

Commission Position 26 – Reducing the Buyer Pool

(Recodification adoption June 7, 2022: CP-44 Commission Position on Coming Soon Listings recodified to CP 26 - Reducing the Buyer Pool)

The Commission has received inquiries and complaints regarding Brokers who advertise properties as coming soon, require a specific contract software, and offer a reduced cooperation fee to Brokers who work for certain Brokerage Firms, are located in a specific geographical location (e.g., a city Broker representing a buyer looking to purchase a property in a mountain resort community), or represent the buyer in different capacities (i.e., Transaction-Broker vs. Single Agent). The common complaint the Commission receives about these types of marketing limitations is that they are not in the best interest of the Consumer, and they reduce the Consumer's property competitiveness in the marketplace. While the Commission does not impose specific requirements on how a property is marketed for sale or lease, a Broker must comply with the license law.

Among other duties, sections 12-10-404(1) and 12-10-407, C.R.S., require a Broker acting as a Single Agent or a Transaction-Broker engaged by a seller or a landlord, to “exercise reasonable skill and care” for the seller or landlord. A Single Agent is also required to “promote the interests of the seller or landlord with the utmost good faith, loyalty, and fidelity”.

During the negotiation of the Listing Contract, and as part of the Broker's duty 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”. (*see* C.R.S. § 12-10-404(1)(c)(IV)). This includes benefits or risks of limiting a property's market exposure, requiring a specific contract software, and tiering the cooperation fee based on a specific Brokerage Firm, the geographical location of the Broker, or different working relationships. Motivation for these types of marketing limitations should be carefully considered. Are the intended marketing limitations for the benefit of the Consumer or the Broker? What are the advantages and disadvantages for the Consumer? These types of marketing limitations that reduce the seller or landlord's buyer/tenant pool and risk a lower price and possible extension of the days on the market for the benefit of the Broker could 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 violating their fiduciary duties. Finally, a Broker who places the importance of receiving a commission or other Broker benefits above their duties, responsibilities, or obligations to the seller or landlord (e.g., not presenting all offers regardless of contract software) is endangering the interest of the public.

Ultimately, the seller or landlord must be fully informed about how, when, and where the property will be marketed and approve such marketing if it potentially reduces the buyer or tenant pool. A Broker who fails to advise a seller or landlord of the material benefits or risks of their marketing plan, and does not obtain the seller's or landlord's approval, may be subject to discipline by the Commission. Any limitations on marketing efforts that might be viewed as reducing the number of buyers or tenants viewing a seller's or landlord's property must be memorialized in writing in the Listing Contract prior to any marketing being performed.