



Director's Corner

Commission Settlements and Colorado Licensees

The Division has received a lot of inquiries about the proposed settlement agreement between the National Association of Realtors (“NAR”) and plaintiffs Rhonda Burnett, Jerod Breit, Jeremy Keel, Hollee Ellis, Francis Harvey, Christopher Moehrl, Michael Cole, Steve Darnell, Jack Ramey, Daniel Umpa, Jane Ruh, Don Gibson, Lauren Criss, and John Meiners, and the impacts that the proposed agreement will have on broker compensation in Colorado. If you have not read the proposed agreement or are unfamiliar with the proposed terms, [you can review a copy here.](#)

As an initial matter, it is important to note that the settlement terms are only applicable to members of NAR and the Realtor MLSs. Colorado has approximately 51,000 licensed real estate brokers, but not all of our brokers are Realtors. To put it simply, the proposed settlement agreement is not binding on the Colorado Real Estate Commission, the Division of Real Estate, or Colorado’s licensed real estate brokers who are not Realtors. Furthermore, the terms of the proposed agreement do not necessitate any changes to real estate broker licensing law or Commission rules and regulations.

Although the proposed settlement is only binding on those brokers who are members of NAR and the Realtor MLSs, it may still have some impact on the way real estate is practiced in Colorado. In order to understand this potential impact, it is helpful to review the requirements set by state law and regulations.

Colorado law offers two types of brokerage relationships in which a broker may perform licensed duties on someone else’s behalf: **single agency**, which requires that a broker enter into a contract with a consumer to perform their licensed duties, and **transaction brokerage**. Pursuant to Commission Rule 6.14.C, Brokers representing a





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seller or landlord as a transaction broker are required to have a written agreement with a consumer to perform their licensed duties. In contrast, a broker representing a buyer as a transaction broker is not required to have a written agreement to perform licensed duties. Despite not being required to do so, brokers who represent buyers as transaction brokers may want to consider requiring a written agreement (i.e. an Exclusive Right to Buy Contract) when working with a buyer to ensure that the buyer understands who will be responsible for compensating the broker for the licensed duties that are performed. Brokers working with buyers need to have a candid discussion with the buyer about who is ultimately responsible for paying for the buyer's broker's services (i.e. if the seller is unwilling to pay a cooperating commission, either the buyer will be paying the commission or the broker will not be compensated). The Commission-approved listing contracts address broker compensation and are therefore a useful tool to document the agreement made regarding compensation. Brokers should be aware that, with the current Commission-approved Exclusive Right to Buy Listing Contract, if a broker checks the wrong box under compensation and a cooperating commission is not offered, the broker will effectively be working for no compensation.

One of the terms of the proposed settlement requires that Realtor MLS participants enter into a written agreement with a buyer before the buyer tours any homes. However, Colorado law does not require that a brokerage relationship be established before a broker can show property to a buyer (this is assuming that the broker will not be eliciting confidential information). Colorado law also does not require that a compensation agreement be in place before a broker shows a buyer property.

In general, real estate brokers can anticipate some changes regarding the practice of providing cooperating commissions. Colorado law does not require the seller, or the seller's broker, to offer a cooperating commission to compensate the





broker representing the buyer, but it also does not prohibit it. Section 12-10-410, C.R.S.-Compensation states the following:

- (1) In any real estate transaction, the broker's compensation may be paid by the seller, the buyer, the landlord, the tenant, a third party, or by the sharing or splitting of a commission or compensation between brokers.
- (2) Payment of compensation shall not be construed to establish an agency relationship between the broker and the party who paid the compensation.
- (3) A seller or landlord may agree that a transaction-broker or single agent may share the commission or other compensation paid by the seller or landlord with another broker.
- (4) A buyer or tenant may agree that a single agent or transaction-broker may share the commission or other compensation paid by the buyer or tenant with another broker.
- (5) A buyer's or tenant's agent shall obtain the written approval of the buyer or tenant before the agent may propose to the seller's or landlord's agent that the buyer's or tenant's agent be compensated by sharing compensation paid by the seller or landlord.
- (6) Prior to entering into a brokerage or listing agreement or a contract to buy, sell, or lease, the identity of those parties, persons, or entities paying compensation or commissions to any broker shall be disclosed to the parties to the transaction.
- (7) A broker may be compensated by more than one party for services in a transaction if those parties have consented in writing to such multiple payments prior to entering into a contract to buy, sell, or lease.

Despite it being common practice prior to the proposed settlement, a broker representing a buyer should not assume that the seller, or the seller's broker, will automatically be paying a cooperating commission to the buyer's broker. The Division anticipates that the payment of a cooperating commission





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will become a regular point of negotiation between the buyer and seller in a sales transaction. Any language inserted into the sales contract that addresses the payment of broker commissions must be at the direction of either the seller or the buyer, otherwise the broker inserting the language is likely in violation of Commission Rule 7.4.

Lastly, it is a violation of the Brokerage Relationship Act for a broker to prioritize the payment of a commission over the fulfillment of the broker's duties to their client. Refusing to show a property to a client or submit an offer on the client's behalf because the broker is uncertain whether a cooperating commission will be paid, or the broker disagrees with the amount of cooperating commission offered, is unacceptable under Colorado law and may be grounds for license discipline.

