

2019 DMAR REPORT

ON THE COLORADO REAL ESTATE COMMISSION





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EXECUTIVE SUMMARY

Broker disciplinary cases resolved in 2018 totaled 318. This number represents a slight decrease from the previous year which closed with 324 disciplinary resolved cases. This decline in disciplinary cases is likely linked, at least in part, to the slight decrease in the number of complaints against brokers in 2018 which totaled 1598 (compared to 1661 complaints in 2017).

In 2018, 198 licensees faced discipline for failure to meet continuing educational requirements. This violation was by far the most common violation of license law for 2018 and has been for at least the last five years. 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 rather than on each licensee's individual license anniversary date.

Trust accounting issues continue to be a problem for brokers, especially property managers. Given the severity of discipline meted out to non-compliant property management operations, it is important for brokerage firm owners and employing brokers to redouble efforts to ensure compliance with trust accounting obligations.

For the last three years, the Commission has seen an increasing number of cases involving the failure to make appropriate brokerage disclosures in writing. Prior to undertaking any brokerage activities, 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.

2018 also saw a record number of brokers disciplined for record retention issues. Both brokers and brokerages 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 2018 LICENSE LAW VIOLATIONS

A. EDUCATION VIOLATIONS

Unsurprisingly, the top violation of Colorado brokerage license law for 2018 was the failure to comply with continuing education requirements. With 198 brokers disciplined for violation of continuing education rules, Colorado brokers performed slightly better than previous years in compliance with continuing education requirements (217 CE related cases in 2017).

These violations typically resulted in light discipline, including relatively low fines (hundreds of dollars) and additional remedial 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. Historically, the Division of Real Estate has audited roughly 1000 brokers each calendar year for continuing education compliance.

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 in each three-year cycle, 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.

The Commission is currently in the process of transitioning brokers to a 3-calendar year license cycle in place of the old system which used each broker's individual anniversary date. Brokers that renew their license in 2018, 2019, or 2020 will receive license good for the remainder of the renewal year plus two years until December 31st; from that point forward, each licensee will receive a license good for three calendar years.

The transition to the calendar year cycle is causing confusion about how to comply with continuing education requirements because the transition will necessarily leave some brokers with less than three years to satisfy all 24 credits hours. Some brokers may find it difficult to complete three unique annual update classes during the shortened transition period. The Division of Real Estate has therefore provided some flexibility for continuing education compliance during the less than the "2 year plus" transitional period. Specifically, if necessary, brokers may take just two unique annual update classes during the "2 year plus" transition period and they may satisfy the remaining 16 continuing education required credit hours with elective courses.

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ANALYSIS OF 2018 LICENSE LAW VIOLATIONS

B. SUBSTANTIAL INCREASE IN TRUST ACCOUNTING VIOLATIONS

The Commission disciplined dramatically more brokers for trust accounting violations than in any prior year when DMAR has tracked broker discipline. By way of example, trust accounting and related violations climbed to a total of 53 in 2018 from 16 in 2017.

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 or diverting 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

Many of these cases involve brokers acting as property managers without the requisite understanding of the trust accounting and financial record keeping requirements, including monthly reconciliations. However, no brokerage is immune and brokerages engaging only in buy/sell transactions were still involved in these trust accounting types of cases.

These trust accounting issues are the types of cases that the Commission takes very seriously because of the potential for substantial consumer harm. Because the Commission perceives these types of violations as serious, discipline tends to be harsh. For example, accounting violations and mismanagement of funds belonging to others is a leading cause of license revocation.

Further, the Division staff auditing brokerage firms has changed and several of these staffers were formerly auditors for the Colorado Department of Revenue. New audit staffers appear to have a different approach and different priorities when compared to former audit staff. This new approach to audits may be the cause, at least in part, to the higher level of disciplinary cases involving trust accounting issues.



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ANALYSIS OF 2018 LICENSE LAW VIOLATIONS

C. BROKERAGE DISCLOSURES

Disciplinary records from 2018 show a relatively high number of violations relating to the required provision of written brokerage disclosures to prospective clients and consumers. Specifically, 2018 records show a total of 39 violations of the rules and statutes requiring brokers to make appropriate written disclosures of brokerage relationships to clients and consumers. In 2017 we experienced a similarly high number of brokerage-disclosure violations at 35.

As the Commission continues to focus on consumer protection, this regulatory issue remains in the spotlight two years running. Importantly, we have found that the failure to make appropriate written brokerage disclosures in a case involving actual consumer harm typically receives relatively harsh discipline.



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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:

- provide a party with the appropriate written brokerage disclosure form
- 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 are reminded to ensure that brokerage disclosure must be made when brokers move past the “small talk” stage with a potential client or consumer; the specific trigger for making brokerage disclosures to a potential client or consumer is generally 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. It is critically important for brokers to provide appropriate written broker disclosure forms in a transaction.



ANALYSIS OF 2018 LICENSE LAW VIOLATIONS

D. RECORDKEEPING CONTINUES TO BE A PROBLEM FOR BROKERS

The Commission continued to discipline a relatively high number of brokers for failing to keep records required under the Commission rules and statutes. Before 2016, the Commission saw either zero or a very small number of such violations on an annual basis.



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instances of violations of the recordkeeping rules and statutes in 2018.

By contrast, there has been an increase in these violations culminating in 18 such violations in 2018. Further, illustrating the importance of this issue as a regulatory hot topic, the Commission raised this common license law violation as a significant issue in the 2019 Commission annual update class.

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. This requirement is imposed not only on brokerage firms, but also upon individual licensees.

The records that must be maintained include not just contract and closing documentation for closed transactions, but also contract documents where a transaction did not close. All CREC-approved and other standard forms that are used in a transaction should be maintained.

Financial documentation related to a given transaction must also be kept for four years. While such documents may be kept in an electronic format, they must be available for viewing or printing by CREC investigators upon request.



ANALYSIS OF 2018 LICENSE LAW VIOLATIONS

E. NONDISCLOSURE OF ADVERSE MATERIAL FACTS

For the first time since such disciplinary records were tracked, there is a notable number of disciplinary cases involving a failure by either a listing agent or a transaction broker to disclose adverse material facts to a buyer in a real estate transaction.

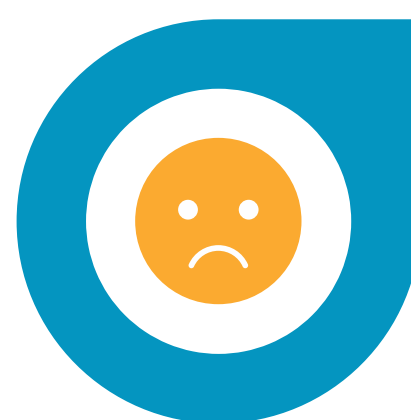
These types of nondisclosure disputes are common civil claims against brokers where the buyer is surprised to learn some adverse aspect about a property after closing and claims monetary losses or damages as a result. The increase in such cases at the Commission suggests that disgruntled buyers are filing complaints with the Commission as a means to address their grievance.

As a reminder, listing agents and transaction brokers always have an independent obligation to disclose adverse material facts about a property about which facts such broker actually knows. Listing brokers also must ensure that sellers provide written disclosure of adverse material facts themselves.

While the Commission does not have the disciplinary authority to require a broker to pay money damages to an injured or complaining party, the Commission can and does impose harsh discipline where a listing broker conceals adverse information about a property that should fairly be disclosed to a buyer.



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COMMISSION INVESTIGATIONS AND AUDITS

According to Division of Real Estate records, in 2018 the Colorado Division of Real Estate received 1598 complaints against real estate brokers. This number is just below the 1661 complaints filed against brokers in 2017. Complaints against brokers have more or less remained at these same levels for the last few years. Fortunately, a substantial portion of these broker complaints are dismissed at intake for various reasons and were not further investigated. Typically, complaints over which the Commission has no jurisdiction or that are unrelated to Colorado license law are dismissed at the intake level.



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randomly selected brokerage firms across the state who were part of the Commission's random audit program.

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 written letter to the Division and only a small amount of time is needed to file. The consistently high number of complaints filed with the Division of Real Estate over the last few years has sometimes results in long 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. Unfortunately, there is no applicable statute of limitations barring the Real Estate Commission from pursuing formal disciplinary charges even after many years have passed since the relevant events transpired.

Separate and apart from complaint-based investigations, the Commission maintains a random audit program. In 2018, the Commission randomly selected 34 brokerage firms across the state for random audit. This audit process generally requires production of certain required documents, including an office policy manual, brokerage relationship policy, among others, as well as a description of the types of brokerage activities ongoing at the target brokerage. Failure to respond or responses that indicate compliance problems can lead to a formal complaint.

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.



COMMISSION DISCIPLINE

With regard to the type and severity of discipline, at 318 disciplinary cases in 2018, the Commission addressed roughly the same number of disciplinary cases it did in 2017 (324). However, other than a steady increase in the average fine per case, the same general disciplinary trends prevail; 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.

Commission data also shows that of the 34 random audits conducted in 2018, only 7 resulted in discipline against the brokerage for employing broker.

Regarding 2018 discipline, the average actually-paid fine was \$1,175. This represents a steep increase over the last several years which saw annual jumps from \$770 in 2016 to \$1,157 in 2017.

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
- the lower number of more serious non-education related license law violations that tend to result in higher fines.

For example, the highest fine imposed for 2018 for broker misconduct was \$51,750 which is still a healthy increase over the top fine imposed in 2017 of \$46,000.

16 licensees faced revocation, 3 faced suspension and 17 faced probation.

41 brokers faced public censure, whereas in 2017, 55 brokers were subject to public censure.

The average disciplinary case imposed just under 12.5 hours of remedial coursework in 2018 which is a slight decrease from the previous year. In 2018, 16 licensees faced revocation, three faced suspension and 17 faced probation. By contrast, in 2017, 16 licensees also faced revocation; five faced suspension; and 25 brokers faced probation. In 2018, 41 brokers faced public censure, whereas in 2017, 55 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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COMMISSION REGULATORY & POLICY ISSUES

A. REVISIONS TO TRANSACTION BROKERAGE RELATIONSHIPS

In the 2017 ACU course, the Division attempted to convey the simple message that an agent was analogous to a coach for one side of a transaction (e.g. buyer or seller, but not both buyer and seller) and that a transaction broker was more like referee, with duties to both sides. The Colorado brokerage community have professed confusion about transaction brokerage, especially where one party is represented by a transaction broker and another is either unrepresented (doesn't want a broker) or is represented by an agent.

The Commission is presently reviewing a new draft rule addressing this issue. Under the proposed rule, rather than clarifying that the referee doesn't need to provide service to a party who doesn't want service, the draft rule would permit a transaction broker to choose to be a TB for one party only (e.g. just the buyer or just the seller).

An advantage of the proposed rule is that it would enable common existing practices by brokers. A disadvantage of the proposed new rule is will add significant complexity to the practice of brokerage, complexity that is unlikely to be understood and followed by most brokers. It will also require significant revisions to, and lengthening of, the listing and brokerage relationship disclosure forms.

The Commission will likely next consider the proposed rule in August of this year, and may vote on it at that time.

B. MINIMUM SERVICE LISTINGS AND "MLS ENTRY ONLY" LISTINGS

Over the last several years, the Commission imposed increasingly harsh discipline for Colorado brokers who do not provide their clients with all of the "uniform" or minimum duties set forth in the brokerage statutes and Position Statement 36.

As of March 7, 2019, the Colorado Court of Appeals weighed in on this issue and determined specifically that a Colorado broker may not contract to perform less than the uniform statutory brokerage duties. The Colorado Court of Appeals conclusively decided that Colorado brokers must perform all of the uniform statutory duties to maintain compliance with Colorado brokerage license law. This holding is binding on all Colorado brokers unless modified by the Colorado Legislature or the Colorado Supreme Court.



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COMMISSION REGULATORY & POLICY ISSUES

C. REGULATION OF TEAMS

While not directly reflected in the data extracted from the Commission's records, the Commission has recently discussed the regulation of teams. Specifically, the Commission is worried about problems with team advertising and supervision of team members. Commissioners have discussed the need for a comprehensive rule governing teams, including the requirement of a written team agreement, restrictions on team advertising, supervision of the team and team members, among other issues. Commissioners have directed Division staff to review the issue and propose the framework for a rule governing teams. Review of this issue at the staff level is ongoing.



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D. SCRUTINY OF EMPLOYING BROKERS

While the Commission's 2018 data actually suggests a downtick in disciplinary cases involving an employing broker's failure to supervise, rhetoric among the Commissioners suggests that the Commission is concerned about broker misconduct resulting from absentee or inattentive employing brokers.

It seems likely that the Commission will renew its scrutiny of employing brokers as a cause of broker misconduct. This seems especially true following adoption of the new rules raising the bar to becoming an employing broker in Colorado.

Employing brokers are reminded that all employees and contractors must be appropriately supervised whether such person has a real estate license or not. Further, employing brokers protect themselves and their broker associates by maintaining a written office policy manual, as well as periodically reviewing the office policy manual with broker associates and unlicensed employees and contractors. Further, employing brokers need to ensure that newly licensed brokers receive a high level of supervision which includes review of contract documents before execution and monitoring a transaction from contract to closing, among other heightened supervisory obligations.