

CP-46 Commission Position on Broker Disclosure of Adverse Material Facts

(revised 08/01/2017)

Brokers must disclose known adverse material facts.

In all real estate transactions, brokers are obligated to disclose known adverse material facts to all of the parties involved in the transaction. C.R.S. §§ 12-10-404(1)(c)(III), -404(3)(a), -405(1)(c)(III), -405(3)(a), -407(2)(b)(VI), and -407(2)(b)(VII). While clients have certain disclosure obligations, they are not addressed in this Position Statement. Brokers should refrain from advising clients about clients' disclosure duties, which may be different.

What is an adverse material fact?

During the course of a real estate transaction, a broker for either side of the transaction may become aware of certain information pertaining to the property. For example, a broker may become aware that the roof of the property was recently repaired, or that the property was hit by lightning several times, or that one of the owners of the home for sale is a smoker. Brokers may have difficulty in ascertaining whether to disclose such facts.

In order to answer these types of questions, brokers first should consider whether the information is material. Factual information is material when a reasonable person would have ascribed actual significance to the information. *Moye White LLP v. Beren*, 320 P.3d 373, 378 (Colo. App. 2013). Examples of material facts include facts affecting title, facts affecting the physical condition of the property and environmental hazards affecting the property. "Undisclosed facts are 'material' if the consumer's decision might have been different had the truth been disclosed." *In re Gattis*, 318 P.3d 549, 554 (Colo. App. 2013) (quoting *Briggs v. Am. Nat'l Prop. & Cas. Co.*, 209 P.3d 1181, 1186 (Colo. App. 2009)).

Next, brokers should consider whether that material information is adverse to a party's interest in the transaction. *See In re Fisher*, 202 P.3d 1186, 1196 (Colo. 2009); *Black's Law Dictionary* 62 (9th ed. 2009) (defining "adverse"). A broker must consider how that material information affects each of the parties in the transaction, not just the individual party they are representing. If that material information is contrary (i.e. "adverse") to the interest of one of the parties, then the broker must disclose it to all the parties.

An "adverse material fact" includes but is not limited to a fact that affects the structural integrity of the real property, presents a documented health risk to occupants of the property including environmental hazards and facts that have a material effect on title or occupancy of the property. Examples of adverse material facts include building or zoning violations, water damage to the flooring of property caused by marijuana plants, structural damage to a home caused by insect infestations or expansive soils or any type of lien filed against the property.

Brokers need only disclose known adverse material facts.

A broker need only disclose facts of which the broker has actual knowledge. *See Baumgarten v. Coppage*, 15 P.3d 304, 307 (Colo. App. 2000). For example, if a property owner knows that the foundation is crumbling but never tells his broker, the broker has no duty to disclose that fact because the broker has no knowledge. Because a broker must actually know the adverse material fact, a broker does not violate Commission rules if he or she did not know the adverse material fact but only should have known the fact.

The Commission believes that disclosure of known adverse material facts is an important requirement that brokers must undertake in order to protect Colorado buyers and sellers. Accordingly, real estate brokers must disclose those facts they actually know, that a reasonable person would ascribe actual significance to and are contrary to the interests of a party in a real estate transaction. To the extent a broker is unclear about whether a known fact that affects the physical property is adverse or material, the broker should err on the side of disclosing the fact.

Brokers must not disclose circumstances that may psychologically impact or stigmatize real property.

Understanding a broker's obligation to disclose known adverse material facts is as important as a broker's duty not to disclose information that may psychologically impact or stigmatize real property. Without the informed consent of the client, brokers must not disclose facts or suspicions regarding circumstances which may psychologically impact or stigmatize real property. C.R.S. §§ 12-10-404(2)(e), -405(2)(e), -407(3)(e). The law states that:

[f]acts or suspicions regarding circumstances occurring on a parcel of property which could psychologically impact or stigmatize such property are not material facts subject to a disclosure requirement in a real estate transaction.

C.R.S. § 38-35.5-101(1) (2016).

There is minimal guidance in Colorado as to what equates to a psychological impact or stigmatization of a property. However, Colorado law identifies two specific circumstances that brokers are prohibited from disclosing due to the potential stigmatization of that property to potential buyers.

The first circumstance that cannot be disclosed is when an occupant of real property was suspected to be or was infected with the human immunodeficiency virus (HIV) or diagnosed with acquired immune deficiency syndrome, or any other disease which has been determined by medical evidence to be highly unlikely to be transmitted through the occupancy of a dwelling place. C.R.S. § 38-35.5-101(1)(a).

The second circumstance that a broker cannot disclose is when "the property was the site of a homicide or other felony or of a suicide." C.R.S. § 38-35.5-101(1)(b). Colorado courts have not provided any greater guidance concerning the types of felony crimes that fall under its definition.

A broker's obligation to avoid disclosure of circumstances which may psychologically impact or stigmatize real property should not impede a party's right to be informed about all known adverse material facts. The Commission concludes that the only circumstances in which a broker is not obligated to disclose facts or suspicions regarding circumstances that may psychologically impact or stigmatize real property are those two set forth immediately above in section 38-35.5-101(1)(a) and (b), C.R.S.

Brokers must disclose all known adverse material facts, unless it is one of the circumstances set forth in section 38-35.5-101(1), C.R.S.

The Commission's primary purpose is to protect the public. *Albright v. McDermond*, 14 P.3d 318, 322 (Colo. 2000). The Commission believes it is in the public's best interest for brokers to disclose all known adverse material facts to the parties to a real estate transaction because this disclosure increases each party's awareness of those facts prior to completion of the transaction, it reduces the potential for creating an unfair transaction, and it otherwise protects the overall integrity of the transaction.

The Commission suggests that brokers have robust conversations with their clients about broker disclosures, with an eye towards full and complete disclosure. Brokers who are aware of either of the two factual scenarios set forth in C.R.S. § 38-35.5-101 are encouraged to obtain their clients' consent to permit disclosure of these facts.