

Commission Position 2 – Broker Commissions

(Recodification adoption June 7, 2022: CP-2 Commission Position on Earned Fees recodified to CP 2 – Broker Commissions and CP 3 – RESPA and Referral Fees)

Commissions:

Section 12-10-217(1)(l), C.R.S., prohibits a Broker or Brokerage Firm from paying a commission or valuable consideration, for performing Real Estate Brokerage Services in Colorado, to any person who is not licensed as a Broker. According to Colorado case law, “negotiating” means “the act of bringing two parties together for the purpose of consummating a real estate transaction”. (*see Brakhage vs. Georgetown Associates, Inc.*, 523 P2d 145 (1974)). Therefore, any unlicensed person who directly or indirectly brings a buyer/tenant and seller/landlord together for Colorado property is negotiating and would need a Colorado Broker’s License 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.

Allowable Referral Fees Paid for Reasonable Cause:

A Broker or Brokerage Firm may pay a referral fee if reasonable cause for payment exists and is not prohibited under the Real Estate Settlement Procedures Act (RESPA). (*see* Rule 6.21. and CP 3 - RESPA and Referral Fees). Pursuant to section 12-10-304(1), C.R.S., a reasonable cause means an actual introduction of business has been made; a contractual referral fee relationship exists; or 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 [Colorado] selling broker or vice versa.” Brokers and Brokerage Firms must take care not to pay a referral fee to an unlicensed person or entity performing activities requiring a License.

Referral Fees Paid to Out-of-State Brokers:

A Broker or Brokerage Firm who cooperates with a broker who is licensed in another Jurisdiction or country but is not licensed in Colorado may pay the out-of-state brokerage firm a “finder’s fee”, a “share of the commission”, or a “referral fee” when an actual introduction of business exists. The out-of-state broker must hold an active real estate license; reside and maintain an office in their Jurisdiction or county; must not perform any Real Estate Brokerage Services in Colorado; and all funds collected must be deposited into the Colorado Brokerage Firm to be distributed to the out-of-state brokerage firm. (*see* Rule 6.21.C.). If the payment is made to citizens or residents of a country which does not license real estate brokers, the payee must then represent that they are in the business of selling real estate. A referral fee must be paid to the out-of-state brokerage firm from the Colorado Brokerage Firm and may not be paid directly to the out-of-state brokerage firm from the closing. However, the Colorado Brokerage Firm may direct the closing company (e.g., title company or attorney) to pay the referral fee directly to the out-of-state brokerage firm provided that the settlement statement accurately discloses the Colorado Brokerage Firm as the recipient of all commissions and a properly executed commission disbursement instrument is retained in the transaction file as set forth in Rule 6.20.

Administrative Fees:

As a result of the United States Supreme Court’s decision in *Freeman v. Quicken Loans, Inc.*, 132 S. Ct. 2034 (2012), Brokerage Firms may charge administrative fees, either for services performed by the Broker or the Brokerage Firm, in addition to the Brokerage Firm’s commission. 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); dividing or splitting fees amongst a single settlement service provider is not

All defined terms referenced in the Commission Position statements are codified in 4 CCR 725-1, Chapter 1 of the Rules regarding Real Estate Brokers.

prohibited. A Broker and their Employing Broker or Brokerage Firm is considered a single provider of settlement services and fees may be split amongst them.