

# "10 THINGS"

Every REALTOR® Needs To Be  
Thinking About in  
2018

**Legal and Regulatory Considerations Impacting REALTORS®**

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# Program Overview

This presentation is intended to be a general overview of relevant & topical matters that impact you as REALTORS®.

This is the “30,000 foot view” of a small but important handful of legal, regulatory, legislative & business trends that may very well be impacting many of you. Most of these topics could be stand-alone topics on their own.

**Why *these* 10 Things?** I assembled this list from a variety of sources including recurring questions from the CAR Legal Hotline, recent State and Federal regulations, monitoring industry trends, developments at the Colorado Real Estate Commission, and a STRONG desire to pick topics that wouldn't bore you!



This list is in no particular order of importance,  
...so you can't just fall asleep until the end!

# 10. “Caveat Emptor”

## The Contract’s Starting Point

Sunbather BEWARE!

# Caveat Emptor – Latin for ***“let the buyer beware”***

- Basic Common Law principle that a buyer – particularly of real property – should be responsible for diligent inspection of what they are purchasing
- CBS Paragraph 10.2 – “AS IS” condition, “WHERE IS” and “WITH ALL FAULTS”
- Harsh result for Buyers!

- Seller off the hook? Not so fast!
- Carveouts in fairness to Buyer...
- Disclose Latent Defects **ACTUALLY KNOWN** by Seller – in Writing!
- Seller’s Property Disclosure – **NOT A SELLER’S WARRANTY!** Just a “tool” for providing Buyer info about the property.

# Best Practices!

**Seller Agent:** Advise seller to understand Paragraph 10.2 (Latent Defect) obligations and complete the Seller's Property Disclosure accurately and honestly. Disclosure is best!

**Buyer Agent:** Advise buyer to engage competent professionals to perform analysis of property. Act with diligence!

**Transaction Broker:** Make sure BOTH parties to contract are familiar with obligations/expectations of Paragraph 10.2

**DON'T GET CAUGHT HOLDING THAT COBRA!**

# 9. Errors and Omissions Insurance

## Policy Basics

***OOPS!***

# What is E&O?

## Insurance Policy against being an idiot!

- Insurance for licensed professionals against screwing up... “Professional Liability” / “Malpractice” / “E&O”
- Covers claims against broker for negligent acts, errors or omissions in brokerage service
- Mandated for Real Estate Brokers in CO since 1996
- Why? To give Consumers recourse!
- “Claims Made” Coverage vs. “Occurrence” Coverage
- **DON'T BE AFRAID TO FILE CLAIMS!**



# CO E&O Policy Requirements

Rule D-14 (12-61-103.6 CRS)

- Policy for Broker & Brokerage Firm (unless independent)
- Minimum of \$100K coverage for claim & \$300K aggregate/year
- \$1K maximum deductible (\$0 for legal expenses/defense)
- Insurer must defend covered claims (Broker can choose counsel)
- At least \$25K for licensee's use of lockbox

# E&O Exclusions

(Consider Additional Endorsements!)

- Fair Housing/Discrimination
- Personal Injury/Property Damage
- Commission Complaints
- Personal Interest (Principal)
- Environmental
- Security/Wire Fraud
- Property Management

**CAN THE POOR DOG SUE ITS OWNER!?**

# 8. Teams

## Thoughts on an Emerging Business Structure

**Push Together... or Fall Apart!**

# Emerging Real Estate Business Model - Why?

## Benefits

- Efficiency
- Specialization
- Responsiveness
- Broker Convenience
- Consistent Deal Flow/Commissions
- Mutual Support
- Marketing Power

# Team Rules & Restrictions

(CP-40 & Rule E-8)

- Advertising Limitations – Corp/LLC/Realty
- Broker Supervision
- Unlicensed Assistants (supervision/splitting commissions/independent contractor?)
- “Team” Agreements
- Doing Business as a “Team”
- Collateral liability

**LOTS OF MUSCLE, BUT YOU ARE ONLY AS STRONG AS YOUR WEAKEST LINK!**

# 7. “Hey That’s Mine!”

## Intellectual Property and Real Estate

**Give Me That!**

# Intellectual Property

## What is it?

Not “real” and not “personal”

“Intellectual” Property are creations of the mind

- Patent – specific product design
- Trademark – name, phrase or symbol
- Copyright – document, writing, photo, music, drawing
  - Not ideas (“trade secrets”) – through I.C. or confidentiality agreements (contracts)

# Copyright and Real Estate –

creative, original and tangible medium... it is secured immediately at creation!

## What and who owns it?

- Photos?
- Virtual Tours?
- Renderings/Drawings?
- Listing Remarks?
- Home description (“2 beds, 4 bath”)?
- List Price?
- It is critical to understand who owns it and how you are licensed to use it (IDX, express agreement, license).



# Who cares?

- Valuable information.
- Technology has made it easy for copyright holders to identify misuse.
- E-8 Violation? Code of Ethics?
- MLS liability (broker indemnification)
- Trademark infringement? Brokerage name, slogans, or logos

**DON'T LET THE RABBIT STEAL YOUR VALUABLE COOKIE!**

# 6. Failure to Disclose

## Property and Brokerage Relationships

**Be Afraid!**

# Disclosures Related to the Property

## Seller's Obligation to Disclose:

- CBS Paragraph 10.2 – “**Latent defects** actually known by the Seller...”

## Broker's Obligation to Disclose:

- License Law (12-61-804/805/807 CRS)
- “**adverse material facts** actually known by the broker...”
- Applies to both seller (property) and buyer (qualifications)

# Disclosures to the Client/Customer

(12-61-808 CRS & E-35)

- CLEARLY Disclose Relationships
- When? Prior to engaging in “Brokerage Activities” (elicit or accept confidential info – “needs, motivations or qualifications”) Open houses? Small talk? General facts?
- What? Brokerage Disclosure to Buyer(BD24) / Seller(SD16)
- Designated Broker – relationship only extends to individual agent
- Definitions of Working Relationships (DD25) – tool for discussing relationships
- Disclosure of Transaction Brokerage Relationship
- Change of Status

**DISCLOSE, DISCLOSE, DISCLOSE... DON'T GET CAUGHT WITH YOUR TONGUE UP YOUR NOSE!!**

# 5. Office Policy Manuals

**Don't Overlook!**

# Who?

## Employing Broker's Responsibility (E-30/31)

- Develop and maintain manual
- Review periodically with Broker Associates
- Obtain acknowledgement from BA that they have received/read
- Identify brokerage relationships offered to clients
- Maintain policy for handling confidential client info (Designated Brokerage)

# What?

## Office Policy Manual Inclusions (CP-21)

- Handling of Contracts
  - Review/E.M./back-ups/closings
- Licensee's Purchase & Sale
- Monitoring license renewals & transfers
- Delegations of authority? (Managing Brokers)
- Property Management
- Use of Personal Assistants
- Training, staff meetings, etc.

# Why?

Required by License Law & “E” Rules!

## Best Practices

- Have one!
- Keep it up to date! (Revisions as recently as 2015)
- Add other provisions as may be appropriate to your firm business
- Use it in conjunction with good independent contractor agreement

**DON'T BE LEFT HANGING (LIKE TOM BRADY)!**



# 4. 2019 Contract Changes

## Looking Forward!

**Whееееее!**

# What's Coming on 1/1/19?

## Extensive Changes to CBS

- Lead Based Paint!
- FIRPTA
- Countered/Rejected
- Paragraph 13 (Deeds)

## Personal Property Document

- Fair Market Value
- Conditional on Closing
- Buyer should disclose to lender

**DON'T FALL ASLEEP!  
CONTRACTS ARE SCINTILLATING (AND IMPORTANT)!!**

# 3. Specific Performance

## A Practical Remedy?

# CBS Paragraph 21

Parties Remedies for Breach of Contract

“Time is of Essence” – no wiggle room

- Late delivery of Earnest Money?

## Remedies for Breach?

Seller Remedy for Buyer Breach = Liquidated Damages

- Unless SP box checked
  - Probably impractical unless very egregious facts

Buyer Remedy for Seller Breach = Specific Performance OR Damages OR Both

Specific Performance = equitable remedy where court FORCES a party to a contract to perform

Potentially long process 6-12 month PLUS

Maybe impractical for Buyer but may be VERY expensive for Seller

Damages instead or SP?

# Best Practices

- Don't analyze potential claims for your client!
- Buyer has significant exposure (uncertainty/time/money/emotion) in claim
- Seller has enormous exposure for damages, fees, etc.
- Advise EITHER party to seek good legal counsel before considering remedy!

**IMAGINE HAVING TO SUE MICHAEL SCOTT!?**

# 2. Recordkeeping

## Expectations in Real Estate

**Close Call!**

# Specific Record-Keeping Requirements!

Memorialized in License Law, E Rules and CP-9

How Long?

Originals? Or “duplicates!” (photo/fax/electronic)



# What Documents?

Any document that was prepared by, or on behalf of, a licensee and pertains to the consummation of a lease, purchase, sale or exchange of real estate in which a broker participates...

Broad category!

Does NOT include: existing public records, title commitments, lender documents

Buyer's Closing Disclosure?

Division Records Retention Checklist!

# Transaction Files and the Retention of Records

The records of licensed brokerage activity must be retained for four years per §12-61-113(1)(i), C.R.S. Rules E-4 and E-5, as well as the Commission position statement of record keeping (CP-9), control the contents of the broker's property transaction file. Rule E-3 requires any licensee to produce appropriate records concerning licensed activity and operation of the trust accounts upon the request of the Commission.

The Following is a checklist for common records to retain in both the listing and selling broker's property transaction file. Other ancillary documents and agreements executed between the parties and the closing entity or lender are not required.

## Sales Files

- Lead-based paint disclosures for residential property built before 1978;
- Exclusive right-to-buy/sell, or agency or open listing agreement & amendments (listing broker only);
- Disclosure of brokerage relationships;
- Disclosure of compensation for services and income from affiliated entities;
- Disclosure of the source of residential property square footage;
- Contract to buy/sell/exchange real estate, counterproposals, amendments, and attachments;
- Current marketing/MLS information used in the transaction;
- Inspection notice;
- Seller's property disclosure statement;
- Actual closing instructions, negotiated before the actual date of closing;
- Copy of any power of attorney (show recording data if closed in-house);
- Copy of earnest money check, validated escrow bank deposit slip (or receipt below);
- Signed and dated receipt for earnest money held by third-party closing entity;
- Copy of earnest money note;
- Buyer's financial information, if "owner-carry" financing;
- Rental/occupancy agreement before closing date (have separate security deposit);
- Estimated closing costs/estimated monthly expenses prepared by licensee;
- Settlement statement (or equivalent computer form) for the party represented or assisted;
- Side agreement/amendment to revise a settlement statement;
- Promissory note (unsigned, marked "COPY");\*\*
- Closing entity commission check remittance less earnest money amount if applicable;
- Tax reports required by government agencies (Colorado withholding tax);\*\*
- Escrow receipts or collection agreements continuing after closing;
- Accounting for use of advance retainer fees;
- Six-column worksheet for settlement (or equivalent computer form);\*\*
- Deed of trust (copy showing recording data if closed in-house);\*\* and
- Other legal documents prepared by the broker.\*\*

\*\*Required only when the broker personally prepares the document, conducts the closing in-house without use of a title company, and/or is responsible for recording of any documents.

## Management Files

- Current/past management and/or short-term reservation management agreements;
- Current/past lease or rental occupancy agreements with tenants and guests;
- Lead-based paint disclosures for residential property built before 1978;
- Disclosure of brokerage relationships and/or listing contracts to lease;
- Disclosure of compensation, service income from affiliated entities;
- Brokerage accounting records, bank reconciliation, tax and owner reports;
- Ongoing contracts, bids, invoices, service provider billings, and correspondence with client;
- Legal notices, actions, and accounting reports affecting owner/occupant/tenant funds;
- Documentation for commissions earned versus taken or charged to others;
- Prompt assessment, timely (45-90 days) collection, restitution of all money due escrow; and
- Documentation verifying reported receipts, income, and all expenses paid for another.

# Associate vs. Employing Broker Distinctions?

## **Best Practices...**

- Keep good records! (Audit/Complaint/Lawsuit)
- Make sure documents are executed timely!  
(LBP/Broker Relationships)
- Keep email and other less formal correspondence

**AVOID ANY “CLOSE CALLS” WITH LICENSE LAW AND RULE COMPLIANCE!**

# 1. Parties Right to Cancel

**You're FIRED!**

# Common Hotline Call!

Client wants to fire Broker?

Broker wants to fire Client?

No written agreement?

Written agreement?

# **Exclusive Right to Sell**

## Paragraph 19

### **Paragraph 19.1 = Right of Seller**

- Abandonment
- Failure to Fulfill “Material Obligations”
- Failure to Fulfill Uniform or Fiduciary Duties

## Paragraph 19.2 = Right of Brokerage Firm

- Title unsatisfactory
- Physical condition of property
- Proposed/existing projects (transportation)
- Activities/odors/noises
- Stigmatizations
- Uncooperative seller

# **Exclusive Right to Buy**

## Paragraph 10

### **Paragraph 10.1 = Right of Buyer**

- Same as Listing Contract!

### **Paragraph 10.2 = Right of Broker**

- LIMITED TO FAILURE TO REASONABLY COOPERATE!



## Best Practices...

- Avoid suing your client!
- Pre-negotiate termination
- Stand your ground!
- Don't do things that can be construed as abandonment