

**DENVER METRO**  
ASSOCIATION OF REALTORS®

# 2017 DMAR REPORT

ON COLORADO REAL ESTATE  
COMMISSION





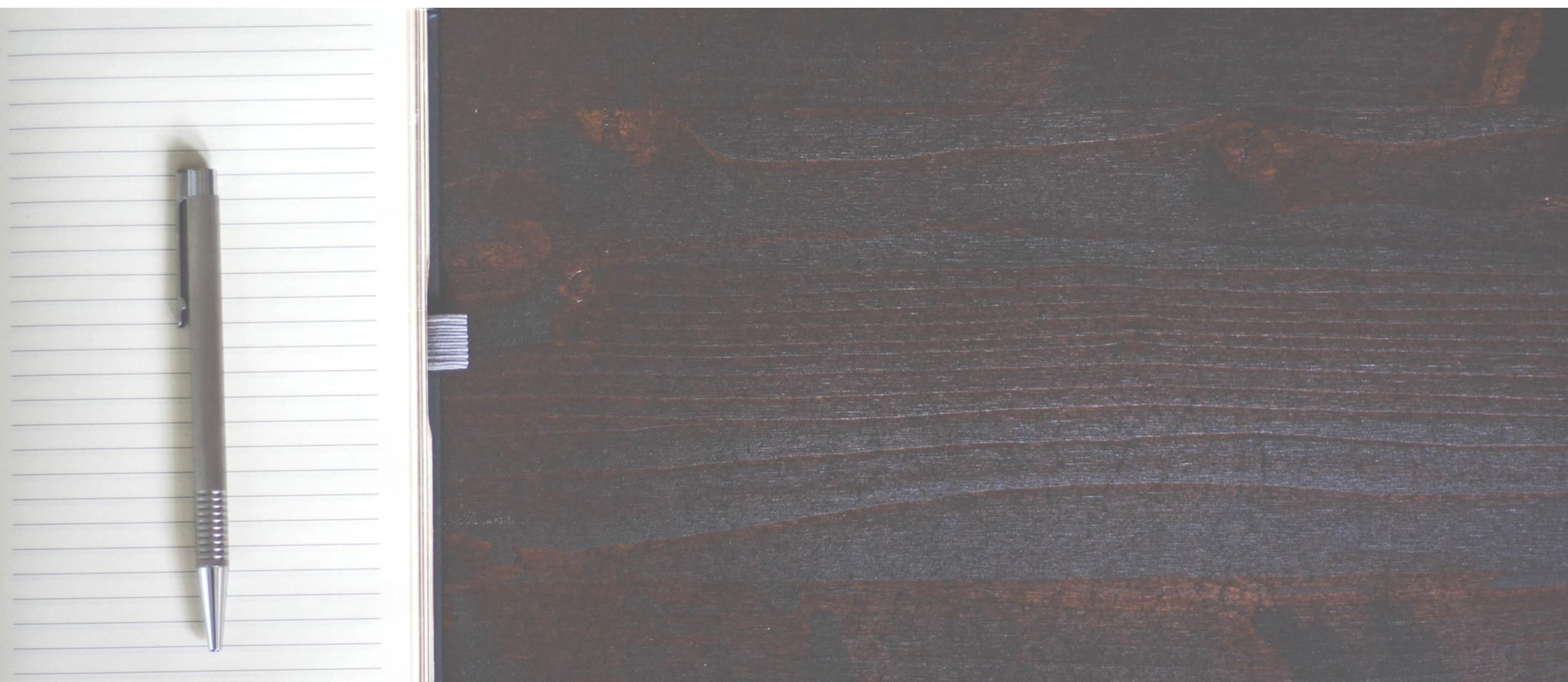


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# EXECUTIVE SUMMARY

Broker disciplinary cases resolved in 2016 totaled 248. This number represents a substantial decrease from the previous year which closed with 301 disciplinary resolved cases. This decline in disciplinary cases is likely caused, at least in part, by an increase in the number of complaints against brokers in 2016 (1551 complaints in 2016 compared to 1328 in 2015) and scarce resources at the Division of Real Estate to deal with this increase.

In 2016, 174 licensees faced discipline for failure to meet continuing educational requirements. This violation was by far the most common violation of license law for 2016 and has been for several years. Continuing its trend, the Division of Real Estate randomly audited 1012 brokers in 2016 for continuing education compliance. Licensees should ensure compliance with continuing education requirements. Licensees should also be aware that the three year compliance period for continuing education will soon change by ending on a calendar year basis rather than on each licensee's individual license anniversary date.

Both 2016 and 2015 also saw a substantial rise in cases involving the failure to make appropriate brokerage disclosures in writing. Licensees should make certain to either provide the appropriate brokerage disclosure form or secure an executed listing/exclusive right to buy contract and ensure that a copy of such form or contract is retained in the broker's file.

2016 also saw an increase in brokers disciplined for record retention issues. Brokers are advised to ensure they are retaining required records (discussed further below) for not less than the statutory four year period.



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# ANALYSIS OF 2016 LICENSE LAW VIOLATIONS

## A. EDUCATION VIOLATIONS

Unsurprisingly, the top violation of Colorado brokerage license law for 2016 was the failure to comply with continuing education requirements. With 174 brokers disciplined for violation of continuing education rules in 2016 (a decrease of 21% from the previous year), brokers overall performed substantially better than previous years in compliance with continuing education requirements. These violations typically resulted in light discipline, including fines (hundreds of dollars) and additional coursework, but not public censure or other harsher disciplinary penalties. However, repeat offenders are likely to face harsher discipline.

The Colorado Division of Real Estate is continuing to conduct random education record audits of licensees each calendar quarter. At 1012 brokers audited for 2016, the number of total continuing education audits appears to be up slightly compared to previous years.

It is critically important for licensees to ensure compliance with continuing education requirements. As a reminder, brokers must complete 24 hours of continuing education credit every 3 years, including the mandatory 4 hour annual update course for each of the three years in the license cycle. Brokers are responsible for retaining records of completion for the prior continuing education cycle.

On June 1, 2017, Governor Hickenlooper signed into law a bill which, among other things, will change the license renewal date for Colorado real estate brokers such that a Colorado real estate broker license cycle will end on December 31 of the third year following issuance or renewal. This new cycle should also govern the continuing education compliance period. While the Commission is expected to engage in rulemaking to enact specific changes, licensees should expect a change in the future such that the continuing education compliance period will close at the end of the calendar year (December 31) in the third year of each broker's license cycle as opposed to ending on each licensee's individual the license anniversary date.



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# ANALYSIS OF 2016 LICENSE LAW VIOLATIONS

## B. BROKERAGE DISCLOSURES

Disciplinary records from 2016 show that brokers continue to accepted responsibility for a relatively high number of violations of the rules and statutes requiring the provision of written brokerage disclosures to consumers. As the Commission continues to focus on consumer protection, this regulatory issue remains in the spotlight two years running now.

As a reminder, every brokerage firm must have a clear brokerage relationship policy which identifies the types of relationships that brokers can enter into with clients. Licensees should be clear on the types of brokerage relationships they are authorized to enter into under their brokerage relationship policy.

Brokers must understand that when they enter into a brokerage relationship with a client, they must either: (i) provide a party with the appropriate written brokerage disclosure form; or (ii) enter into a written brokerage relationship using the appropriate form exclusive right contract. Brokers must also make appropriate brokerage disclosure to the other unrepresented counterparty. Additionally, brokers must remember to document in writing any change in brokerage relationship.

Brokers should also recall that the trigger for making brokerage disclosures to a potential client is eliciting or accepting confidential information from such party.

Licensees should make certain to either provide clients the appropriate brokerage disclosure form or secure an executed listing contract and ensure that a copy of such form or contract is retained in the broker's file. Ultimately, it is critically important for brokers to provide appropriate broker disclosure forms in a transaction.



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# ANALYSIS OF 2016 LICENSE LAW VIOLATIONS

## C. ACCOUNTING VIOLATIONS

Brokers continue to engage in conduct constituting various types of accounting violations. Common violations of this type include:

- failing to perform the mandatory monthly reconciliations of trust accounts
- failing to maintain proper trust or escrow accounts designated as such with the financial institution holding the funds
- failing to timely remit or account for money belonging to others
- converting funds of others
- comingling the licensee's funds with funds of others
- failing to properly account for and manage trust funds
- not disclosing markups of vendor charges or profits from affiliated businesses, among certain other accounting violations

Many of these cases involve brokers acting as property managers without the requisite understanding of the trust accounting and record keeping requirements.

This issue is one that the Commission takes very seriously because of the potential for substantial consumer harm. Accounting violations and mismanagement of funds belonging to others is a leading cause of license revocation. However, brokers seemed to be doing a better job where accounting is concerned in 2016. This is reflected by a substantial and sustained downtrend in the number of violations year on year for a total of 10 such disciplinary instances involving accounting related violations in 2016 compared with 24 for 2015 and 33 for 2014.



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# ANALYSIS OF 2016 LICENSE LAW VIOLATIONS

## D. NEW TREND: RECORDKEEPING PROBLEMS

For the first time in years, the Commission disciplined a number of brokers for failing to keep records required under the Commission rules and statutes. Prior years saw either zero or a very small number of such violations, whereas 2016 saw 10 instances of violations of the recordkeeping rules and statutes. The Commission also addressed this issue in a recent newsletter.

Brokers are reminded that they must keep required transaction and accounting records in their possession for inspection by Division investigators for a period of four years. While such documents may be kept in an electronic format, they must be available for viewing or printing by investigators. However, keeping with the best practices in trust accounting, employing brokers maintaining trust accounts should print, sign and store a hardcopy of the monthly reconciliation worksheet for each brokerage trust account.



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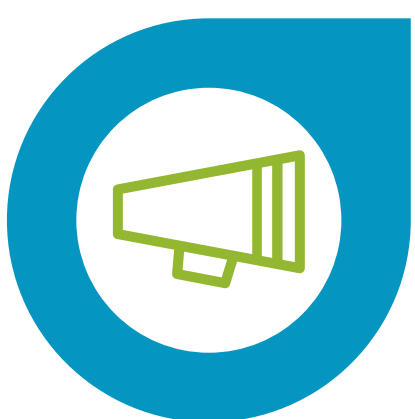
## E. CRIMINAL ISSUES

Colorado licensees continue to get into criminal trouble impacting their real estate licenses, but at a much lower numbers than previous years. 2016 saw just 8 such violations compared with 22 and 20 such violations in 2015 and 2014 respectively. These cases involve brokers admitting to or being convicted of criminal impacting their real estate license, including failure to self-report a criminal plea or conviction to the Commission.

The Division of Real Estate generally receives an alert whenever a licensee is arrested anywhere in the United States. The Division will then monitor the case for a criminal plea or conviction that would implicate a violation of Colorado license law. For this reason, it is vitally important that licensees understand whether their criminal plea agreement or conviction implicates Colorado license law and, if it does, self-report in writing to the Division of Real Estate within the 30 day window following the plea or conviction. The best practice is for brokers facing criminal charges to understand the brokerage license implications before entering into a plea arrangement or going to trial on a criminal case.



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# COMMISSION INVESTIGATIONS

According to Division of Real Estate records, in 2016 the Colorado Division of Real Estate received 1551 complaints against real estate brokers. A substantial portion of these complaints were dismissed at intake for various reasons and were not further investigated. However, this number of complaints represents an almost 17% increase in complaints filed against brokers compared with 2015 (1328 broker complaints were filed in 2015). Complaints against brokers have also increased steadily since 2010.

Currently, the barriers to filing a complaint against a broker are low; for example, complaints may now be filed anonymously through the Division of Real Estate’s website or an anonymous letter to the Division. The increase in complaints filed with the Division of Real Estate has resulted in longer timeframes for investigations and resolution of disciplinary cases. Currently, licensees under investigation can sometimes wait several months or even years before an investigation is finalized and a resolution is proposed.

Brokers are reminded that some Colorado real estate broker errors and omission insurance policies (often referred to as E&O policies) provide for defense of regulatory claims, including complaints to the Division of Real Estate. Further, under many of these E&O policies, a letter from the Division (referred to as an E-21 letter) notifying a broker of a complaint often qualifies as a “claim” under broker E&O policies requiring a broker to notify an E&O carrier of such claim in order to secure coverage under an E&O policy.



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# COMMISSION DISCIPLINE

With regard to the type and severity of discipline, the Commission addressed about 50 fewer cases in 2016 than 2015, representing about an 18% decrease in disciplinary cases year on year. With overall fewer cases addressed in 2016, the number of disciplinary cases across the disciplinary spectrum was lower. However, other than an increase in the average fine, the same general disciplinary trends prevail where numerous or serious violations of license law garner relatively harsh discipline, including steeper fines, public censure, and, in certain cases, probation, suspension, or revocation. By contrast, minor infractions typically result in smaller fines and coursework.

Regarding 2016 discipline, the average actually-paid fine was \$760. This represents an increase from an average actually-paid fine of \$620 in 2015. To a degree, this average level of fine reflects the relatively high number of brokers paying comparatively small fines for first time continuing education violations. Other, non-education related license law violations tend to result in higher fines. For example, the highest fine imposed for 2016 for broker misconduct was \$34,500.00 which is a substantial increase over the top fine imposed in 2015 of \$22,000.00. In some respects, the increase in average fine reflects the Commission catching up with the increase to the statutorily mandated administrative markup from 10% to 15%.

The average disciplinary case imposed slightly less than 13 hours of remedial coursework in both 2016 which is a slight decrease from previous years. In 2016, 13 licensees faced revocation, six faced suspension and eight faced probation. By contrast, in 2015, 23 licensees faced revocation; six faced suspension; and nine brokers faced probation. In 2016, 23 brokers faced public censure, whereas in 2015, 42 brokers were subject to public censure which process includes publication on the Commission’s website and inclusion in the Commission’s quarterly newsletter.



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the highest fine imposed for 2016 for broker misconduct



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## COMMISSION REGULATORY & POLICY ISSUES

### A. MINIMUM SERVICE LISTINGS AND “MLS ENTRY ONLY” LISTINGS

Over the last several years, the Commission imposed increasingly harsher discipline for Colorado brokers who do not provide their clients the “uniform” or minimum duties as set forth in the brokerage statutes and Position Statement 36. For its part, the Commission is clear that Colorado brokers may not contract for less than the minimum brokerage duties when acting as a broker.

The Commission has investigated several licensees, including some that work with builders, who have entered into “MLS Entry Only” or “minimum service” listings. Discipline for these cases has become increasingly harsh; the Commission’s standard proposed discipline includes public censure, fines in the thousands of dollars and remedial coursework.

Further, in both the 2017 and the 2016 Commission Annual Update Course address this issue. Thus, brokers still engaged in “limited service listings” do not have much of an excuse for continuing to engage in this business model. In any event, the Commission takes this issue seriously and will continue investigate these types of relationship and impose discipline where a broker is engaged in a brokerage relationship that does not meet the minimum brokerage duties.



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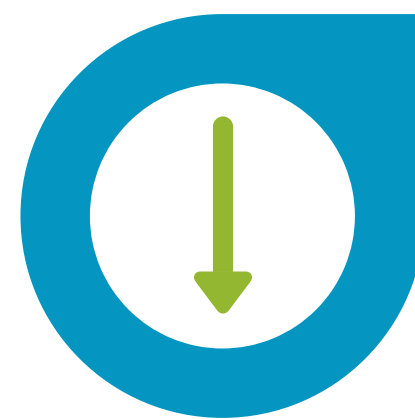
# COMMISSION REGULATORY & POLICY ISSUES

## B. ANTICOMPETITIVE BEHAVIOR

The Commission has recently received complaints and heard cases involving brokers' anticompetitive conduct. Examples of such conduct include brokers placing listing language in the MLS specifying a lower coop commission paid to certain brokerage firms. Other examples include communications with sellers of listed properties attempting to dissuade them from using certain brokerage firms. A few such examples are also included in the 2017 Annual Commission Update course.

While the Commission does not specifically regulate such anti-competitive behavior, it has approached discipline of such conduct in two ways. First, the Commission will analyze whether a licensee was acting consistently with license law and the duties owed to his or her client. For example, if a seller is not aware of a reduced coop commission targeting certain business models or brokerage firms, this may implicate a failure to perform certain statutory obligations owed to a seller. Second, because the Commission does not regulate anticompetitive behavior, it has, in certain cases, referred complaints to the Federal Trade Commission for investigation of Colorado brokers.

The best practice is for brokers to avoid targeting specific business models or brokerage firms. Otherwise, a broker should consult with legal counsel before engaging in such conduct.



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# COMMISSION REGULATORY & POLICY ISSUES

## C. RECORD RETENTION

Based on disciplinary records, comments at Commission meetings, recent publications and Annual Commission Update course materials, the Division seems aware that licensees are: (i) not clear on specifically which records must be retained, (ii) not retaining all of the records they are required to retain under the license laws.

As a reminder, licensees are required to retain all executed instruments that relate to a client's engagement of such licensee or pertain to the consummation of the leasing, purchase, sale or exchange of real property in which the broker may participate as a broker. (See CREC Rule E-4). This requirement includes retention of:

- executed listing and brokerage disclosure documents, (e.g. Exclusive Right to Buy or Sell contracts, brokerage disclosures – even if unsigned)
- contract documents (e.g., Contracts to Buy and Sell Real Estate, Agreements to Amend/Extend, Inspection Resolutions, etc.)
- closing documents (e.g. deeds, settlement statements, closing disclosures, etc.). Such records must be kept for a period of four years. Such records may be kept in electronic format.

Employing brokers responsible for trust accounts must also keep reconciliation records, including a monthly trust account ledger, trust account journal, related bank statements and a reconciliation worksheet. (See CREC Rule E-1(o)). Because the Commission expects an employing broker to perform such reconciliation monthly, the best practice is for employing brokers reconciling trust accounts to print out, sign or initial, and retain in hard copy form the monthly reconciliation worksheet.



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# CONCLUSION

## TOP LICENSE LAW ISSUES ABOUT WHICH BROKERS SHOULD BE AWARE:

### Continuing Education Violations

Continuing education compliance is an obvious problem area for brokers. Brokers need to ensure compliance with continuing education requirements, especially because the Division audits brokers every quarter for continuing education compliance. Brokers should also be aware of the likely upcoming change to the compliance cycle dates.

### Record Retention

Brokers are reminded that they must keep required transaction and accounting records in their possession for inspection by Division investigators for a period of four years. While such documents may be kept in an electronic format, they must be available for viewing or printing by investigators. However, keeping with the best practices in trust accounting, employing brokers maintaining trust accounts should print, sign and store a hardcopy of the monthly reconciliation worksheet for each brokerage trust account.

### Brokerage Disclosures

Brokers must understand that when they enter into a brokerage relationship with a client, they must either: (i) provide a party with the appropriate written brokerage disclosure form; or (ii) enter into a written agency relationship using the appropriate form exclusive right contract. When acting as a broker in a transaction, brokers must also make appropriate brokerage disclosure to the other unrepresented counterparty. Brokers need to focus on ensuring that either the correct disclosure is made or the client signs an exclusive right contract with such broker. Brokers also must be careful to document a change in relationship during a transaction.