract to become effective upon expiration or termination of any existing Exclusive Listing."

6.15.C. "The burden of inquiry is on the Broker to determine the existence of the Listing Contract and to advise the Consumer to seek guidance from a licensed attorney."
The Commission's intent in promulgating Rule 6.15 was (1) to prevent brokers from interfering with existing listing contracts to the detriment of the owner and (2) to protect the owner from possible claims that two commissions are owed.

Many owners are extremely dependent on the expertise of the licensee. They may sincerely believe an existing listing contract is not in effect when, in fact, it is. The burden of inquiry is on the licensee.

Earlier versions of 6.15 had been criticized for being too restrictive. The current rule still provides that licensees shall not negotiate directly with an owner if they know that the owner has a written unexpired Exclusive Right to Sell or Lease. However, the licensee is now allowed to negotiate the terms for a future listing or take a listing effective upon expiration of a current listing so long as the licensee is first contacted by the owner.

This recognizes the fact that an owner with property currently listed may initiate the negotiations concerning a future listing. In addition, the current rule recognizes that in some instances owners become dissatisfied with the services of the broker with whom they have a listing and wish to cancel the listing. If a knowledgeable and informed seller wishes to cancel a listing and list with another company, this cannot be prevented. Of course, the seller runs the risk that improper cancellation of a listing contract can result in legal consequences. Brokers should never independently advise a seller in this area. Instead, an inquiring seller should be advised to seek legal counsel to explain the

consequences of canceling an unexpired listing.

If the rule is followed closely it will provide greater opportunities for licensees to negotiate listings where a seller does not wish to re-list with the same broker while maintaining the integrity of the principal/agent brokerage relationship.

INTEREST BEARING TRUST ACCOUNTS (Rev. 8/01/2004)

Section 12-10-217(1)(i), C.R.S. permits brokers to place entrusted money in an interest bearing account.

The Commission has taken the position that in the absence of a contract signed by the proper parties to the contrary, any interest accumulating on a trust account does *not* belong to the broker who is acting as escrow agent. (This position is based upon 12-10-217(1)(t) and upon the well-established tenet of agency that the agent may not profit personally from the agency relationship except for agreed upon compensation.)

Contracts calling for large earnest money deposits or other payments should contain a provision specifying which party is entitled to interest earned and under what conditions. In the absence of such a provision, accrued interest normally belongs to the seller if the contract is consummated or if the seller is successful in declaring a forfeiture. The entrusted **money normally belongs to the purchaser if the contract fails**.

In a property management trust account, the accrued interest on that portion of rental money received that belongs to the lessor beneficiary (landlord), would belong to the lessor beneficiary. The accrued interest on security deposits would belong to the respective tenants unless the lessor can establish a right to the security deposit (in the absence of a contract to the contrary).

However, in the case of the property management of mobile homes, by Colorado statute, the interest earned on security deposits may be retained by the landlord of a mobile home park as compensation for administering the trust account. (38-12-209(2)(b) C.R.S.)

Nothing in this position statement precludes a real estate broker from voluntarily transferring interest earned on a trust account to a fund established for the purpose of providing affordable housing to Colorado residents if such a fund is established.

ADVANCE RENTALS AND SECURITY DEPOSITS

Pursuant to C.R.S. 12-10-217(1)(i) and Commission Rules 5.2 and 5.8.A., all money belonging toothers which is received by a broker must be placed in an escrow or trust account. This applies to tenant security deposits and advance rental deposits, including credit card receipts, held by a broker.

A broker may not deliver a security deposit to an owner unless notice is given to the tenant in the lease, rental agreement, or in a separate written notice that the security deposit will be held by the owner. Such notice must be given in a manner so that the tenant will know who is holding the security deposit, and shall include either the true name and current mailing address of the owner or the true name and current mailing address of a person authorized to receive legal notices on behalf of such owner, along with specific requirements for how the tenant is to request return of the deposit.

If, after receipt by the broker, the security deposit is to be transferred to the owner or used for the owner's benefit, the broker, in addition to properly notifying the tenant, must secure the consent of the owner to assume full financial responsibility for the return of any deposit which may be refundable to the tenant. The broker shall not withhold the identity of the owner from the tenant if demand for the return of the deposit is properly made according to the lease, rental agreement, or separate notice, and the owner has refused to return the security deposit. The lease, rental agreement, or separate notice may also give notice that the security deposit will be transferred upon the happening of certain events, e.g., sale of the property or the naming of a new property manager.

Delivery of the security deposit to the owner or to anyone (including a succeeding broker/manager of the property) without proper notice to the tenant, in addition to subjecting the broker to possible civil liability, will constitute a violation of the license law escrow statute cited above. The licensee must retain copies of such notices for inspection by the Commission. Under a property management contract, the broker must transfer all escrowed money belonging to the owner of the property at reasonable and agreed upon intervals and with proper accounting pursuant to statutory requirements and Commission Rules in [Chapter 15 of the MRES study materials.] If advance rental money is held by a broker but is subject to recall by the tenant or occupant, it must be escrowed until such time as it is earned and rightfully transferred or credited to the owner. A broker has no claim on or right to use advance deposits which are subject to recall by a tenant or prospective occupant. Deposits which are not subject to recall are the property of the owner and may not be transferred to the broker's account or used for the broker's benefit unless specifically authorized and agreed to by the owner in the management agreement.

If litigation concerning escrow money commences, the money may be placed with the court. The jurisdiction of the court will, of course, supersede the statutory requirement for escrowing money belonging to others.

RELEASE OF EARNEST MONEY DEPOSITS

Rule 6.22.A. states that: “If for any reason the seller fails, refuses, neglects or is unable to consummate the transaction as provided for in the contract, and through no fault or neglect of the buyer the real estate transaction cannot be completed, the Brokerage Firm has no right to any portion of the earnest money deposit which was deposited by the buyer.”

The Commission will not pursue disciplinary action against a broker for refusal to disburse disputed funds when the broker is acting in accordance with the language of the appropriate Commission-approved contract to buy and sell. It is clear in the contracts to buy and sell real estate that the **broker holds the earnest money on behalf of *both* buyer and seller**. If there is no dispute, the broker should disburse to the appropriate party immediately.

Some brokers unnecessarily require a signed release by both parties even when there is no disagreement. Audits have disclosed many instances where brokers have held deposits for extended periods just because one or both parties will not sign a release. While good judgment is always urged, releases are *not* a requirement of the Real Estate Commission. In addition, where one party has given written authorization for the release of a deposit to another, a written release by the other party is not required.

Exculpatory provisions holding the broker harmless do not belong in an agreement for the release of earnest money and should not be used to relieve the broker from liability unrelated to earnest money.

In the case of a dispute between the parties, the broker is authorized by the contract to buy and sell to obtain mutual written instructions (such as a release) before turning a deposit over to a party. The Commission has approved an optional use "Earnest Money Release" form when such a written release might help facilitate expeditious disbursement.

Unless otherwise indicated in the Commission-approved contract to buy and sell, a broker is not required to take any action regarding the release of the earnest money deposit when there is a **controversy**. If the following provisions are included in the contract, the broker may exercise three options in the event of an earnest money dispute, if the broker is the holder of the earnest money deposit. One option is that the broker may await any proceeding between the parties. Another option for the broker is to interplead all parties and deposit the earnest money into a court of competent jurisdiction. If included in the contract to buy and sell, the broker is entitled to recover court costs and reasonable attorney and legal fees. However, if this provision is struck from the contract to buy and sell, the broker may not be entitled to recovery those costs. A third option available to the broker is to provide notice to the buyer and seller that unless the broker receives a copy of the Summons and Complaint or Claim (between the buyer and seller) containing a case number of the lawsuit within one hundred twenty (120) days of the broker’s notice to the parties, the broker will be authorized to return the earnest money to the **buyer**.

If the broker is unable to locate the party due the refund, the broker may be required to transfer the deposit to the Colorado State Treasurer under the provisions of the Colorado "Unclaimed Property Act" C.R.S. 38-13-101. Notice of funds held is published in local

newspapers under the "Great Colorado Payback Program" each year. Further information and reporting forms may be obtained from that office.

CLOSING COSTS

In the past, the Commission's position had been that real estate licensees were responsible for all costs of closing. This position has been modified after a re- examination of the Colorado Supreme Court case of *Conway-Bogue vs. The Denver Bar Association* and after the adoption of Rule 6.14.B.

Commission Rule 6.14.B states:

> "Brokers are not obligated to prepare any legal documents as part of a real estate transaction. If the Broker or the Broker's designee prepares any legal document, the Broker or the Broker's designee **may not charge a separate fee for preparation of such legal documents**. The Broker is not responsible for fees charged for the preparation of legal documents where they are prepared by an attorney representing the Consumer. Costs of closing not related to preparation of legal documents may be paid by the Broker or by any other person. A Broker who closes transactions and charges separately for costs of closing not related to the preparation of legal documents must specify the costs and obtain the written consent of the parties to be charged."

Based on the new rule the position is as follows:

1. Licensees are still responsible for paying the costs of legal document preparation when they are preparing such documents for their clients. If the broker delegates this function to an agent (title company or closing service) the broker is still responsible for bearing the cost.
2. Other costs associated with closings can be paid for by the licensee or any other party. The Commission will no longer require that licensees bear these costs. Licensees are urged to use the Closing Instructions form developed by the Commission.
3. It is now permissible for brokers to close their own transactions and make additional charges for providing closing services so long as the charges are **not** tied to legal document preparation. If a licensee does this it must be with the consent of the parties and all charges must be specified. This consent may be obtained through the Listing Contract, the Contract to Buy and Sell, the Closing Instruction form, or otherwise.
4. Licensees are not responsible for bearing the cost of legal document preparation where the documents are prepared by an attorney representing the parties to the transaction. However, the broker should not designate the broker's own attorney to prepare legal documents for the parties and then charge as if the attorney had prepared the documents on behalf of a client.
5. The broker must still provide accurate closing statements.

Particular note should be paid to the first sentence of the rule. While there is no legal obligation for a broker to prepare the legal documents in a transaction the Commission strongly advises that licensees make this clear in the Listing Contract. Many persons, purchasers and sellers alike, normally look to the broker for the preparation of these documents. If the broker has not made it clear that the broker's company will not undertake the preparation of legal documents, the parties might well assume that the broker will do so at the broker's cost.

ASSIGNMENT OF CONTRACTS AND ESCROWED FUNDS

Assignments of contracts and escrowed funds usually occur when one real estate company is purchased or taken over by another real estate company.

The following reflects the general position of the Commission concerning the assignment of contracts and escrowed funds as it concerns the brokers.

1. All parties to a contract must be informed of assignments and all beneficiaries of escrowed funds must be informed of any transfer of escrowed funds.
2. Listing contracts may not be assigned by the listing broker to another broker (without the consent of the owner), because the listing contract is a personal contract of a type which would not be entered into except when the owner relies on the personal skills and expertise of the broker.
3. The broker concerned with an executory contract is not a party principal to the contract itself and, therefore, has no voice in its assignment. The broker signs the sales contract only as the receipting agent.
4. The right of entitlement of a broker to a commission, pursuant to a contract between the broker and a seller, is assignable. In the Commission approved form of executory contract, the agreement of the seller in regard to a commission is placed outside the body of the contract between the purchaser and seller.
5. The contract between the seller and the broker concerning commissions does not affect the contract between the principal parties in the sale.
6. Earnest money taken pursuant to an executory contract is money belonging to others and falls within the purview of 12-10-217(1)(h) and (i), C.R.S. Earnest money being held by the broker is not transferable to any party except to a closing agent as immediately prior to closing as is practicable.
7. The maintenance of earnest money held in escrow must be pursuant to the rules of the Commission. The broker may, for convenience, authorize other persons to withdraw money from this escrow account (see Commission Rule 5.3.C.), but the withdrawal must be pursuant to law and Commission rules.
8. Unless contracted to the contrary, the mechanical act of closing the transaction may be performed by any qualified person or persons with the agreement of the principal parties to the contract.
9. The absence of the closing broker or the Broker’s agent will not relieve such broker from the broker’s responsibilities of approving the Statement of Settlement. (See Commission Rule 6.19.). However, the absence of the broker cannot impede the

closing of the transaction pursuant to the executory contract.

10. If a licensed broker receipts for earnest money pursuant to an executory contract and then transfers such earnest money to an unauthorized person, who is also a licensed broker, the licensed transferee, (as well as the transferor), is also subject to the law and rules of the Commission in regard to money belonging to others. Such licensed transferee is obligated to retain such money in a trust account until the transaction is consummated, defeated, or settlement has occurred, or unless directed otherwise by a court of law. If litigation concerning escrowed money commences, the money may be placed with the court. The jurisdiction of the court will supersede the statutory requirements and the Commission Rules.
11. If the seller and the buyer, who are the sole beneficiaries of the escrowed money, both agree that such escrowed money be transferred, then settlement has occurred and the broker must transfer the money according to the wishes of the beneficiaries. This does not defeat the broker's right to a commission whether by original contract with the seller or by assignment of such contract right.

RECORD KEEPING BY BROKERS

The Commission is often asked what documents must be kept in the broker's files which concern a particular transaction.

A duplicate means photocopy, carbon copy, or facsimile, or electronic copies which contain a digital or electronic signature as defined in 24-71-101(1) C.R.S. Pursuant to Rule 6.14.A. and 6.19.A., a broker shall maintain a duplicate of the original of any document (except deeds, notes and trust deeds or mortgages prepared for the benefit of third party lenders) which was prepared by or on behalf of the licensee and pertains to the consummation of the leasing, purchase, sale or exchange of real property in which the broker participates as a broker. The payoff statement and new loan statement monetarily affect the settlement statements and should be retained by the respective broker concerned.

Cooperating brokers, including brokers acting as agents for buyers in a specific real estate transaction, shall have the same requirements for retention of duplicate records as is stated above, except that a cooperating broker who is not a party to the listing contract need not retain a copy of the listing contract or the seller's settlement statement. A broker is not required to obtain and retain copies of existing public records, title commitments, loan applications, lender required disclosures or related affirmations from independent third party closing entities after the settlement date. The broker shall retain documents bearing a duplicate signature for the disclosures required by Commission Rule 7.1.

The broker engaged by a party shall insure that the final sales agreement, settlement statement, or amendment of the settlement, delivered at closing for that party's tax reporting or future use, shall bear duplicate signatures as authorized by the parties concerned.

A complete listing of the documents normally required by the Commission for sales transactions and management activities can be found in Chapters 20 & 21 of the MacIntosh Study Materials.

COMPENSATION AGREEMENTS BETWEEN EMPLOYING AND EMPLOYED BROKERS

In regard to an employed broker's claim for compensation from an employing broker, the Real Estate Commission has no legal authority to render a monetary judgment in a money dispute nor will it arbitrate such a matter. A broker's failure to pay an employee does not warrant disciplinary action.

The Commission's position is:

1. An employed broker is an employee of the employing broker.
2. That an employed broker may not accept a commission or valuable consideration for the sale of real property except from his or her employing broker. (12-10-221, C.R.S.)
3. That a commission or compensation paid to the employing or independent broker for real estate services is money belonging to such broker and is not money belonging to others as defined in 12-10-217(1)(h) and (i), C.R.S.
4. That a claim by an employed licensee for money allegedly owed by an employing broker must be decided by the civil courts on the basis of contract or "*quantum meruit*." [*Quantum meruit* is a legal action brought to recover compensation for work done and labor performed "where no price has been agreed." The term literally means "as much as is deserved".]
5. That an employing broker pays their licensed or unlicensed employees pursuant to an oral or written employment contract.

Therefore, the contractual relationship between employing and employed brokers, as well as the office policy manual, should adequately cover the compensation of employed brokers.

ASSIGNMENTS OF BROKER'S RIGHTS TO A COMMISSION

The Real Estate Commission recognizes and will enforce the statutory obligation of employed licensees as described in (12-10-217(1), C.R.S.), and more particularly:
"12-10-217(1)(g), C.R.S. In the case of a broker registered as in the employ of another broker, failing to place, as soon after receipt as is practicably possible, in the custody of that licensed broker-employer any deposit money or other money or fund entrusted to the employee by any person dealing with the employee as the representative of that licensed broker-employer."

The Commission recognizes and will enforce the prohibition described in 12-10-221, C.R.S.: “12-10-221, C.R.S. It is unlawful for a real estate broker registered in the commission office as in the employ of another broker to accept a commission or valuable consideration for the performance of any of the acts specified in this part 2 from any person except the broker’s employer, who shall be a licensed real estate broker.”

However: If a broker is entitled to a commission pursuant to 12-10, Part 3, C.R.S., or, a broker is entitled to a commission in a transaction and title has passed from a seller to a buyer, the broker may assign any or all legal rights to such commission to any person including employed licensees and no disciplinary action will be invoked against such broker for having made such an assignment.

BROKER'S PAYMENT -OR- REBATING A PORTION OF AN EARNED COMMISSION

The License Law forbids a broker from paying a commission or valuable consideration for performing brokerage functions to any person who is not licensed as a real estate broker or salesperson. Thus, "referral fees" or "finder's fees" paid as the result of performing brokerage activities are prohibited.

The question of whether or not a broker may make payments from their earned commission to a buyer or a seller in a particular transaction will arise because usually neither the buyer nor the seller is licensed.

However, the License Law also permits any person to sell or acquire real property on such person's own account.

In a listing contract, the broker is principal party to the contract and the consideration offered is the brokerage services. The broker may add to this consideration the payment of money to the property owner in order to secure the listing. This is not a violation of the License Law.

Also, in a particular real estate transaction, the broker may pay a portion of commission to the unlicensed seller. This is merely a reduction in the amount of the earned commission and does not violate the License Law.

Payment to the unlicensed purchaser is often referred to as "rebating" and the intention to pay money to the purchaser is sometimes advertised and promoted as a sales inducement. The payment to the purchaser in itself is not a violation of the License Law because the broker is licensed to negotiate and the purchaser may negotiate on their own account. However, a broker representing the seller in a transaction should take care to ensure that such payments do not conflict with fiduciary duties. For example, the "rebate" of a portion of a commission to a purchaser to be used by the purchaser as a down

payment could distort the purchaser's financial qualifications and ultimately harm the seller. Additionally, a purchaser who does not receive a promised rebate of a partial commission may try to hold the seller liable for the wrongdoing of the broker on the theory of respondent superior. The Commission recommends that brokers disclose such payments to the seller and obtain the seller's consent prior to acceptance of any offer to purchase.

Gratuitous gifts to a purchaser subsequent to closing and not promised or offered as an inducement to buy would also be allowed (i.e., a door knocker or dinner). Such gifts would not require disclosure and consent inasmuch as fiduciary duties would not be involved.

SINGLE-PARTY LISTINGS

These are most commonly used when an agent for a buyer approaches a For Sale By Owner. The unrepresented seller is agreeing to sign a listing agreement with *that* broker only, and to pay a commission to that (buyer's) agent should that buyer (only) purchase the property. Contractually this is accomplished by identifying the buyer in a listing agreement and limiting the duration of the agreement for a few days.

Brokers often secure single-party listings because they have what they believe to be a good prospect for purchase of a particular property where a seller is not represented by a (listing) broker. These listings are usually only for a few days, but occasionally the broker wishes to be protected for a longer period while the broker is negotiating with a particular prospective purchaser.

A single-party listing, when placed on a Commission approved form for an Exclusive Right to Sell or Exclusive Agency, results in greater protection to the broker than the broker needs to have and the owner is placed in a position which is unfair. The owner may not realize that if the owner later contracts with a Listing Broker to help sell the property, and signs a listing contract, that owner may then become liable for the payment of two commissions (to the buyer's broker on the temporary single-party listing *and* their new listing broker) even though the owner has excepted a sale to the person mentioned in a single-party listing contract.

In any and all contracting, the intent of the parties is paramount in its importance. In a listing contract, a broker is dealing with those less informed than the broker, and the broker has a duty to disclose the true meaning of the listing contract.

The Commission does not wish to limit any owner of the freedom to contract. However, the broker should fully disclose to the owner the effect of the exclusive right to sell listing contract or the exclusive agency contract.

Usually, when an owner signs an exclusive right to sell or exclusive agency agreement concerning a single party, the owner wishes to limit the rights of the broker under the

listing contract. Therefore, in the space provided for Additional Provisions, one, two, or all of the following limitations should be inserted in this space:

1. The provisions of this listing contract shall apply only in the event a sale is made to _____.
2. The termination date shall not be extended by the "holdover Period" of this listing contract.
3. In the event a sale is made by the owner or their broker to any other party than the above names, this listing contract is void.

If an owner is misled to their disadvantage, the broker may be found guilty of endangering the public.

SALE OF MODULAR HOMES BY LICENSEES

The Commission is aware that many services rendered by licensees may or may not, in themselves, require licensing. Such services as collection of rents on real property, subdivision development services other than sales, or the general management of real property not involving renting or leasing may all be performed independently by an unlicensed person. When performed by a licensee, these services are all so integrated with real estate brokerage that all money received in connection therewith must be held or disbursed according to the law and rules of the Real Estate Commission.

Therefore, it is the position of the Commission that a licensee who sells land and a modular home to be affixed to the land, to the purchaser in concurrent or an arranged or pre-arranged or packaged transaction, is subject to the laws and rules of the Commission. Consequently, all money received concerning the integrated transaction, including the modular home, should be processed through the broker or the employing broker pursuant to 12-10-221, C.R.S., and 12-10-217(1)(g), C.R.S. and Commission Rules in Chapter 15 of the MacIntosh study materials, Rule 6.19.

It is also the position of the Commission that if a licensee sells to an owner of land, a modular home to be affixed to the land, and there has been no brokerage relationship between the owners of the land and the licensee, such licensee in such a sale will not be required to comply with the requirements of 12-10-221, C.R.S., or 12-10-217(1)(g), C.R.S., or Commission Rules in Chapter 15 of the MacIntosh study materials, Rule 6.19.

SALE OF ITEMS OTHER THAN REAL ESTATE

Inquiries have been made to the Commission as to the proper handling of sales, made by licensees, of items or services other than real estate. The following is the position of the Commission:

If the item, appliance, repair, remodeling or installation is performed in conjunction with a management contract or lease for a particular party or pursuant to an oral or written contingency in a specific executed contract of sale of the property, the employed licensee

must process any fees or commissions received from the vendor or contractor through the employing broker. Also, disclosure must be made by the licensee to both the buyer and the seller of the property that the licensee is compensated by the vendor or contractor.

It is also the position of the Commission that if the sale of the item, appliance, repair, remodeling or installation is performed pursuant to a separate contract, and without reference to a specific contract of sale of the property, then the employed licensee may receive compensation directly from the vendor or contractor and payment need not be made through the employing broker. However, if the sale of items or services is made to a buyer of real property during the term of the brokerage agreement with the seller of such property, then disclosure *must* be made by the licensee to both the buyer and the seller of the property that the licensee is compensated by the vendor or contractor.

The Commission takes no position when the licensee engages in selling items or services unconnected with real estate sales.

In any of the above situations the employed licensee may be subject to any requirements or prohibitions imposed by the employment agreement with the employing broker.

ACCESS TO PROPERTIES OFFERED FOR SALE (Rev. 11/01/2005)

The Commission approved listing agreements ("LC-" series,[Chapter 21]) include a section titled OTHER BROKERAGE FIRMS ASSISTANCE - MULTIPLE LISTING SERVICE - MARKETING.

Provisions of this section allow the seller and listing broker to agree on whether or not to submit the property to a multiple listing service [MLS], information exchange, and whether there are limitations on the methods of marketing the property.

The provisions of the section also allow for discussion and the establishment of "Other Instructions" regarding access to the property by other brokerage firms such as through a lock box, for example.

It is the position of the Commission that the access information, and adherence to the Other Instructions, whether through lock box code or other means, is the responsibility of the listing broker. Listing brokers should take every effort to safeguard the access information on behalf of the seller. The listing agreements also include a section titled MAINTENANCE OF THE PROPERTY, which addresses the broker's liability for damage of any kind occurring to the property caused by the broker's negligence. Brokers are advised that failure to safeguard the access information and adhere to the instructions of the Seller related to access by other brokerage firms, could result in a claim of negligence brought against the listing broker.

Selling brokers who obtain access information should safeguard that information at all times. At no time should a selling broker share the access information with a third party (inspector, appraiser, buyer, etc.) without the listing broker's authorization. Selling brokers are reminded that pursuant to the Contract to Buy and Sell, the Buyers indemnify the Seller against damage to the property in connection with the property inspection provision.

PAYMENTS TO A WHOLLY OWNED EMPLOYEE'S CORPORATION

The Commission has received several inquiries concerning the payment of commissions or fees by an employing broker to a corporation which is wholly owned by an *employed* licensee. m

C.R.S. 12-10-203(8), which prohibits the licensing of an employed broker as a corporation, partnership or limited liability company and the limitations on the payment or receipt of real estate fees, as described in 12-10-217(1)(i) and 12-10-221, are recognized by the Commission; however, it is the position of the Commission that:

> An employing broker's payment of earned real estate fees to a corporation which is solely owned by an employed licensee of such employing broker shall not be considered by the Commission as a violation of 12-10-217(1)(i) or 12-10-221; however, a contract between the employing broker and such corporation or employed licensee shall *not* relieve the broker of any obligation to supervise such employed licensee or any other requirement of the licensing statute and Commission rules. It is not the intent of this position statement that the employed licensee be relieved from personal civil responsibility for any licensed activities by interposing the corporate form.

It must be stressed that the above position statement does not allow such corporations to be licensed under a broker and specifically refers only to corporations which are owned solely by the employed licensee.

SHORT TERM OCCUPANCY AGREEMENTS

The Commission has been asked for its position concerning the need for a real estate broker to escrow funds coming into their possession involving short term occupancies.

A short-term occupancy can be distinguished from a lease in that it is in the nature of a hotel reservation and a license to use. Short term occupancy agreements, if properly treated, are *not* considered lease agreements. Activities relating to these agreements are exempt from the definition of real estate brokerage. Concerns arise when a licensed real estate broker wants to engage in short term occupancy activities either exclusively or as part of their separate brokerage practice. In some instances brokers have objected to holding money belonging to others in their trust accounts or accounting for these funds if the activity itself is exempt.

C.R.S. 12-10-217(1)(h) subjects a licensee to disciplinary action for "Failing to account for or to remit, within a reasonable time, any moneys coming into their possession which belong to others, whether acting as real estate brokers, salespersons, or otherwise and failing to keep records relative to said moneys.." In addition, the case of *Seibel vs. Colorado Real Estate Commission*, 533 P.2nd 1290, gives the Commission jurisdiction over the acts of a licensed broker even where those acts would otherwise exempt the person from original licensure.

Based on the above, it is the position of the Commission that a licensed real estate broker engaging in short term occupancy agreements must escrow and account for funds coming into their possession which belong to others. To hold otherwise, would be to invite further confusion and mistrust on the part of the public in an already confusing real estate related practice. It has been the Commission's experience that most brokerage companies engaging in short term occupancy activities combine those activities with those requiring a license (*i.e*., long term rental and lease agreements, sales). In addition, brokers continually hold themselves out to the public as being both licensed and professional. The public does not distinguish between an activity technically exempt from licensure and the overall business practices of a licensed real estate broker.

STATEMENT ON PERSONAL ASSISTANTS (Rev. 10/02/2012)

Personal assistants (“assistants”) are generally thought of as employees or independent contractors (“employees”) that perform various functions, including clerical duties, on behalf of a licensed real estate broker (“broker”). Assistants can be grouped into two separate categories: unlicensed assistants and licensed assistants. An unlicensed assistant cannot perform the same duties that a licensed assistant can perform. A broker needs to be cognizant of these differences, along with the broker’s individual supervision responsibilities to the assistant. If a “licensed” assistant’s broker’s license is currently on inactive or expired status, the assistant is limited to performing only those tasks that may be completed by an unlicensed assistant.

§12-10-222, C.R.S., mandates that a broker can be held liable for any unlawful act or violations of the license law committed by an employee of a broker, if the broker had actual knowledge of the unlawful act or violation or had been negligent in the supervision of such employees.

Commission Rule 6.3.A.2. clarifies that employees include but not limited to, “Unlicensed On-Site Managers, secretaries, bookkeepers and personal assistants...” Employing brokers that employ assistants, or allow their employed brokers to employ assistants, need to include procedures on the use of licensed and/or unlicensed assistants in the office policy manual.

The license law prohibits unlicensed persons, including unlicensed assistants, from practicing real estate brokerage, which includes negotiating the sale, exchange or lease of real property on behalf of another person. An unlicensed assistant should promptly disclose to brokers, other industry professionals (i.e. loan originators, lenders, appraisers, property inspectors, etc.) and consumers that he or she is not a broker, and disclose the name of the broker for whom the assistant works.

An unlicensed assistant may complete the following tasks:

1. Complete forms prepared for, and as directed by a broker. Unlicensed assistants cannot independently draft legal documents such as listing or sales contracts, and they cannot offer opinions, advice or interpretations of these documents.
2. Distribute preprinted, objective information prepared by the broker about a property listed for sale.
3. Perform clerical duties, including gathering information for a listing.
4. If authorized by the seller, provide access to property, conduct showings or open houses.
5. Deliver paperwork to other brokers, buyers or sellers.
6. Deliver paperwork that requires signatures in regard to financing documents that are prepared by lending institutions.
7. Prepare market analyses on behalf of the broker, if the analyses are approved and submitted by the broker to the client with a disclosure that the market analyses were prepared by the unlicensed assistant. The broker must ensure that market analyses comply with Commission Rule 6.12.
8. Collect and receipt for earnest money deposits, security deposits or rents.
9. Schedule property repairs on behalf of the broker, if there is an existing agreement that authorizes the broker to make repairs to the property.

The broker should inquire as to whether any of the unlicensed assistant's activities are covered by the broker's errors and omissions insurance policy. Furthermore, licensed assistants may need their own separate errors and omissions insurance policy to cover the acts they perform on behalf of the broker.

OFFICE POLICY MANUALS **(Revised and Adopted 12/04/2018)**

12-10-Part 4 C.R.S. [Chapter 14] and Commission Rules 6.3. & 6.4. [Chapter 15] set out a broker's supervising responsibilities. In order to help brokers comply with the rules it is suggested that a policy manual contain procedures for at least the following:

1. typical real estate transactions
    a. review of contracts
    b. handling of earnest money deposits, including the release thereof
    c. back-up contracts
    d. closings

2. non-qualifying assumptions and owner financing
3. guaranteed buyouts
4. investor purchases
5. identifying brokerage relationships offered to public (required by 12-10-408, C.R.S.)
6. procedures for designation of brokers who are to work with a seller, landlord, buyer or tenant, individually or in teams (required by Rule 6.4.) (Does not apply to brokerage firms that consist of only one licensed natural person.)
7. identify and provide adequate means and procedures for the maintenance and protection of confidential information (required by Rule 6.4.B.4.)
8. procedures and practices for the reasonably secure maintenance and protection of personal identifying information (required by 6-1-713.5, C.R.S.)
9. procedures for the destruction or proper disposal of paper or electronic records by shredding, erasing, or otherwise modifying the following information to make it unreadable or indecipherable through any means:
    a. a social security number;
    b. a personal identification number;
    c. a password;
    d. a pass code;
    e. an official state or government-issued driver's license or identification card;
    f. a government passport number;
    g. biometric data, as defined in 6-1-716(1)(a), C.R.S.;
    h. an employer, student or military identification number; or
    i. a financial transaction device, as defined in 18-5-701, C.R.S.
10. procedures and practices for the identification and notification of a security breach of personal identifying information (required by 6-1-716, C.R.S.)
11. licensee's purchase and sale of property
12. monitoring of license renewals and transfers
13. delegation of authority
14. property management
15. property listing procedures, including release of listings
16. training
    a. dissemination of information
    b. staff meetings
17. use of personal assistants
18. fair housing/affirmative action marketing
19. listing syndication [MLS]
    a. brokerage participation
    b. entry and maintenance of information
20. performance of and compensation for real estate related activities (i.e. broker price

opinions, etc.)

Brokers are encouraged to add other policies as appropriate to their practice.

In the event that one or several of these suggested topics (e.g. guaranteed buyouts) are not applicable in a particular office, they should be addressed by stating that the office does not participate in that activity.

The Commission will continue its policy of non-involvement in matters relating to NOT independent contractor agreements, and disputes over earned commissions. Office policies in these areas do not fall within the purview of Commission Rules.

HANDLING OF CONFIDENTIAL INFORMATION IN R/E BROKERAGE

Prior to designated brokerage, it was common for brokers to share the motivations of a buyer or seller during office sales meetings, for example. Under designated brokerage, the law specifically prohibits sharing of such information. Confidential information, and the broker responsibility thereto, are defined in C.R.S. 12-10-404(2), 12-10-405(2), 12-10-407(3), and Rules 6.3.D. and 6.4.B. Confidential information can include, but is not limited to, motivation of the parties.

Brokers are required to have a written office policy that identifies and provides adequate means and procedures for the maintenance and protection of confidential information. Situations where inadvertent disclosure of confidential information may occur, include, but are not limited to:

- sales meetings or marketing sessions,
- shared fax or copy machines,
- shared computer networks, printers and file directories,
- in-office mail boxes,
- hand written telephone messages,
- phone conversations or meetings with clients,
- relocation, divorce, pending foreclosure and other sensitive documents,
- conversations with affiliated business providers,
- production boards,
- social functions

Brokers must develop office policies and procedures to address the handling of confidential information. For example, some offices may have “locked” transaction files that include confidential information and other offices may elect not to include confidential information in transaction files.

A designated broker *is* permitted to share confidential information with a supervising broker without changing or extending the brokerage relationship beyond the designated broker. Brokers may want to consult legal counsel regarding the necessity of securing the authorization of the party to whom the information is confidential before the designated broker shares that confidential information with the supervising broker. Such advice could include modifications to the listing agreement or buyer agreement that create such authorization.

USE OF "LICENSEE BUYOUT ADDENDUM" (Rev. 1/17/06)

Rule F-7 requires real estate licensees to use the Commission approved “Licensee Buyout Addendum to Contract to Buy and Sell Real Estate”, when purchasing certain listed properties.

It is the Commission’s position that Rule 7.1.A. requires use of the Buyout Addendum under the following circumstances:

1. When a licensee enters into a contract to purchase a property concurrent with [at the same time as] the listing of such property.
2. When a licensee enters into a contract to purchase a property as an inducement or to facilitate the property owner’s purchase of another property, the purchase or sale of which will generate a commission or fee to the licensee.
3. When a licensee enters into a contract to purchase a property from an owner but continues to market that property on behalf of the owner under an existing listing contract.

Unless one of the above situations exists, licensees are not required to use the Buyout Addendum.

The term “licensee”, as used above, refers to the individual licensee who has personally taken a listing or to the listing broker or brokerage entity if the buyout is to be accomplished by that broker or brokerage entity. If the listing licensee or broker desires to acquire a listed property solely for personal use or future resale and not as an inducement to the owner, the licensee or broker is advised to (1) clearly sever their agency or listing relationship in writing; (2) renounce the right to any commission, fee or compensation in conjunction with acquisition of the listed property; and, (3) advise the owner to seek other assistance, representation or legal advice.

Future resale of a purchased property, as referred to above, means resale to a third party purchaser with whom the licensee has not negotiated during the listing period. Resale to a person with whom a licensee has conducted previous negotiations concerning the subject property during the listing period (often referred to as a “pocket buyer”), would constitute a violation of 12-10-217(1)(q) in the absence of full written disclosure and acknowledgment by the owner.

PREPARATION OF MARKET ANALYSES AND REAL ESTATE EVALUATIONS USED FOR LOAN PURPOSES

The Colorado Real Estate Appraiser Licensing Act contains special provisions which allow licensed real estate salespersons and brokers to perform certain real estate valuation related activities without being registered, licensed or certified as real estate appraisers. These provisions are found in Sections 12-10-602 and 12-10-618, C.R.S.

The first of these allows a broker or salesperson to prepare an "estimate of value" which is not represented as an appraisal and is not used to obtain financing. The position of the Commission is that this provision allows a broker or salesperson to prepare a market analysis for use in the real estate brokerage process and to offer their estimate as to the value or market price of real estate for court testimony or tax purposes.

The second provision allows a broker or salesperson to prepare what are termed "evaluations" in federal banking regulations. These evaluations may be used for lending purposes. This provision is very narrow in scope- a broker or salesperson may prepare such an evaluation only for a federally regulated bank, savings and loan or credit union with whom they have a contract. The loan amount must be below the threshold which invokes the requirement for a true appraisal.

As the authority to prepare such estimates of value and evaluations is tied to the holding of a Colorado real estate broker or salesperson license, the Colorado Real Estate Commission has jurisdiction over the activities of brokers and salespersons engaged in such activities. The Commission will consider the conduct of licensees who prepare estimates of value and evaluations in light of Sections 12-10-217(1)(q) and (w), which speak to unworthiness, incompetency and dishonest dealing.

It is the position of the Commission that the mere holding of a brokers or salespersons license does not in itself assure the competency necessary to prepare more complex estimates of value or evaluations. Licensees preparing estimates of value and evaluations have a responsibility to possess training and experience commensurate with the complexity of the assignment undertaken.

Investigations undertaken by the Commission relating to unworthiness, incompetency and dishonest dealing will take into account the following:

- Brokers preparing estimates of value and evaluations must act independently at all times. The estimate or evaluation must be unbiased.
- The broker preparing an estimate or evaluation must not represent themselves as an appraiser, nor represent the work product as being an appraisal.
- The broker preparing an estimate or evaluation must at all times comply with the statutory requirement in Sections 12-10-602 and 12-10-618, Colorado Revised

Statutes, for a written notice that they are not an appraiser. The wording and use of the written notice are specified in the Rules of the Board of Real Estate Appraisers. The required wording is: “NOTICE: The preparer of this appraisal is not registered, licensed or certified as a real estate appraiser by the State of Colorado”.

- The broker must not prepare an estimate of value or evaluation of real property which requires a level of competency beyond the level of training and experience possessed by the licensee.

RECORDING CONTRACTS

Over the years the Commission has received many inquiries and complaints concerning the recording of listing contracts [in the public records of the Clerk & Recorder’s office of the County in which the subject property is located] to protect claims for commissions. In addition, some licensees have attempted more "creative" ways of holding up a closing, such as filing mechanics liens or notices of *lis pendens*, as well as recording demand letters or purchase contracts. The end result is usually a cloud on the title and sometimes a slander of title action.

Some states have passed statutes authorizing the filing of such liens. Colorado has not. Filings and recordings such as these are inappropriate and will result in Commission action.

Here is a typical scenario: Broker lists a property at $725,000 for 120 days and actively markets it. No offers come in during the first 30 days. Broker advises her seller to lower the price by $25,000 to encourage some activity. The seller is adamant that the property is worth the list price and refuses. After another 15 days with no offers, the seller reluctantly lowers the price. He also tells the broker that he doesn't feel she is trying hard enough to sell the property and he's going to take it off the market if nothing happens. A week later an offer for $700,000 comes in from another company, which is presented and rejected. The seller is quite upset at the low offer and demands to be released from the listing. There is no further communication between the parties, but the listing is never formally terminated. Three weeks later the broker learns that the seller has entered into a contract with the same buyer for $710,000 and closing is set. The broker is very upset and wants to protect her commission. What can she do?

1. File a mechanics lien?
   ANS: No. Real estate licensees are not a protected class of lien claimant under the statute, except as provided in C.R.S. 38-22.5 (Commercial Real Estate Brokers Commission Security Act.)

2. File a *lis pendens* (notice of pending lawsuit)?
   ANS: No. A *lis pendens* relates to a title or ownership dispute involving the land itself. The broker has no legal interest in the real estate.

3. Record the listing contract ?
   ANS: No. This will usually have the effect of clouding title to the property, which in turn affects the closing between buyer and seller. The broker should not interfere in the process of transferring title to property.

4. Escrow the disputed commission?
   ANS: Maybe. This is a touchy area. If the broker makes demand on the seller for the commission prior to closing and states her possible rights (mediation; arbitration; civil action) the parties may agree to an escrow pending settlement of the dispute. However, there is no legal requirement that the closing entity escrow funds absent an agreement.

5. Commence mediation, arbitration or civil action (as appropriate)?
   ANS: Yes. Nothing prevents a licensee from asserting any legal claim against a principal.

A commission dispute is an emotional issue. Sometimes a licensee has put in considerable time on a listing only to be faced with a seller who refuses to pay, attempts to renegotiate or is outright deceitful. On the other side, the Commission has witnessed instances in which the licensee had no legitimate right to a commission and was using superior knowledge and scare tactics to force payment. Clearly this is a time to consult a good real estate attorney and avoid the risk of a complaint based on a hasty decision.

LICENSEE'S ROLE IN AUCTIONING PROPERTIES

Real estate experts predicted in the late 1990s that the following decade would see a significant increase in the sale of real estate through auctions. For many years auctioning was associated with rural or distressed properties. However, sales activity occurred in both residential and commercial real estate.

The brokers act requires that real estate auctions be conducted by a licensed broker and defines the activity as "..offering, attempting or agreeing to auction real estate, or interest therein, or improvements affixed thereon.." (CRS 12-10-201(6)(a)(VI)).

A long-standing Attorney General's opinion allows an unlicensed auctioneer to "cry" the bid at a real estate auction in the presence of a broker or seller. However, the control of the sale, including listing, advertising, showing the property and writing contracts must remain with the broker or the auctioneer will be violating the law.

Based on the statute and Attorney General's opinion, the following guidelines are established for unlicensed persons involved in the auction process:

1. Auctioneers should never hold themselves out as providing real estate brokerage

services to the public (e.g., listing, advertising, negotiating, contracting, legal document preparation);

2. Inquiries from sellers should be referred to a licensed broker or attorney;
3. Inquiries from buyers should be referred to the seller, listing broker or seller's attorney;
4. Only auctioning services should be advertised to buyers and sellers;
5. A potential buyer may be chauffeured to a property, so long as the property is shown by the seller or a licensed broker or salesperson;
6. Information on listed properties may be distributed when such information has been prepared by a broker or salesperson;
7. Auctioneers may "cry" the sale, but may not engage in subsequent negotiations, document drafting and the handling of earnest money;
8. Payment should be based on auctioning services performed regardless of the success of a sale.

similar to "public assist."

PERFORMANCE OF RESIDENTIAL LEASING AND PROPERTY MANAGEMENT FUNCTIONS (Adopted August 1998 – Revised August 2013)

Property management is one of the leading sources of complaints received by the Commission. This position statement is designed to identify common issues found during the course of a complaint investigation or an audit; however it does not encompass all of the potential issues associated with property management. Any licensed real estate broker ("Broker") interested in performing property management duties are strongly encouraged to complete educational offerings specific to property management, train with a Broker experienced in property management, and develop a strong familiarity with the [MRES information regarding] Escrow Records, and Property Management and Leases.

License Requirements

Pursuant to C.R.S. §12-10-201(6), the leasing and subsequent management of real estate for a fee or compensation, is included among the activities for which a license is required. As a result of the complaints received and issues identified in Commission investigations and audits, the Commission considers property management to be a complex area of practice. C.R.S. §12-10-217(1)(q) requires that a Broker be competent and worthy in the performance of their duties so as to not endanger the interest of the public. Furthermore, it is the Commission's position that prior to performing any acts that require a Broker's license, a Broker should determine whether he or she possesses the knowledge, experience and/or training necessary to perform the terms of the transaction and to maintain compliance with the applicable federal, state or local laws, rules, regulations, or ordinances. If the Broker does not have the requisite knowledge, experience and/or training necessary to fulfill the terms of the agreement, the Broker should either decline to provide brokerage services or seek the assistance of another Broker who does have the necessary experience, training and/or knowledge. A Broker who agrees to lease property, or perform ongoing property management duties, needs to

ensure that he or she is competent to perform the duties he or she agrees to undertake and must have permission from the Broker's employing broker. Similarly, the employing broker has the responsibility to ensure that he or she is competent to supervise a broker that performs leasing or property management duties.

Leasing v. Property Management

While leasing and property management are similar, they are two distinctively different services. Leasing is a onetime activity in which the broker acts as a special agent, while property management is an ongoing relationship in which the broker is a general agent. If a Broker is performing leasing, the Broker may list a property for lease, advertise the property, help screen tenants and/or help negotiate a lease. Once the lease is signed by the landlord and tenant, the Broker's duty to the landlord or tenant is complete. With property management, a broker's obligations continue beyond the formation of the lease. A Broker performing property management duties may also perform leasing duties; where a Broker only performing leasing duties is not performing property management duties.

Generally, a Broker will function in one of three capacities with regards to rental properties. The Broker may provide leasing services only for a landlord, where the broker is involved in procuring a tenant and negotiating the lease terms. Alternatively, the broker may provide leasing services on behalf of the tenant in locating a suitable rental property and negotiating a lease. In the first two scenarios, the Broker's duties are fulfilled once the lease is executed and the broker is not involved in the transaction any further. In the third scenario, the Broker agrees not only to provide leasing services, but is also responsible for one or more of the following: maintaining the property's physical condition, communicating with tenants, collecting rent and/or collecting security deposits. In this scenario, the Broker's duties are ongoing; therefore the Broker is conducting property management services. Regardless of whether the Broker is working with the landlord or the tenant, the Broker must establish clear expectations regarding the services the Broker agrees to provide and communicate these expectations to the consumer.

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Supervision

Before engaging in property management or leasing, the Broker should discuss with the employing broker whether the Broker is capable of and allowed to perform property management or leasing duties. The employing broker is responsible for maintaining all trust accounts and all transaction records, and the employing broker is responsible for exercising authority, direction and control over the [employed] Broker's conformance to statutes and Commission rules (Rules 6.3.A. and 6.3.B.). This includes reviewing all contracts to ensure competent preparation and reviewing all transaction files to ensure that required documents exist (Rule 6.3.C.). If the employing broker does not allow Brokers to perform leasing and/or property management duties, the Broker needs to refrain from leasing and/or property management activities or seek employment elsewhere. If the real estate brokerage firm does allow leasing and/or property

management, regardless of how minor, the employing broker must ensure that the office policy manual addresses these activities, including management of the Broker's own property. Both the Broker and the employing broker need to be aware of state and local laws that impact the performance of property management duties, which include, but are not limited to, laws pertaining to security deposits, habitability, carbon monoxide alarms, asbestos, lead-based paint, handling of confidential information, zoning and agency.

Forms

C.R.S. §12-10-403(4)(a) indicates that a Broker may complete standard forms including those promulgated by the Commission. Forms that are not promulgated by the Commission must be drafted by an attorney. When the Broker provides leasing services for a tenant, the Broker should complete the Exclusive Tenant Listing Contract. When the Broker provides ONLY leasing services for the landlord, the Broker should complete the Commission-approved Exclusive Right to Lease Listing Contract. If the Broker also will be providing property management services in addition to leasing services for the landlord, a Broker should use the Brokerage Duties Addendum to Property Management Agreement with a property management agreement drafted by an attorney. Under Rule 6.14.A.2., the Broker must provide a copy of any executed contracts to the consumer. While not all property managers provide a physical copy of the lease to the landlord, because sometimes it is executed by the Broker on behalf of the landlord, the Broker should make the document available to the landlord upon request.

If the Broker is going to provide property management services, the Broker needs to provide a property management agreement. The property management agreement must be drafted by an attorney. The property management agreement should outline the duties and responsibilities of both parties. The property management agreement should, at the very minimum, address:

- Duration of the relationship;
- The parties;
- Identify the property to be managed;
- General duties performed by the Broker, including the signing of leases.
- Fees for the manager's services, including disclosure of any mark-ups (Commission Rule 5.17.). [Mark-ups are a percentage added – typically 10% to 20% - added to a third-party invoice. The property management company it taking 10% off the top, for arranging and supervising repair or maintenance.] Before a mark-up can be charged, the Broker must obtain prior written consent to assess and receive mark-ups and/or other compensation for services performed by any third party or affiliated business entity;
- Tenant selection criteria. If the decision to lease will be based on criminal history or financial worthiness, the property management agreement should indicate who is responsible for collecting this data and what sources will be used. Additionally, the Broker must ensure compliance with the Fair Housing and Fair Credit Acts.

- Posting of eviction notices. If a Forcible Entry and Detainer (a/k/a eviction) is necessary, an attorney should represent the landlord in the filing of the Forcible Entry and Detainer. A Broker that files a Forcible Entry and Detainer without the assistance of an attorney may be practicing law without a license;
- Ownership Interest. The Broker must disclose a Broker's direct or indirect ownership interest in any company which will be providing maintenance or other services to the landlord, and any other conflicts of interest (Rule 6.17.);
- Identity of the entity responsible for holding the security deposit, and if interest is earned on security deposit escrow accounts, who benefits from such interest and consent to transfer the interest to the beneficiary;
- Process to be followed for any subsequent transfer of the landlord's monies, security deposits, keys and documents (Rule 5.8.A.); and,
- Requirement that the landlord receive regular monthly accounting of all funds received and disbursed.

While these general duties should be addressed in the property management agreement, it is not an all-inclusive list of all the duties that may be performed by a property manager or that should be addressed within the property management agreement. Brokers are encouraged to pay close attention not only to Commission rules and regulations, but also the "Property Management" information in MRES Chapter 20 ("Real Estate Related Business") and "Leases" information in MRES Chapter 3 ("Interests in Land/Forms of Ownership").

Regardless of whether the Broker is acting as a leasing agent or a property manager, prior to engaging in any of the activities that require a real estate broker's license, the Broker is required to disclose in writing the different brokerage relationships that are available to the tenant (Rule 6.5.). The Commission-approved Brokerage Disclosure to Tenant form should be used to disclose the brokerage relationships available.

In Colorado there is not an approved lease form. Therefore, prior to a tenant being procured, the Broker must: 1) hire an attorney to draft a lease form for the Broker to use; or 2) the landlord will need to designate a lease. The terms of the lease need to be clear and in writing. A Broker may choose to limit which lease is used to only the lease form provided by their attorney so long as the landlord authorizes the Broker to use their attorney prepared lease form in the property management agreement.

Trust Accounts and Record Keeping

Any Broker performing property management duties in which the Broker is responsible for the collection and distribution of rent or security deposits needs to be especially cognizant of the Commission rules and regulations pertaining to the management of funds of others and records retention. Brokers should pay close attention to "Escrow Records" discussions in MRES Chapters 14 and 15, and "Property Management" in MRES Chapter 20, and "Leases" in MRES Chapter 3. C.R.S §12-10-217(1)(h) requires that a Broker

account for and remit, within a reasonable time, any moneys coming into the Broker's possession that belong to others. Rule 1.34. defines money belonging to others as including, but not limited to, funds received by a Broker in connection with property management agreements, rent or lease contracts, and money belonging to others that is collected for future investment or other purposes. All money belonging to others which is received by a Broker acting as a property manager must be deposited in the Broker's escrow or trust account within five (5) business days of receipt (Rule 5.7.A.).

If a Broker is going to deposit rent or security deposits into the employing broker's trust account(s), the Broker is required to keep records relative to these monies. Rule 5.10. requires that all money belonging to others that is accepted by the Broker be deposited in one or more accounts separate from money belonging to the Broker, employing broker or brokerage entity. Separate trust accounts must be maintained in the name of the employing broker, or the employing broker and the licensed business entity, and the maintenance of the separate accounts is the responsibility of the employing broker (Rule 5.3. and 5.6.). This includes rent checks. Rule 5.5. requires that "A Brokerage Firm who engages in Property Management must deposit rental receipts and security deposits and disburse money collected for such purposes in separate Trust or Escrow Accounts, a minimum of one for rental receipts and a minimum of one for security deposits." As an alternative to trust accounts, a Broker may deposit rent monies or security deposits directly into an account owned and controlled by the landlord.

Rule 5.8.A. prohibits a Broker who receipts for security deposits from delivering such deposits to a landlord, unless the tenant's written authorization is given in the lease or written notice is given to the tenant by first-class mail. The notice must identify who is holding the security deposit and the procedure the tenant must follow to request the return of the deposit. If the security deposit is held by or transferred to the landlord, the property management agreement must specify that the landlord is responsible for the security deposit's return and that, in the event of a dispute, the Broker is authorized to reveal the true name and current mailing address of the landlord. The Broker may not use any portion of the security deposit for the Broker's benefit.

Pursuant to Rule 5.14., a Broker is required to supervise and maintain a record keeping system, at the Broker's licensed place of business that consists of an "escrow or trust account journal", a "ledger" and a "bank reconciliation worksheet". The Broker must also maintain supporting records that detail all cash received and disbursed under the terms of the management and rental agreements. If a Broker has deposited personal funds into the trust account to open and maintain the trust account, the journal and "broker's ledger record" must contain entries documenting this money. The Broker's personal funds must also be included in the bank reconciliation worksheet. All deposits of funds into an escrow or trust account must be documented, as must all disbursements of funds from an escrow or trust account.

Absent a written agreement that indicates otherwise, the “cash basis” of accounting is required for maintaining all required escrow or trust accounts and records. Funds from one owner cannot be used to supplement operating capital, or to finance expenditures of other owners or the Broker (C.R.S. §§12-10-217(1)(h) and (i) and Rules 1.34. 5.9., 5.11., 5.18., 6.3.A. and 6.3.B.). The Broker is required to retain accurate, on-going records which verify disclosure of and consent to any mark-ups assessed or received, and fully account for the amounts or percentage of compensation assessed or received (Rule 5.17.). For Commission purposes, brokers may maintain their records in electronic format as long as the records are stored in a format that can be continually retrieved and legibly printed (Rule 6.24.). C.R.S. §12-10-217(1)(k) requires Brokers to maintain possession of their records for four (4) years.

Security Deposits

Brokers have to be very careful how they handle security deposits. The security deposit law is complicated and legal assistance is advisable. Wrongful withholding of a security deposit may result in the landlord, and the Broker as the landlord’s agent, being liable for treble the amount wrongfully withheld, plus reasonable attorneys’ fees and court costs. C.R.S. §38-12-103 requires that the security deposit be returned to the tenant within one month after a lease is terminated or the premises have been vacated and accepted, whichever occurs last. The lease may indicate a longer period of time to return the security deposit to the tenant; however state law does not allow this extension of time to exceed sixty days. Security deposits cannot be retained to cover normal wear and tear. C.R.S. §38-12- 102 defines normal wear and tear as:

> “deterioration which occurs, based upon the use for which the rental unit is intended, without negligence, carelessness, accident, or abuse of the premises or equipment or chattels by the tenant or members of his household, or their invitees or guests.”

Normal wear and tear is at the core of most security deposits lawsuits. Security deposits may be retained for nonpayment of rent, abandonment of the premises, or nonpayment of utility charges, repairs or cleaning contracted for by the tenant in the lease. If there is cause to retain any portion of the security deposit, the tenant must be provided with a written statement listing the exact reasons why all or a portion of the security deposit is being retained. The statement must be delivered with the difference between the amount of the security deposit and the amount retained. The Broker or the landlord is deemed to have complied with this requirement by mailing the statement and payment to the tenant’s last known address. If the Broker or the landlord fails to provide the statement to the tenant within 30 days (or the alternative deadline specified in the lease) of the lease terminating or the surrender and acceptance of the premises, whichever occurs last, the landlord or the Broker may forfeit his right to retain any portion of the security deposit to offset amounts owed. The landlord does not lose the right to pursue amounts due, they just lose the right to utilize the security deposit to offset amounts owed. Furthermore, if the tenant pursues court action regarding any portion of the security deposit being

retained, the landlord or the Broker bears the burden to prove that retention of any portion of the security deposit was not wrongful.

In the rare event that a lease is nullified and voided due to the landlord's failure to repair a hazardous condition attributed to a gas appliance, piping, or other gas equipment, the landlord or the Broker must deliver all, or the appropriate portion of, the security deposit plus any rent rebate owed to the tenant for the time period that the tenant vacated the premises. Payment must be made to the tenant within 72 hours of the tenant vacating the premises. If the 72nd hour falls on a Saturday, Sunday, or legal holiday, the security deposit, and any rent rebate due, must be delivered to the tenant by noon on the next day that is not a Saturday, Sunday, or legal holiday. If a portion of the security deposit is retained, the tenant must be provided with a written statement listing the exact reasons why all or a portion of the security deposit is being retained and payment of the remaining balance of the security deposit. If the tenant does not receive all or a portion of the security deposit with the statement within the required deadlines, the tenant may be entitled to three times the amount of the security deposit and reasonable attorney fees (C.R.S. §38-12-104).

Transfer of Services

If a Broker no longer will be managing a property, the Broker must transfer a copy of the entire file to the landlord or, upon written authorization from the landlord, to the new Broker engaged to perform the property management. At a minimum, the entire file should include:

(a) Copy of existing lease
(b) Copy of check-in condition report
(c) Keys
(d) Outstanding tenant balances
(e) Tenant(s) security deposit(s)
(f) Owner's funds (subject to outstanding obligations)

Although the Commission rules do not specifically address the transfer of management duties, there should be no delay in transferring the tenant's security deposit to either the landlord or the new Broker. The Broker must give written notice by first class mail to the tenant that the security deposit has been transferred to the landlord or new Broker along with the landlord's or new Broker's contact information. The notice must indicate who is holding the security deposit and the specific requirements for the procedure in which the tenant may request return of the deposit [reference Rule 5.8.A. and C.R.S. §38-12-103(4)]. Timely transfer of the deposit protects the Broker from getting caught between the landlord and the tenant regarding the accounting of the deposit. The Broker must also provide the landlord with a final accounting of all trust funds held by the Broker. Although the Broker may delay the transfer of the landlord's funds until all outstanding invoices or debts have been resolved, the transfer of the landlord's funds needs to occur within a reasonable amount of time. A Broker that fails to transfer funds in a reasonable amount

of time may be subject to discipline by the Commission for unworthiness or incompetency, C.R.S. §12-10-217(1)(q).

Managing Broker's Own Property

Brokers are subject to the license law and Commission rules when they participate in real estate matters as principals, including managing the Broker's own property. See *Seibel v. Colorado Real Estate Commission*, 34 Colo. App. 415, 530 P.2d 1290 (1974). A Broker who manages his or her own rental property needs to disclose known conflicts of interest and that the Broker possesses a Colorado real estate broker's license (Rule 6.17.). The Broker also needs to use a lease drafted by an attorney for the transaction, along with disclosing in writing to the tenant the brokerage relationships under Colorado law (Rule 6.5.).

If the Broker has an employing broker, it is important for the Broker to consult with the employing broker regarding the brokerage firm's requirements or limitations regarding managing a Broker's own property. When a Broker personally receipts for a security deposit on his or her own property, the license law does not require that the security deposit be placed in an escrow account. Additionally, a Broker cannot deposit rental proceeds into the brokerage firm's escrow account(s) for properties owned by the Broker [Rule 1.34.].

SHOWING PROPERTIES (Adopted March 4th 1999)

The Real Estate Commission reminds licensees that the Brokerage Relationships Act imposes duties on agents to promote the interests of their buyers or sellers with the utmost good faith as well as to counsel their principals on material benefits or risks of a transaction. A transaction-broker must exercise reasonable skill and care, advise the parties and keep the parties fully informed regarding the transaction. Whether working as an agent or a transaction-broker, these duties include disclosing the accessibility of and actual access to a property or properties.

Working With a Seller:

Pursuant to the section in the various listing contracts entitled, "Other Brokers, Assistance", the licensee should advise the seller of the advantages and disadvantages of using multiple listing services and other methods of making the property accessible by other brokers (e.g., using lock boxes, by appointment only showings, etc.). If applicable, it should be explained that some methods may limit the ability of a selling broker to access and show a particular property. The chosen methods of cooperating with other brokers should be included in the listing agreement.

Working With a Buyer:

A licensee working with a buyer has an obligation to explain the possible methods used by a listing broker and seller to show a particular property. These methods may include limitations on the buyer and selling broker being able to access a property due to the type of lock box placed on the property, the seller's choice to have the property shown by appointment only, etc. The selling broker should include such showing limitations in the Exclusive Right To Buy Contract (agency or transaction-broker).

There should be no instances of a listing broker refusing to allow a property to be shown, unless the seller has given prior explicit, written authorization to do so.

"MEGAN'S LAW" (Adopted July 1, 1999)

The Commission has been asked for its position as to the disclosure requirements for real estate licensees with regard to "Megan's Law." In 1994, and primarily as a response to the murders of two young girls, a federal law was passed creating a registration and notification procedure to alert the public as to the presence of certain types of convicted sex offenders living in a neighborhood. This is commonly referred to as "Megan's Law." Identified sex offenders are required to register with local law enforcement officials. The federal law also required states to establish registries of convicted sex offenders. It contains no disclosure requirements for real estate licensees when working with the public.

In compliance with federal law, Colorado enacted legislation that sets procedures and timeframes for local registration. The office of chief of police is the designated place of registration for those offenders residing within any city, town or city and county. The office of the county sheriff is the designated place of registration for those living outside any city, town or city and county. In addition, the law enforcement agency is required to release information regarding registered persons. However, the duty to release information may differ depending on whether the inquiring party does or does not live within that jurisdiction.

While legislation in a few states has specifically imposed disclosure requirements on real estate licensees working with buyers and sellers, Colorado's legislation imposes no such requirements. Colorado's legislation clearly places the duty to release information on the local law enforcement agency, after considering a request.

It is the position of the Real Estate Commission that all real estate licensees should inform a potential buyer to contact local law enforcement officials for further information if the presence of a registered sex offender is a matter of concern to the buyer.

Editor's Note: C.R.S. 18-3-412.5 requires the Colorado Bureau of Investigation to post on the Internet identifying information, including a picture, of each sex offender:

- Sentenced as a sexually violent predator; or
- Convicted of a sexual offense involving children.

SELLER ASSISTED DOWN PAYMENTS

The Colorado Real Estate Commission and the Colorado Board of Real Estate Appraisers have issued this Joint Position Statement to address mutual concerns pertaining to practices of real estate brokers and real estate appraisers with regard to residential sales transactions involving seller assisted down payments, seller concessions, personal property transferred with real property and other items of value included in the sale of residential real property.

A residential real estate transaction has a life well beyond closing and possession of the property. Accurate sales data is crucial for appraisals and comparative market analysis (CMA) work products. Both appraisers and real estate brokers can effectively work together to maintain the safeguards that accurate sold data affords.

A real estate broker can facilitate these safeguards by adherence to the following:

- Note the presence and amount of any seller paid costs (including a seller assisted down payment or fee paid to charitable organization on behalf of the buyer) or other seller concession in the proper transaction documents, including the Buy/Sell Contract, Closing statements, and Real Property Transfer Declaration.
- Utilize all available fields in the multiple listing service to report sold information including all transaction terms and seller concessions. Sold information should be entered promptly and be specific and detailed particularly when the sold price includes a seller assisted down payment or concessions.
- Advise buyers and sellers consult legal and tax counsel for advice on tax consequences of seller contributions and inducements to purchase.
- Cooperate with appraisers as they perform their due diligence in asking questions about sales.

An appraiser can facilitate these safeguards by adherence to the following:

- Research and confirm subject property and comparable sales, including obtaining details of the contract and financing terms.
- Research and confirm all relevant information about a transaction, including determination of seller paid costs.
- Utilize all available data search tools, including the listing history and seller contributions features of multiple listing services.
- Make appropriate adjustments to comparables with seller contributions and inducements to purchase when developing work products.
- Comply with the applicable provisions of the Ethics Rule and Standards 1&2 of the Uniform Standards of Professional Appraisal Practice.

- Comply with any supplemental standards required by agencies such as the Federal Housing Administration.

ACTING AS A TRANSACTION BROKER OR AGENT IN PARTICULAR TYPES OF TRANSACTIONS (Adopted 9-8-04)

The public may enter into either a Transaction-Broker relationship or an Agency relationship with a Broker. Fundamental among the differences between Agency and Transaction-Brokerage is that an Agent is an advocate with fiduciary duties, while a Transaction-Broker should remain neutral, not advocate. However, in some situations the relationship of the Broker with a particular party or property may make a particular relationship inappropriate or problematic.

Before acting as a Transaction-Broker in transactions where neutrality is difficult, the Broker should consider whether the Transaction-Brokerage arrangement is suitable, consult with the Broker's supervising Broker and then make the necessary disclosures. Some examples of these situations include:

1. Selling or purchasing for one's own account (whether the property is solely or partially owned or to be acquired by the Broker), (See Rule 6.17 regarding proper disclosures);
2. Selling or purchasing for the account of a spouse or family member of the Broker;
3. Selling or purchasing for the account of a close personal friend, business associate, or other person where it would be difficult for the Broker to remain neutral; or
4. Selling or purchasing for the account of a repeat or regular client/party where it would be difficult for the Broker to remain neutral (i.e., undertaking as a Transaction-Broker the listing of multiple units, lots or properties such as listing a real estate development or condominium complex for a single developer, listing multiple residential or commercial properties for the same seller that will be sold to different buyers, or listing for lease a multiple unit residential or commercial property that will be leased to different tenants).

An agency relationship between a Broker and a seller or landlord, buyer or tenant, requires a written agency agreement. The duties of an agent go beyond facilitation of the transaction as a neutral party and require representing the interests of the Broker's principal over the interests of the other party. In certain circumstances, fulfilling the duties of an Agent including acting as advocate may be difficult. A Broker who enters into an agency relationship must fulfill the duties of advocacy, fidelity, loyalty and other fiduciary duties associated with a single agency relationship. In circumstances where the Broker may not be able to fulfill the duties imposed on an agent the Broker should consider whether the agency arrangement is appropriate, consult with the Broker's supervising Broker and act accordingly.

BROKERAGE DISCLOSURES (Adopted 9-8-04)

The Commission believes that a broker who intends to act as a buyer's or tenant's agent in a transaction should attempt to secure a written agency agreement as early in the brokerage relationship as possible. However, the Commission also recognizes that in some instances, the buyer or tenant will not immediately execute such a written agency agreement.

In these situations, the broker should initially function as a transaction-broker by either entering into:

- BC 60: Exclusive Right-to-Buy Contract; or
- LC 57: Exclusive Right-to-Lease Listing Contract; or ETC 59: Exclusive Tenant Contract

With any of the three forms the broker should check the box "Transaction- Brokerage" whereby only the brokerage services and duties contained in Section 4 of the agreement would apply; or present a buyer or tenant with BD24 Brokerage Disclosure to Buyer.

The broker may then engage as a transaction-broker and may perform any of the activities enumerated in section 12-10-201 (6), C.R.S., which are the acts of real estate brokerage.

However, *before* the broker begins to work as the buyer's or tenant's *agent* and advocate to secure the best possible price or lease rate and terms for the buyer or tenant, the parties *must execute one of the above listed agreements with the "Agency" box checked*. In an agency relationship the broker has the duties and responsibilities contained in Section 4 of the agreement, and the additional duties of an agent contained in Section 5 of the agreement.

SETTLEMENT SERVICE PROVIDER SELECTION, CLOSING INSTRUCTIONS AND EARNEST MONEY DEPOSITS (Revised 08/07/2012)

The Commission issues this position statement to clarify how settlement service providers are selected, when closing instructions must be completed by a real estate broker ("broker") and how earnest money is to be handled.

Selection of settlement service providers

Regardless of whether a broker is acting as a single agent or transaction broker, all brokers acting in their licensed capacities are required to advise their clients to obtain expert advice as to material matters about which the broker knows but the specifics of which are beyond the expertise of the broker. See C.R.S. 12-10-404(1)(c)(V), 12-10-405(1)(c)(V), and 12-10-407(2)(b)(II).

Expert advice includes, but is not limited to, the brokering of a mortgage, performing title searches and issuing insurance, appraising real property, surveying and issuing

improvement location certificates, performing property inspections and other due diligence (including environmental) and practicing law (which also includes analyzing the legal implications of the foregoing).

Brokers need to ensure that they perform the acts required by the real estate brokerage practice act, based on the capacity in which they have agreed to practice, i.e. as a single agent or transaction broker. A common standard of practice amongst brokers is to provide the names of three settlement services providers in a specific area of practice and allow the consumer to choose.

The Commission understands that there are occasions when a broker cannot provide the names of three separate settlement service providers that practice in one specific area, but regardless of how many names may be provided, it is imperative that final selection of the settlement service provider be left to the consumer, not the broker.

Closing Instructions

The purpose of closing instructions is for the consumer to engage the company that will be responsible for ultimately closing the sales transaction. In most transactions, the company responsible for closing the transaction is a title company, although there are brokers that provide these services. As stated above, the consumer is responsible for the selection of settlement service providers, including the individual or company that performs the closing services.

If the broker is performing the closing services, including the preparation, delivery and recording of closing documents and the disbursement of funds, the broker is the “Closing Company” and thereby is responsible for completing the Commission-approved Closing Instructions at the time that the Contract to Buy and Sell Real Estate is executed by the buyer and seller. As required by Commission Rule 5.21. and C.R.S. 12-10-217(1)(k), the broker shall retain a copy of the Closing Instructions for future use or inspection by an authorized representative of the Real Estate Commission.

If a title company is engaged to perform the closing services, the Division of Insurance requires that a title entity provide closing and settlement services only when there are written instructions from all necessary parties. See Division of Insurance Rule 3-5-1. All amendments to existing written instructions with a title entity must also be in writing.

If a title company is engaged to provide the closing services, it is the “Closing Company” and it is the responsibility of the title company to complete the closing instructions as required by the Division of Insurance. The broker should make a reasonable effort to obtain a copy of the closing instructions from the title entity for the broker’s transaction file, to ensure compliance with Commission Rule 5.21, and C.R.S. 12-10-217(1)(k) as stated above.

Earnest Money Deposits

A listing broker who receives earnest money is required to deposit the money in the broker's escrow or trust account in a recognized depository no later than the third business day following the day on which the broker receives notice of contract acceptance.

If the selling broker receipts for a promissory note, or thing of value, such note or thing of value must be delivered with the contract to the listing broker to be held by the listing broker. Any check or note must be payable, or assigned, to the listing broker. Upon receipt of the earnest money, the listing broker must complete the Earnest Money Receipt as the Earnest Money Holder. A copy of the receipt must be retained by the broker to ensure compliance with Commission Rule 5.21, and C.R.S. 12-10-217(1)(k).

If the buyer and seller have agreed in writing that a third party or entity will hold the earnest money, the listing broker must deliver the earnest money to the third party or entity. The listing broker must obtain a dated and signed Earnest Money Receipt from the third party or entity upon delivery of the earnest money. For record keeping purposes, the broker must retain a copy of the Earnest Money Receipt and a copy of the earnest money check, note or other thing of value as required by Commission Rule 5.21, and C.R.S. 12-10-217(1)(k).

BROKERS AS PRINCIPALS (Buyers or Sellers of their own properties)

The Commission regularly receives public **complaints** regarding real estate transactions involving a licensed real estate broker acting as a principal. Predominantly these complaints allege that the broker, who is a principal to the transaction, and may or may not also be serving as a broker in the transaction, has failed to disclose an adverse material fact; has failed to disclose brokerage relationships (when acting as more than a principal); has failed to ensure that the contract documents and/or settlement statements accurately reflect the terms of the transaction; has filed a document that unlawfully clouds the title to the property; has failed to disclose the broker's licensed status; has mismanaged funds belonging to others; and/or has falsified information used for the purpose of obtaining financing.

The Commission reminds licensees that the Commission may investigate and discipline a license if a licensee is acting in the capacity of a principal in a real estate transaction and violations of the license law occur. The Commission's authority to investigate and impose discipline in these transactions was determined by the Colorado Court of Appeals. (See Seibel v. Colorado Real Estate Commission.) The court's decision affirmed that licensed real estate brokers are subject to the Real Estate Brokers Licensing Act and rules adopted by the Commission when they participate in real estate matters as

principals. In such cases, licensees need to be mindful of Rule 6.17 (regarding conflict of interest and license status disclosures) and the above Position Statement regarding Acting as a Transaction Broker.

MINIMUM SERVICE AGREEMENTS

The Commission has received numerous inquiries regarding the minimum services that brokers must provide to buyers or sellers of real property. §12-10-403, C.R.S. requires that any broker performing the activities requiring a real estate broker's license as set forth in §12-10-201(6), C.R.S., act in the capacity of either a transaction broker or a single agent in the transaction. The minimum duties required to be performed by a real estate broker acting in the capacity of a single agent are set forth in §§12-10-404 and 12-10-405, C.R.S., §12-10-404, C.R.S. Single agent engaged by seller or landlord states, in part:

1. A broker engaged by a seller or landlord to act as a seller's agent or a landlord's agent is a limited agent with the following duties and obligations:
    a. To perform the terms of the written agreement made with the seller or landlord;
    b. To exercise reasonable skill and care for the seller or landlord;
    c. To promote the interests of the seller or landlord with the utmost good faith, loyalty, and fidelity, including, but not limited to:
        i. Seeking a price and terms which are acceptable to the seller or landlord; except that the broker shall not be obligated to seek additional offers to purchase the property while the property is subject to a contract for sale or to seek additional offers to lease the property while the property is subject to a lease or letter of intent to lease:
        ii. Presenting all offers to and from the seller or landlord in a timely manner regardless of whether the property is subject to a contract for sale or a lease or letter of intent to lease;
        iii. Disclosing to the seller or landlord adverse material facts actually known by the broker;
        iv. Counseling the seller or landlord as to any material benefits or risks of a transaction which are actually known by the broker;
        v. Advising the seller or landlord to obtain expert advice as to material matters about which the broker knows but the specifics of which are beyond the expertise of such broker;
        vi. Accounting in a timely manner for all money and property received;
        vii. Informing the seller or landlord that such seller or landlord shall not be vicariously liable for the acts of such seller's or landlord's agent that are not approved, directed or ratified by such seller or landlord.
    d. To comply with all requirements of this article and any rules promulgated pursuant to this article; and

e. To comply with any applicable federal, state, or local laws, rules, regulations, or ordinances including fair housing and civil rights statutes or regulations.

§12-61-805, C.R.S. Single agent engaged by buyer or tenant states, in part:

1. A broker engaged by a buyer or tenant to act as a buyer's or tenant's agent shall be a limited agent with the following duties and obligations:
    a. To perform the terms of the written agreement made with the buyer or tenant;
    b. To exercise reasonable skill and care for the buyer or tenant;
    c. To promote the interests of the buyer or tenant with the utmost good faith, loyalty, and fidelity, including but not limited to:
        i. Seeking a price and terms which are acceptable to the buyer or tenant; except that the broker shall not be obligated to seek other properties while the buyer is a party to a contract to purchase property or while the tenant is a party to a lease or letter of intent to lease;
        ii. Presenting **all** offers to and from the buyer or tenant in a timely manner regardless of whether the buyer is already a party to a contract to purchase property or the tenant is already a party to a contract or a letter of intent to lease;
        iii. Disclosing to the buyer or tenant adverse material facts actually known by the broker;
        iv. Counseling the buyer or tenant as to any material benefits or risks of a transaction which are actually known by the broker;
        v. Advising the buyer or tenant to obtain expert advice as to material matters about which the broker knows but the specifics of which are beyond the expertise of such broker;
        vi. Accounting in a timely manner for all money and property received; and
        vii. Informing the buyer or tenant that such buyer or tenant shall not be vicariously liable for the acts of such buyer's or tenant's agent that are not approved, directed, or ratified by such buyer or tenant;
    d. To comply with all requirements of this article and any rules promulgated pursuant to this article; and
    e. To comply with any applicable federal, state, or local laws, rules, regulations, or ordinances including fair housing and civil rights statutes or regulations.

The minimum duties required to be performed by a real estate broker acting in the capacity of a transaction broker are set forth in §12-61-807, C.R.S. which states, in part:

1. A broker engaged as a transaction-broker is not an agent for either party;
2. A transaction-broker shall have the following obligations and responsibilities:

a. To perform the terms of any written or oral agreement made with any party to the transaction;
b. To exercise reasonable skill and care as a transaction-broker, including, but not limited to:
    i. Presenting all offers and counteroffers in a timely manner regardless of whether the property is subject to a contract for sale or lease or letter of intent;
    ii. Advising the parties regarding the transaction and suggesting that such parties obtain expert advice as to material matters about which the transaction-broker knows but the specifics of which are beyond the expertise of such broker;
    iii. Accounting in a timely manner for all money and property received;
    iv. Keeping parties fully informed regarding the transaction;
    v. Assisting the parties in complying with the terms and conditions of any contract including closing the transaction;
    vi. Disclosing to prospective buyers or tenants any adverse material facts actually known by the broker including but not limited to adverse material facts pertaining to the title, the physical condition of the property, any defects in the property, and any environmental hazards affecting the property required by law to be disclosed;
    vii. Disclosing to any prospective seller or landlord all adverse material facts actually known by the broker including but not limited to adverse material facts pertaining to the buyer's or tenant's financial ability to perform the terms of the transaction and the buyer's intent to occupy the property as a principal residence; and
    viii. Informing the parties that as a seller and buyer or as landlord and tenant they shall not be vicariously liable for any acts of the transaction- broker;
c. To comply with all requirements of this article and any rules promulgated pursuant to this article; and
d. To comply with any applicable federal, state, or local laws, rules, regulations, or ordinances including fair housing and civil rights statutes or regulations.

Section 12-10-8403, C.R.S. allows real estate brokers to perform duties in addition to those established in §§12-10-404, 12-10-405 and 12-10-407, C.R.S. The additional duties may include, but are not limited to, holding open houses, property showings, providing a lockbox, use of multiple listing services or other information exchanges, etc.

Additional services that brokers agree to provide their clients must be documented in writing. A broker is not allowed to solely perform "additional" services which require a real estate broker's license, i.e. offering the real property of another for sale through

advertisements, without providing the minimum duties required by single agency or transaction brokerage.

The Commission does not regulate the fees or commissions charged by brokers for minimum or additional services provided. Fees and commissions are **[always] negotiable** between the broker and the principal.

SURVEY AND LEASE OBJECTIONS TO THE CONTRACT TO BUY AND SELL REAL ESTATE

[Every Section of this Contract will be covered in detail in Chapter 21 of these course materials, including the Section discussed in this position statement. For a complete discussion of Lease and Title Matters, please review Chapters 3 and 7.]

The intention of the Commission in adopting the Contract to Buy and Sell Real Estate is set forth below.

1. As background, under Section 8.1 [of the Sales Contract, Ch. 21], Buyer has the right to object to title matters up to the ***Title Objection Deadline***. Under Section 8.5, Seller has the obligation and right to use reasonable efforts to correct such objections and bear nominal expense prior to Closing. If any unsatisfactory title condition is not corrected prior to Closing, Buyer may either terminate the Contract or waive objection to any unsatisfactory title condition prior to Closing.
2. Under Section 8.2, if Buyer objects to any off-record matter on or before the ***Off-Record Matters Objection Deadline***, the Contract will terminate. Seller has no right to cure such off-record matters. Seller does not have a right to cure any objection to existing surveys or leases under Section 8.2. Section 8.5 does not apply to objections under Section 8.2.
3. Under Section 7.3, Buyer may obtain a new, updated or recertified Survey (Current Survey) on or before the ***Survey Deadline***. Current Surveys are different than existing surveys, [which are] surveys which are not current and which may be delivered to Buyer under Section 8.2 as an off-record matter; objections to existing surveys must be made on or before the ***Off-Record Matters Objection Deadline***. Buyer may object to the Current Survey on or before the ***Survey Objection Deadline***. If Buyer timely objects to the Current Survey, the Contract will terminate. Buyer's objection to the Current Survey is governed by Section 8.3.2, and Seller has no right to cure any objection to the Survey. Section 8.5 does not apply to objections under Section 8.3.2.

8.5 Under Sections 10.8.2 (Survey) and 10.8.3 (Leases) Buyer has a right to "terminate" the Contract. Seller has no right to cure any such objection. Section does not apply to objections under Sections 10.8.2 and 10.8.3.

Conclusion: Buyer has a right terminate the Contract due to objections with any Survey (Existing or Current) or to any Lease. Seller has no right to cure any objection to the

Survey or Lease (whether such objection is based on Section 7, 8 or 10 as Section 8.5 does not apply to Survey or Lease objections).

DISCLOSURE OF AFFILIATED BUSINESS ARRANGEMENTS AND CONFLICTS OF INTEREST (Adopted 4/05/2011)

This statement supplements Rule 6.18 Affiliated Business Arrangements (Chapter 15). *Affiliated Business Arrangements* [Rule] was enacted in Colorado to provide transparency, accountability, and consumer protection through disclosure and consistency concerning affiliated business arrangements. Affiliated business arrangements have also been regulated for many years by the Real Estate Settlement Procedures Act (RESPA). RESPA was precipitated by significant reforms identified by Congress as necessary to ensure that consumers did not pay disproportionately high settlement costs as the result of certain deleterious business practices by settlement service providers. RESPA is applicable to any residential mortgage transaction involving a federally related mortgage loan. However, Colorado law requires disclosure of affiliated business arrangements to consumers even if the transaction does not involve a federally related residential mortgage loan.

Colorado law C.R.S. 12-10-218(1)(a) defines an "affiliated business arrangement" as an arrangement in which:

> "*A provider of settlement services or an associate of a provider of settlement services has either an affiliate relationship with or a direct beneficial ownership interest of more than one percent in another provider of settlement services*;"

and the provider directly or indirectly refers business to the other provider or affirmatively influences the selection of another provider of settlement services.

It is the Commission's position that real estate brokers must disclose affiliated business arrangements to consumers in all transactions intended to result in the transfer of title from one party to another. RESPA requires that affiliated business arrangements be disclosed before or at the time a referral is made to a provider of settlement services.

Colorado law requires a licensee to disclose any affiliated business arrangement when an offer to purchase real property is fully executed. In Colorado, the disclosure is required to be in writing, must be given to both agents and transaction brokers, must comply with RESPA and Colorado law, and must be made using the Federal RESPA disclosure form. Colorado law requires real estate brokers to disclose their affiliated business arrangements to all parties to the real estate transaction and all parties are expected to sign the disclosure form.

The Commission recommends that real estate brokers disclose their affiliated business arrangements to the party with whom they are working early in their relationship, i.e. at the time brokerage relationships are disclosed or when the listing contract or buyer broker

agreement is negotiated. In those transactions where the broker does not deal with another party until the time of contracting written disclosure should be made to all parties at the time the purchase contract is fully executed.

Additionally, real estate brokers are required to make certain disclosures to the Division of Real Estate regarding their affiliated business arrangements. Colorado law requires every licensee to disclose to the Commission when they enter into or change an affiliated business arrangement.

All affiliated business arrangements to which the licensee is a party must be disclosed. Disclosure is required at the time of a new application for licensure or at the time of activation of an inactive license. The disclosure must include the physical location of the affiliated business. Employing brokers are required to disclose the names of all affiliated business arrangements to which the employing broker is a party on an annual basis, at the least. The disclosure must include the physical location of the affiliated businesses. The Commission has determined that these disclosures shall be made electronically through the Division of Real Estate's website at https://www.dora.state.co.us/pls/real/AFB_Web.Logon

It is the Commission's position that Rule 6.17 *Continuing Duty to Disclose Conflict of Interest and License Status*, applies to all licensees including real estate brokers who perform licensed property management services and are affiliated with businesses or vendors that provide services applicable to lease transactions. For example, a real estate broker acting on behalf of a landlord is required to disclose to the landlord that the real estate broker has partial ownership of the maintenance company that the real estate broker utilizes for the landlord's property repairs. The Commission strongly recommends that this type of information be disclosed to the principal early in the business relationship, i.e. at the time brokerage relationships are disclosed or when the listing contract is negotiated.

Additionally, this disclosure should be made in writing.

LEASE OPTIONS, LEASE PURCHASE AGREEMENTS & INSTALLMENT LAND CONTRACTS (Updated 4/05/2011)

The Commission recognizes that in order to maintain the resilience of the real estate market during times when conventional lending requirements are rigorous, alternative funding practices are utilized to sustain the market conditions of supply and demand. The Commission has received and investigated numerous complaints pertaining to lease options, lease purchase agreements and installment land contracts. Although the Commission does not have the authority to prohibit the types of real estate transactions that real estate brokers participate in, the Commission strongly cautions real estate

brokers to utilize the services of an attorney licensed to practice law within the State of Colorado.

It has been the Commission's observation, based on complaints received, that lease option and lease purchase transactions are complex and generally contain provisions with significant financial risk posed to the prospective buyer and seller. Installment land contracts and the other transactions mentioned in this position statement afford buyers the opportunity to take possession of the real property and make installment payments to the seller. There is a significant potential for harm to the seller, buyer or assignee if the installment land contract is not properly drafted. In all of the above transactions, the seller retains legal title to the property while the buyer may acquire equitable title.

The Commission does not have an approved contract form necessary to memorialize the terms and nuances related to these complex transactions, or any jurisdictional regulations that may be germane. Pursuant to Rule 7.1, *et seq.*, the appropriate provisions of the license law and the brokerage relationship act (§§12-10-217, 12-10-404, 405 and 407, C.R.S.), real estate brokers are prohibited from drafting a contract document that would reflect the terms of such a transaction as it would exceed their level of competency and is a matter requiring the expertise and advice of an attorney. Additionally, such behavior may be construed as the unauthorized practice of law by the real estate broker and subject to civil penalties.

The contracts for these transactions should not be prepared by a real estate broker; rather, the documents should be drafted by a licensed Colorado attorney-at-law engaged for each particular transaction.

COMMISSION POSITION ON TEAMS (Adopted 4/05/2011)

The Commission recognizes that there are benefits to both real estate brokers and consumers in the usage of real estate broker teams. Teams may be formed within a licensed brokerage firm with the approval of the employing broker. Real estate brokers operating as teams need to ensure that they are compliant with Commission rules regarding advertising, name usage and supervision.

Advertising and name usage:

While there is no prohibition of teams, real estate brokers need to ensure that they do not advertise in a manner that misleads the public as to the identity of the brokers' licensed brokerage. Real estate brokers that function as teams should not advertise teams using the terms "realty", "real estate", "company", "corporation", "corp.", "inc.", "LLC" or other similar language that would indicate a company other than the employing brokerage firm.

Advertising includes, but is not limited to, websites, signage, property flyers, mailings, business cards, letterhead and contracts. The advertising of team names should never

give the impression that the team is an entity separate from the licensed real estate brokerage.

If the identity of the employing broker or the brokerage firm is difficult for the public or the Commission to ascertain, the team may be in violation of Rule 6.10 Advertising.

Supervision:

In addition to the supervision requirements set forth in Rules 6.3.C, and 6.3.D, Rule 6.3.B. Employing broker responsibilities requires that the broker designated to act as the broker for any partnership, limited liability company or corporation, *i.e.,* the employing broker, fulfill the following duties:

1. Maintain all trust accounts and trust account records;
2. Maintain all transaction records;
3. Develop an office policy manual and periodically review office policies with all employees;
4. Provide for a high level of supervision for newly licensed persons pursuant to Rule 6.3.D;
5. Provide for a reasonable level of supervision for experienced licensees pursuant to Rule 6.3.C;
6. Take reasonable steps to ensure that violations of statutes, rules and office policies do not occur or reoccur;
7. Provide for adequate supervision of all offices operated by the broker, whether managed by licensed or unlicensed persons.

Pursuant to §12-10-222, C.R.S. and Rule 6.2.A, employing brokers are also responsible for providing supervision over such activities with reference to the licensing statutes and Commission rules for all brokerage employees, including but not limited to administrative assistants, bookkeepers and personal assistants of licensed employees. Thus, employing brokers are responsible for the actions of unlicensed persons who perform functions within the real estate broker team. Employing brokers need to ensure that any unlicensed person acting within the team is not engaged in practices that require a real estate broker's license. Employing brokers also need to establish that the compensation paid to an unlicensed person for services provided is not in the form of a commission. Compensation paid to an unlicensed person is not required to be paid solely by the employing broker. However, §12-10-221, C.R.S. requires that all licensee compensation or valuable consideration for the performance of any acts requiring a broker's license is paid.

BROKER COMPETENCY (Adopted December 2011)

Pursuant to sections 12-10-404, 12-10-405 and 12-10-407, C.R.S., which are the laws that govern the duties of a real estate broker acting in the capacity of a single agent or transaction broker, real estate brokers are required to perform the terms of written or oral

agreements they make with certain parties to a real estate transaction. Pursuant to sections 12-10-404 and 12-10-405, C.R.S., real estate brokers acting in the capacity of a single agent have a duty to promote the interests of their clients with the utmost good faith, loyalty, and fidelity. Pursuant to section 12-10-217(1)(q), C.R.S., it is a violation of the license law if a licensee demonstrates unworthiness or incompetency to act as a real estate broker by conducting business in such a manner as to endanger the interest of the public.

Prior to performing any acts that require a real estate broker's license, a broker should determine whether he or she possesses the knowledge, experience, and/or training necessary to perform the terms of the transaction and maintain compliance with the applicable federal, state or local laws, rules, regulations, or ordinances. If the broker does not have the requisite knowledge, experience and/or training necessary to consummate the terms of the agreement, the broker should either decline to provide brokerage services or seek the assistance of another real estate broker who does have the necessary experience, training, and/or knowledge. The Commission will have grounds to discipline a broker's license if a broker fails to take the measures necessary to gain competence and violations of the license law are substantiated.

APARTMENT BUILDING OR COMPLEX MANAGEMENT

The Commission recognizes that owners of apartment buildings or complexes will engage the services of real estate brokerages or unlicensed, on-site managers, or both. An "owner" includes either a person or an entity recognized under Colorado law. The owner must have a controlling interest in the entity formed by the owner to manage the apartment building or complex. In the instance of an entity, the "owner" may form a separate entity to manage the apartment building or complex. The ownership entity and the entity formed by the owner to manage the apartment building or complex must be under the control of the same person or persons.

Pursuant to §12-10-201(6)(b)(XII), C.R.S., a regularly salaried employee of the owner of an apartment building or complex is permitted to perform customary duties for his or her employer without a real estate broker's license. The unlicensed, on-site manager must either report directly to the owner or to the real estate broker, if a real estate broker is engaged to manage the property. The Commission views the following to be customary duties of an unlicensed, on-site manager:

1. Performance of clerical duties, including gathering information about competing projects.
2. Obtain information necessary to qualify perspective tenants for a lease. This includes obtaining and verifying information regarding employment history, credit information, references and personal information as necessary.
3. Provide access to a property available for lease and distribute preprinted, objective

information prepared by a broker as long as no negotiating, offering or contracting is involved.

4. Distribute preprinted, objective information at an on-site leasing office that is prepared by an owner or broker, as long as no negotiating, offering or contracting is involved.
5. Quote the rental price established by the owner or the owner's licensed broker.
6. Act as a scrivener to the owner or the broker for purposes of completing predetermined lease terms on preprinted forms as negotiated by the owner or broker.
7. Deliver paperwork to other brokers.
8. Deliver paperwork to landlords and tenants, if such paperwork has already been reviewed by the owner, or a broker or has been prepared in accordance with the supervising broker's instructions.
9. Collect and deposit rents and security deposits in accordance with the owner's lease agreement or the brokerage firm's written office policy.
10. Schedule property maintenance in accordance with the brokerage firm's management agreement or the owner's lease agreement.

If the owner has executed a Power of Attorney form or a written delegation of authority that authorizes the unlicensed, on-site manager to sign and execute leases on behalf of the owner, the unlicensed, on-site manager may execute those without possessing a real estate broker's license. Brokers supervising unlicensed, on-site managers with this authority are expected to review the executed documents to ensure compliance with lease terms, management agreements, local, state and federal laws, including the real estate brokerage practice act and Commission rules.

Employing brokers need to be especially aware of their supervisory duties under the license law. Supervisory duties apply whether the on-site manager is an employee or independent contractor of the broker or brokerage firm, or if the on- site manager is a regularly salaried employee of the apartment building or complex owner. The employing broker should have a written office policy explaining the duties, responsibilities and limitation on the use of on-site managers. This policy should be periodically reviewed with all employees.

PROPERTY INSPECTION RESOLUTIONS

The Commission has received inquiries and complaints claiming that real estate brokers ("Brokers") misrepresent property conditions and negotiate repairs in a manner that conceals issues from the buyer's lender, particularly when the property's condition would affect a lending decision. The Commission issues this position statement to clarify how Brokers can advise buyers regarding inspection objection issues and maintain compliance with Commission rules and regulations. Brokers must understand that in working with their clients to resolve inspection issues, Colorado law imposes upon

Brokers the duty to avoid misrepresentations [C.R.S.§ 12-10-217(1)(a)] and dual contracts [C.R.S. § 18-5-208].

Other than terminating the contract based on inspection, there are generally five alternatives available to address property condition issues in a sales transaction: 1) the seller can repair the property prior to closing; 2) the seller can agree to pay a concession or contribution, for example, a portion of the buyer's closing costs; 3) after closing, the buyer can make the repair without assistance from the seller; 4) the buyer and the seller can negotiate a modification to the sales price; or 5) at closing, the seller can escrow funds or pay a contractor (if allowed by the lender).

If the buyer is obtaining a loan to fund the purchase of the property, any of these options can affect the mortgage financing. Prior to negotiating any of these alternatives, the broker should advise the buyer to ask their mortgage loan originator or lender whether the resolution may (1) have a detrimental impact on the Buyer's ability to get the loan; (2) cause delays in the lender's processing and funding of the loan by Closing; and (3) require further inspections and repairs.

Once items to negotiate have been identified, the buyer broker should use the Commission- approved Inspection Objection form to identify the inspection issues that the buyer seeks to have resolved (Note: the Inspection Objection form is a notice form and is not part of the contract). Then, once the buyer and seller have reached a resolution, the Brokers can memorialize the terms on the Commission-approved Inspection Resolution form or the Agreement to Amend/Extend the Contract.

"COMING SOON" LISTINGS

The Commission has received inquiries and complaints regarding real estate brokers ("brokers") who advertise properties as "coming soon" to the market. The common complaint the Commission receives about "coming soon" listings is that the listing broker provides limited exposure of the property on the open market in an effort to broker both sides of the transaction, or "double end the deal". Many of the complaints that the Commission receives indicate that once the property is entered into a multiple listing service, becomes available for showings or is otherwise given full market exposure, the listing broker notifies any parties interested that the property is already under contract. While the Commission cannot impose limitations on how a property is marketed for sale or lease, a broker must comply with the license law.

Among other duties, §12-10-404(1), C.R.S., requires a broker acting as a single agent engaged by a seller or a landlord, to "exercise reasonable skill and care for the seller or landlord" and "promote the interests of the seller or landlord with the utmost good faith, loyalty, and fidelity". A broker who acts as a transaction broker for the seller or landlord is also required to "exercise reasonable skill and care", among the other responsibilities and obligations enumerated in §12-10-407, C.R.S.

During the negotiation of the listing contract, and as part of the broker's obligation to exercise reasonable skill and care, a broker is responsible for advising the seller or

landlord “of any material benefits or risks of a transaction which are actually known by the broker”. This includes limiting a property’s market exposure by delaying access for showings or open houses, or limiting the amount of time that the seller or landlord will consider offers. Motivation for limiting exposure of the property should be carefully considered. Is the property being marketed as “coming soon” because the seller is preparing it for sale or lease? This would be a legitimate use of that particular marketing method. However, if the property is being marketed as “coming soon” in an effort for the listing broker to acquire a buyer and “double end” the transaction, this would be a violation of the license law because the broker is not exercising reasonable skill and care. If the broker is a single agent for the seller or landlord, the broker may be viewed by the Commission as also failing to promote the interests of the seller or landlord with the utmost good faith, loyalty and fidelity. Finally, a broker who places the importance of his commission above his duties, responsibilities or obligations to the consumer who has engaged him is practicing business in a manner that endangers the interest of the public.

Ultimately, it is the seller or landlord’s decision how, when and where the property will be marketed. A broker who fails to advise a seller or landlord of the material benefits or risks, or does not allow the seller or landlord to decide how the property will be marketed, may be subject to license discipline by the Commission. The manner in which the broker and seller or landlord agree to market the property must be memorialized in writing in the listing contract prior to any marketing being performed.

BROKER DISCLOSURE OF ADVERSE MATERIAL FACTS (rev. 08/01/2017)

Brokers must disclose known adverse material facts.

In all real estate transactions, brokers are obligated to disclose known adverse material facts to all of the parties involved in the transaction. C.R.S. §§12-10-404(1)(c)(III), -404(3)(a), - 405(1)(c)(III), - 405(3)(a), -407(2)(b)(VI), and -407(2)(b)(VII). While clients have certain disclosure obligations, they are not addressed in this Position Statement. Brokers should refrain from advising clients about clients’ disclosure duties, which may be different.

What is an adverse material fact?

During the course of a real estate transaction, a broker for either side of the transaction may become aware of certain information pertaining to the property. For example, a broker may become aware that the roof of the property was recently repaired, or that the property was hit by lightning several times, or that one of the owners of the home for sale is a smoker. Brokers may have difficulty in ascertaining whether to disclose such facts.

In order to answer these types of questions, brokers first should consider whether the information is **material**. Factual information is material when a reasonable person would have ascribed actual significance to the information. *Moye White LLP v. Beren*, 320 P.3d 373, 378 (Colo. App. 2013). Examples of material facts include facts affecting title, facts affecting the physical condition of the property and environmental hazards affecting the

property. “Undisclosed facts are ‘material’ if the consumer’s decision might have been different had the truth been disclosed.” *In re Gattis*, 318 P.3d 549, 554 (Colo. App. 2013) (quoting *Briggs v. Am. Nat’l Prop. & Cas. Co.*, 209 P.3d 1181, 1186 (Colo. App. 2009)).

Next, brokers should consider whether that material information is **adverse** to a party’s interest in the transaction. *See In re Fisher*, 202 P.3d 1186, 1196 (Colo. 2009); Black’s Law Dictionary 62 (9th ed. 2009) (defining “adverse”). A broker must consider how that material information affects *each of the parties* in the transaction, not just the individual party they are representing. If that material information is contrary (i.e. “adverse”) to the interest of one of the parties, then the broker must disclose it to all the parties.

An “adverse material fact” includes but is not limited to a fact that affects the structural integrity of the real property, presents a documented health risk to occupants of the property including environmental hazards and facts that have a material effect on title or occupancy of the property. Examples of adverse material facts include building or zoning violations, water damage to the flooring of property caused by marijuana plants, structural damage to a home caused by insect infestations or expansive soils or any type of lien filed against the property.

Brokers need only disclose known adverse material facts.

A broker need only disclose facts of which the broker has actual knowledge. See *Baumgarten v. Coppage*, 15 P.3d 304, 307 (Colo. App. 2000). For example, if a property owner knows that the foundation is crumbling but never tells his broker, the broker has no duty to disclose that fact because the broker has no knowledge. Because a broker must actually know the adverse material fact, a broker does not violate Commission rules if he or she did not know the adverse material fact but only should have known the fact.

The Commission believes that disclosure of known adverse material facts is an important requirement that brokers must undertake in order to protect Colorado buyers and sellers. Accordingly, real estate brokers must disclose those facts they actually know, that a reasonable person would ascribe actual significance to and are contrary to the interests of a party in a real estate transaction. To the extent a broker is unclear about whether a known fact that affects the physical property is adverse or material, the broker should err on the side of disclosing the fact.

Brokers must not disclose circumstances that may psychologically impact or stigmatize real property.

Understanding a broker’s obligation to disclose known adverse material facts is as important as a broker’s duty not to disclose information that may psychologically impact or stigmatize real property. Without the informed consent of the client, brokers must not disclose facts or suspicions regarding circumstances which may psychologically impact or stigmatize real property. C.R.S. §§ 12-10- 404(2)(e), - 405(2)(e), - 407(3)(e). The law states that:

> [f]acts or suspicions regarding circumstances occurring on a parcel of property which could psychologically impact or stigmatize such property are not material facts subject to a disclosure requirement in a real estate transaction.

C.R.S. § 38-35.5-101(1) (2016).

There is minimal guidance in Colorado as to what equates to a psychological impact or stigmatization of a property. However, Colorado law identifies two specific circumstances that brokers are *prohibited* from disclosing due to the potential stigmatization of that property to potential buyers.

The first circumstance that cannot be disclosed is when an occupant of real property was suspected to be or was infected with the human immunodeficiency virus (HIV) or diagnosed with acquired immune deficiency syndrome, or any other disease which has been determined by medical evidence to be highly unlikely to be transmitted through the occupancy of a dwelling place. C.R.S. §38-35.5-101(1)(a).

The second circumstance that a broker cannot disclose is when "the property was the site of a homicide or other felony or of a suicide." C.R.S. §38-35.5-101(1)(b). Colorado courts have not provided any greater guidance concerning the types of felony crimes that fall under its definition.

A broker's obligation to avoid disclosure of circumstances which may psychologically impact or stigmatize real property should not impede a party's right to be informed about all known adverse material facts. The Commission concludes that the only circumstances in which a broker is not obligated to disclose facts or suspicions regarding circumstances that may psychologically impact or stigmatize real property are those two set forth immediately above in section 38-35.5-101(1)(a) and (b).

> **Brokers must disclose all known adverse material facts, *unless* it is one of the circumstances set forth in section 38-35.5-101(1).**

The Commission's primary purpose is to protect the public. *Albright v. McDermond*, 14 P.3d 318, 322 (Colo. 2000). The Commission believes it is in the public's best interest for brokers to disclose all known adverse material facts to the parties to a real estate transaction because this disclosure increases each party's awareness of those facts prior to completion of the transaction, it reduces the potential for creating an unfair transaction, and it otherwise protects the overall integrity of the transaction.

The Commission suggests that brokers have robust conversations with their clients about broker disclosures, with an eye towards full and complete disclosure. Brokers who are aware of either of the two factual scenarios set forth in C.R.S. § 38-35.5-101 are encouraged to obtain their clients' consent to permit disclosure of these facts.

[Disclosure Requirements for Meth Labs – suspected or confirmed:

According to CBS1-8-13. Contract To Buy And Sell Real Estate (Residential), §10.11. Methamphetamine Disclosure: "If Seller knows that methamphetamine was ever

manufactured, processed, cooked, disposed of, used or stored at the Property, Seller is required to disclose such fact.

But…

No disclosure is required if the Property was **remediated** in accordance with state standards and other requirements are fulfilled…

Practical Concerns for the Broker:
• *Don't* try to be a "pseudo-inspector". It is not Broker's responsibility and may create liability;
• *Do* be aware of issues and talk to the clients about them;
• Broker's responsibility is to inform the client, provide suggestions on how to obtain information. If the client chooses to test, be knowledgeable of best specialist for client to contact for testing.]

SOME DEFINED TERMS

The purpose of this position statement is to provide definitions of the terms that regularly appear in the regulations promulgated by the Commission through the rule-making process.

Advertise or Advertising: The promotion, solicitation or representation of real estate brokerage services requiring a real estate broker's license. Advertising may include, but is not limited to, business cards, brochures, websites, signage, property flyers, mailings (paper or electronic), social media, letter head, email signatures and contract documents.

Applicant: An individual or entity seeking a license from the Commission to perform the duties enumerated in C.R.S. §12-10-201(6)(a).

Broker: Any individual licensed by the Colorado Real Estate Commission to perform the acts enumerated in C.R.S. §12-10-201(6)(a) regardless if such broker is licensed as an associate broker, independent broker or employing broker. Brokerage or Brokerage Firm: Any sole proprietor, partnership, limited liability company, corporation or any other authorized entity licensed by the Commission to perform the acts enumerated in C.R.S. §12-10-201(6)(a).

Commission: The Colorado Real Estate Commission, created pursuant to C.R.S. §12-10-206.

Division: The Division of Real Estate.

Licensee: A broker or brokerage firm licensed by the Commission.

Team: Two (2) or more brokers within a brokerage firm that conduct their real estate brokerage business together.

Trademark: Any logo, service mark or other identifying mark used in conjunction with a brokerage firm's legal name or trade name. Trademarks may be registered with the Colorado Secretary of State pursuant to C.R.S. §7-70-102, C.R.S. As an example, the brokerage "A Better Choice Real Estate" uses a logo bearing the initials "ABC". The logo is used to identify the brokerage and the real estate services that it provides, therefore it would be the trademark for the brokerage.

Trade Name: The name under which a brokerage firm does business other than the brokerage firm's legal name. Any trade name used by a brokerage firm must be on file with the Commission and must be filed with the Colorado Secretary of State pursuant to C.R.S. §7-71-101. For example, a brokerage is licensed with the Commission under its legal name of "Colorado Real Estate Group LLC". However, the brokerage is also a franchise of "International Realty" and does business under the trade name "International Realty of Colorado".

Viewable Page: A page that may or may not scroll beyond the border of the screen and includes the use of frame pages.