

## CHAPTER 13 - LISTINGS

An \* in the left margin indicates a change in the statute, rule or text since the last publication of the manual.

### GENERAL

A real estate broker has traditionally acted as a **special agent** authorized to conduct a single transaction for a buyer or seller. The broker's authority as a special agent for a seller is to find a purchaser who is ready, willing and able to buy the single listed property, either on the terms set out by or acceptable to the seller. As a buyer's agent, the broker must locate a single property acceptable to the buyer. The broker, on occasion, may be a **general agent**, such as when employed to manage a leased property over a long period, to collect rent, hire custodial help, contract for repairs, etc.

As an alternative to acting as an agent for one of the parties, a Colorado broker may be engaged as a transaction-broker. In fact, it is legally presumed that a real estate licensee in Colorado is acting as a transaction-broker unless there is a written agency agreement between the broker and the buyer or seller.

### RIGHT-TO-SELL AGREEMENTS

The authority to act for a seller in a real estate transaction is given to the broker by means of a listing contract, which is simply an employment agreement between an owner and broker listing the property for sale. The listing may be either written or oral unless the broker is employed as an agent, in which case the agreement must be in writing in Colorado. From a risk reduction perspective, all listings should be in writing and signed by both the owner and the broker in order to avoid possible misunderstandings that may arise later on. Commission Rule E-11 requires that all written listing contracts provide a definite date for termination.

Absent a signed listing contract supporting a claim of employment, a broker is not entitled to compensation even though he or she may have procured the sale. The law will not assist "volunteers" in their claim of employment. Occasionally a buyer and seller introduced by a broker may later consummate a private deal for which the broker tries to collect a commission. Unless the owner speaks or acts in a manner from which a listing contract could be implied, the broker will not collect. Proof of oral words or conduct or the intent or meaning thereof would be difficult to establish in court. A prudent broker makes employment and its associated payment a certainty only by securing a signed listing contract.

Colorado listings agreements provide that property sold within a holdover period after the listing term, to any party with whom the listing broker negotiated and whose name the broker submitted to the owner in writing, entitles the broker to a commission, unless the property is subsequently listed with another broker.

### TYPES OF SELLER AGREEMENTS

There are five general types of seller listing agreements: (1) net; (2) open; (3) exclusive agency; (4) exclusive right-to-sell, and (5) multiple listing. The five types relate to the degree of freedom the owner retains to either sell the property personally without owing a commission or to employ brokers to assist in the sale. The real estate commission has approved both agency and transaction-broker listing forms for the most commonly used types of listings.

### **Net Listing. –**

A net listing is a contract to find a buyer or lessee for the property at a certain **net price to the owner**. For example: If an owner lists a property for \$100,000 net, and broker finds a buyer at \$100,000 (or less) the broker receives no commission. If the broker finds a buyer at \$115,000 the broker retains \$15,000 as earned commission. If the terms of a net listing agreement are challenged, courts may hold that the broker is not entitled any amount exceeding the broker's usual commission. Additionally, a broker who abuses a net listing may be found in violation of section 12-61-113(l)(q) dealing with secret undisclosed profit. Because the commission does not encourage net listings, there are no approved net-listing forms.

Net listings are generally out of favor in the sale of developed property. They are primarily used where the property is of a speculative nature. In addition to having no set price, an open net listing does not obligate the owner to restrict the listing to one broker. Thus on an open net listing given to three different brokers, these brokers may offer the property for sale to the same prospect at three different prices. When several brokers quote different prices for the same property, there is a negative reflection on the honesty and integrity of the real estate industry.

### **Open Listing –**

Under an open listing, the owner lists the property with a broker at a specified price, agreeing to pay a commission on that price or any offer acceptable to the owner. However, the **owner retains the right to sell the property personally or to list the property with other brokers**. This type of listing may be more common in small communities, where the seller is likely to be acquainted with all or most of the brokers and does not wish to antagonize the others by listing with only one. **Only the broker who is the procuring cause of the sale is entitled to a commission**. If the owner sells directly to a buyer without broker involvement, the owner is not obligated to pay compensation to any broker holding an open listing.

The Commission has published both agency and transaction-broker open listing contracts.

### **Exclusive Agency Listing –**

Under an exclusive agency listing, the owner agrees that a commission will be payable only to the named broker, and that the property will not be listed with or sold by another broker. However, **if the owner sells to a buyer procured without broker's assistance, no commission is due**. An exclusive agency listing, as compared to the net or open listing, permits the broker to apply his or her best efforts, unhampered by possible interference from other brokers, but still subject to the uncertainty of an owner sale. The commission has approved exclusive agency listing contracts for both agency and transaction-brokerage.

### **Exclusive Right-to-Sell Listing –**

This is similar to exclusive agency except that the **broker is given the sole and exclusive right to sell the property during the listing period**. Even if the owner sells to a buyer procured by the owner, the broker is entitled to a commission. This type of listing is the most commonly used by brokers in Colorado. Brokers can apply their best efforts, secure in the knowledge that the right to a commission cannot be defeated by anyone during the listing period. The commission has approved exclusive right-to-sell listing contracts for both agency and transaction brokerage.

### **Multiple Listing –**

A multiple listing is not technically a separate kind of listing. It is, rather, a marketing arrangement. Broker-members of a local real estate association or multiple listing service (MLS) may combine to market their listings through the organization. Any member may then sell any

property registered with the service and rely on a predetermined commission offered by the listing broker. The seller may choose whether to participate in MLS or an on-line property information exchange in the commission-approved listing contracts. The seller also contracts in the listing as to which types of cooperating brokers will be offered how much compensation for bringing a buyer into the sale. Multiple listings are widely distributed and should never contain confidential seller information, such as the seller's motivation or willingness to accept a lower price or less favorable terms than those stated in the listing agreement.

Today, more and more listings are also being distributed statewide, nationally and internationally over the Internet. Because many of these listing services do not require membership, it is wise for a cooperating broker to obtain a fee agreement prior to entering into negotiations.

### **RIGHT-TO-BUY AGREEMENTS**

The authority to act for a buyer in the purchase of real estate is secured by means of an employment agreement between the broker and buyer. The agreement engages the broker to locate a property for the buyer at an acceptable price and terms. The information above concerning seller listings also applies to buyer listings or right-to-buy agreements, including the requirement for a definite termination date and the inclusion of a holdover period. The commission has approved both agency and transaction-broker versions of the exclusive right-to-buy agreements

#### **Exclusive Right-To-Buy Contract:**

The broker agrees to assist (TB) or represent (agent) the purchaser or lessee by entering into a buyer listing agreement. The purchaser or lessee thus becomes the client/employer and compensates the broker for locating suitable property. With proper consent in the listing contract, the broker working with the buyer may seek compensation from the seller or the seller's broker. Brokers must make sure that clients fully understand the exclusive nature of this agreement. Clients who work with multiple brokers or directly with owners may create multiple contracts and commission obligations or precipitate litigation over breach of contract or procuring cause issues.

### **CHANGE OF STATUS**

A broker may not represent one party as an agent and work as a transaction-broker with the other party in the same transaction unless the principal to the agency agreement has agreed to revert to transaction brokerage. To accommodate this change, the commission listing forms contains a selection by the client at the time of the listing and a "Change of Status" form to notify the client at the time the "double ended" situation develops.

### **APPROVED FORMS**

Commission Rule F-7 (Chapter 25) mandates the use of one of the standard commission approved seller or buyer listing contracts. If another listing contract is deemed necessary, an attorney representing one of the parties to the transaction must prepare it. Agency listings, whether for sellers or buyers, must be in writing. (C.R.S. 12-61-808 (2)(b)) & (38-10-108)

### **BROKER RESPONSIBILITY**

Real estate brokers represent themselves to the public as possessing knowledge, ability and skill in the field of real estate. The broker owes to the public the duty of exercising reasonable competence, judgment and care in advising and rendering services. Real estate brokers fulfill these obligations by keeping abreast of social, economic and legal developments affecting real property as well as changes to license law.

If a member of the public suffers a loss due to the actions or omissions of a broker, he or she may hold the broker liable in both civil action and in discipline before the real estate commission.

In addition to exercising reasonable skill and care, a broker acting as an **agent** for a buyer or seller must also advocate on behalf of the client to bring about a purchase or sale on the best possible terms. A **transaction broker**, on the other hand, may not act as an advocate for one party's interests over those of the other party. All brokers, whether acting as an agent or transaction broker, must observe all facets of the license law and exercise reasonable skill and care in performing the terms of the employment agreement.

### **Diligence in Pursuing the Objective of the Listing Agreement**

A real estate broker has the duty to perform the terms of the employment agreement, including exerting reasonable effort to accomplish the sale or purchase of the property. If the broker does not perform, the owner is justified in voiding the contract. It is a violation of the listing agreement and license law for a broker to "sit" on a listing, that is, take a listing and make no attempt to sell or acquire the property. If a seller elects to set what the broker believes is an unreasonable list price, it is improper and unethical to take the listing and attempt to induce the seller to reduce the price. If the seller is not amenable to comparable properties and their market prices, any broker should refuse the listing.

Buyer brokers must actively fulfill their duty to identify the most appropriate property. A buyer broker must be reasonably available at the buyer's convenience to tour and show properties. It is never proper to suggest that buyers view properties or attend open houses on their own. A buyer may never be considered an unlicensed personal assistant in the context of the commission position statement on this subject.

### **Cancelled Listings**

If a client unilaterally cancels an employment agreement during its original **unexpired** term, the listing broker may either accept the end of the employment or pursue legal remedy. If the client attempts to re-list with another broker before the original listing expires, the second broker must emphatically caution the seller of potential liability for the payment of two commissions should the original broker bring civil action for breach of contract.

### **Conflicts of Interest**

A broker must avoid even the appearance of conflict of interest with a client. Thus a broker must clearly and fully disclose all aspects of a personal offer to purchase property listed with the broker or the broker's firm. The best action is to first abrogate the listing and then make the offer. A licensee should utilize a commission-approved licensee buy-out addendum to the buy/sell contract in the purchase of a listed property. Similarly, of course, a buyer broker must not pursue the purchase of property shown to a client without clear assent from the client.

Colorado broker licenses may be suspended or revoked for acting for more than one party without the consent of all parties or for failing to disclose a conflict of interest. A seller wants to sell at the highest possible price; a buyer seeks to purchase at the lowest price. These interests are adversarial and irreconcilable. In attempting to serve two masters, a licensee may be in danger of sacrificing the interest of a buyer or seller to the broker's own interest.

### **Scope of Activity – Principal Consent**

Within well-defined limits, a single broker may assist both parties to a transaction. This is allowed only with appropriate written consent of the parties to the transaction. By general custom, the broker is also permitted to represent both parties, with their knowledge and consent, and receive compensation from each in an exchange of properties. Again, the

commission-approved exchange agreement provides for such disclosure and consent.

A broker who, without the seller's express consent, informs a prospective buyer that his or her seller will accept an offer less than the asking price violates the license law. Likewise, a buyer broker, either agent or transaction-broker, is prohibited from informing the seller that the buyer will pay more than the offering price. A broker may never withhold an offer, either hiding the first one because of anticipating receipt of a 2<sup>nd</sup> higher offer, or hiding a subsequent higher offer fearing that it might kill the current deal. Brokers are required by statute to present all offers, including those received right up to closing.

### **Commission-Approved Forms**

Real estate licensees are fortunate that Colorado is among the leaders in affording opportunities for participation in continuous education and conference programs and providing approved forms for use by licensees. Approved listing forms address a wide range of current contractual issues in specific detail, particularly those of brokerage relationships. The commission-approved seller's property disclosure forms deal with disclosure of the physical condition of residential or vacant land/farm and ranch property. Sellers are asked to certify that the disclosure is correct to the best of the seller's current, actual, knowledge. Disclosure of property condition is optional. However, if a licensee chooses to use a disclosure form, it must be a commission-approved version. If the seller declines to make such a disclosure, that provision should be stricken from the listing agreement, but not before advising the seller that buyers and buyer brokers often require completion of such a form.

A real estate broker has a statutory duty to account to members of the public for all funds received in the course of a transaction. The broker must keep accurate records and accounts and must keep any funds received on behalf of others in an identified trust account separate from funds belonging to the broker.

### **Closing Instructions**

The real estate commission, working in concert with the division of insurance, has developed a closing instructions form that must be used in conjunction with an approved listing contract. The closing instructions form provides for the appointment of a closing agent and outlines responsibility for payment of fees for closing services. The commission's position is that this form be initiated, with the buyer or seller, at the time a listing is signed. The form can then be completed with the signatures of both parties at the time of acceptance of a sales contract, and delivered to the closing entity in advance.

It is impossible to anticipate all the varied situations that may raise questions concerning the broker's responsibilities. No safer guide for conduct exists than to treat others the way in which you would want to be treated.

### **Broker Compensation**

In order to be entitled to compensation, a real estate broker must: (1) establish employment; (2) fulfill the terms of employment; and (3) get the transaction closed - unless defeated by the refusal of his or her client to consummate the sale as agreed upon.

Broker commissions have historically been paid by the seller out of the transaction proceeds with money the buyer brought into the transaction, typically computed as a percentage of the selling price. Listing brokers then often split this commission with a cooperating buyer broker. Brokers employed by buyers now often seek compensation directly from that buyer, a responsibility clearly delineated in the commission-approved buyer listing agreements. More recently brokers have turned to forms of compensation other than the traditional percentage, such as retainer or hourly fees, or combinations of either along with success fees.

Broker commissions are always freely and independently negotiable, established by agreement of the parties and not by law. To prevent controversy and clearly identify the intent of the parties, all compensation and terms of payment must be clearly stipulated in the employment contract. If the original fee or commission is changed, whether to facilitate a closing or to induce future business, this must be clearly spelled out in a written amendment. The commission-approved listing contracts provide a section dealing with the splitting of fees with cooperating brokers.

By Colorado law, a seller's broker is entitled to a commission if the seller refuses or neglects to correct a title defect, provided the contract would otherwise bind the purchaser to close the sale. If a buyer wrongfully refuses to complete the sale, a listing broker may receive compensation in the form of liquidated damages from the down payment forfeited by the purchaser. The broker's right in this instance is usually set forth in the contract to purchase or in the listing agreement or both.

If the purchaser makes an offer to buy conditional on some event, such as the ability to secure a loan, then he or she may rightfully cancel the contract if the condition does not occur. The buyer must have acted in good faith to secure the loan. In such event the broker is not entitled to a commission.

If a buyer offers a different price or terms than agreed to in the original buyer agreement, or the seller accepts a different price or terms than contained in the original listing agreement, the broker(s) is entitled to a commission. Under these circumstances the parties have ratified, or given implied agreement to variations in the terms of the original contract(s).

### **Sales Arrangements Between Brokers**

An employment agreement (buyer or seller listing contract) is normally only between the broker and the principal. To help sell the property, it is common for the listing broker and seller to agree to offer compensation to other cooperating brokers, including buyer agents or transaction-brokers. Although unusual, buyer brokers may also offer compensation to cooperating brokers to help in locating a property for the buyer. The responsibility to pay a commission rests squarely with the listing broker.

Commission-approved seller listing contracts require the consent of the seller before a broker may offer commission splits to cooperating brokers.

If the broker's office policy offers various levels of compensation, such as one percentage to buyer agents and another to transaction brokers, it must be clearly disclosed to the seller that such a policy could result in restricting market exposure or cooperation from other brokers.

Once determined, commission splits are usually communicated to other brokers through a multiple listing service. In the absence of a multiple listing service, commission letters or agreements between brokers are a common method of establishing agreement on the terms of sharing commissions. By whatever method, terms of cooperative commission sharing must be specifically agreed to in advance and clearly communicated to potential cooperating brokers.

