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Marcia Waters, Director
Colorado Department of Regulatory Agencies
Division of Real Estate
1560 Broadway, Suite 925
Denver, Colorado 80202

RE: PROPOSED MODIFICATIONS TO COMMISSION RULE F-7

Director Waters:

The Colorado Association of REALTORS® (“CAR”) is in receipt of the Colorado Real Estate Commission’s (“Commission”) proposed modifications to Commission Rule F-7. CAR has reviewed the proposed modifications with Association leadership, a cross-section of membership and other interested parties. I am writing today to express CAR’s concerns related to the modifications as proposed.

At the outset, it is important to point out that CAR was the primary driving force behind the original development and implementation of the F Rules in 1971. As an Association, we understand the need for consistency and quality in the contract documents that REALTORS® and other licensees use to facilitate real estate transactions throughout the State of Colorado. Generally, the Commission approved forms are outstanding documents and CAR remains committed to actively assisting the Commission and the Forms Committee with the review, development and implementation of any form(s) the Commission promulgates.

In its Conway-Bogue decision, the Colorado Supreme Court flatly rejected the state and local bar associations’ contention that a broker’s completion of “standard and approved” forms constituted the unauthorized practice of law. The court clearly recognized the public’s interest in allowing brokers some latitude in completing such forms on behalf of their clients. The Court also acknowledged the inherent difficulty in specifically defining that latitude.

Reaching its decision, the Colorado Supreme Court approvingly invoked language from the Minnesota Supreme Court (Covern v. Nelson) stating: ***“The line between what is and what is not the practice of law cannot be drawn with precision. Lawyers should be the first to recognize that between the two there is a region wherein much of what lawyers do every day in their practice may also be done by others without wrongful invasion of the lawyers’ field....ordinary conveyancing, part of the every day business of the realtor, is within that region.”***



The Court further cited: ***“We do not think the possible harm which might come to the public from the rare instances of defective conveyances in such transactions is sufficient to outweigh the great public inconvenience which would follow if it were necessary to call in a lawyer to draft these simple instruments.”***

Presumably with some intention, the Court did not specifically define the scope of conveyancing instruments that actually could be completed by brokers. Instead, they simply made reference to “standard and approved” forms. In order to provide some clarity, CAR persuaded the Commission to develop the F Rules and promulgate “Commission approved” forms roughly 45 years ago. As a result of the practical impossibility of developing a “Commission approved” form to address every transactional eventuality, the legislature, courts and Commission have also recognized a broader and more amorphous category of “standard” forms that brokers may complete without venturing in to the realm of unauthorized practice of law.

In 1993, the Colorado legislature codified a broker’s authority to complete forms in a similarly broad manner. C.R.S. 12-61-803(4) says that ***“[brokers] may complete standard forms including those promulgated by the Colorado real estate commission...”*** Based simply on our state’s license law, it seems clear that a real estate broker’s statutory authority to complete forms is in fact even broader than the current Commission Rule F-7, which *mandates* a broker’s use of Commission approved forms, if available. Regardless of that interpretation, the expansive nature of the statute demonstrates the legislature’s unwillingness to further define or limit a broker’s ability in this regard. Of course, the legislature does appropriately mandate that a broker advise a client to consult an attorney prior to executing any forms (including Commission approved forms).

CAR appreciates the Commission’s desire to explicitly define a “standard form” (something both the Colorado Supreme Court and the Colorado legislature have been unable and/or unwilling to do for almost 60 years). That said, CAR believes the currently proposed revision to Commission Rule F-7 goes too far.

As proposed, F-7 creates an exhaustive list of criteria that, at a minimum, will drag an individual attorney into a broker’s use of any form that is not promulgated by the Commission. Moreover, any such form will pro-actively require an annual review by an attorney. While these modifications may create additional, recurring revenue opportunities for attorneys, they create a very substantial and unnecessary burden on brokers and the consumer public.

In addition to taking an extremely narrow view of a broker’s statutory authority under C.R.S. 12-61-803(4), the proposed Rule modification and explicit definition of “standard form” creates unreasonable mandates on the parties to a transaction. As an example, if a client/principal wanted their broker to simply fill in the names of parties in an assignment of lease form that was provided to the broker by their client, the parties would need to do the following: 1) ensure that the document was prepared by the client’s attorney; 2) ensure that the document was reviewed at least annually by the client’s attorney; 3) add an ALL CAPS disclaimer to the client’s document identifying the client’s attorney; 4) ensure that the document met F-7’s distinguishable spacing and text requirements; 5)

determine that the document is “intended” to be used repeatedly by the broker; and 6) provide (at least) annual training on the use of the form.

As described above, the proposed rule modification will create unnecessary cost, delay and general frustration to the transaction. Those unnecessary costs will ultimately be borne by either the broker or the parties to the transaction and may create unnecessary transactional contention. In addition, delays and deal frustration always have the potential of derailing an otherwise viable real estate transaction.

In addition to the exceptionally narrow interpretation of license law and practical implications it would have for the broker and parties to a transaction, some elements of the proposed definition of “standard form” will also create difficult enforcement criteria for the Commission. Specifically, the requirements that 1) the form be “intended” to be used repeatedly by the broker; 2) that a broker/firm at least annually consult with an attorney regarding the broker’s (or their client’s) form; and 3) that the brokerage is providing at least annual training on the form will be potentially hard for audit/complaint respondents to demonstrate, and Commission investigators to quantify, from an enforcement perspective.

A final concern we have with the proposed rule modification relates to the potential for conflicts of interest among Colorado attorneys in preparing/reviewing forms for broker use. The proposed rule will require an attorney-client relationship be established between a broker and the attorney who is preparing/reviewing standard forms on the broker’s behalf. While there is obviously no shortage of lawyers generally, the number of lawyers who are capable of preparing and annually reviewing a standard form set *with efficiency* is far more limited. Within a few years after implementation of this proposed rule, it is likely that brokers will have some difficulty in identifying potential attorneys that are both efficient in their form review practice and not, in some manner, conflicted from doing same. Moreover, even the consumer public may eventually have difficulties in identifying law firms to handle disputes between parties where a firm has not previously been involved in the review or preparation of a disputed standard form.

While I am not sure that empirical evidence exists to demonstrate significant historical misuse of standard forms or resulting public harm, CAR agrees that Commission Rule F-7 should have some additional instruction and clarification with regard to a broker’s use of such a form. The additional clarification should simply be a restated emphasis that a broker is responsible for exercising reasonable skill and care in the use of all forms, including any “standard” forms. **As an example of the type of F-7 language revision(s) that we would support, I have attached some modifications to the rule currently being proposed.**

In the event a broker utilizes a standard form in manner that is inconsistent with the attached, or fails to offer reasonable care in their selection and use of a standard form, they are subject to Commission investigation and discipline. In the event a broker is engaging in the unauthorized practice of law in the creation or preparation of a standard form, they are subject to additional state review and discipline. To the extent a broker is failing to provide reasonable care in their use of a standard form

and such failure results in damages to their client, a broker is subject to civil liability for the client's damages. In short, there are many reasons that a broker needs to be performing consistently with license law and Commission regulations that do not necessitate an unfounded narrowing of their ability to utilize standard forms without the burden of an annual review by an attorney.

CAR has enjoyed a long-term and successful partnership with the Colorado Real Estate Commission. Our roughly 24,000 REALTOR® members are among the industry's most dedicated, trained, experienced and ethical practitioners. Regardless of the Commission's final decision on this matter, we will continue to educate our members on compliance with the F Rules and all other aspects of Commission regulation and license laws. Thank you for taking this letter under consideration and all of your efforts to balance the interests of real estate brokers and the consumers they serve.

If you have questions or care to discuss any of this further, please do not hesitate to contact me at any time.

Regards,



Scott Peterson
General Counsel
Colorado Association of REALTORS®

cc: Alan Lovitt, 2015/2016 Chair – Colorado Association of REALTORS®
Tyrone Adams, CEO – Colorado Association of REALTORS®

SUGGESTED MODIFICATIONS - F-7 Use of Forms

Pursuant to 12-61-803(4), C.R.S., a broker is authorized only to complete forms and to complete only “standard forms including those promulgated by the Colorado Real Estate Commission.” Therefore, there are two categories of forms that a licensed broker may complete: (i) forms promulgated by the Commission (“Commission-Approved Form(s)”), and (ii) standard forms. C.R.S. 12-61-803(4) requires that the broker advise parties that both categories of forms have important legal consequences and that the parties should consult legal counsel prior to signing any form.

(a) If there is a Commission-Approved Form applicable to the transaction or circumstances, the broker must use the Commission-Approved Form. Brokers can see the current list of Commission-Approved Forms at the Commission/DORA website online. The only exception to the required use of an applicable Commission-Approved Form is a broker’s use of a listing contract drafted by an actively licensed attorney in lieu of the Commission-approved listing contract.

(b) Any form that is not a Commission-Approved Form shall be considered a standard form. Brokers should use extreme caution when utilizing standard forms and will be held to the same standard of care in their selection, use and completion of a standard form as a Commission-Approved Form. At a minimum, a standard form shall:

- 1) Not be used to violate state or federal law or Commission Regulations; and
- 2) Be appropriate to the transaction or circumstance in which it is used; and
- 3) Be current and not outdated or obsolete; and
- 4) Be understood by the broker; and
- 5) Be completed and used correctly and in compliance with then current law and Commission Regulations; and
- 6) Be a Commission-approved form if it is appropriate to the transaction or circumstance in which such a form is to be used, except as stated in (a) above.