

# 2022-2023

# Broker-in-Charge Update (BICUP) Course

## Student Manual



June 2022

Copyright © June 2022 by North Carolina Real Estate Commission

**ALL RIGHTS RESERVED.** This manual may be reproduced only by (1) certified Education Providers for distribution to licensees enrolled in the Providers' courses and (2) "Vendors" who have obtained in advance the written permission of the Commission to reproduce and sell the manual to Education Providers in accordance with guidelines established by the Commission. Any other person or entity wishing to reproduce this manual or any portion thereof must first obtain the express written permission of the Commission.

THIS PAGE LEFT INTENTIONALLY BLANK.

## INTRODUCTION

The *2022-2023 Broker-in-Charge Update (BICUP) Course* is a four (4) hour\* course that must be completed by all brokers-in-charge and brokers who have BIC-Eligible status and who wish to renew their licenses on active status on July 1, 2023, for the 2023-2024 license year.

Brokers-in-charge and brokers with BIC-Eligible status must take the BICUP course each year to satisfy the Update course requirement and to maintain BIC-Eligible status, as prescribed by Commission Rules 58A .1702 and 58A .0110.

\*Per Commission Rule 58H .0101(7): "Instructional hour" means 50 minutes of instruction and 10 minutes of break time.

### Development and Delivery

This course was developed by the staff of the North Carolina Real Estate Commission and is provided by certified Education Providers and instructors.

Per Commission Rule 58H .0403(d): Education providers shall use the Commission-developed course materials to conduct Update courses. Education providers shall provide a copy of the course materials to each broker taking an Update course.

Per Commission Rule 58H .0207(d): For each continuing education course taught, an education provider shall provide a course completion certificate signed by the education director to each student that meets the requirements of 21 NCAC 58A .1705. The course completion certificate shall identify the course, date of completion, student, and instructor.

### Commission Rule 58A .1705: Attendance & Participation Requirements

(a) In order to receive credit for completing an approved continuing education course, a broker shall:

- (1) attend at least 90 percent of the scheduled instructional hours for the course;
- (2) provide his or her legal name and license number to the course sponsor;
- (3) present his or her pocket card or photo identification card, if necessary; and
- (4) personally perform all work required to complete the course.

(b) With the instructor or the sponsor's permission, a 10 percent absence allowance may be permitted at any time during the course, except that it may not be used to skip the last 10 percent of the course unless the absence is:

- (1) approved by the instructor; and
- (2) for circumstances beyond the broker's control that could not have been reasonably foreseen by the broker, such as:
  - (A) an illness;
  - (B) a family emergency; or
  - (C) acts of God.

## Comments and Complaints

Comments and complaints about the course, education provider, or instructor may be directed in writing to:

North Carolina Real Estate Commission  
Education and Licensing Division  
P.O. Box 17100  
Raleigh, NC 27619-7100  
Email address: [educ@ncrec.gov](mailto:educ@ncrec.gov)

## TABLE OF CONTENTS

<b>Section 1: Material Facts</b>	<b>.....1</b>
<b>Section 2: Dual Agency</b>	<b>.....55</b>
<b>Section 3: BIC Responsibilities</b>	<b>.....91</b>
<b>Section 4: Law and Rules Updates</b>	<b>.....127</b>
<b>Section 5: Licensing and Education</b>	<b>.....135</b>

# Section 1

## MATERIAL FACTS: Speak Up!



### *Is it a Material Fact?*

True or False. Indicate whether or not the following “facts” are material.

- a) Square footage error \_\_\_\_
- b) Synthetic Stucco that has been repaired or replaced \_\_\_\_
- c) The mere existence of polybutylene plumbing \_\_\_\_
- d) A structural issue that has been repaired \_\_\_\_
- e) A well recently contaminated with e-coli but current tests reveal no presence of bacteria \_\_\_\_
- f) A roof that leaks during severe rain \_\_\_\_

### *“See No Evil, Say No Evil”*

Jake, a broker with A+ Realty, meets with Peter, a property owner, to provide a listing presentation. During the meeting, Peter says that he recently had a home inspection that indicated water leakage in the basement walls and crawl space, but that he has ordered no further inspections to verify the issue or determine repair needs. Jake tours the property and observes no moisture or standing water. Peter decides to list the property with Jake. On the *Residential Property and Owners’ Association Disclosure Statement (RPOADS)* Peter selects “No Representation” to all of the questions. Throughout the listing period, there is no visible evidence of moisture or water, so Jake does not mention Peter’s inspection report to any of the prospective buyers.

1. Did Jake fulfill his duties as a broker? YES/NO
2. Why or why not? Choose the best answer.

- a) Although Jake did not personally observe any moisture or standing water, he still had an obligation to disclose the water leakage in the basement walls and crawl space.
- b) Because Jake has an obligation to disclose whether he personally saw any water or not.
- c) Because the owner, Peter, already checked “*No Representation*” on the *RPOADS*.
- d) Because Peter’s completion of the *RPOADS* relieved Jake of any additional disclosure obligations.

### **“Dues Surprise Party”**

Linda, a broker with X Realty, lists her personally owned residential condominium unit with her firm on March 1. The unit goes under contract on March 3 and the buyer submits the Due Diligence Fee and the Earnest Money Deposit in accordance with the terms of the contract. Linda receives notification of a proposed assessment from the HOA on March 5. If the assessment is approved, HOA dues will be temporarily increased starting in July to pay for various exterior repairs. Must Linda tell the buyer about the proposed assessment? Why or why not? Choose the best answer.

- a) No. Linda owns the property; therefore, she has no obligation to share the information about the assessment unless it is approved prior to closing.
- b) No. The proposed assessment is only for a temporary increase in dues, there is no obligation to disclose.
- c) Yes. Linda is a broker and must disclose the proposed assessment because it is a fact that is directly related to the property.
- d) Yes. Linda owns the property and is obligated to share the information about the assessment if it is approved prior to closing.

---

## **LEARNING OBJECTIVES**

After completing this section, you should be able to:

- define a material fact;
- explain the categories of material facts;
- explain the responsibilities of a broker for discovery and disclosure of material facts;
- identify red flags that indicate possible material facts; and
- explain the responsibilities of a broker regarding a home inspection.

---

## TERMINOLOGY

**Home Inspection:** An evaluation of the visible and accessible systems and components of a home which provides an understanding of the condition of the home.

**Home Inspection Report:** A written evaluation that describes the condition of the functioning and malfunctioning systems within the home.

**Material Fact:** Any fact that could affect a reasonable person's decision to buy, sell, or lease real property is considered a material fact and must be disclosed by a broker to the parties in the transaction and any interested third parties regardless of the broker's agency role within the transaction.

N.C.G.S. §93A-6(a)(1) indicates that brokers are subject to disciplinary action if they make any willful or negligent misrepresentation, or omission and/or failure in disclosing material facts to all parties in a transaction.

---

## MATERIAL FACTS

### *Material Facts are Important*

The Commission analyzed all of the disciplinary cases published in the eBulletin for 2020-2021, to determine the most common violations under License Law and Commission rules. Although the Commission does not have *formal* categories for cases, some cases fall into more than one category which results in brokers having multiple rule violations.

The statistics below do not include cases which were investigated and closed, closed and warned, or voluntarily surrendered.

In 2020-2021, there were a total of 152 cases in the eBulletin. The statistics for the categories are as follows:

- 47% - Material Facts;
- 19% - Trust Accounts;
- 10% - Agency;
- 9% - Contracts;
- 6% - Property Management; and
- 9% - Other.

If we analyze cases dealing only with material facts and further evaluate the issues addressed specifically in those cases, the statistics are:

- 30% - Structural Issues and Items Presented on Previous Home Inspections;
- 15% - Square Footage;
- 15% - Lots/Subdivisions/Road;
- 10% - Permits;
- 10% - Sewage/Septic/Water; and
- 20% - Other Material Facts.

The statistics referenced above demonstrate the importance of brokers having a thorough comprehension of:

- material facts,
- red flags, and
- the mandatory requirement to discover and disclose material facts under License Law and Commission rules.



### **What is a material fact?**

A material fact is ANY fact that could affect a reasonable person’s decision to buy, sell, or lease.

What is considered “any” fact? Could the fact that a property:

- is located in a flood zone;
- has a malfunctioning electrical system;
- has an unpermitted bedroom;
- is located in a neighborhood with restrictive covenants; or
- has been previously occupied by a pet

be considered material facts? **Yes!** These facts are just a few examples of material facts that could affect a reasonable person’s decision to buy, sell, or lease property. A broker must volunteer and timely disclose the material facts to the parties in the transaction and any interested third parties regardless of the broker’s agency role within the transaction.



### **What are the four categories of material facts?**

The four categories of material facts are:

- facts about the property itself;
- facts that relate directly to the property;
- facts directly affecting the principal’s ability to complete the transaction; and
- facts that are known to be of special importance to a party.



## 1. Facts about the property itself

This category comprises issues about the property and its improvements, such as:

- structural defect(s),
- malfunctioning system(s),
- leaking roof, or
- drainage or flooding problem(s).

***Why is a leaking kitchen faucet or water in a crawl space considered a material fact?*** A leaking kitchen faucet and water in a crawlspace are material facts because they signify that there may be an issue with the plumbing system that needs to be repaired. This information is important for a broker to disclose because the plumbing system is needed in order for an individual to fully utilize a property. Therefore, clients/customers need to be aware of any issues with systems, leaks, or structural defects so they can make an informed decision as to whether they will request repairs or purchase the property, or use this information to negotiate the purchase price of the property and repair the issue themselves.

## 2. Facts that relate directly to the property

This category includes factors that are external to or outside of the property that affect the use, desirability, or value such as:

- a pending zoning change,
- existence of restrictive covenants,
- plans to widen a street, or
- plans to build a shopping center adjacent to a property.

***How can zoning affect a property?*** Zoning classifications will ultimately affect how a property can be used by a client/customer. For instance, zoning classifications affect whether or not a property is considered residential, mixed use, or commercial, etc. Therefore, brokers must analyze the zoning classification of a property to determine whether or not the property can be used for the intended purpose for which it is purchased. For example, if a client/customer purchases a lot with the intent to construct a home, the broker would need to ensure that the lot is zoned for residential purposes.

***How does the existence of restrictive covenants affect a property?*** The existence or nonexistence of restrictive covenants is a material fact. However, the specific restrictions within the covenants become material facts when they are of special importance to a party. For example, if restrictive covenants exist for a property, the covenants may prohibit a property from having certain animals, an in-ground swimming pool, and/or the parking of commercial vehicles in the neighborhood. If these covenants do exist, they may affect how desirable the property is to future buyers. Therefore, brokers must disclose the existence of restrictive covenants, advise consumers on where to obtain a copy, and recommend consumers seek legal advice regarding the

applicability of the covenants. It is not the broker's responsibility to interpret the covenants.

### **3. Facts directly affecting the principal's ability to complete the transaction**

This category includes any fact that might adversely affect the ability of a principal (seller or buyer) to consummate the transaction such as:

- a buyer's inability to qualify for a loan,
- a buyer's inability to close on a home without selling a currently owned home, or
- a seller's inability to convey clear title due to the commencement of a foreclosure sale or judgment lien on the property.

***Why is a buyer's inability to qualify for a loan a material fact?*** A buyer's inability to qualify for a loan is a material fact that must be disclosed to all parties in the transaction. This information is important because the buyer will not be able to consummate the sale of the property if they do not have financing from a lender. Further, another example of a material fact that must be disclosed to all parties is when a buyer initially makes a cash offer on a property but changes to FHA or VA financing during the transaction. This is a material fact because the buyer may not be able to meet all of the requirements for financing from the lender which may delay/prevent the consummation of the sale.

Lastly, if a buyer's financial situation has changed materially from their original loan application, a broker's failure to disclose this information may be a material fact violation and/or may lead to charges being filed for mortgage fraud for both the buyer and the broker.

***Why is it a material fact that a buyer has to sell a currently owned home before they have the ability to close on another home?*** It is a material fact when a buyer has to sell a currently owned home before they can purchase another property because if a buyer does not sell their current home, they may not have the financial means to complete the transaction. Therefore, brokers who are aware of this fact must disclose its existence to all parties in the transaction.

### **4. Facts that are known to be of special importance to a party**

This category includes facts of special interest or importance to a party.

For example, a buyer may not wish to purchase a home that:

- has specific zoning restrictions,
- is within a neighborhood,
- is within the city limits, or
- has been previously occupied by a pet.

There are many facts relating in some way to a property that normally would not be considered “material” but because a broker knows they are of special interest or importance to a party, they become material facts that the broker must discover and disclose for that party. In plain words, if a buyer informs a broker of their specific interest for a property, the broker must discover and disclose all facts relating to this specific interest because it is of importance to the buyer and has now become a material fact.

For example, if a buyer informs their broker that they would like to purchase a property that would provide them with the ability to run a small, home-based business, the broker is expected to discover this information for the buyer because it will directly affect which property the buyer purchases.

In an effort to discover and disclose information of special importance to a party, brokers must research and review property specific information, such as zoning and restrictive covenants, if they exist. If restrictive covenants exist, brokers are not expected to read every word of the restrictive covenants or interpret it for the buyers. However, they are expected to be familiar with the restrictive covenants so they can discover and disclose the specific information that is requested by the buyers. If buyers have specific questions regarding the restrictive covenants for the property, the broker should advise the buyer to consult with an attorney.

**NOTE:** Any fact within the four categories of material facts must be volunteered and timely disclosed to the parties to the transaction and any interested third party as well, *regardless* of the broker’s agency role within the transaction. Additionally, there are many facts relating to a property that normally would not be considered material; however, because a broker knows they are of special importance to a party, they become material facts that the broker must discover and disclose.



### How does a broker discover material facts?

A broker has an affirmative duty to discover and disclose material facts to all parties in a transaction. Further, brokers are expected to take reasonable steps to discover all pertinent facts about a property that are necessary to serve their client’s interest.

For example, listing agents are expected to:

- accurately gather all information about a listed property necessary to effectively market the property; and
- comply with disclosure requirements to prospective buyers.

Moreover, buyer's agents are expected to:

- assist buyer-clients in obtaining any information related to the property; and
- gather specific property information that is of particular interest to the buyer-clients.

Some brokers mistakenly believe that if they don't know of a material fact then they can't be required to disclose it. However, the duty of a broker to discover material facts eliminates a broker's option to avoid learning a material fact. For example, a broker may believe that they do not have to "walk around" a property to view its condition or inquire about stains on the ceiling. If a broker fails to visually inspect a property, how can they determine if red flags exist before they make any statements?

In plain words, a broker has a duty to investigate any issue or fact that could mean a potential problem to the property. Thus, a visual inspection should be performed to start the discovery process. The Commission is aware that the real estate market is very competitive at this time and offers are often submitted on properties without being seen. If a broker submits an offer on a property per the directive of their client without visually inspecting the property, the broker should advise the client that failure to visually inspect a property prior to submitting an offer creates risks such as not being able to discover obvious defects with the property.

Further, the broker should document in writing that they have disclosed to their client the risks associated with submitting an offer on a property sight unseen. It is important for brokers to understand that they *cannot* waive their duty to discover and disclose material facts.

Moreover, the Commission uses the *Reasonableness Standard* to evaluate a broker's duty to discover and disclose material facts. This standard dictates that a broker has a duty to discover and disclose *any* particular material fact if a ***reasonably knowledgeable and prudent broker*** would have discovered the fact during the course of the transaction and while acquiring information about the property.

### ***Examples to Consider***

The following examples can be found in the Commission article, [Intentional Ignorance](#). These examples display brokers who are not adhering to the *Reasonableness Standard* while conducting brokerage activity.

1. A buyer agent knows their client has respiratory issues and notices standing water in the crawl space of the property. The buyer agent does not inquire about mold or suggest to the buyer to hire a mold inspector.
2. A buyer agent knows their client wants to construct a barn and raise chickens and goats. The buyer agent does not obtain the restrictive covenants or zoning restrictions that may affect the buyer's intended use of the property or advise their client to do so.

3. A commercial broker represents a tenant, who wants to lease a space for a daycare center. The commercial broker fails to determine if the space meets the requirements for operating a daycare.
4. A property manager notices rust-colored stains in the sinks, toilets, and tubs but fails to inquire about the water quality, water filtration systems, or suggest that the owner tests the water quality.

Although a broker may not know a material fact, if the Commission determines that a prudent broker would know it, then the broker may be disciplined for failing to disclose the fact. N.C.G.S. §93A-6(a)(1) authorizes the Commission to pursue disciplinary actions against a broker who misrepresents or omits a material fact. Therefore, every broker must exercise reasonable care and diligence in discovering and disclosing all material facts to all interested parties in a timely manner.

**NOTE:** Brokers are also expected to discover material facts about properties that are being sold “As Is” and disclose this information to all parties in the transaction.



### **What other facts must be disclosed to a principal in a transaction?**

Under agency law, an agent must disclose to the principal *any* information that may affect the principal’s rights and interests or influence the decision of the principal in the transaction. Relevant information that a broker-agent must share only with their principal includes:

- the other party’s willingness to agree to a price or terms different from those previously stated,
- the other party’s motivation for engaging in the transaction, or
- any other confidential information that might affect the principal’s rights and interests or influence the principal’s decision in a transaction.

An agent acting as a dual agent owes the same fiduciary duties to both parties, namely, loyalty, obedience, skill, care, and diligence, confidentiality, accounting, and disclosure of all information. If a broker advises or advocates for one principal over the other, the other principal will be greatly disadvantaged. The broker must remember that although the parties have competing interests, both parties are owed identical fiduciary duties. Therefore, the agent cannot advise or advocate for either party. The agent must treat the parties fairly, impartially, equally and honestly, and not engage in conduct that would advance one party’s position over the other.

Dual agents essentially communicate the exchange of information between the parties and will assist the parties with satisfying the terms of the contractual agreement.

**NOTE:** An agent must communicate *relevant* information to the principal, even if the information does not rise to the level of being a material fact. However, an agent acting as a dual agent cannot share information to either party about the other party's willingness to agree to different terms, motivation, or any other confidential information that may affect or influence their decision in the transaction.



### ***Are there any facts that are statutorily not material?***

**Yes.** State and fair housing laws exempt the disclosure of certain facts that may seem material such as:

- the death or serious illness of a previous property occupant,
- a convicted sex offender occupying, having occupied, or residing near a property, or
- a current or former occupant's AIDS/HIV status.

For clarification, a broker may be asked about the death or serious illness of a previous property occupant or convicted sex offender occupying, having occupied, or residing near a property during a transaction. The broker may decline to answer the question(s); however, if the broker chooses to answer the questions, they must do so truthfully.

In contrast, if a broker is asked whether a current or previous occupant has/had AIDS/HIV, it should be treated as an impermissible question. The broker should respond that it is a violation of fair housing laws for the broker to answer the question.

### ***Questions to Consider***

***Must the broker disclose information regarding the death or serious illness of a previous occupant?***

**No.** According to N.C.G.S. §39-50,

*..In offering real property for sale it shall not be deemed a material fact that the real property was occupied previously by a person who died or had a serious illness while occupying the property.*

In plain words, a broker does not have to disclose that a property was previously occupied by a person who died or had a serious illness while occupying the property. Since this information is not considered a material fact, a broker may decline to answer a question about the death or serious illness of a previous occupant. However, if the broker chooses to answer the question, they must answer truthfully. The statute further indicates that it is not permitted for an individual to make a false statement about past occupancy.

***Must a broker disclose that a convicted sex offender occupies, has occupied, or resides near a property?***

**No.** It is not mandatory that a broker discloses this information. The N.C.G.S. §39-50, also specifies that this information is not a material fact; therefore, brokers are not required to volunteer to a prospective buyer or tenant information that a registered sex offender occupies, has occupied, or resides near a property being offered for sale or rent.

***How should a broker respond if they are asked about a convicted sex offender occupying, having occupied, or residing near a property?***

Brokers should remember that this information is not a material fact; therefore, they are not obligated to disclose any information. Brokers may very well decline to answer this question. However, if a broker chooses to answer, they must answer truthfully and to the best of their knowledge.

***If someone asks a broker about convicted sex offenders occupying, having occupied, or residing near a property, what resources might be recommended?***

A broker may recommend the county sheriff's registry or the statewide registry at <http://sbi.jus.state.nc.us/sor> to access convicted sex offender information.

***What if someone asks the broker about the AIDS/HIV status of a current or former occupant? Can the broker answer the question?***

**No.** Under federal and state fair housing laws, a person with AIDS/HIV is considered to be legally handicapped and is protected from discrimination in housing. Therefore, if a broker is asked this question, they should indicate that it will be a violation of the fair housing laws if they respond.

---

## **BROKER RESPONSIBILITY**



### ***“The Unexpected Tenants”***

Charlie, a seller-client, hires Teresa, an agent with 123 Homes, to list his property. Charlie informs Teresa that his family cemetery is located on the property. Teresa decides not to disclose this information to potential buyers because she does not want to scare them off and she wants the property to sell quickly. Fred, a buyer, purchases the property and realizes the existence of the cemetery after he moves into the home.

Fred contacts Teresa and expresses his anger with the cemetery not being disclosed prior to his purchase of the property. Did Teresa fulfill her duties as a broker? Why or why not? Choose the best answer.

- a) Yes. Because it was Charlie's duty as a seller to disclose this information to prospective buyers.
- b) No. Because Teresa did not advise Charlie to disclose this information in the seller's disclosure.
- c) Yes. Because Teresa did not represent Fred and had no duty to discover and disclose material facts to him.
- d) No. Because Teresa was aware of the cemetery prior to listing the property and should have disclosed this fact relating to the property to all parties in the transaction.



## What is a Broker's Responsibility?

A broker must discover and disclose material facts to all interested parties to the transaction, regardless of who they represent. This mandatory disclosure of material facts includes disclosure of:

- facts about the property that the broker *knows* exist,
- facts about the property they *reasonably should know exist*, and
- information that is considered *common knowledge*.

***For example, what if a broker notices a property has stains on the ceiling? Does the broker have to disclose this information? Yes.*** The broker must disclose the existence of the stains. The stains are considered a red flag and require further inquiry to determine the cause and discover if remediation of the issues has occurred.

***Does a broker have a duty to disclose the leaking roof even if they represent the seller? Yes.*** Although the broker represents the interests of the seller, the broker is still obligated to explain/inform the seller of the broker's obligation to disclose the leaking roof to all parties in the transaction.

***What if the seller instructs the broker not to disclose the leaking roof?*** If the seller instructs the broker not to disclose the leaking roof, the broker must not follow the seller's instructions because they are not lawful. A broker's discovery and disclosure of material facts is not contingent upon whether or not they receive permission from their client to disclose this information. The discovery and disclosure of material facts is a mandatory disclosure under N.C.G.S. §93A-6(a)(1). If the broker obeys the seller and does not disclose the leaking roof, they may be in violation of the statute.



**What if a buyer agent is informed of the leaking roof and the listing agent and/or seller if unrepresented, had no prior knowledge of this material fact? Must the buyer agent inform the listing agent and/or seller if they are unaware of this information? Yes.** Although the buyer agent may reasonably rely on the property information that is provided by the listing agent, they are not absolved of the responsibility to discover and disclose material facts about the property. Therefore, if a buyer agent is made aware of any material facts during their research or inquiry of a property, they must disclose that information to all parties in the transaction.

**What if a buyer agent discovers an issue that might rise to the level of a material fact during a showing? Must the buyer agent inform the listing agent of this information? Yes.** If a buyer agent discovers an issue during a showing, they should notify the listing agent of the potential issue. The listing agent should then investigate the issue and have it evaluated by a professional if needed.

If an offer is presented while the listing agent is actively working to determine if the issue is material, the listing agent should disclose the potential issue to the buyer agent and inform them that the issue is currently being investigated.

**Once a broker has determined that a material fact or potential material fact exists, what should they do?** The broker must disclose the material fact or potential material fact to their client or customer so they can possess the adequate knowledge to:

- make an intelligent decision regarding the property,
- negotiate repair services, or
- decide to terminate the contract.

**Should a broker still disclose the material fact or potential material fact if it is going to scare off buyers? Yes.** A broker does not have a choice regarding whether or not they disclose material facts to buyers. The statute states that material facts must be disclosed to all parties in the transaction.

If a broker is debating whether or not they should disclose the existence of material facts, they should ask themselves the following questions:

- Would you like to be the subject of a disciplinary investigation?
- Would you like to be a Respondent in a civil lawsuit?

A broker who thinks that a transaction will close quicker without disclosing material facts to all parties will more than likely become the subject of a disciplinary action or civil lawsuit due to their failure to follow the law. Brokers should disclose material facts to all parties during the transaction rather than possibly defending their license later.



### **“The Raining Skylights”**

Cher, a seller, wants to list her property, so she hires Zack, a listing broker, with ABC Homes.

During the prelisting walkthrough, Cher informs Zack that she has completed the *Residential Property and Owners’ Association Disclosure Statement* and *Mineral and Oil and Gas Rights Mandatory Disclosure Statement*.

Zack asks Cher if she has any problems with the roof leaking because he notices several stains near the skylights. Cher states that the roof only leaks during heavy rainfall. She also states that the insulation surrounding her skylights is decayed and she does not have the extra funds to repair them before listing the property.

Zack creates the listing in the MLS and does not disclose the leaking roof. Sam, a buyer agent, and his buyer-client, Shannon, go to view Cher’s property. Sam notices the stains on the ceiling and discusses this information with Shannon. Shannon still expresses an interest in the property; however, Sam informs her that he needs to ask Zack some additional questions and conduct more research before he could assist her with making an intelligent, informed offer.

1. Did Zack fulfill his duties as a broker? Why or why not? Choose the best answer.
  - a) No. Because Zack is not a home inspector.
  - b) No. Because Cher made Zack aware of the leaking roof and he failed to disclose it to all parties in the transaction.
  - c) Yes. Because Zack did not verify any actual issues.
  - d) Yes. Because Cher’s comments are her opinions.
  
2. Did Sam fulfill his duties as a broker? Why or why not? Choose the best answer.
  - a) Yes. Because Sam told Shannon they needed further information regarding the property.
  - b) No. Because Sam should not have written the offer without an additional investigation.

- c) Maybe. Sam did reasonably suspect there was an issue; therefore, the best practice would be for Sam to get the additional information from Zack, the listing agent, before assisting the buyer with her offer.
- d) Yes. Because Sam did not know for certain if there were any problems with the skylights.



## How does the Commission determine if a broker reasonably knew a fact about the property?

In the Commission article, [“What is Common Knowledge?”](#), it states that the Commission determines whether or not a broker *knew* the existence of a material fact by analyzing documents, reviewing written correspondence, and interviewing individuals involved in the transaction. The Commission also examines public records and reviews applicable educational resources to determine whether or not a broker should have *reasonably known* a material fact about a property.

The article further explains that the Commission uses the *Reasonableness Standard* to evaluate a broker’s duty to discover and disclose material facts. This standard dictates that a broker has a duty to discover and disclose *any* particular material fact if a ***reasonably knowledgeable and prudent broker*** would have discovered the fact during the course of the transaction and while acquiring information about the property.

***If a listing agent lists a property sight unseen, do they have a duty to discover and disclose material facts? Yes.*** Every broker has a duty to discover and disclose material facts to all parties in the transaction. Therefore, brokers should recognize the inherent risk of possible disciplinary action when they list properties without a preliminary, visual inspection to determine whether or not material facts or red flags exist. Similarly, a buyer agent who writes an offer for a client may have a difficult time researching red flags and material facts without viewing the property. Therefore, by writing an offer on an unseen property, the buyer agent may not be adhering to their duty to discover and disclose material facts by evaluating the condition of the property or researching property specific information for their client.

A reasonably prudent broker would pay attention to red flags as they are conducting a visual, preliminary inspection of the property. A broker also has a duty to further investigate any issue or fact that could suggest a potential problem with the property.

**NOTE:** Regulatory Affairs considers a broker’s failure to conduct a visual, preliminary inspection of a property a red flag.



## **What is a red flag?**

A “red flag” is the presence of any fact or issue that should make a reasonably prudent broker working with a buyer or seller suspect that the information provided by another party may be incorrect or incomplete.



## **What are some examples of red flags?**

Some examples of “red flags” are:

- stains on the ceiling, floors, or in the cabinets;
- discoloration of flooring;
- absence of septic permits;
- unpermitted spaces;
- leaks;
- stream in the backyard;
- cracked foundational issues; or
- inconsistent or inaccurate measurements of square footage.



## **What should a broker do if a red flag is present?**

If “red flags” are present, a broker must conduct more research and use due diligence to determine the severity of the issue and the effect that these “red flags” will have on their client’s decision regarding the property.

As a best practice, brokers should complete additional research by:

- asking the owner about known issues with the property,
- measuring the property or hiring a vendor to measure the property if there is a discrepancy (e.g. red flag) in square footage,
- asking the owner to provide service records for repairs conducted on the property,
- researching the existence of septic permits and building permits with the local municipality, or
- advising the client to hire an inspector and/or contractor to estimate and/or repair issues.



### *“Slip Sliding Away”*

Maxine is the buyer agent for Alesha. Alesha is interested in purchasing a beach-front property. Maxine contacts Rob, a listing agent, for the property. During the conversation with Rob, Maxine asks the following questions:

1. Does the property have any storm damage from the hurricane last year?
2. What are the locations of the set-back lines for the property?
3. Can a structure be rebuilt on the lot if the existing structure was extensively damaged?

Rob tells Maxine that the hurricane caused cosmetic damage and is currently being repaired. He stated that even if a hurricane were to cause serious damage in the future, he saw no reason she couldn't rebuild. He also states that he will provide her with additional information later because he did not know the locations of the set-back lines. Maxine informs Alesha of the information she receives from Rob. Alesha tells Maxine she really likes the property and instructs her to submit an offer. Maxine submits the offer without receiving the additional information or verifying the extent of the damage to the property.

Alesha hires vendors to perform the inspection and survey soon after she goes under contract on the property. After the survey, she is informed to contact the Division of Coastal Management for more details. Maxine calls the Division and they tell her the lot has more than 50% damage; therefore, the existing structure on the property cannot be rebuilt using the current footprint.

Alesha does not want to proceed with the transaction and terminates the contract even though the due diligence period has expired. The seller, releases Alesha's earnest money deposit.

1. Should Rob possess common knowledge regarding the properties he lists?  
YES/NO
2. Did Rob fulfill his duties as a broker?
  - a) Yes. Because the owner told Rob it was being repaired.
  - b) No. Because Rob should have knowledge about common requirements in coastal management areas and should have known that damage beyond 50% would prohibit rebuilding in the coastal management area.
  - c) Yes. Because Rob may have been unaware of the actual damage to the structure.
  - d) No. Because Rob does not usually deal with coastal properties.

3. Did Maxine fulfill her duties as a broker? Choose the best answer.
- a) Yes. Because Maxine relied on the information from the listing agent.
  - b) No. Because Maxine did not have enough information and repeated a misrepresentation made by the listing agent.
  - c) Yes. Because Maxine is not a structural engineer.
  - d) No. Because Maxine must do a visual inspection of the property before writing an offer.



### **What is *common knowledge*?**

Common knowledge is defined as knowledge that is widely or generally known to everyone or nearly everyone in a community.

A reasonably prudent broker is expected to possess common knowledge regarding the area in which they practice brokerage. A reasonably prudent broker would ensure they possess the following common knowledge while practicing brokerage:

- geographic competence;
  - The broker should have knowledge of the geographic area including business developments, economic changes, and zoning and planning development. Brokers can develop geographic competence in a variety of ways like researching the area, taking continuing education courses, completing professional development classes, or possessing previous knowledge from residing in the area.
- market knowledge; and
  - The broker should have common knowledge regarding the market including information such as economic, social, and environmental influences that may affect the value of property. Also, knowledge of appreciation rates, property prices, and demographic statistics are important.
- industry standards for real estate specialty areas (e.g. residential, short-sales, commercial, etc.).
  - The broker should have knowledge of the typical transaction cycles for the types of specialties in which they practice. Also, the broker should be familiar with the terminology and transaction documents and/or forms that are used for each specialty area.

***Are there some ways that a broker can obtain common knowledge and stay current with their information? Yes. As a best practice, brokers should:***

- read the local newspaper;
- watch the local news;
- attend city council meetings or review the agenda/notes;
- network and communicate with other brokers and professionals in the area; and
- consistently review information regarding zoning and local ordinances.



### ***“The HGTV Special”***

Pat, a listing agent with 123 Realty, is representing Joe in the sale of his property. Joe, an investor, tells Pat that he purchased the property seven months ago and his son, Sam, performed the renovations. The renovations included the addition of a bedroom, bathroom, deck and HVAC system. Pat asks Joe for a copy of the permits. Joe states that Sam is not a licensed contractor, and he did not obtain permits.

After receiving this information, Pat lists the property and advertises all of the new renovations. Buyer #1 offers to purchase the property. During their inspection, the home inspector states that the deck is not structurally sound. Buyer #1 terminates the contract during the due diligence period. Pat does not update the listing nor did Joe revise any seller disclosures.

Buyer #2 submits an offer and has the property inspected as well. The inspection report for Buyer #2 reveals the same deck issue noted in the inspection report submitted by Buyer #1. Buyer #2 submits a Due Diligence and Repair Addendum. Joe agrees to make the repair for Buyer #2. Buyer #2 has the property re-inspected after the repair was allegedly made and it had not been fixed. Buyer #2 terminates after the due diligence period. Joe refuses to release the earnest money deposit to Buyer #2. Also, he does not update any seller disclosures; and Pat does not revise the listing in the MLS.

Pat receives an offer from Buyer #3 who is represented by Sue, a buyer agent. After advisement from Sue, Buyer #3 offers to pay the full price in cash, close within seven days, and will not conduct an inspection. Joe

accepts the offer and the property closes without incident. After closing, Buyer #3 discovers the house needs thousands of dollars in repairs.

1. Did Pat have knowledge of a material fact?  
YES/NO
2. Did Pat fulfill her obligations as a broker? Choose the best answer.
  - a) Yes. Because until the initial home inspections, Pat did not know if there were problems with the deck.
  - b) Yes. Because it was the obligation of Buyer #3 to get a home inspection.
  - c) No. Because Pat did not disclose the unpermitted additions nor that the work was done by an unlicensed individual.
  - d) No. Because Pat should have required the Joe to obtain the proper permits.
3. Should Sue, the agent for the 3<sup>rd</sup> buyer, have foreseen any red flags in this transaction? Choose the best answer.
  - a) Yes. Sue should have reasonably known there were some red flags due to the number of times the property was under contract. She should have asked additional questions.
  - b) No. Because Sue did not represent any of the previous buyers.
  - c) No. Because Sue's buyer-client chose not to get a home inspection.
  - d) No. Not unless Sue actually knew there were problems with the deck.



### **What are the responsibilities of a listing agent when acquiring a listing?**

The listing agent is responsible for verifying the accuracy of property data and the discovery of material facts when they acquire a listing.

A listing agent can compile accurate property data and discover material facts by:

- conducting a visual inspection of the property,
- asking the seller questions about the property, and
- obtaining copies of documentation regarding repairs and renovations.

In an effort to further receive accurate information, the listing agent should ask the seller if they have had a property inspection performed in the past. If they have, the agent should review the report to determine what, if anything, needs to be disclosed. Moreover, if the home inspection report lists issues with the property, the listing agent should inquire as to whether or not repairs have been made. If the listing agent is not



able to confirm with written documentation that a repair has been made, then the listing agent must disclose the existence of these defect(s) to all prospective buyers and/or their agents.

It is imperative for brokers to know that the Commission will hold the listing agent accountable for the accuracy of the property information. This includes property information that is:

- communicated directly to cooperating brokers and/or buyers,
- placed in remarks of MLS, or
- included in advertisements.

**NOTE:** The seller(s) completion of the *Residential Property and Owners' Association Disclosure Statement* does not void a broker's duty to discover and disclose material facts. For instance, if a seller answers *No Representation* to a question, but the listing agent is aware of a material defect, the listing agent must still disclose the defect to prospective buyers and/or their agents.



### When should a listing agent disclose material facts?

A listing agent should ensure they are *timely* disclosing the existence of material facts to all parties in a transaction. *Timely* disclosure means that prospective buyers are provided the information in plenty of time to make an informed choice as to whether to make an offer on and/or purchase the property.

If a listing agent becomes aware of a material fact after a listed property has gone under contract, the fact should be disclosed *immediately* to all parties to the transaction.



### Where can the listing agent disclose material facts?

Currently, there is no rule that mandates *where* the disclosure of material facts must take place; however, brokers have several options for disclosure.

**Can a broker use the Residential Property and Owners' Association Disclosure Statement to disclose material facts? No.** The *Residential Property and Owners' Association Disclosure Statement* is a seller's disclosure regarding their property. Brokers should not complete this form.

**So, where can a broker disclose material facts?** The broker can disclose material facts in the Multiple Listing Service. The disclosure in the MLS can take place in the remarks section and/or brokers can attach supplemental documents regarding material

facts to the listing. It is possible that brokers may not be aware of material facts upon listing the property. If this is the case, once brokers are made aware of material facts, they have a duty to disclose it and should update the listing to make all parties aware of this information.

***Can a broker disclose material facts via email communication and/or text message? Yes.*** A broker can disclose the existence of material facts via email communication and/or text message.

In summary, a broker can disclose material facts in the MLS, via email communication, and/or text message. As a best practice, brokers should ensure that material fact disclosures are in writing.



### **What are some best practices for a listing agent prior to listing a property?**

Some best practices for a listing agent to consider prior to listing a property are to:

- state their duty to discover and disclose material facts under License Law and Commission rules to their clients and/or consumers,
- evaluate and conduct a preliminary inspection of the property to determine if any “red flags” exist before making any statements,
- research any issues on the property to determine if they were repaired and the likelihood of the issue existing in the future,
- interview the seller about repair timelines and prior records of completion,
- determine the seller’s willingness to repair a defect if it exists, and
- disclose the material fact to all parties in the transaction.

**NOTE:** The **Doctrine of Caveat Emptor** cannot be used by a broker as a defense not to disclose material facts. North Carolina is a “buyer beware” state; however, a broker must disclose all material facts that the broker knows or reasonably should know to all interested persons in the transaction in a *timely* manner.



### ***“The Garage Has Feet”***

Jessica, a buyer agent, represents Sue. Sue is interested in a residential property in an older, established neighborhood. Jessica and Sue view the property.

While viewing the property, Jessica is concerned because Rachelle, the listing agent, describes the property as having 3264 square feet in the MLS. Jessica tells Sue that she believes the square footage wrongfully includes 576 square feet from the garage. Jessica does not advise Sue to have the property professionally measured, and she does not notify Rachelle of the misrepresentation. Sue purchases the property and is later informed that the property is actually 2688 square feet.

Did Jessica fulfill her duties as a broker? Why or why not? Choose the best answer.

- a) No. Because she did not inform Rachelle of her misrepresentation of the square footage.
- b) Yes. Because she made Sue aware of the misrepresented square footage.
- c) No. Although she advised Sue that the square footage may be inaccurate, she did not advise her to have the property professionally measured or notify Rachelle of the inaccuracy.
- d) Yes. Because she did not have a duty to inform Rachelle about her misrepresentation of the square footage.



### **What are the responsibilities of a buyer agent?**

The buyer agent has a responsibility to inquire about the presence of material facts for their client. A buyer agent may generally rely on the accuracy of the property information provided by the listing agent, whether it is provided on a listing information sheet or in a Multiple Listing Service. Further, a buyer agent is not expected to personally verify the accuracy of information provided by the listing agent in most instances.

However, the buyer agent must still adhere to the *reasonableness standard*; therefore, they are not automatically relieved of responsibility by relying on data provided by the listing agent. Thus, if the buyer agent reasonably suspects that the information may be inaccurate, they cannot rely on it and must conduct further research.

Also, buyer agents have a duty to verify issues that their clients have identified as being material to them, such as whether or not the property has restrictive covenants or has been previously occupied by pets. Additionally, a reasonably prudent buyer agent would ask the listing agent whether the property has been previously inspected. If it has, the buyer agent should inquire about any defects listed in the home inspection report.

If a buyer is considering a property that has been owned for a short period of time, the buyer agent should ask if the seller is an investor or flipper. If that is the case, the

buyer agent should ask for copies of all invoices for the renovations, and whether the renovations were performed by licensed contractors and vendors with appropriate permits obtained.



## **What are some best practices for a buyer agent?**

As a best practice, a buyer agent should:

- research zoning codes/requirements of a property,
- determine facts of special importance or relevance to their client,
- research property-specific information,
- evaluate and visually inspect a property for issues, and
- inquire with the listing agent about the presence of material facts.

---

## **HOME INSPECTIONS**

Brokers are often asked whether or not conducting a home inspection is a mandatory requirement prior to purchasing a property. The short answer is no. However, the Commission encourages brokers to advise their clients to hire a home inspector to evaluate the condition of the property on the day that it is inspected.

If a client does purchase a home inspection, the broker must then review the contents of the home inspection report with the client. While reviewing the report, the broker should not attempt to interpret it. The home inspector interprets the report. However, brokers must review the home inspection report with their clients so they can advise them on possible repairs and/or price negotiation.

Before, during, and after the home inspection, brokers may have questions like:

- Where are the common places for material facts in a home inspection report?
- What should a broker do when their client receives a home inspection report that contains material facts?
- What information should a broker disclose from a home inspection report?
- How does a broker disclose material facts?
- Can a broker share the actual home inspection report?

The next set of questions will reiterate what a home inspection is, why a home inspection is important, and provide guidance to brokers on how to discover and disclose material facts arising from a home inspection report.



## What is a home inspection?

According to N.C.G.S. §43-151.45, a home inspection consists of a written evaluation of two or more of the following components of a residential building: heating system, cooling system, plumbing system, electrical system, structural components, foundation, roof, masonry structure, exterior, and interior components, or any other related residential housing component.



## Why is a home inspection important?

A home inspection is important because it evaluates the condition of a property on the day it is inspected. It also provides preliminary information to a seller or a potential homebuyer so they can make a determination on what repairs to make or whether to proceed with the purchase of the property or to terminate the contract based on the findings in the home inspection report.



## Does the Commission require buyers to hire a home inspector prior to purchasing a property?

The Commission does not require a buyer to hire a home inspector. Although a home inspection is not required, a homebuyer can gain an understanding of the condition of the property (i.e. defective systems) by hiring a licensed home inspector.

Also, a broker who represents a prospective buyer should encourage the client to conduct a home inspection during the due diligence period even if the home is new construction, or if the seller indicates they are selling the property “As Is,” or a seller performed a prelisting inspection. Moreover, differences in home inspection report details should be expected.

Even if a broker advises a client to perform a home inspection, the client may still waive the inspection. If a client chooses to waive an inspection, the broker should document the client’s waiver in the transaction file.

**NOTE:** All home inspectors are not created equal. Homebuyers should understand that property inspectors have varying levels of experience with systems within the home (i.e. HVAC, plumbing, electrical, etc.).

**NOTE:** An appraisal is not the same as a home inspection. An appraisal is an opinion as to a property’s value, marketability, usefulness, or suitability.



### **“The NOT So New HVAC”**

Jason, a BIC and listing agent with XYZ Realty, lists his personal residential property. Jason indicates in MLS that the property has new carpeting, wood flooring, and a new HVAC system. Further, he writes in the MLS remarks that the property qualifies for conventional financing although his community consists mainly of rental properties.

Jason uses the square footage in the tax records to enter the property in MLS. During the listing period, Jason has three buyers contract to purchase the property but all of the contracts were terminated after a property inspection indicated material defects with the HVAC system. Jason does not update the listing with this new information from the home inspection report.

Chad, the fourth buyer, enters into an agreement to buy the property and hires a vendor to perform a home inspection. His inspection report also indicates that the HVAC system has material defects. Chad is no longer interested in purchasing the property and terminates the contract during the due diligence period. Jason updates the MLS *after* Chad terminates the contract.

1. If Jason is an unlicensed individual, does he have to disclose material facts? YES/NO
2. If Jason is an unlicensed individual, does he have to disclose material facts on the *RPOADS* form? YES/NO Why or Why not?
3. As a licensed broker selling his own property, has Jason violated License Law and Commission rules? Choose the best answer.
  - a) Yes. Because in this transaction, Jason is in the role of a private seller.
  - b) No. Because home inspection reports can vary and the previous reports were just opinions.
  - c) Yes. Because he relied on tax records for the square footage and failed to disclose a material fact regarding the HVAC.
  - d) No. Because he did not attempt to represent the buyers and owed them no obligations.



## Where are material facts commonly found in a home inspection report?

Home inspection reports may reveal that a property has several issues that may need to be repaired and/or replaced. Once brokers are accustomed to reviewing home inspection reports, they may realize that there are some common places that material facts may exist in the report.

Brokers should read and review the entire home inspection report with their clients and become familiar with the common places material facts may exist such as:

- Roof
  - damaged boots
  - rotted fascia and soffit boards
  - missing or torn shingles
- Attic
  - damaged trusses
  - lack of insulation
- Crawlspace
  - lack of vapor barrier
  - damaged floor joists
  - water intrusion
  - damaged vents
  - termites
  - lack of foundation for piers.



## What should a broker do when their client receives the home inspection report and it contains material facts?

They should thoroughly review the home inspection report with the client. If the broker or client has any questions about items discussed in the report, the broker should ask for clarification or an explanation from the home inspector. The broker also has an affirmative duty to disclose any and all material facts identified in the inspection report.

**NOTE:** During the review of the home inspection report, the broker should not attempt to step outside of their area of expertise by interpreting the condition of the property. If the broker or client has any questions about items discussed in the report, the broker should ask for clarification or an explanation from the inspector regarding the issues/defects. Also, a broker should also encourage clients to order specialized inspections when these types of reports are suggested by home inspectors.



## What information should a broker disclose from a home inspection report?

The broker must disclose ANY defect and/or issue regarding the property that is listed in the report to ALL parties in the transaction.

Let's say a broker advised a seller to perform a home inspection before listing their property and the inspection report revealed several material facts. According to N.C.G.S. §93A-6(a)(1), the broker must disclose all material facts to all parties in the transaction.

***What if the seller-client tells the broker not to disclose the material facts in the home inspection report?*** If the seller tells the broker not to disclose the material facts, the broker must inform the seller-client that they have a mandatory obligation to disclose it and proceed with the disclosure.

***What if a broker represents a buyer-client?*** If a broker represents a buyer-client and discovers upon review of their home inspection report that a material fact exists, the broker must inform all parties to the transaction and this includes the listing agent and/or seller, if they are unrepresented. As stated previously, if a buyer-client also instructs the broker not to share the information, by law the broker cannot follow the unlawful instructions from the buyer and should proceed with the material facts disclosure.

In plain words, a broker must disclose all material facts in the home inspection report to all parties in the transaction regardless of who they represent.



## How does a broker disclose material facts?

As mentioned previously, brokers have several options to assist them with disclosing material facts. Brokers may choose to include this information in the listing description, in the remarks section of the MLS, via email communication and/ or text message.

Regardless of the method the broker uses to disclose this information, the disclosure should be in writing.



## Can a broker share the actual home inspection report?

**It depends.** When a client orders a home inspection, the findings within the report are considered confidential information; however, if the report is shared with the broker,



the broker must disclose all material facts. ***What if a seller-client shares with their broker a home inspection that was ordered prior to listing their property? Can a broker share the report? It depends.*** If the seller-client advises the broker not to share the home inspection report with prospective buyers, the broker must not share the actual home inspection report. However, the broker must disclose the material fact findings from the report, even though the report findings were originally considered confidential.

Similarly, if a prospective buyer performs a home inspection, then the findings within their home inspection report are also considered confidential information until they share the report with their buyer agent who must still disclose all material facts. Further, the prospective buyer may or may not choose to share the actual inspection report with the seller. If the prospective buyer indicates that their buyer agent can share the home inspection report with the seller, the buyer agent may do so. If the buyer agent does share the report with the seller, the findings within the report will no longer be considered confidential information.

***If a buyer agent does share the home inspection report with the listing agent, can the listing agent share the report with other cooperating brokers? It depends.*** First, after the report is shared, it is no longer considered confidential information. However, the seller may prohibit their agent from sharing the actual report with others. If the seller prohibits this, then the agent must follow the instructions of the seller and not share the actual report. The agent must still disclose material facts.

---

## **BUILDING PERMITS**

The Commission does not expect brokers to remember all of the requirements for obtaining a building permit; however, brokers should have some knowledge regarding the basic requirements for when a building permit is required.

Brokers should accurately disclose material facts such as whether or not required building permits were obtained.

Various resources are available to assist brokers with obtaining information about building permits. For example, in June of 2021, the Commission published an article entitled, [Building Permit's - A Broker's Responsibility](#). This article outlines for brokers the requirements for obtaining building permits for original construction, additions, renovations, and repairs as determined by county and/or municipal building inspection offices.



## “Tiki Time”

Mark, a listing agent with ABC Realty, lists Tara’s property. Mark is excited about listing Tara’s property because she has a hard-wired tiki bar with an outside kitchen and screened porch in her backyard. Mark knows these features will attract several potential buyers. As Mark is entering the information in the MLS, he asks Tara if the tiki bar and screened porch were upgrades constructed by the builder. Tara says that she constructed the tiki bar and screened porch herself after watching a do-it-yourself television show.

Mark is intrigued but wants further clarification and asks Tara if a general contractor assisted her with the project. Tara says no and further explains that she did not pull any permits since she is the homeowner.

Mark does not include this information in the listing description or disclose it to prospective buyers and/or cooperating brokers.

Did Mark fail to fulfill his duties as a broker? Choose the best answer.

- a) Yes. Because Mark was aware that permits were not obtained for plumbing and electrical work and the renovation project was done by an unlicensed person.
- b) No. Because Mark was not aware of any problems with the tiki bar or the screened porch.
- c) No. Because Tara, the homeowner, informed Mark that permits were not required.
- d) Yes. Because all construction projects require permits.



## When is a building permit required?

N.C.G.S. §160D-1110(c) states that no permit is required for any construction, installation, repair, replacement, or alteration performed in accordance with the current edition of the North Carolina State Building Code costing fifteen thousand dollars (\$15,000) or less in any single-family residence *unless* the work involves any of the following:

- (1) the addition, repair, or replacement of load-bearing structures;
- (2) the addition or change in the design of plumbing;
- (3) the addition, replacement, or change in the design of heating, air-conditioning, or electrical wiring, devices, appliances, or equipment, other than like-kind replacement of electrical devices and light fixtures; or
- (4) the addition (excluding replacement) of roofing.

**NOTE:** Permit requirements for local jurisdictions vary. Brokers are not expected to interpret the statutes for building permits. However, a broker is expected to inquire about additions/renovations, the existence and/or lack of permits, and red flags that may indicate work has been done to the property. A broker should contact the Building Inspection Department to clarify if/when a permit is required if there is some confusion.



### **What are some red flags that may indicate the need for a building permit?**

Red flags may exist when a seller has:

- added,
- replaced,
- repaired, and/or
- changed some item that affects the structure or the plumbing, HVAC or electrical systems of the property.

If a red flag exists, brokers should ask questions to obtain more information, such as:

- What renovations were performed?
- Who performed the renovations (i.e. licensed contractor/vendor)?
- Did you obtain a permit for the renovations?

Brokers are not expected to become familiar with all state and local permitting requirements; however, they are expected to recognize red flags and ask additional questions.



### **How should a broker verify whether a permit was obtained?**

When a broker lists a property, the broker should inquire about all of the renovations, additions, and repairs made during the seller's ownership.

As a best practice, brokers should contact the local building inspection office to verify:

- whether permits and/or occupational licenses were required for the renovations;
- whether permits were pulled, and obtain copies of the permits.

Additionally, brokers should make a good faith effort to obtain the paid invoices which reference the work that was also completed on the property.



**If a building permit was required but not obtained, must a broker disclose this information?**

**Yes.** If a broker discovers that the seller failed to obtain a required permit, the broker must disclose this material fact to all prospective buyers, even if the seller chooses not to disclose it.

---

## SQUARE FOOTAGE



### *“Below the Grade”*

Jackie, a listing agent, is instructed by her seller-client, Tamara, to hire a vendor to calculate the square footage of her property. The vendor indicates that the property has 3,419 square feet of heated living area and 1,294 square feet of “partially finished area (below grade)” which is unheated. Jackie includes the unheated area as “Living Area Below Grade” in the MLS and represents that the property has 4,713 square feet instead of 3,419 square feet.

Several buyers are interested in the property. Tamara enters into a contract with a buyer and also accepts a back-up contract on the property. Tamara’s contract with Buyer #1 is terminated during the due diligence period due to repair issues. Jackie does not revise the MLS listing. Saul is the buyer in the back-up contract. During his property inspection, Saul discovers that the basement does not have a heat source and terminates his contract due to misrepresentation.

After Saul terminates the contract, Jackie revises the square footage information in the MLS, discloses the repair issues, and the lack of a permanent heat source in the basement to subsequent buyers.

1. Is it mandatory under Commission rules for a broker to state the square footage of a property in a listing? YES/NO
2. Did Jackie fulfill her duties as a broker?
  - a) Yes. Because Jackie immediately corrected the square footage and repair issues in the MLS once it became a problem for the buyers.
  - b) No. Because Jackie initially misrepresented the square footage measurement of the heated living area.
  - c) Yes. Because Jackie was relying on the square footage measurements from an outside vendor.
  - d) No. Because Jackie should have made no reference to the square footage of the unheated below grade area.

The Commission is often asked to clarify whether or not brokers are required to state the square footage of a property in the listing description, and the answer is no. The Commission has published a resource entitled, [Residential Square Footage Guidelines](#), to clarify whether stating the square footage of a property is required by brokers. Further, it also assists brokers with how to measure, calculate, and report (both orally and in writing) the living area contained in detached and attached single-family residential dwellings.

Again, brokers are not required by Commission rules to report the square footage of properties offered for sale (or rent); however, when they do report square footage, it is important that the information they give is accurate. The Commission is aware that brokers who are members of a professional trade association, may be required to report the square footage of a property in a listing. Therefore, the Commission recommends brokers to carefully follow the *Residential Square Footage Guidelines* or any other standards that are comparable to them, including those approved by the American National Standards Institute, Inc. (ANSI) which are recognized by the Commission as comparable standards. Brokers should be aware of the standards a vendor may use and the differences within the standards when they are hired to measure a property.

Also, in 2015, the Commission published an article, [Your Square Footage Measurement Must Be Right When Listing a Property](#). This article is still applicable to brokers today. The article provides responses to some of the most frequently asked questions regarding square footage. Let's review some of the questions and their responses.



### **Do listing agents have to report square footage?**

**No.** The Commission does not require listing agents to report square footage. However, if they decide to report the square footage of a property, it must be accurate. Brokers should obtain the correct square footage by measuring it themselves or utilizing the services of a vendor.



### **Can tax records be used as a resource for square footage measurements?**

**No.** Brokers cannot utilize tax records as a resource for square footage measurements. If a broker finds that after measuring the property, the square footage measurement differs from the information in the tax records, there may be other issues, like a permit, that needs to be investigated and resolved.

**NOTE:** Blue prints are also not an acceptable resource for square footage measurements.



### **Can an appraiser measure the property?**

**Yes.** Although not required, an appraiser is generally a very good source to measure a property due to their training and experience. The Commission will normally allow a broker to rely on a licensed appraiser's current measurement as long as that reliance is reasonable. Regardless of who performs the measurement, the broker or an appraiser, the broker should keep the measurements on file in the event of a question or problem arising.



### **Can I use an old appraisal?**

**No.** A broker should not use an old appraisal or an old MLS listing description since there may have been changes to the property.



## What happens if a broker reports the wrong square footage?

According to N.C.G.S. §93A-6(a)(1), a broker who makes any willful or negligent misrepresentation or pursues a course of misrepresentation through advertising, may be subject to disciplinary action by the Commission. Therefore, if the square footage is wrong, the listing agent **and** firm may be held responsible. Further, per Rule 58A .0110, the BIC is responsible for all advertising, so they may also be subject to disciplinary action.

**NOTE:** The Commission will evaluate the facts of each case to determine what caused the inaccurate square footage. If you would like to know the types of questions the Commission may ask during the course of an investigation, please read the article, [Your Square Footage Measurement Must Be Right When Listing a Property](#), for more details.



## How can a broker include the unpermitted section of a property in the square footage?

The unpermitted section within a property should be included separately and disclosed to all of the parties in writing. A listing agent should disclose this information in writing to ensure they are not misrepresenting the property and/or misleading the buyer. Further, the buyer should be made aware of the unpermitted section's size and location as well. *Brokers should clearly identify unpermitted space within a property.*

**Note:** The Commission recommends brokers to carefully follow the *Residential Square Footage Guidelines* or any other standards that are comparable to them, including those approved by the American National Standards Institute, Inc. (ANSI). Brokers can also familiarize themselves with the ANSI Standards by accessing this website: <https://singlefamily.fanniemae.com/media/30266/display>

---

## SEPTIC PERMITS

Brokers must research the type of septic system a property has and disclose it to all parties in the transaction. North Carolina requires that every residence have an approved system for sewage disposal. The approved systems for sewage disposal are:

- municipal systems
- community systems, and
- onsite systems.



### ***“The Questionable Bedroom”***

Rebecca lists a property for her seller-client, Alice. Alice informs Rebecca that she is unsure of the type of septic system and if it permits a four-bedroom house. Rebecca does not pull the septic permit and uses the prior listing description which advertised the property as having four bedrooms and 2 bathrooms. Jonah and Lois purchase the property under the impression that it is permitted as a four-bedroom house.

During a renovation project, Jonah and Lois discover the septic permit is for a three-bedroom house. In order to move forward with their renovations, Jonah and Lois must purchase a septic system that accommodates a four-bedroom house.

Did Rebecca fulfill her duties as a broker? Why or Why not? Choose the best answer.

- a) No. Because Rebecca did not research the type of septic system, pull the permit to determine the number of bedrooms permitted, or disclose the information to all parties in the transaction.
- b) Yes. Because Rebecca advertised the property using the previous listing description.
- c) No. Because Rebecca did not disclose the type of septic system.
- d) Yes. Because brokers are not required to pull septic permits.



### **Why is a septic permit important?**

A septic permit is important because it sets the capacity limit for the system, specifically enumerating the number of bedrooms for a residence (with the presumption that two people will occupy a bedroom), or the maximum number of rooms or some other measure for a nonresidential structure.

The permit may also include a map that depicts the best location for the septic system and a repair area. Moreover, the septic permit may also prohibit the use of an automatic dishwasher, garbage disposal, or other mechanism that might overload the system.



**NOTE:** If a property uses an onsite sewage disposal system, the permitting records should be available from the local Health Department or NC Department of Environmental Quality. Brokers should verify the number of bedrooms authorized by the septic permit and discover whether any restrictions are attached to the septic permit, such as prohibition against dishwashers, garbage disposals, etc., to comply with License Law.



## Should a broker verify the existence of a septic system before listing a property?

**Yes.** Brokers should verify the type of septic system, if any, that serves the property and the number of bedrooms that are permitted before making any representations about the listing.

To begin the verification process, brokers can interview the seller and ask the following questions about their sewage disposal system:

- What type of septic system do you have?
- Where is the septic system located?
- Where is the repair area for the septic system located?
- Is the septic system working properly?
- Has the septic system been maintained in the past?
- Has the septic system been repaired in the past? If so, when and by whom?
- When was the septic system last pumped?
- Have there been any signs of possible failure with the septic system?
- Have there been any additions to the house?

Brokers can also contact the local Health Department in the county in which the property is located to obtain a copy of the septic permit.

As an additional resource, brokers can use the article, [“Septic System Owner’s Guide](#), published by North Carolina State Extension Publications, to assist them with gathering introductory information from a homeowner regarding their septic systems.

**NOTE:** The following questions contain responses written by Regulatory Affairs in the article, [Septic Permits- A Refresher](#). Brokers should review the responses below to ensure they are accurately providing information in advertisements or listing descriptions about the septic system.



## **Should a broker assume that a property is connected to municipal water or is serviced by a septic system?**

**No.** Brokers should never assume that a property is connected to municipal water or serviced by a septic system. Most importantly, brokers should never assume that rural homes are the only properties that have septic issues.

A broker should consider the location of the property (i.e. whether it is in an older neighborhood), whether the property exhibits “red flags” (e.g. depression in the yard or the existence of stone markings for the septic tank), or seller confirmation on the existence of a septic system/connection to municipal water to start the verification process on the type of septic system that is on the property.

Brokers can also verify the existence of a municipal connection from the city or county, depending on the location of the property.



## **What is a combination system and what should the broker know about this type of system?**

A combination system is when a property’s septic system is connected to a municipal system but the water is not. Brokers should be aware that city or county responsibilities ends where the septic system connects to the municipal system. Therefore, issues with a pump connected to the septic tank, root damage to pipes in the yard, or other problems that may occur on an owner’s land, are the responsibility of the homeowner.

**NOTE:** Combination systems with municipal system connections may not have a permit on file.



## **What should a broker do if the septic system is an onsite system?**

Once a broker determines that a property has an onsite septic system, they should call the county health department. The county health department should provide the broker with the septic permit information. The broker should review the septic permit to determine the capacity that has been set for the property. Brokers should also analyze the permit to determine whether or not it includes other limitations, such as prohibiting the use of a dishwasher or garbage disposal.

Most importantly, a broker should only advertise the number of bedrooms specified in the septic permit. If the broker misrepresents the property as having more bedrooms than the septic system permits, the system could be overused and eventually fail. Also,

if the broker advertises more bedrooms than are permitted, they are engaging in willful misrepresentation.

If the broker experiences issues with locating records for the septic permit, they may utilize the tax records to *assist* with the determination of *permitted* bedrooms. For instance, if the property has four bedrooms but the tax records indicate three bedrooms, this may indicate that three bedrooms is the septic permit's limit. In cases where the permit cannot be located, a broker should disclose what they know; namely, that the property has an on-site septic system but the system permit could not be located. Further, the broker should also document in the transaction file that the septic permit could not be located.

**NOTE:** Brokers should take reasonable steps to ensure that they are discovering and disclosing the correct sewage system utilized by any home they are listing. If the home is connected to an on-site septic system, then the property should be represented as having the amount of bedrooms as indicated on the permit. Buyer agents should be alert to any red flags and perform their own due diligence if there are concerns about the septic system.

---

## SUMMARY OF IMPORTANT POINTS

- A material fact is ANY fact that could affect a reasonable person's decision to buy, sell, or lease.
- The four categories of material facts are:
  - facts about the property itself,
  - facts that relate directly to the property,
  - facts directly affecting the principal's ability to complete the transaction, and
  - facts that are known to be of special importance to a party.
- A broker has an affirmative duty to discover and disclose material facts to all parties in a transaction.
- Brokers are expected to take reasonable steps to discover all pertinent facts about a property that are necessary to serve their client's interest.
- Listing agents are expected to:
  - accurately gather all information about a listed property necessary to effectively market the property; and
  - comply with disclosure requirements to prospective buyers.
- buyer's agents are expected to:
  - assist buyer-clients in obtaining any information related to the property; and
  - gather specific property information that is of particular interest to the buyer-clients.
- Any information that may affect the principal's rights and interests or influence their decision in the transaction must be disclosed, such as:
  - the other party's willingness to agree to a price or terms different from those previously stated,
  - the other party's motivation for engaging in the transaction, or
  - any other information that might affect the principal's rights and interests or influence the principal's decision in a transaction.
- State and fair housing laws excuse the disclosure of certain facts that seem material such as:
  - disclosing the death or serious illness of a previous property occupant, or
  - disclosing a convicted sex offender occupying, having occupied, or residing near a property,
- State and fair housing laws prohibit:
  - disclosing a current or former occupants' AIDS/HIV status.
- Brokers must discover and disclose material facts to all interested parties in the transaction.
- The mandatory disclosure of material facts includes disclosure of:
  - facts about the property that the broker knows exist,
  - facts about the property the broker reasonably should know exist, and
  - information that is considered common knowledge.

- A broker must disclose a material fact or potential material fact to a client/customer so they can possess the adequate knowledge to:
  - make an intelligent decision regarding a property,
  - negotiate repair services, or
  - decide to terminate the contract.
- The Commission determines whether or not a broker knew the existence of a material fact by:
  - analyzing documents,
  - written correspondence, and
  - interviewing individuals involved in the transaction.
- An examination of public records and educational resources are used by the Commission to determine whether or not a broker should reasonably know a material fact about a property.
- The Commission uses the *Reasonableness Standard* to evaluate a broker's duty to discover and disclose material facts.
- A broker has a duty to discover and disclose any material fact if a reasonably knowledgeable and prudent broker would have discovered the fact during the course of the transaction.
- A red flag is the presence of any fact or issue that should make a reasonably prudent broker working with the buyer or seller suspect that the information provided by another party may be incorrect.
- Red flags can be:
  - stains on the ceiling, floor, or in the cabinet,
  - discolored flooring,
  - absence of septic permits,
  - unpermitted spaces,
  - leaks,
  - stream in the backyard,
  - cracked foundational issues, or
  - miscalculations of square footage.
- If red flags are present, a broker must conduct additional research by:
  - asking the owner about known issues with the property
  - measuring the property or hiring a vendor to measure the property if there is a discrepancy (e.g. red flag) in square footage,
  - asking the owner to provide service records for repairs conducted on the property,
  - researching the existence of septic permits and building permits with the local municipality, or
  - advising the client to hire an inspector and/or contractor to estimate and/or repair issues.
- Common knowledge is defined as knowledge that is widely or generally known to everyone or nearly everyone in a community and can be obtained in a multitude of ways.
- The listing agent is responsible for verifying the accuracy of property data and the discovery of material facts.

- The listing agent can compile accurate property data and discover material facts by:
  - conducting a visual inspection of the property,
  - asking the seller questions about the property, and
  - obtaining copies of documentation regarding repairs and renovations.
- Brokers should ensure they are timely disclosing material facts to all parties in a transaction.
- Timely disclosure of material facts occurs when:
  - the listing agent discloses the existence of a material fact in the description of any advertisement or property listing, and/or
  - before prospective buyers and/or agents view the property.
- A listing agent should consider the following best practices before listing a property:
  - state their duty to discover and disclose material facts under License Law to their clients/consumers,
  - evaluate and conduct a preliminary inspection of the property to determine if any “red flags” exists before making any statements,
  - research issues on the property to determine if they were repaired and the likelihood of the issue existing in the future,
  - interview the seller about repair timelines and prior records of completion,
  - determine the seller’s willingness to repair the defects, and
  - disclose the defects to all parties in the transaction.
- If the listing agent is informed of material facts after they have listed the property, the material facts should be disclosed immediately to all parties in the transaction.
- A buyer agent has a responsibility to inquire about the presence of material facts for their client.
- A buyer agent may rely on the accuracy of the property information provided by the listing agent unless the buyer agent reasonably suspects that the information may be inaccurate.
- A buyer agent has a duty to verify issues that their clients have identified as being material.
- As a best practice, a buyer agent should:
  - research zoning codes/requirements of a property,
  - determine facts of special interest or relevance to their client,
  - research property-specific information,
  - evaluate and visually inspect a property for issues, and
  - inquire with the listing agent about the presence of material facts for their client.
- A home inspection consists of a written evaluation of two or more of the following components of a residential building: heating system, cooling system, plumbing system, electrical system, structural components, foundation, roof, masonry structure, exterior, and interior components, or any other related residential housing component.

- A home inspection is important because it evaluates the condition of the property on the day it is inspected.
- Homebuyers are not required to conduct a home inspection prior to purchasing a property; however, brokers are encouraged to advise their clients to conduct a home inspection.
- They should thoroughly review the home inspection report with the client. If the broker or client has any questions about items discussed in the report, the broker should ask for clarification or an explanation from the home inspector.
- The broker also has an affirmative duty to disclose any and all material facts identified in the inspection report.
- A broker should not attempt to interpret the home inspection report or the condition of the property.
- Brokers are not expected to know all of the requirements for obtaining a building permit.
- Red flags may exist when a seller has:
  - added,
  - replaced,
  - repaired, and/or
  - changed some item that affects the structure or the plumbing, HVAC or electrical systems of the property.
- If a red flag exists, brokers should ask questions to obtain more information, such as:
  - What renovations were performed?
  - Who performed the renovations (i.e. licensed contractor/vendor)?
  - Did you obtain a permit for the renovations?
- Brokers should contact the local building inspection office to verify whether:
  - permits and/or occupational licenses were required, and
  - permits were pulled, and obtain copies of the permits.
- If a broker discovers that the seller failed to obtain a required permit or failed to hire a licensed professional when a license was required, then the broker must disclose this material fact to all prospective buyers, even if the seller chooses not to disclose it.
- A Commission publication entitled, *Residential Square Footage Guidelines* is available to assist brokers with measuring, calculating, and reporting (both orally and in writing) the living area contained in detached and attached single-family residential dwellings.
- Brokers are not required by License Law or Commission rules to report the square footage of properties offered for sale (or rent); however, when they do report square footage, it is essential that the information they give is accurate.
- Brokers cannot use tax records or blueprints as a resource for square footage measurements.
- Brokers should not use an old appraisal or old MLS listing description as a resource for square footage measurements.

- Unpermitted additions to a property should not be included in the overall square footage of the property. The unpermitted section should be included in the description separately and disclosed to all of the parties in writing.
- Brokers must research the type of septic system a property has due to it being a material fact.
- A septic permit is important because it sets the capacity limit for the system and specifies the number of bedrooms for a residence, or the maximum number of rooms or some other measure for a nonresidential structure.
- Brokers can contact the local Health Department in the county in which the property is located to obtain a copy of the septic permit.



---

## ANSWERS TO DISCUSSION QUESTIONS

For Discussion on page 1

*Is it a Material fact?*

**True or False.** Indicate whether or not the following “facts” are material.

*Answers in bold.*

- a) Square footage error - **True**
- b) Synthetic Stucco that has been repaired or replaced - **True**
- c) The mere existence of polybutylene plumbing - **False**
- d) A structural issue that has been repaired - **True**
- e) A well recently contaminated with e-coli but current tests reveal no presence of bacteria - **True**
- f) A roof that leaks during severe rain - **True**

**“See No Evil, Say No Evil”**

Jake, a broker with A+ Realty, meets with Peter, a property owner, to provide a listing presentation. During the meeting, Peter says that he recently had a home inspection that indicated water leakage in the basement walls and crawl space, but that he has ordered no further inspections to verify the issue or determine repair needs. Jake tours the property and observes no moisture or standing water. Peter decides to list the property with Jake. On the *Residential Property and Owners’ Association Disclosure Statement (RPOADS)* Peter selects “No Representation” to all of the questions. Throughout the listing period, there is no visible evidence of moisture or water, so Jake does not mention Peter’s inspection report to any of the prospective buyers.

1. Did Jake fulfill his duties as a broker? YES/NO

**Answer: No.**

2. Why or Why not? Choose the best answer.

*Answer in bold.*

- a) **Although Jake did not personally observe any moisture or standing water, he still had an obligation to disclose the water leakage in the basement walls and crawl space.**
- b) Because Jake has an obligation to disclose whether he personally saw any water or not.
- c) Because the owner, Peter, already checked “No Representation” on the RPOADS.
- d) Because Peter’s completion of the RPOADS relieved Jake of any additional disclosure obligations.

### ***“Dues Surprise Party”***

Linda, a broker with X Realty, lists her personally owned residential condominium unit with her firm on March 1. The unit goes under contract on March 3 and the buyer submits the Due Diligence Fee and the Earnest Money Deposit in accordance with the terms of the contract. Linda receives notification of a proposed assessment from the HOA on March 5. If the assessment is approved, HOA dues will be temporarily increased starting in July to pay for various exterior repairs. Must Linda tell the buyer about the proposed assessment? Why or why not? Choose the best answer.

*Answer in bold.*

- a) No. Because she owns the property, Linda has no obligation to share the information about the assessment unless it is approved prior to closing.
- b) No. Because the proposed assessment is only for a temporary increase in dues, there is no obligation to disclose.
- c) **Yes. Because Linda is a broker, she must disclose the proposed assessment because it is a fact that is directly related to the property.**
- d) Yes. Because she owns the property, Linda is obligated to the share the information about the assessment if it is approved prior to closing.

**For Discussion on page 11**

### ***“The Unexpected Tenants”***

Charlie, a seller-client, hires Teresa, an agent with 123 Homes, to list his property. Charlie informs Teresa that his family cemetery is located on the property. Teresa decides not to disclose this information to potential buyers because she does not want to scare them off and she wants the property to sell quickly. Fred, a buyer, purchases the property and realizes the existence of the cemetery after he moves into the home.

Fred contacts Teresa and expresses his anger with the cemetery not being disclosed prior to his purchase of the property. Did Teresa fulfill her duties as a broker? Why or why not? Choose the best answer.

*Answer in bold.*

- a) Yes. Because it was Charlie’s duty as a seller to disclose this information to prospective buyers.
- b) No. Because Teresa did not advise Charlie to disclose this information in the seller’s disclosure.
- c) Yes. Because Teresa did not represent Fred and had no duty to discover and disclose material facts to him.
- d) **No. Because Teresa was aware of the cemetery prior to listing the property and should have disclosed this fact relating to the property to all parties in the transaction.**

## For Discussion on page 14

### *“The Raining Skylights”*

Cher, a seller, wants to list her property, so she hires Zack, a listing broker, with ABC Homes.

During the prelisting walk through, Cher informs Zack that she has completed the *Residential Property and Owners’ Association Disclosure Statement and Mineral and Oil and Gas Rights Mandatory Disclosure Statements*.

Zack asks Cher if she has any problems with the roof leaking because he notices several stains near the skylights. Cher states that the roof only leaks during heavy rainfall. She also states that the insulation surrounding her skylights is decayed and she does not have the extra funds to repair them before listing the property.

Zack creates the listing in the MLS and does not disclose the leaking roof. Sam, a buyer agent, and his buyer-client, Shannon, go to view Cher’s property. Sam notices the stains on the ceiling and discusses this information with Shannon. Shannon still expresses an interest in the property; however, Sam informs her that he needs to ask Zack some additional questions and conduct more research before he could assist her with making an intelligent, informed offer.

1. Did Zack fulfill his duties as a broker? Why or why not? Choose the best answer.

*Answer in bold.*

- a) No. Because Zack is not a home inspector.
  - b) No. Because Cher made Zack aware of the leaking roof and he failed to disclose it to all parties in the transaction.**
  - c) Yes. Because Zack did not verify any issues.
  - d) Yes. Because Cher’s comments are her opinions.
2. Did Sam fulfill his duties as a broker? Why or why not? Choose the best answer.

*Answer in bold.*

- a) Yes. Because Sam told Shannon they needed further information regarding the property.
- b) No. Because Sam should not have written the offer without an additional investigation.
- c) Maybe. Sam did reasonably suspect there was an issue; therefore, the best practice would be for Sam to get the additional information from Zack, the listing agent, before assisting the buyer with her offer.**
- d) Yes. Because Sam did not know for certain if there were any problems with the skylights.

## For Discussion on page 17

### *“Slip Sliding Away”*

Maxine is the buyer agent for Alesha. Alesha is interested in purchasing a beach-front property. Maxine contacts Rob, a listing agent, for the property. During the conversation with Rob, Maxine asks the following questions:

1. Does the property have any storm damage from the hurricane last year?
2. What are the locations of the set-back lines for the property?
3. Can a structure be rebuilt on the lot if the existing structure was extensively damaged?

Rob tells Maxine that the hurricane caused cosmetic damage and is currently being repaired. He stated that even if a hurricane were to cause serious damage in the future, he saw no reason she couldn't rebuild. He also states that he will provide her with additional information later because he did not know the locations of the set-back lines. Maxine informs Alesha of the information she receives from Rob. Alesha tells Maxine she really likes the property and instructs her to submit an offer. Maxine submits the offer without receiving the additional information or verifying the extent of the damage to the property.

Alesha hires vendors to perform the inspection and survey soon after she goes under contract on the property. After the survey, she is informed to contact the Division of Coastal Management for more details. Maxine calls the Division and they tell her the lot has more than 50% damage; therefore, the existing structure on the property cannot be rebuilt using the current footprint.

Alesha does not want to proceed with the transaction and terminates the contract even though the due diligence period has expired. The seller, releases Alesha's earnest money deposit.

1. Should Rob possess common knowledge regarding the properties he list? YES/NO

*Answer: Yes. Common knowledge is knowledge that is widely or generally known to everyone or nearly everyone in the community. If Rob is going to practice in an area, Rob should have common knowledge, specifically geographic competence about properties in his area.*

2. Did Rob fulfill his duties as a broker? Choose the best answer.

*Answer in bold.*

- a) Yes. Because the owner told Rob it was being repaired.
- b) No. Because Rob should have knowledge about common requirements in coastal management areas and should have known that damage beyond 50% would prohibit rebuilding in the coastal management area.**
- c) Yes. Because Rob may have been unaware of the actual damage to the structure.
- d) No. Because Rob does not usually deal with coastal properties.

3. Did Maxine fulfill her duties as a broker? Choose the best answer.

*Answer in bold.*

- a) Yes. Because Maxine relied on the information from the listing agent.
- b) No. Because Maxine did not have enough information and repeated a misrepresentation made by the listing agent.**
- c) Yes. Because Maxine is not a structural engineer.
- d) No. Because Maxine must do a visual inspection of the property before writing an offer.

**For Discussion on page 19**

***“The HGTV Special”***

Pat, a listing agent with 123 Realty, is representing Joe in the sale of his property. Joe, an investor, tells Pat that he purchased the property seven months ago and his son, Sam, performed the renovations. The renovations included the addition of a bedroom, bathroom, deck and HVAC system. Pat asks Joe for a copy of the permits. Joe states that Sam is not a licensed contractor and he did not obtain permits.

After receiving this information, Pat lists the property and advertises all of the new renovations. Buyer #1 offers to purchase the property. During their inspection, the home inspector states that the deck is not structurally sound. Buyer #1 terminates the contract during the due diligence period. Pat does not update the listing nor did Joe revise any seller disclosures.

Buyer #2 submits an offer and has the property inspected as well. The inspection report for Buyer #2 reveals the same deck issue noted in the inspection report submitted by Buyer #1. Buyer #2 submits a Due Diligence and Repair Addendum. Joe agrees to make the repair for Buyer #2. Buyer #2 has the property re-inspected after the repair was allegedly made and it has not been fixed. Buyer #2 terminates after the due diligence period. Joe refuses to release the earnest money deposit to Buyer #2. Also, he does not update any seller disclosures and Pat does not revise the listing in the MLS.

Pat receives an offer from Buyer #3 who is represented by Sue, a buyer agent. After advisement from Sue, Buyer #3 offers to pay the full price in cash, close within seven days, and will not conduct an inspection. Joe accepts the offer and the property closes without incident. After closing, Buyer #3 discovers the house needs thousands of dollars in repairs.

1. Did Pat have knowledge of a material fact? YES/NO Why or why not?

***Answer: Yes. Pat had knowledge of material facts when she was informed by Joe that his renovations were performed by his son, Sam, who was unlicensed. Pat also knew that Joe did not obtain permits for the renovations.***

2. Did Pat fulfill her obligations as a broker? Choose the best answer.

*Answer in bold.*

- a) Yes. Because until the initial home inspections, Pat did not know if there were problems with the deck.
- b) Yes. Because it was the obligation of Buyer #3 to get a home inspection.
- c) **No. Because Pat did not disclose the unpermitted additions nor that the work was done by an unlicensed individual.**
- d) No. Because Pat should have required the Joe to obtain the proper permits.

3. Should Sue, the agent for the 3<sup>rd</sup> buyer, have foreseen any red flags in this transaction? YES/NO Why or Why not? Choose the best answer.

*Answer in bold.*

- a) **Yes. Sue should have reasonably known there were some red flags due to the number of times the property was under contract. She should have asked additional questions.**
- b) No. Because Sue did not represent any of the previous buyers.
- c) No. Because Sue buyer-client chose not to get a home inspection.
- d) No. Not unless Sue actually knew there were problems with the deck.

**For Discussion on page 22**

***“The Garage Has Feet”***

Jessica, a buyer agent, represents Sue. Sue is interested in a residential property in an older, established neighborhood. Jessica and Sue view the property.

While viewing the property, Jessica is concerned because Rachelle, the listing agent, describes the property as having 3264 square feet in the MLS. Jessica tells Sue that she believes the square footage wrongfully includes 576 square feet from the garage. Jessica does not advise Sue to have the property professionally measured and she does not notify Rachelle of the misrepresentation. Sue purchases the property and is later informed that the property is actually 2688 square feet. Did Jessica fulfill her duties as a broker? Why or why not? Choose the best answer.

*Answer in bold.*

- a) No. Because she did not inform Rachelle of her misrepresentation of the square footage.
- b) Yes. Because she made Sue aware of the misrepresented square footage.
- c) **No. Although she advised Sue that the square footage may be inaccurate, she did not advise her to have the property professionally measured or notify Rachelle of the inaccuracy.**
- d) Yes. Because she did not have a duty to inform Rachelle about her misrepresentation of the square footage.

## For Discussion on page 26

### *“The Not So New HVAC”*

Jason, a BIC and listing agent with XYZ Realty, lists his personal residential property. Jason indicates in MLS that the property has new carpeting, wood flooring, and a new HVAC system. Further, he writes in the MLS remarks that the property qualifies for conventional financing although his community consists mainly of rental properties.

Jason uses the square footage in the tax records to enter the property in MLS. During the listing period, Jason has three buyers contract to purchase the property but all of the contracts were terminated after a property inspection indicated material defects with the HVAC system. Jason does not update the listing with this new information from the home inspection report.

Chad, the fourth buyer, enters into an agreement to buy the property and hires a vendor to perform a home inspection. His inspection report also indicates that the HVAC system has material defects. Chad is no longer interested in purchasing the property and terminates the contract during the due diligence period. Jason updates the MLS *after* Chad terminates the contract.

1. If Jason is an unlicensed individual, does he have to disclose material facts?  
YES/NO

*Answer: No. Jason does not have to disclose material facts as a “seller” of the property. Sellers are not required to disclose material facts about their property in the disclosure forms.*

2. If Jason is an unlicensed individual, does he have to disclose material facts on the RPOADS form? YES/NO Why or Why not?

*Answer: No. Jason does not have to disclose the existence of material facts on the RPOADS.*

3. As a licensed broker selling his own property, has Jason violated License Law and Commission rules? Choose the best answer.

*Answer in bold.*

- a) Yes. Because in this transaction, Jason is in the role of a private seller.
- b) No. Because home inspection reports can vary and the previous reports were just opinions.
- c) **Yes. Because he relied on tax records for the square footage and failed to disclose a material fact regarding the HVAC.**
- d) No. Because he did not attempt to represent the buyers and owed them no obligations.

## For Discussion on page 30

### ***“Tiki Time”***

Mark, a listing agent with ABC Realty, lists Tara’s property. Mark is excited about listing Tara’s property because she has a hard-wired tiki bar with an outside kitchen and screened porch in her backyard. Mark knows these features will attract several potential buyers. As Mark is entering the information in the MLS, he asks Tara if the tiki bar and screened porch were upgrades constructed by the builder. Tara says that she constructed the tiki bar and screened porch herself after watching a do-it-yourself television show.

Mark is intrigued but wants further clarification and asks Tara if a general contractor assisted her with the project. Tara says no and further explains that she did not pull any permits since she is the homeowner.

Mark does not include this information in the listing description or disclose it to prospective buyers and/or cooperating brokers.

Did Mark fail to fulfill his duties as a broker? YES/NO Why or why not? Choose the best answer.

*Answer in bold.*

- a) ***Yes. Because Mark was aware that permits were not obtained for plumbing and electrical work and the renovation project was done by an unlicensed person.***
- b) No. Because Mark was not aware of any problems with the tiki bar or the screened porch.
- c) No. Because Tara, the homeowner, informed Mark that permits were not required.
- d) Yes. Because all construction projects require permits.

## For Discussion on page 32

### ***“Below the Grade”***

Jackie, a listing agent, is instructed by her seller-client, Tamara, to hire a vendor to calculate the square footage of her property. The vendor indicates that the property has 3,419 square feet of heated living area and 1,294 square feet of “partially finished area (below grade)” which is unheated. Jackie includes the unheated area as “Living Area Below Grade” in the MLS and represents that the property has 4,713 square feet instead of 3,419 square feet.

Several buyers are interested in the property. Tamara enters into a contract with a buyer and also accepts a back-up contract on the property. Tamara’s contract with



Buyer #1 is terminated during the due diligence period due to repair issues. Jackie does not revise the MLS listing. Saul is the buyer in the back-up contract. During his property inspection, Saul discovers that the basement does not have a heat source and terminates his contract due to misrepresentation.

After Saul terminates the contract, Jackie revises the square footage information in the MLS, discloses the repair issues, and the lack of a permanent heat source in the basement to subsequent buyers.

1. Is it mandatory under Commission rules for a broker to state the square footage of a property in a listing? YES/NO

*Answer: No. It is not a mandatory requirement under Commission rules for a broker to state the square footage of a property in a listing. If a broker does state the square footage of a property, the information must be accurate. If the information is inaccurate, the broker may be engaging in misrepresentation.*

2. Did Jackie fulfill her duties as a broker? Choose the best answer.

*Answer in bold.*

- a) Yes. Because Jackie immediately corrected the square footage and repair issues in the MLS once it became a problem for the buyers.
- b) No. Because Jackie initially misrepresented the square footage measurement of the heated living area.**
- c) Yes. Because Jackie was relying on the square footage measurements from an outside vendor.
- d) No. Because Jackie should have made no reference to the square footage of the unheated below grade area.

## For Discussion on page 36

### ***“The Questionable Bedroom”***

Rebecca lists a property for her seller-client, Alice. Alice informs Rebecca that she is unsure of the type of septic system and if it permits a four-bedroom house. Rebecca does not pull the septic permit and uses the prior listing description which advertised the property as having four bedrooms and 2 bathrooms. Jonah and Lois purchase the property under the impression that it is permitted as a four-bedroom house.

During a renovation project, Jonah and Lois discover the septic permit is for three-bedroom house. In order to move forward with their renovations, Jonah and Lois must purchase a septic system that accommodates a four-bedroom house. Did Rebecca fulfill her duties as a broker? Why or Why not? Choose the best answer.

Answer in bold.

- a) **No. Because Rebecca did not research the type of septic system, pull the permit to determine the number of bedrooms permitted, or disclose the information to all parties in the transaction.**
- b) Yes. Because Rebecca advertised the property using the previous listing description.
- c) No. Because Rebecca did not disclose the type of septic system.
- d) Yes. Because brokers are not required to pull septic permits.

## Section 2

# Dual Agency: Who Do You Represent?



### *“The Undisclosed Pitfall”*

Sam and Melissa are affiliated brokers with ABC Homes. Sam meets with Lucas, a prospective seller, and Lucas enters into a listing agreement with ABC Homes. He does not agree to dual agency. Lacy, a buyer-client, enters into a written buyer agency agreement with Melissa, but dual agency is not discussed.

Lacy views the property owned by Lucas and is interested in making an immediate offer on the property.

Can Sam and Melissa legally practice dual agency in this transaction?  
YES/NO Why or why not?

---

---

## LEARNING OBJECTIVES

After completing this section, you should be able to:

- explain the basic requirements of Commission Rule 58A .0104;
- define dual agency;
- describe how to legally practice dual agency;
- explain designated dual agency;
- list an advantage of designated dual agency; and
- identify some policies a BIC should consider before allowing the practice of designated dual agency in the firm/company.

---

## TERMINOLOGY

### Agency Concepts

- **Agency:** The relationship that exists when one person or entity is authorized to act for and on behalf of another.
- **Agent:** The person or entity acting for and on behalf of the principal within the bounds of the authority granted and who owes fiduciary (legal) duties to the principal.
- **Principal / Client:** The party who authorizes another (the agent) to act on the principal's behalf within specified parameters and to whom the agent owes certain legal duties.
- **Dual Agency:** The practice of one firm/sole proprietorship representing both the buyer and the seller in the same real estate sales transaction.
- **Designated Dual Agency:** The practice of one brokerage company representing both the buyer and the seller but designating individual brokers to exclusively represent either the buyer's or seller's interest.

**NOTE:** Commission rules commonly use the term firm. However, these rules apply to firms AND sole proprietorships. According to the BIC Best Practices Guide, a firm may be a corporation, partnership, limited liability company, or any other type of business entity. Also, prior to a firm conducting brokerage activity, a firm license is required. A sole proprietorship is a business that is owned and managed by one individual who is solely responsible for its debts and obligations. A sole proprietorship may have more than one broker associated with their company as well.

---

## AGENT'S FIDUCIARY DUTIES

It is important for brokers to remember that an agency relationship is created when the principal authorizes the agent to act on their behalf. Therefore, we need to review the fiduciary duties that an agent owes a principal before we begin the discussion on dual and designated dual agency.

A *fiduciary* is a person who acts for another in a relationship of trust and who is obligated to act in the other's best interests, including placing the other's interests before their own. Brokers must act as fiduciaries for their principals while conducting brokerage activities.



## What are the fiduciary duties owed to a principal?

A fiduciary must:

- be **obedient** to the principal (e.g., follow all lawful directives);
- be **loyal** to the principal;
- **disclose** all facts to the principal that may influence the principal's decision;
- **preserve** all personal, confidential information about the principal that is not a material fact;
- **account** for the funds of the principal; and
- **exercise** skill, care, and diligence in the performance of their duties; and

in addition, all brokers must operate in **good faith** to promote the principal's interests.

In plain words, when a principal employs a real estate broker as an agent, that principal is entitled to receive absolute loyalty and obedience from the agent. This means that the broker cannot advance their own personal, business, or family interests above their principal's interests. The principal's interests must be the top priority of the agent.

Also, the agent may not participate in conduct that will compromise or divide the loyalty they owe to the principal. Basically, the agent cannot participate in activities that will be adverse to the interests of the principal. Also, the agent must comply with all lawful instructions of the principal and ensure they are fulfilling the terms of the agency agreement.

### ***Agency Agreements and Disclosures***

Prior to establishing an agency relationship with a principal, a broker must adhere to the requirements set forth in Commission Rule 58A .0104(c). This rule states:

In every real estate sales transaction, a broker shall, at *first substantial contact* with a prospective buyer or seller, **provide** the prospective buyer or seller with a copy of the publication "Working with Real Estate Agents,"... **review** the publication with the buyer or seller, and determine whether the agent will act as the agent of the buyer or seller in the transaction.

It is imperative that the broker *provide and review* the WWREA Disclosure form to the prospective buyer or seller at first substantial contact in all sales transactions (i.e. residential and commercial). The WWREA Disclosure form informs the prospective buyer or seller not to share confidential information before an agency relationship is created.

It further educates the consumer on the type of agency options that a firm/company may provide during representation.

After the WWREA Disclosure is provided and reviewed, the consumer has the ability to make an informed decision regarding the type of agency relationship, if any, they would like to enter into with the firm/company.

If the prospective buyer or seller decides against entering into an agency relationship with the broker, the broker does not owe any fiduciary duties to the individual under agency law. For example, if the broker receives any personal, information from the consumer, the information is *not* considered confidential and can be shared with others.



### Are agency agreements required to be in writing?

**Yes.** An agency agreement must:

- be in writing;
  - listing agreements must be in writing before brokerage services are provided
  - buyer agency agreements must be in writing no later than the time one of the parties makes an offer to purchase, sell, rent, lease, or exchange real estate to another
- identify and be signed by all parties and include the broker's license number;
- have a definite termination date on which it automatically expires; and
- contain the fair housing non-discrimination language as stated in Rule 58A .0104(b).

Also, all agency agreements must be *expressed* from the beginning before any brokerage services can be conducted. An *express* agreement means that the agreement, even if oral, includes all of the contractual terms between the parties.



### When must an agency agreement with sellers or lessors be in writing?

Rule 58A .0104(a) indicates that brokers may not provide any sales, leasing, or management services for any property owner without having a written agency agreement from the onset of the brokerage relationship.

***What if a broker is only providing limited brokerage services? Is an agency agreement required for the limited brokerage services?*** Yes. It does not matter if the broker is providing full or limited services, the agency agreement must still be executed in writing before the agreed upon services are provided. If the broker does not have a written agency agreement, they may be forfeiting any right to receive compensation.

Also, Rule 58A .0104(a) states that every agency agreement must specify a definite termination date on which the agency agreement will automatically expire. However, an agency agreement (e.g. property management) between a landlord and broker to procure tenants or receive rents for the landlord's property may allow for an automatic renewal so long as the landlord may terminate without notice at the end of the contract period and any subsequent renewals.



## **When must an agency agreement with buyers and tenants be in writing?**

A buyer agency agreement with a buyer/tenant *must* be reduced to writing and signed no later than the time one of the parties makes an offer to purchase, sell, rent, lease, or exchange real estate to another. However, if the policies of a firm/company permit a broker to enter into an oral buyer agency agreement, then the broker may do this initially.

However, oral buyer agency agreements must be express and permit the buyer/tenant to work with other agents for an undetermined time period. In other words, the oral agreement *may not* be exclusive and obligate the buyer/tenant to work only with the firm/company for any period of time. The moment the buyer agency relationship is restricted to a specific time period or to only one brokerage company, the agency agreement must immediately be reduced to writing and signed by all parties.

---

## **DUAL AGENCY**



### ***“But Everyone Agreed”***

Alice, a broker with 123 Realty, enters into an oral buyer agency agreement with Bernice, a buyer-client. Bernice is interested in purchasing two parcels of land listed by 123 Realty. Alice tells Bernice that the seller has provided the firm with written authorization to practice dual agency. She also tells Bernice while reviewing the WWREA Disclosure, that the firm can represent her as a dual agent as well if she agrees to this type of agency representation.

Before agreeing to representation, Bernice asks Alice to explain the concept of dual agency. Alice uses the WWREA Disclosure and *Questions and Answers: on Working with Real Estate Agents* brochure to assist her with answering questions about dual agency. Bernice verbally agrees to dual agency representation. After the verbal agreement, Alice submits an offer to the sellers on behalf of Bernice.

Did Alice violate License Law and Commission rules? YES/NO?

If so, how? \_\_\_\_\_



### **What is dual agency?**

Dual agency exists when a firm/company or sole practitioner represents both the interests of the prospective buyer and prospective seller in the same real estate transaction.



### **Does dual agency always involve only one individual broker representing both buyer and seller in a transaction?**

**No.** There continues to be confusion about how many affiliated brokers of a real estate brokerage company can be actively involved in a dual agency transaction.

Perhaps the clearest illustration of dual agency is a sole practitioner who is responsible for securing a seller-client and then a buyer-client interested in that seller-client's listed property. Most people can quickly appreciate the challenge that a single broker (individual dual agent) would encounter while balancing fair and equal (neutral) representation of both sides without sharing protected confidential client information.

But, recall that dual agency can also be practiced by a single entity. Therefore, a real estate firm can have the listing of a seller-client and also have a buyer agency agreement with a buyer who is interested in that particular listing. If both the buyer and the seller clients authorize dual agency, the firm and ALL of its affiliated brokers are in dual agency with both the seller-client and the buyer-client for this property. The situation could mirror the sole practitioner example above, in that, a single affiliated broker signed up both the seller and buyer clients with each authorizing the broker to serve as the dual agent. It is more likely that one affiliated broker secured the listing of the seller-client and a different affiliated broker created agency with the buyer-client who is interested in the firm's listing.

The fiduciary duties owed in dual agency are not affected whether one or multiple affiliated brokers are involved. Involving a second affiliated broker, does not automatically change the dual agency relationship to designated dual agency.



Additional authorization is required from both clients to practice designated dual agency. This will be discussed further in the section.



## Is dual agency legal in North Carolina?

**Yes.** Dual agency is legal in North Carolina as long as both parties (e.g. seller and buyer) have provided written authorization for the agent to represent both parties in the transaction.



### *“Did I Say Too Much or Too Little?”*

Nelson, an agent with See Homes, represents Renee, a seller-client. In the listing agreement, Renee provides written authority for See Homes to practice dual agency. She also tells Nelson that he is not to share any of her confidential information during the transaction. Renee informs Nelson that she has noticed a weird smell coming from the right side of her house. Nelson walks outside to the right of the house and notices puddles of water in the yard. Nelson tells Nancy that it is normal for puddles of water to accumulate during heavy rainfall and the new buyers can easily fix the issue. Nelson lists Renee’s property later that evening and does not include any information about the water puddles in the yard.

Donna, an unrepresented buyer, contacts Nelson and inquires about Renee’s property. During the conversation, Nelson reviews the property details with Donna and the WWREA Disclosure form. Nelson informs Donna that he can represent her in the transaction if she would agree to dual agency representation. Donna agrees to dual agency representation in the written buyer agency agreement. Nelson communicates to Renee that he is now acting as a dual agent in the transaction.

Nelson discloses the material facts to Donna. He further tells her that Renee will accept \$10K less than the list price of the home because she knows the property needs some repairs. A couple of hours later, Donna submits an offer on Renee’s property for \$10K less than the listing price. Nelson reviews the offer with Renee; she accepts the terms of the offer and enters into a contract with Donna.

Did Nelson violate Commission rules? If so, how?

---



**Does a dual agent owe fiduciary duties to both the buyer and the seller clients?**

**Yes.** A dual agent owes the same fiduciary duties to both principals in a transaction. Therefore, a dual agent must ensure that their clients are aware of the responsibilities and fiduciary duties owed by a dual agent and provide their consent for representation.

***What if the dual agent is aware of material facts regarding a property? Must the dual agent disclose the material facts? Yes.*** An agent, whether acting for one client side or both in a transaction, must disclose all facts to their principal that may influence their decision about a property, including material facts. Therefore, a dual agent (just like in any transaction) must disclose material facts to all parties in the transaction, which happens to include both principals. Although material facts must be disclosed to both principals, the dual agent must not disclose confidential information of either client, or advocate for one client over the other during the transaction.

According to the Bulletin article, [Dual Agency: When Is It Appropriate?](#), practicing dual agency lawfully is challenging because the buyer and seller must agree to be represented in an adversarial relationship by the same agent/firm. Therefore, a dual agent must act with a combination of discretion and fairness that can often times be difficult to balance.

***Note:*** Brokers can potentially have more exposure to claims of conflicts of interest when practicing dual agency. The article, [Dual Agency: When Is It Appropriate?](#) is reprinted at the end of this section.



**Is it mandatory for sole proprietorships or firms to practice dual agency?**

**No.** A sole proprietorship or firm has the authority to determine the type(s) of agency representation it will offer potential clients.



## What is unauthorized dual agency?

Unauthorized dual agency occurs when a broker or brokerage company has an agency agreement to represent one party in a transaction, but also represents another party in the same transaction without the express **written** authority (i.e., authorized dual agency) of each party. Unauthorized dual agency is illegal in North Carolina.



## What is required for an agent to legally practice dual agency?

According to N.C. Gen. Stat. § 93A-(6)(a)(4), a licensee violates Real Estate License Law if they act for more than one party in a transaction without the knowledge of all parties for whom they act. Therefore, in order for a broker to legally practice dual agency they are required to obtain **written** authorization at the beginning of the agency relationship. The only *exception* for obtaining written authorization at the start of the relationship is when a buyer or tenant is represented by a broker in an oral agreement in adherence to Rule 58A .0104(a).

Also, as noted before, express **written** authority for dual agency shall be reduced to writing **not later** than the time that one of the parties represented by the broker makes an offer to purchase, sell, rent, lease, or exchange real estate to another party.

***What if a broker does not receive written authority to practice dual agency?*** If a broker represents more than one party in a transaction without the written authority of each party, the broker may be in violation of Commission Rule 58A .0104(d) which specifies:

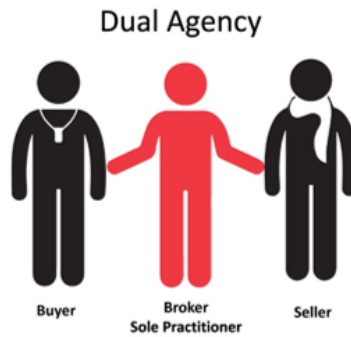
*A real estate broker representing one party in a transaction shall not undertake to represent another party in the transaction without the written authority of each party.*

Such a violation by a broker may require a forfeiture of any commission or other compensation for participation in the transaction.



## Can *one* agent practice dual agency?

**Yes.** A sole practitioner or affiliated agent of a firm may practice dual agency and represent both parties in the transaction as long as it is permitted in the office policies.



*Note: This diagram shows one broker and/or sole practitioner who works for both the buyer and seller in the same transaction. Both the prospective buyer and prospective seller must consent and provide written authority to the broker and/or sole practitioner to engage in dual agency.*



### **Can different agents within the same firm practice dual agency?**

**Yes.** A firm is practicing dual agency when it represents more than one party in the same transaction. In order for dual agency to be practiced legally, the prospective buyer and seller must both provide written authority for the firm to practice dual agency. Therefore, a broker affiliated with the firm may work directly with the prospective buyer-client and another affiliated broker with the same firm may work directly with the prospective seller-client; both affiliated brokers remain in dual agency with both clients, just like all of the brokers affiliated with the firm.

***If one broker in the firm assists the prospective buyer and another broker in the firm assists the prospective seller, isn't it automatically considered designated dual agency? No.*** If there are two agents affiliated with the same firm representing the buyer and the seller in the transaction, this is considered dual agency. Although the brokers work for the same firm, they have not been designated to represent only the interest of the buyer and/or seller. Designated dual agency does not exist automatically. It is created when the parties provide written authority and the firm's policies permit it.



### ***“The Dual Agency Firm”***

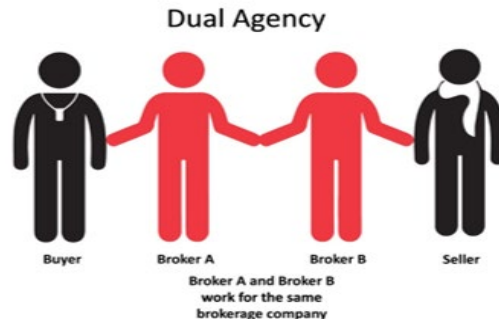
John and Tasha are brokers affiliated with XYZ Homes. John represents Tim, a seller-client, and Tasha represents, Sara, a buyer-client. Tim and Sara have provided authorization for XYZ Homes and their agents to practice dual agency in the agency agreements.

Sara is interested in purchasing Tim’s property. Tasha informs Sara that she will provide her with all of the seller disclosures, CMA’s, and property information to assist her with making an offer on Tim’s property. Tasha further proceeds to tell Sara that she can not advise her on what offer to submit on the property.

XYZ Homes only practices dual agency. It does not allow the practice of designated dual agency.

Are John and Tasha designated dual agents for Tim and Sara, respectively? YES/NO

---



***NOTE:*** This diagram is an example of the most common form of dual agency. This example displays two brokers who are both affiliated with the same firm and/or company. Broker A is working directly with the buyer and Broker B is working directly with the seller. The firm and/or company and all of its brokers represent both the buyer and the seller. The brokers have divided loyalty between the buyer and seller. Both the prospective buyer and seller must consent and provide written authority for the firm and/or company to engage in dual agency.



### **Can dual agents share confidential information with either principal?**

**No.** A dual agent must treat buyers and sellers fairly and equally and cannot help one party gain an advantage over the other party. Dual agents owe both their clients the same fiduciary duties and must not divulge confidential information about either party to the other without prior permission.



### **Can a dual agent reduce potential conflicts of interest by fully explaining their duties and obligations owed to each client?**

**Yes.** A dual agent can reduce potential conflicts of interest by explaining the fiduciary duties they owe to each principal while practicing dual agency. Additionally, if a client is not comfortable with the firm representing both parties from the neutral dual position, the firm can offer designated dual agency representation as an option if it is offered by the firm. Both principals would have to approve designated dual agency representation.

**NOTE:** *Designated dual agency cannot be practiced by a sole practitioner.*



#### ***“The Errors of Latrice’s Ways”***

Latrice, a broker with A+ Realty, lists her residential property with her firm. Latrice completes all seller disclosures and marks *“No Representation”* on the *Residential Property and Owners’ Association Disclosure Statement*.

Sarah, an unrepresented buyer, is interested in Latrice’s property. Latrice informs Sarah that she owns the property but can still represent her during the transaction if she provides Latrice with her written, informed consent. Sarah signs the written buyer agency agreement and provides written authority for A+ Realty to practice dual agency.

Latrice and Sarah view the property. During the walk through, Latrice provides Sarah with information regarding the property such as the seller disclosures she completed and a Comparative Market Analysis for the area. Latrice also makes

Sarah aware that she cannot advise her on what price to offer because she is acting as a dual agent.

Sarah tells Latrice that her pre-approval amount is \$417,000, and states that this is also the price she wants to offer for the property. Latrice completes the **Standard Form 2-T, Offer to Purchase and Contract** using the information provided by Sarah. Upon completing the offer, Latrice signs it and enters into a contract with Sarah.

Sarah closes on the property within 30 days.

What errors, if any, did Latrice make during this transaction?

---



**Can a broker selling their own residential property act as a dual agent and represent a buyer in the transaction?**

**No.** According to Rule 58A .0104(o), a broker who is selling property in which the broker has an ownership interest shall not undertake to represent a buyer of that property. Reality check: how can the seller-broker not share the buyer-client's confidential information with themselves?!



**Can a broker selling their own commercial property act as a dual agent and represent a buyer in the transaction?**

**It depends.** A broker who is selling commercial real estate as defined in Rule 58A .1802, in which the broker has *less* than 25% ownership interest, may represent a buyer of that property if the buyer consents to the representation after full written disclosure of the broker's ownership interest. If the broker has *more* than a 25% ownership interest in the property, then they cannot represent a buyer in the transaction.



**Can a firm/company act as a dual agent for a property listed by an affiliated broker-owner?**

**Yes.** A firm/company may act as a dual agent for a property listed by an affiliated broker as long as the broker representing the buyer on behalf of the firm does not have an ownership interest in the property. The buyer must also consent to the representation after full written disclosure of the affiliated broker's ownership interest in the listed property.

---

## DESIGNATED DUAL AGENCY

Designated agency is a subcategory of dual agency. Subsections (j)-(m) of Rule 58A .0104 authorizes real estate firms to engage in an optional form of dual agency known as designated agency, in certain sales transactions involving in-house dual agency.

Designated dual agency involves appointing or “*designating*” individual broker(s) in a firm to represent only the interests of a seller and other individual broker(s) in the same firm to represent only the interests of a buyer in a transaction.



*“How Many Wrongs Make a Right?”*

Stephanie, the BIC of XYZ Homes, designates Frank to represent Stacey, the seller-client and Donnell to represent Chris, the buyer-client, after both principals provide written authorization for designated dual agency. Prior to being designated dual agents, neither Frank nor Donnell have prior confidential information about the principals. Further, Stephanie reminds Frank and Donnell not to share any confidential information about their clients without the clients’ permission.

The next day, Frank and Donnell are having a conversation. Frank tells Donnell that his client, Stacey, will accept any amount over the asking price because she has to catch up on her past due alimony payments.

Did Frank violate Commission rules? YES/NO If so, how?

---

Should Donnell inform Chris of the information he learned from Frank? YES/NO

Why or why not?

---

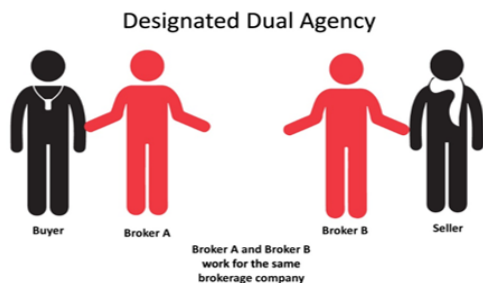


### What is designated dual agency?

Designated dual agency exists when both the buyer and seller clients provide written authorization for the firm/company that represents them both to designate one or more individual brokers to represent only their interests during the transaction. In other words, one or more brokers represent only the interests of the seller-client, and one or more brokers represent only the interests of the buyer client.



Although the buyer and seller are both clients of the same firm/company, the buyer has a designated agent and the seller has a designated agent. Therefore, the designated agents represent **only** the interests of their respective clients. Be aware that an individual broker cannot be designated and represent only the interests of one party if the broker has received prior confidential information concerning the other party in the transaction.



**NOTE:** This diagram displays a space between Broker A and Broker B. Broker A and Broker B work for the same firm and/or company and the firm/company represents both the buyer and seller in the same transaction. However, Broker A has loyalty only to the buyer and Broker B has loyalty only to the seller.



### When is authorization required for designated dual agency?

Pursuant to Rule 58A .0104(d), the written authority for designated dual agency shall be reduced to writing not later than the time the parties are required to reduce their dual agency agreement to writing.

Remember, the written authority for dual agency must be obtained at the formation of the relationship except when a buyer or tenant is represented by a broker without a written agency agreement. Under such circumstances, the written authority for dual agency shall be reduced to writing not later than the time that one of the parties represented by the broker makes an offer to purchase, sell, rent, lease, or exchange real estate to another party.

**Note:** If the buyer agency agreement is in writing from the outset of the agency relationship, then both the listing agreement and buyer agency agreement need to include written authorization for dual and/or designated dual agency before any in-house listings can be shown.

**NOTE:** Both parties **must** request designated dual agency in the written agreements before it can be practiced.



### **What is an advantage of designated dual agency?**

The advantage of designated dual agency over standard dual agency is that each of the firm's clients (seller and buyer) receive representation more like single agency than dual agency.

In the typical dual agency situation, client advocacy is lost because the dual agent may not advocate for one client to the detriment of the other client.

This leads to the dual agent remaining impartial at all times. However, designated dual agency allows agents to fully represent the interests of their respective clients, allowing agents to advise their clients during the transaction.



### **Can a sole practitioner practice designated dual agency?**

**No.** A sole practitioner is one broker; therefore, one broker cannot practice designated dual agency. Designated dual agency requires one or more brokers to be designated to represent only the interests of the seller and one or more other brokers to be designated to represent only the interests of the buyer.



### **Must a firm/company practice designated dual agency?**

**No.** A firm/company has the ability to determine what type(s) of agency representation they will offer to prospective clients.



### **What is required for a firm/company to practice designated dual agency?**

In order for a firm/company and its affiliated brokers to legally engage in designated dual agency, the designated brokers must NOT know confidential information about the opposing parties prior to designation. In other words, the agent being designated for the buyer must not have/know confidential information about the seller, and vice versa.

If a brokerage company would like to have affiliated brokers eligible to offer designated dual agency, it would be in the company's best interest to publish policies that support the confidentiality of information about the company's clients. For example, a company policy might limit the sharing of any client's confidential information to only affiliated brokers that legally need to know the information. This policy would minimize the possibility of a broker not being eligible for designation because they already possess confidential information about one of the sides of the transaction.

**NOTE:** According to Rule 58A .0104(m), a broker designated to represent a buyer or seller shall disclose the identity of all of the brokers so designated to both the buyer and the seller. The disclosure shall take place no later than the presentation of the first offer to purchase or sell.



**Is designated dual agency automatic when two brokers from the same firm each represent the buyer-client and seller-client?**

**No.** If there are two agents affiliated with the same firm representing the buyer and seller in the transaction, this is considered dual agency. Although the two agents work for the same firm/company, they have not been *designated* to represent only the interests of the buyer or seller. Designated dual agency does not exist *automatically* unless it is stated in the written office policies *and* written authority is provided by the client.



***“Here We Go Again”***

Lisa and Stan are brokers with ABC Realty. Tom and Mary are clients of the firm and have authorized ABC Realty to practice dual agency and requested the firm to designate brokers to represent each of their respective interests. The BIC of ABC Realty has designated Lisa to represent Tom, the seller-client, and Stan to represent Mary, the buyer-client.

Lisa lists Tom’s property for \$875,000. Mary is interested in purchasing Tom’s property and Stan submits an offer on Mary’s behalf.

While advocating for their respective clients, Stan informs Lisa that Mary needs to purchase a property quickly because she needs to start a new job. Therefore, she is willing to offer more to entice Tom to accept her offer if necessary. Lisa is shocked by Stan’s comment and begins to walk towards the BICs office.

Has Stan violated Commission rules? YES/NO \_\_\_\_\_

Why or why not? \_\_\_\_\_



## **Can a broker practicing designated dual agency share confidential information about their client?**

**No.** A designated dual agent is required to act only in the best interests of their client and this includes ensuring confidential information is not shared with anyone, including the opposing designated party, without permission.

Pursuant to Rule 58A .0104 subsections (k) and (l), the broker so designated shall not, without their client's permission, disclose to the other party or the broker designated to represent the other party:

- (1) that a party may agree to a price, terms, or any conditions of sale other than those offered;
- (2) the motivation of a party for engaging in the transaction, unless disclosure is otherwise required by statute or rule; and
- (3) any information about a party that the party has identified as confidential, unless disclosure is otherwise required by statute or rule.

***What if a designated dual agent acquires confidential information about the firm's other principal (e.g., the opposing party) after being designated? Should the designated dual agent disclose this information to their principal? Yes.*** Designated dual agency allows a broker to exclusively represent a designated principal's interests including advocating on their behalf and advising them during the transaction. If a broker learns confidential information post-designation about the designated principal's opponent, who is also the firm's principal, the broker would need to share this information with their designated principal.

Although, the designated agent must inform their principal of the information they have acquired post-designation, the brokerage company may incur civil liability and/or be subject to disciplinary action due to the poor handling of confidential information of their other principal.

**NOTE:** *Rule 58A .0104(k) and (l) prohibits a designated dual agent from disclosing information about their designated principal which does not rise to the level of material facts to the company's opposing principal (or designating agent for the opposing principal) without the consent of the broker's own designated principal.*

*In order to prevent improper disclosure of confidential information in designated dual agency transactions, a BIC should have office procedures and policies in place to maintain the confidentiality of client information.*



## Can designated dual agents be full or provisional brokers?

**Yes.** Designated dual agents may be full or provisional brokers pursuant to Commission rules. However, a BIC cannot act as the designated agent for a party in a real estate sales transaction when a provisional broker under their supervision acts as a designated agent for another party. A firm/company may have a policy that prohibits the practice of designated dual agency by specific agents.



### “The BIC & the PB”

Mary, a consumer, contacts ABC Homes to inquire about a property listed by the firm. Victoria, a provisional broker, answers the call. After Victoria provides and reviews the *Working with Real Estate Agents Disclosure*, Mary decides that she wants Victoria to represent her in the transaction and enters into a written buyer agency agreement authorizing designated dual agency.

Before showing the property to Mary, Victoria speaks to Jamie, the BIC, about Mary’s interest and desire for designated dual agency. Since there are only the two of them in the firm, Jamie tells Victoria that she will be the designated agent for Mary and he will be the designated agent for Alan, the seller-client. Jamie also assures Victoria that any information she submits in the transaction file will not be disclosed to Alan although Jamie still has to review it.

Did Victoria violate Commission rules? YES/NO Why or why not?

---

Did Jamie violate Commission rules? YES/NO Why or why not?

---



## Can a BIC practice designated dual agency?

**Yes.** A BIC can be a designated broker for a party in a real estate sale transaction. However, a BIC cannot act as the designated agent for a party in a real estate sales transaction when a provisional broker under their supervision acts as a designated agent for another party with a competing interest according to Rule 58A .0104(j).

In the Commission article, [BICs and Designated Dual Agency Transactions - Room for Conflicts!](#), the Commission states a best practice for BICs is to not represent a party in a designated dual agency situation. Basically, if BICs adopt this practice it can reduce the chance that a BIC may violate Commission rules for either:

- failing to maintain and review transaction records, or
- learning confidential information about the other party and using or (failing to use) that confidential information to the advantage of their client in a designated dual agency situation.

If a BIC decides to represent a party in a designated dual agency transaction, the BIC must establish policies and procedures to ensure compliance with the Commission's rules. The BIC should also designate another broker in the office to collect and review records from the transaction. This will prevent the BIC who is a designated dual agent from having access to confidential information about the other party in the transaction.

It may also provide comfort to the other designated dual agents that they can provide records in compliance with Rule 58A .0108(d) and not have their client's confidential information inappropriately shared with the other party in a designated dual agency transaction.



### *“There is a Difference”*

West is a broker affiliated with 123 Homes. West is contacted by Joe, a prospective seller, because he is interested in listing his property. Joe enters into a listing agreement with West at the conclusion of the listing presentation. In the listing agreement, Joe authorizes 123 Homes to practice dual agency and requests specifically designated dual agency.

West has been working with Fran, a buyer-client. Fran previously provided 123 Homes authorization to practice dual agency in the buyer agency agreement. However, West does not discuss designated dual agency as an option with Fran. West informs Fran that the firm just acquired a new listing and that she may be interested in purchasing this type of property. Fran views the property with West and decides to submit an offer.

West submits and reviews the offer with Joe. Joe agrees with the terms of the offer and enters into a contract with Fran. Prior to settlement, Joe reviews the contract again and realizes that West acted as a dual agent for both parties. Joe

calls West and indicates his anger and dissatisfaction with West also representing Fran in the transaction.

Did West violate Commission rules? YES/NO Why or why not? \_\_\_\_\_



### **What should a BIC consider before allowing the practice of designated dual agency in their firm/company?**

A BIC should consider developing written office policies to determine how:

- information will be shared,
- files will be managed, and
- confidential information will be protected and not distributed to designated agents of opposing parties.

For example, the BIC should determine how much information, if any, would be shared about a property at an office meeting. If the BIC allows information to be shared that relates to the property only, then the likelihood of an agent extracting personal, financial, or confidential information about a client during the meeting may be substantially reduced.

---

## SUMMARY OF IMPORTANT POINTS

- Brokers must act as fiduciaries for their principals while conducting real estate transactions.
- A fiduciary must:
  - be **obedient** to the principal (e.g., follow all lawful directives);
  - be **loyal** to the principal;
  - **disclose** all facts to the principal that may influence the principal's decision;
  - **preserve** all personal, confidential information about the principal that is not a material fact;
  - **account** for the funds of the principal; and
  - **exercise** skill, care, and diligence in the performance of their duties; and
  - operate in **good faith** to promote the principal's interests.
- An agent cannot advance their own personal, business, or family interests above their principal's interests.
- An agent must comply with all lawful instructions of the principal that are consistent with the terms of the agency agreement.
- In every real estate sales transaction, a broker shall, at *first substantial contact* with a prospective buyer or seller, **provide** the prospective buyer or seller with a copy of the publication "Working with Real Estate Agents,"... **review** the publication with the buyer or seller, and determine whether the broker will act as the agent of the buyer or seller in the transaction.
- An agency agreement must:
  - be in writing;
    - listing agreements must be in writing before brokerage services are provided
    - buyer agency agreements must be in writing no later than the time one of the parties makes an offer to purchase, sell, rent, lease, or exchange real estate to another
  - identify and be signed by all parties and include the broker's license number;
  - have a definite termination date on which it automatically expires; and
  - contain the fair housing non-discrimination language as stated in Rule 58A .0104(b).
- All agency agreements must be *express* from the beginning before any brokerage services can be conducted.
- An express agreement means that the agreement includes all of the terms of the agreement between the parties.
- Oral buyer agency agreements must be express and permit the buyer/tenant to work with other agents for an undetermined time period.



- A buyer agency agreement with a buyer/tenant *must* be reduced to writing before the presentation of any offer being made or received by the buyer/tenant.
- If a firm/company or sole practitioner represents more than one party in the same real estate transaction, this is considered dual agency.
- Dual agency is legal in North Carolina as long as both parties (e.g., seller and buyer) have provided written authority for the agent to represent both parties in the transaction.
- A dual agent owes the same fiduciary duties to both the principals in the transaction.
- The dual agent must disclose material facts, but must not disclose confidential information, or advocate for one client over the other.
- It is not mandatory that a firm/company or sole practitioner practice dual agency.
- Unauthorized dual agency occurs when a broker or brokerage firm has an agency agreement to represent one party in a transaction but also represents another party in the same transaction without the express **written** authority (i.e., authorized dual agency) of each party.
- Express authority for dual agency shall be reduced to writing **not later** than the time that one of the parties represented by the broker makes an offer to purchase, sell, rent, lease, or exchange real estate to another party.
- A sole practitioner or affiliated agent of a firm/company may practice dual agency as long as it is permitted by the office policies.
- A dual agent must treat buyers and sellers fairly and equally and cannot help one party gain an advantage over the other party.
- A dual agent can reduce potential conflicts of interest by explaining their fiduciary duties while practicing dual agency with both their buyer and seller clients.
- According to Rule 58A .0104(o), a broker who is selling property in which the broker has an ownership interest shall not represent a buyer of that property.
- Designated agency is a subcategory of dual agency. It involves appointing or “*designating*” individual agent(s) in a firm or sole proprietorship to represent only the interests of the seller and other individual agent(s) to represent only the interests of the buyer in the same transaction.
- Express written authorization for designated dual agency must be obtained from both parties by the time any oral buyer agency agreement is reduced to writing, which is required prior to any offers being made or received.
- The principal advantage of designated dual agency is that each of the firm’s clients (seller and buyer) receive representation that is more like single agency than dual agency.
- Rule 58A .0104(k) and (l) prohibits a designated dual agent from disclosing information about their designated principal which does not rise to the level of material facts to the company’s opposing principal, or designating agent for the opposing principal, without the consent of the broker’s own designated principal.

- Designated agents may be full or provisional brokers pursuant to Commission rules.
- A BIC can be a designated agent for a party in a real estate sale transaction as long as the designated agent for the opposing party is not a provisional broker under that BIC's supervision.

---

## ANSWERS TO DISCUSSION QUESTIONS

For Discussion on Page 55

### *“The Undisclosed Pitfall”*

Sam and Melissa are affiliated brokers with ABC Homes. Sam meets with Lucas, a prospective seller, and Lucas enters into a listing agreement with ABC Homes. He does not agree to dual agency. Lacy, a buyer-client, enters into a written buyer agency agreement with Melissa, but dual agency is not discussed.

Lacy views the property owned by Lucas and is interested in making an immediate offer on the property.

Can Sam and Melissa legally practice dual agency in this transaction? YES/NO Why or why not?

*Answer: No. Sam and Melissa cannot legally practice dual agency. Dual agency is legal in North Carolina as long as both parties (e.g. Lucas and Lacy) have provided written authorization for the agents to represent both parties in the transaction. Lucas did not provide written authorization for dual agency and Melissa did not even discuss dual agency with Lacy. Therefore, if Sam and Melissa proceed to represent Lucas and Lacy in this transaction, they are participating in unauthorized dual agency. Unauthorized dual agency occurs when a broker or brokerage company has an agency agreement to represent one party in a transaction but also represents another party in the same transaction without the express written authority (i.e., authorized dual agency) of each party. Unauthorized dual agency is illegal in North Carolina.*

For Discussion on Page 59

### *“But Everyone Agreed”*

Alice, a broker with 123 Realty, enters into an oral buyer agency agreement with Bernice, a buyer-client. Bernice is interested in purchasing two parcels of land listed by 123 Realty. Alice tells Bernice that the seller has provided the firm with written authorization to practice dual agency. She also tells Bernice while reviewing the WWREA Disclosure, that the firm can represent her as a dual agent as well if she agrees to this type of agency representation.

Before agreeing to representation, Bernice asks Alice to explain the concept of dual agency. Alice uses the WWREA Disclosure and *Questions and Answers: on Working with Real Estate Agents* brochure to assist her with answering questions about dual agency. Bernice verbally agrees to dual agency representation. After the verbal agreement, Alice submits an offer to the sellers on behalf of Bernice.

Did Alice violate License Law and Commission rules? YES/NO? If so, how?

*Answer: Yes. According to Rule 58A .0104(a) and (d), Alice needed to ensure that the buyer agency agreement authorizing dual agency was reduced to writing prior to Bernice's submission of an offer on the property. It is not sufficient that Bernice initially entered into an oral buyer agency agreement and provided verbal authorization for dual agency. Because Alice did not reduce the buyer agency agreement and dual agency authorization to writing prior to the submission of an offer by Bernice, Alice may be in violation of Commission rules and may forfeit her rights to any compensation.*

**For Discussion on Page 61**

***“Did I Say Too Much or Too Little?”***

Nelson, an agent with See Homes, represents Renee, a seller-client. In the listing agreement, Renee provides written authority for See Homes to practice dual agency. She also tells Nelson that he is not to share any of her confidential information during the transaction. Renee informs Nelson that she has noticed a weird smell coming from the right side of her house. Nelson walks outside to the right of the house and notices puddles of water in the yard. Nelson tells Nancy that it is normal for puddles of water to accumulate during heavy rainfall and the new buyers can easily fix the issue. Nelson lists Renee's property later that evening and does not include any information about the water puddles in the yard.

Donna, an unrepresented buyer, contacts Nelson and inquires about Renee's property. During the conversation, Nelson reviews the property details with Donna and the WWREA Disclosure form. Nelson informs Donna that he can represent her in the transaction if she would agree to dual agency representation. Donna agrees to dual agency representation in the written buyer agency agreement. Nelson communicates to Renee that he is now acting as a dual agent in the transaction.

Nelson discloses the material facts to Donna. He further tells her that Renee will accept \$10K less than the list price of the home because she knows the property needs some repairs. A couple of hours later, Donna submits an offer on Renee's property for \$10K less than the listing price. Nelson reviews the offer with Renee; she accepts the terms of the offer and enters into a contract with Donna.

Did Nelson violate Commission rules? If so, how?

*Answer: Yes. As a dual agent, Nelson owes both principals, Renee and Donna, fiduciary duties. Nelson must also disclose material facts to all parties in the transaction. In addition, he must disclose all **non-confidential** information to both principals to ensure they are able to make an informed decision about how they would like to proceed in the transaction.*

*However, during this transaction, Nelson informed Donna that Renee would accept \$10K less than the list price due to the material facts. As a dual agent, Nelson cannot disclose confidential information (e.g., price, conditions of sale, etc.) for either principal according to Rule 58A .0104(n). Further, Renee advised Nelson not to share any confidential information. Nelson was required to treat Renee and Donna fairly and equally and should not have helped Donna gain an advantage over Renee.*

## **For Discussion on Page 65**

### ***“The Dual Agency Firm”***

John and Tasha are brokers affiliated with XYZ Homes. John represents Tim, a seller-client, and Tasha represents, Sara, a buyer-client. Tim and Sara have provided authorization for XYZ Homes and their agents to practice dual agency in the agency agreements.

Sara is interested in purchasing Tim’s property. Tasha informs Sara that she will provide her with all of the seller disclosures, CMA’s, and property information to assist her with making an offer on Tim’s property. Tasha further proceeds to tell Sara that she can not advise her on what offer to submit on the property.

XYZ Homes only practices dual agency. It does not allow the practice of designated dual agency.

Are John and Tasha designated dual agents for Tim and Sara, respectively? YES/NO

*Answer: No. John and Tasha are two agents affiliated with XYZ Homes. Although John represents Tim and Tasha represents Sara, this is considered dual agency. John and Tasha have not been designated by their BIC to represent only the interests of Tim and Sara, respectively. Designated dual agency does not exist automatically unless it is stated in the written office policies.*

## **For Discussion on Page 66**

### ***“The Errors of Latrice’s Ways”***

Latrice, a broker with A+ Realty, lists her residential property with her firm. Latrice completes all seller disclosures and marks “No Representation” on the *Residential Property and Owners’ Association Disclosure Statement*.

Sarah, an unrepresented buyer, is interested in Latrice’s property. Latrice informs Sarah that she owns the property but can still represent her during the transaction if she provides Latrice with her written, informed consent. Sarah signs the written buyer agency agreement and provides written authority for A+ Realty to practice dual agency.

Latrice and Sarah view the property. During the walk through, Latrice provides Sarah with information regarding the property such as the seller disclosures she completed and a Comparative Market Analysis for the area. Latrice also makes Sarah aware that she cannot advise her on what price to offer because she is acting as a dual agent.

Sarah tells Latrice that her pre-approval amount is \$417,000, and states that this is also the price she wants to offer for the property. Latrice completes the **Standard Form 2-T, Offer to Purchase and Contract** using the information provided by Sarah. Upon completing the offer, Latrice signs it and enters into a contract with Sarah.

Sarah closes on the property within 30 days.

What errors, if any, did Latrice make during this transaction?

*Answer: According to Rule 58A .0104(o), Latrice violated Commission rules when she represented Sara as a buyer agent in the transaction. Under Commission Rule 58A .0104(o), Latrice cannot represent Sara due to having ownership interest in the property. Although Latrice and Sara provided A+ Realty authorization to practice dual agency; another broker affiliated with A+ Realty without an ownership interest in the property would have to represent Sara with the purchase of Latrice's property. Also, Sara must be given a full written disclosure of Latrice's ownership interest in the property and consent to the representation by the affiliated broker of A+ Realty.*

**For Discussion on Page 68**

***“How Many Wrongs Make a Right?”***

Stephanie, the BIC of XYZ Homes, designates Frank to represent Stacey, the seller-client and Donnell to represent Chris, the buyer-client, after both principals provide written authorization for designated dual agency. Prior to being designated dual agents, neither Frank nor Donnell have prior confidential information about the principals. Further, Stephanie reminds Frank and Donnell not to share any confidential information about their clients without the clients' permission.

The next day, Frank and Donnell are having a conversation. Frank tells Donnell that his client, Stacey, will accept any amount over the asking price because she has to catch up on her past due alimony payments.

Did Frank violate Commission rules? YES/NO If so, how?

*Answer: Yes. Frank is designated to represent the exclusive interest of Stacey, and should not have disclosed any confidential information to Donnell without Stacey's permission pursuant to Rule 58A .0104(k). Frank may have violated the Commission rule on two points when he informed Donnell that Stacey would agree to any price over asking and that she is past due on her alimony payments.*

Should Donnell inform Chris of the information he learned from Frank? YES/NO

Why or why not?

*Answer: Yes. Donnell should inform Chris of the information that he has learned from Frank. Designated dual agency allows agents to fully represent the interests of their respective clients, including advising and advocating on their behalf. If a designated agent learns confidential information after becoming designated, they have an obligation to represent their clients' interest to the best of their ability and disclose.*

*The listing broker and firm may be liable due to the disclosure of confidential information by Frank; however, Donnell has an obligation to inform Chris of this information.*

**For Discussion on Page 71**

***“Here We Go Again”***

Lisa and Stan are brokers with ABC Realty. Tom and Mary are clients of the firm and have authorized ABC Realty to practice dual agency and requested the firm to designate brokers to represent each of their respective interests. The BIC of ABC Realty has designated Lisa to represent Tom, the seller-client, and Stan to represent Mary, the buyer-client.

Lisa lists Tom's property for \$875,000. Mary is interested in purchasing Tom's property and Stan submits an offer on Mary's behalf.

While advocating for their respective clients, Stan informs Lisa that Mary needs to purchase a property quickly because she needs to start a new job. Therefore, Mary is willing to offer more to entice Tom to accept her offer if necessary. Lisa is shocked by Stan's comment and begins to walk towards the BICs office.

Has Stan violated Commission rules? YES/NO Why or why not?

*Answer: Yes. Stan may have violated Commission rules if he disclosed Mary's confidential information without her permission to Lisa. As a designated dual agent, Stan is not allowed to share any confidential information regarding Mary (e.g., willingness to pay more for the property or her starting a new job) to Lisa without Mary's permission under Rule 58A .0104(l).*

## For Discussion on Page 73

### ***“The BIC & the PB”***

Mary, a consumer, contacts ABC Homes to inquire about a property listed by the firm. Victoria, a provisional broker, answers the call. After Victoria provides and reviews the *Working with Real Estate Agents Disclosure*, Mary decides that she wants Victoria to represent her in the transaction and enters into a written buyer agency agreement authorizing designated dual agency.

Before showing the property to Mary, Victoria speaks to Jamie, the BIC, about Mary’s interest and desire for designated dual agency. Since there are only the two of them in the firm, Jamie tells Victoria that she will be the designated agent for Mary and he will be the designated agent for Alan, the seller-client. Jamie also assures Victoria that any information she submits in the transaction file will not be disclosed to Alan although Jamie still has to review it.

Did Victoria violate Commission rules? YES/NO Why or why not?

*Answer: Yes. Victoria may be in violation of Commission Rule 58A .0104(j) if she acted as a designated dual agent for Mary, a buyer-client while her BIC Jamie acted as a designated dual agent for Alan, the seller-client. According to Commission Rule 58A .0104(j), a BIC cannot be the designated dual agent in a transaction where a provisional broker under their supervision represents a competing party as a designated dual agent.*

Did Jamie violate Commission rules? YES/NO Why or why not?

*Answer: Yes. As a BIC, Jamie cannot be a designated dual agent in a transaction where a provisional broker under his supervision is representing a competing party in the same transaction as a designated dual agent. Jamie is responsible for supervising Victoria’s transactions. Therefore, Jamie would be able to see confidential information regarding Victoria’s designated principal when he reviews the transaction file. Furthermore, since the firm is a two-person firm, with only a BIC and a provisional broker, designated dual agency should not be practiced due to the likelihood that Commission Rule 58A .0104(j) may be violated.*

*Also, if Jamie is considering practicing designated dual agency, he should ensure that he creates office policies regarding file maintenance, preservation of confidential information, and have additional brokers affiliated with the firm.*



## For Discussion on Page 74

### *“There is a Difference”*

West is a broker affiliated with 123 Homes. West is contacted by Joe, a prospective seller, because he is interested in listing his property. Joe enters into a listing agreement with West at the conclusion of the listing presentation. In the listing agreement, Joe authorizes 123 Homes to practice dual agency and requests specifically designated dual agency.

West has been working with Fran, a buyer-client. Fran previously provided 123 Homes authorization to practice dual agency in the buyer agency agreement. However, West does not discuss designated dual agency as an option with Fran. West informs Fran that the firm just acquired a new listing and that she may be interested in purchasing this type of property. Fran views the property with West and decides to submit an offer.

West submits and reviews the offer with Joe. Joe agrees with the terms of the offer and enters into a contract with Fran. Prior to settlement, Joe reviews the contract again and realizes that West acted as a dual agent for both parties. Joe calls West and indicates his anger and dissatisfaction with West also representing Fran in the transaction.

Did West violate Commission rules? YES/NO Why or why not?

*Answer: Yes. West may be in violation of Commission rules when he did not adhere to the type of agency representation that Joe had authorized in the listing agreement. Joe authorized West and 123 Homes to practice designated dual agency. However, West practiced dual agency by representing buyer-client, Fran, with the purchase of Joe’s property.*

*West failed to adhere to his fiduciary duties and follow the seller’s lawful instructions to only practice designated dual agency. Therefore, West may be subject to disciplinary action by the Commission, be liable for breach of contract, and/or forfeit claims to compensation.*

## Dual Agency: When Is It Appropriate?

### Bulletin 2010-V41-2

In brief, dual agency is appropriate in a sales transaction only when it is agreed to – in writing – by fully informed sellers and buyers.

One of three types of agency representation (see box), dual agency arises when a firm is representing both the sellers and buyers in an in-house sale situation.

Practicing dual agency lawfully is challenging because the sellers and buyers must agree to be represented in an adversarial relationship by the same agent. A dual agent who must act with a combination of discretion and fairness that can be difficult to balance.

Although the laws and rules by which dual agency is practiced have not been reviewed to any significant extent by the courts, theoretically a dual agent owes the full range of agency duties to both principals. This creates practical problems for the dual agent regarding such matters as disclosure of material facts (especially confidential information about a client) and advocating for clients.

Thus, a broker's ability to provide full representation of the client may be compromised to some extent. By entering into dual agency without the full understanding and consent of both clients, a broker may unfairly deprive those clients of the level of service they expect to receive. Additionally, brokers can potentially have more exposure to claims of conflicts of interest when practicing dual agency.

To alleviate the conflicting responsibilities of dual agency, the North Carolina Association of REALTORS® has developed agency contract forms which place limits on the disclosure by a dual agent of information relating to any party's motivation, possible agreement to price, terms or other conditions, or any information identified as confidential. The contract forms also include an acknowledgment by the client that the agent will not act as an advocate for or exclusive representative of the client. Whether this form or another is used, all brokers are required by the Commission's rules to reduce their dual agency agreements to writing with the seller from the outset and with the buyer before one of the parties makes an offer.

Designated agency (a modified form of dual agency), is defined in rules adopted by the Real Estate Commission. It gives each client exclusive representation from an individual broker, while still allowing the firm to represent all of its clients. Remember, a broker-in-charge should never act as a designated agent in a situation where the other designated agent is a provisional broker under his or her supervision. The broker-in-charge loses his or her ability to supervise or assist a provisional broker in such a situation.

An agent who lists his or her own property, or property belonging to the firm, should refrain from acting as a dual agent when selling that property, as there are inherent conflicts of interest in offering one's own personal property for sale and then attempting to represent a buyer in the transaction as well.

What about the case of an unrepresented buyer or seller – can a broker work with him or her while solely representing another party? Yes, so long as the broker reviews and has the unrepresented party sign the *Working With Real Estate Agents* brochure, disclosing in writing that the broker will represent only his or her client (buyer or seller) in the transaction. Remember, there is no requirement that both the buyer and seller have broker representation in a transaction. An agent can work with an unrepresented buyer or seller as a customer, and still fully represent his or her client.

What if a previously unrepresented buyer or seller tells the listing broker that he or she would now like representation in an ongoing transaction where the listing broker has already disclosed that he or she represents only the interests of the seller? The broker's client may object, considering the

information that the client has previously given the broker about his personal situation and/or desire for exclusive representation. If the parties do not consent to Dual Agency at that point, the listing broker should refer the unrepresented party to an outside broker/firm for buyer representation.

All parties in the transaction deserve the best representation possible. Agents should remember to consider the interests of their clients first and determine which form of agency best suits their needs.

### **Agency Refresher**

Clients may choose:

- Exclusive Representation – both the broker and the firm represent only one client in the transaction, to the exclusion of all others;
- Dual Agency – the firm and its agents may represent both the buyer and seller in a transaction; and
- Designated Dual Agency – the firm represents both the seller and buyer via one agent designated exclusively as the seller's agent, and another agent designated exclusively as the buyer's agent, with each agent representing only the interests of their designated client.

This article came from the [October 2010-Vol41-2](#) edition of the bulletin.

## **21 NCAC 58A .0104 AGENCY AGREEMENTS AND DISCLOSURE**

(a) Every agreement for brokerage services in a real estate transaction and every agreement for services connected with the management of a property owners association shall be in writing and signed by the parties thereto. Every agreement for brokerage services between a broker and an owner of the property to be the subject of a transaction shall be in writing and signed by the parties at the time of its formation. Every agreement for brokerage services between a broker and a buyer or tenant shall be express and shall be in writing and signed by the parties thereto not later than the time one of the parties makes an offer to purchase, sell, rent, lease, or exchange real estate to another. However, every agreement between a broker and a buyer or tenant that seeks to bind the buyer or tenant for a period of time or to restrict the buyer's or tenant's right to work with other agents or without an agent shall be in writing and signed by the parties thereto from its formation. A broker shall not continue to represent a buyer or tenant without a written, signed agreement when such agreement is required by this Rule. Every written agreement for brokerage services of any kind in a real estate transaction shall be for a definite period of time, shall include the broker's license number, and shall provide for its termination without prior notice at the expiration of that period, except that an agency agreement between a landlord and broker to procure tenants or receive rents for the landlord's property may allow for automatic renewal so long as the landlord may terminate with notice at the end of any contract period and any subsequent renewals. Every written agreement for brokerage services that includes a penalty for early termination shall set forth such a provision in a clear and conspicuous manner that shall distinguish it from other provisions of the agreement. For the purposes of this Rule, an agreement between brokers to cooperate or share compensation shall not be considered an agreement for brokerage services and, except as required by Rule .1807 of this Subchapter, need not be memorialized in writing.

(b) Every listing agreement, written buyer agency agreement, or other written agreement for brokerage services in a real estate transaction shall contain the following provision: "The broker shall conduct all brokerage activities in regard to this agreement without respect to the race, color, religion, sex, national origin, handicap, or familial status of any party or prospective party." The provision shall be set forth in a clear and conspicuous manner that shall distinguish it from other provisions of the agreement. For the purposes of this Rule, the term, "familial status" shall be defined as it is in G.S. 41A-3(1b).

(c) In every real estate sales transaction, a broker shall, at first substantial contact with a prospective buyer or seller, provide the prospective buyer or seller with a copy of the publication "Working with Real Estate Agents," set forth the broker's name and license number thereon, review the publication with the buyer or seller, and determine whether the agent will act as the agent of the buyer or seller in the transaction. If the first substantial contact with a prospective buyer or seller occurs by telephone or other electronic means of communication where it is not practical to provide the "Working with Real Estate Agents" publication, the broker shall at the earliest opportunity thereafter, but in no event later than three days from the date of first substantial contact, mail or otherwise transmit a copy of the publication to the prospective buyer or seller and review it with him or her at the earliest practicable opportunity thereafter. For the purposes of this Rule, "first substantial contact" shall include contacts between a broker and a consumer where the consumer or broker begins to act as though an agency relationship exists and the consumer begins to disclose to the broker personal or confidential information. The "Working with Real Estate Agents" publication may be obtained on the Commission's website at [www.ncrec.gov](http://www.ncrec.gov) or upon request to the Commission.

(d) A real estate broker representing one party in a transaction shall not undertake to represent another party in the transaction without the written authority of each party. The written authority shall be obtained upon the formation of the relationship except when a buyer or tenant is represented by a broker without a written agreement in conformity with the requirements of Paragraph (a) of this Rule. Under such circumstances, the written authority for dual agency shall be reduced to writing not later than the time that one of the parties represented by the broker makes an offer to purchase, sell, rent, lease, or exchange real estate to another party.

(e) In every real estate sales transaction, a broker working directly with a prospective buyer as a seller's agent or subagent shall disclose in writing to the prospective buyer at the first substantial contact with the prospective buyer that the broker represents the interests of the seller. The written disclosure shall include the broker's license number. If the first substantial contact occurs by telephone or by means of other electronic communication where it is not practical to provide written disclosure, the broker shall immediately disclose by similar means whom he or she represents and shall immediately mail or otherwise transmit a copy of the written disclosure to the buyer. In no event shall the broker mail or transmit a copy of the written disclosure to the buyer later than three days from the date of first substantial contact with the buyer.

(f) In every real estate sales transaction, a broker representing a buyer shall, at the initial contact with the seller or seller's agent, disclose to the seller or seller's agent that the broker represents the buyer's interests. In addition, in every real estate sales transaction other than auctions, the broker shall, no later than the time of delivery of an offer to the seller or seller's agent, provide the seller or seller's agent with a written confirmation disclosing that he or she

represents the interests of the buyer. The written confirmation may be made in the buyer's offer to purchase and shall include the broker's license number.

(g) The provisions of Paragraphs (c), (d) and (e) of this Rule do not apply to real estate brokers representing sellers in auction sales transactions.

(h) A broker representing a buyer in an auction sale transaction shall, no later than the time of execution of a written agreement memorializing the buyer's contract to purchase, provide the seller or seller's agent with a written confirmation disclosing that he or she represents the interests of the buyer. The written confirmation may be made in the written agreement.

(i) A firm that represents more than one party in the same real estate transaction is a dual agent and, through the brokers associated with the firm, shall disclose its dual agency to the parties.

(j) When a firm represents both the buyer and seller in the same real estate transaction, the firm may, with the prior express approval of its buyer and seller clients, designate one or more individual brokers associated with the firm to represent only the interests of the seller and one or more other individual brokers associated with the firm to represent only the interests of the buyer in the transaction. The authority for designated agency shall be reduced to writing not later than the time that the parties are required to reduce their dual agency agreement to writing in accordance with Paragraph (d) of this Rule. An individual broker shall not be so designated and shall not undertake to represent only the interests of one party if the broker has actually received confidential information concerning the other party in connection with the transaction. A broker-in-charge shall not act as a designated broker for a party in a real estate sales transaction when a provisional broker under his or her supervision will act as a designated broker for another party with a competing interest.

(k) When a firm acting as a dual agent designates an individual broker to represent the seller, the broker so designated shall represent only the interest of the seller and shall not, without the seller's permission, disclose to the buyer or a broker designated to represent the buyer:

- (1) that the seller may agree to a price, terms, or any conditions of sale other than those established by the seller;
- (2) the seller's motivation for engaging in the transaction unless disclosure is otherwise required by statute or rule; and
- (3) any information about the seller that the seller has identified as confidential unless disclosure of the information is otherwise required by statute or rule.

(l) When a firm acting as a dual agent designates an individual broker to represent the buyer, the broker so designated shall represent only the interest of the buyer and shall not, without the buyer's permission, disclose to the seller or a broker designated to represent the seller:

- (1) that the buyer may agree to a price, terms, or any conditions of sale other than those established by the seller;
- (2) the buyer's motivation for engaging in the transaction unless disclosure is otherwise required by statute or rule; and
- (3) any information about the buyer that the buyer has identified as confidential unless disclosure of the information is otherwise required by statute or rule.

(m) A broker designated to represent a buyer or seller in accordance with Paragraph (j) of this Rule shall disclose the identity of all of the brokers so designated to both the buyer and the seller. The disclosure shall take place no later than the presentation of the first offer to purchase or sell.

(n) When an individual broker represents both the buyer and seller in the same real estate sales transaction pursuant to a written agreement authorizing dual agency, the parties may provide in the written agreement that the broker shall not disclose the following information about one party to the other without permission from the party about whom the information pertains:

- (1) that a party may agree to a price, terms, or any conditions of sale other than those offered;
- (2) the motivation of a party for engaging in the transaction, unless disclosure is otherwise required by statute or rule; and
- (3) any information about a party that the party has identified as confidential, unless disclosure is otherwise required by statute or rule.

(o) A broker who is selling property in which the broker has an ownership interest shall not undertake to represent a buyer of that property except that a broker who is selling commercial real estate as defined in Rule .1802 of this Subchapter in which the broker has less than 25 percent ownership interest may represent a buyer of that property if the buyer consents to the representation after full written disclosure of the broker's ownership interest. A firm listing a property owned by a broker affiliated with the firm may represent a buyer of that property so long as any

individual broker representing the buyer on behalf of the firm does not have an ownership interest in the property and the buyer consents to the representation after full written disclosure of the broker's ownership interest.

(p) A broker or firm with an existing listing agreement for a property shall not enter into a contract to purchase that property unless, prior to entering into the contract, the listing broker or firm first discloses in writing to their seller-client that the listing broker or firm may have a conflict of interest in the transaction and that the seller-client may want to seek independent counsel of an attorney or another licensed broker. Prior to the listing broker entering into a contract to purchase the listed property, the listing broker and firm shall either terminate the listing agreement or transfer the listing to another broker affiliated with the firm. Prior to the listing firm entering into a contract to purchase the listed property, the listing broker and firm shall disclose to the seller-client in writing that the seller-client has the right to terminate the listing and the listing broker and firm shall terminate the listing upon the request of the seller-client.

*History Note: Authority G.S. 41A-3(1b); 41A-4(a); 93A-3(c); 93A-6(a);  
Eff. February 1, 1976;  
Readopted Eff. September 30, 1977;  
Amended Eff. July 1, 2015; July 1, 2014; July 1, 2009; July 1, 2008; April 1, 2006; July 1, 2005;  
July 1, 2004; April 1, 2004; September 1, 2002; July 1, 2001; October 1, 2000; August 1, 1998;  
July 1, 1997; August 1, 1996; July 1, 1995;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. May 1,  
2018.*

# Section 3

## Broker-in-Charge Responsibilities



### *“Part of the Time”*

1. Hong is the BIC of ABC Realty. He has several full brokers under his supervision and one provisional broker, Lisa. Lisa has been practicing brokerage for seven months. During this time, Lisa has represented several clients without supervision.

Lisa has submitted all transaction documents to the firm within three days of receipt and has asked Hong to review the files with her for accuracy. Hong informs Lisa that since she is a former mortgage loan officer, he knows that she pays attention to detail, and he trusts that her files are accurate.

Lisa has assisted five buyer-clients with purchasing a home. Hong has not reviewed any of her transaction files.

Has Hong adhered to his BIC supervisory responsibilities for Lisa? YES/NO

\_\_\_\_\_

Why or why not? \_\_\_\_\_

2. Are there different requirements for the BIC supervision of provisional brokers and full brokers? \_\_\_\_\_

---

## LEARNING OBJECTIVES

After completing this section, you should be able to:

- explain the general requirements of a broker-in-charge (BIC);
- identify the BIC's responsibilities for supervising affiliated brokers; and
- identify best practices for BIC supervision.

---

## TERMINOLOGY

- **Broker:** This is the primary license status for a broker license and includes any licensee who is affiliated with a firm or sole proprietorship.
- **Broker-in-Charge (BIC):** The broker who has been designated as the primary person having sole responsibility for the supervision and management of a brokerage office.
- **Provisional Broker (PB):** This is the entry-level license status for an individual broker license and includes any licensee who has not completed the 90-hour Postlicensing education program. A PB must be under the supervision of a BIC to be on active status and legally provide brokerage services.

---

## BROKER-IN-CHARGE REQUIREMENTS

N.C.G.S. §93A-2(a1) defines a broker-in-charge as:

... a real estate broker who has been designated as the broker having the responsibility for the supervision of real estate provisional brokers engaged in real estate brokerage at a particular real estate office and for other administrative and supervisory duties as the Commission shall prescribe by rule. A broker-in-charge is not a separate license, but only a separate license status category.

### ***Requirements for BIC Eligible Status***

Pursuant to Commission Rule 58A .0110(e), in order for a broker to be designated as a broker-in-charge (hereafter referred to as "BIC") for a sole proprietorship, real estate firm or branch office, a broker must *first* attain BIC Eligible status by submitting an application on a form available on the Commission's website.

When a broker submits the [Request for BIC Eligible Status and/or BIC Designation \(Form 2.25\)](#), they are providing their licensure information to the Commission including their criminal history and history of occupational license disciplinary actions.



Most importantly, the broker is certifying that:

- their broker license is on active status but NOT on provisional status;
- they have at least two years of full-time or 4 years of part-time real estate brokerage experience within the previous 5 years or are a North Carolina licensed attorney with a practice that consists primarily of handling real estate closings and related matters in North Carolina for 3 years immediately preceding application; and
- they have completed the 12-hour Broker-in-Charge Course within one year prior to application or within 120 days after designation.

### ***Requesting BIC Designation***

A broker who wishes to serve as the BIC of a brokerage office must be designated as a BIC with the Commission. According to Rule 58A .0110(f), once a broker holds BIC Eligible status, they must submit the same form, the [Request for BIC Eligible Status and/or BIC Designation \(REC 2.25\)](#), to become the designated BIC for a sole proprietorship, real estate firm, or branch office. The BIC designation form shall include:

- (1) the broker's:
  - (A) name;
  - (B) license number;
  - (C) telephone number;
  - (D) email address; and
  - (E) criminal history and history of occupational license disciplinary actions; and
- (2) the firm's:
  - (A) name; and
  - (B) license number, if applicable.

A broker who has BIC Eligible status may request BIC designation on the [Request for BIC Eligible Status and/or BIC Designation \(REC 2.25\)](#) at any time while the broker continuously maintains their BIC Eligible status. The broker may also request BIC Eligible status and BIC Designation simultaneously.

### ***Maintaining BIC Eligible Status***

A broker must maintain their BIC Eligible status, and, in turn, BIC Designation by:

- renewing their license in a timely manner each license year,
- keeping their license on active status at all times, and
- completing the 4-hour mandatory BICUP and an approved 4-hour continuing education elective.

**NOTE:** The BICUP course satisfies the broker's 4-hour mandatory continuing education Update course requirement. If a broker with BIC Eligible status fails to take both the BICUP and one elective CE course by June 10 in any given year when required, the broker will lose BIC Eligible status, and BIC designation, if applicable, as of July 1.

---

## **BROKER-IN-CHARGE RESPONSIBILITIES**

Commission Rule 58A .0110(a) requires every real estate firm to have a broker designated by the Commission who meets the qualification requirements to serve as BIC of the firm's principal office and a different broker to serve in the same capacity at each branch office.

A BIC may not be the BIC of more than one office location at a time, and no office of a firm shall have more than one designated BIC. In addition to each office having a BIC, most sole proprietorships (including sole practitioners) must also designate a BIC.

Per Rule 58A .0110(b), a sole proprietorship, even a broker practicing alone, must designate a BIC if the brokerage:

- engages in any transaction where the broker is required to deposit and maintain monies belonging to others in a trust account;
- engages in advertising or promoting their services as a broker in any manner; or
- has one or more other brokers affiliated with them in the real estate business.

### ***BIC Duties***

The designated BIC is the primary person the Commission will hold responsible for the supervision and management of an office. Therefore, the BIC has the ***responsibility*** to supervise affiliated brokers, employees, and others who perform duties on behalf of the brokerage.

Commission Rule 58A .0110(g) lists the specific responsibilities of a broker-in-charge as follows:

- (1) assure that each broker affiliated at the office has complied with Rules .0503, .0504, and .0506 of this Subchapter;
- (2) notify the Commission of any change of firm's business address or trade name and the registration of any assumed business name adopted by the firm for its use;
- (3) be responsible for the conduct of advertising by or in the name of the firm at such office;

- (4) maintain the trust or escrow account of the firm and the record pertaining thereto;
- (5) retain and maintain records relating to transactions conducted by or on behalf of the firm, including those required to be retained pursuant to Rule .0108 of this Section;
- (6) supervise provisional brokers associated with or engaged on behalf of the firm at such office in accordance with the requirements of Rule .0506 of this Subchapter;
- (7) supervise all brokers affiliated at the office with respect to adherence to agency agreement and disclosure requirements;
- (8) notify the Commission in writing that he or she is no longer serving as a BIC of a particular office within 10 days following any such change;
- (9) complete the Commission's Basic Trust Account Procedures Course within 120 days of assuming responsibility for a trust account in accordance with G.S. 93A-6(g), however, the BIC shall not be required to complete the course more than once in three years; and
- (10) supervise all unlicensed individuals employed at the office and ensure that unlicensed individuals comply with G.S. 93A-2(c)(6).

Specifically, a BIC has *five* supervisory responsibilities related to *all* affiliated brokers, including full brokers. The responsibilities can be remembered by using the acronym ALERT.

**A BIC Must Be **ALERT** To All of the Following for ALL Affiliated Brokers:**

- **A**gency Disclosures & Agreements
- **L**icenses, current and active
- **E**very Advertisement
- **R**ecord Keeping
- **T**rust Accounts

**Rule 58A .0110(g)**

**For ALL affiliated brokers under the BIC's supervision**

A BIC's responsibility for full brokers under Commission rules is limited to 5 things. The BIC has to ensure full brokers:

- comply with **agency agreements and disclosures**,
- have **current, active licenses**,
- comply with **advertising laws and regulations**,
- create, maintain, and **retain transaction files**, and
- properly handle **trust money**.

**NOTE:** The Commission may hold the BIC responsible for the brokerage conduct of a full broker due to their supervisory responsibilities under Rule 58A .0110.

### ***Best Practices for Supervision: Affiliated Brokers***

The BIC's supervisory responsibilities outlined in Rule 58A .0110(g) are applicable to all brokers affiliated with a firm/company. Therefore, a BIC should establish some best practices to assist them with their supervisory responsibilities. A BIC may consider:

- creating a reminder to check for active and current licensure for brokers;
- developing a plan for reviewing all advertisements;
- developing policies for using social media for brokerage activity;
- creating a thorough transaction file checklist for needed documentation;
- reviewing all transaction files periodically for accuracy; and
- implementing and enforcing strict policies for the handling of all trust monies.

**NOTE:** These best practices can also assist the affiliated brokers with maintaining compliance with Commission rules.

---

## **BROKER-IN-CHARGE RESPONSIBILITIES FOR PROVISIONAL BROKERS**

A PB is a person who has met all the license qualification requirements (including passing an approved Broker Prelicensing course and the Commission's license examination) and is initially issued a broker license on "provisional status."

Provisional status is an entry level license status category that is not intended to be retained indefinitely. PBs are required to complete Postlicensing education within 18 months of initial licensure to remove the "provisional" status from their license and to remain eligible for "active" status.

Unlike the limited supervision required for full brokers, a BIC must supervise all brokerage activities of PBs affiliated with the office. Generally, a PB may perform the same acts as a broker whose license is not on provisional status as long as they are supervised by a BIC. A PB may not operate ***independently*** in any way.

Commission Rule 58A .0506(d) states:

*A broker-in-charge shall supervise the provisional broker in a manner that assures that the provisional broker performs all acts for which a real estate license is required in accordance with the Real Estate License Law and Commission rules. A supervising broker who fails to supervise a provisional broker as prescribed in this Rule may be subject to disciplinary action pursuant to Rule .0110 of this Subchapter.*

According to Rule 58A .0506(c), the PB may engage in real estate brokerage activities immediately once the BIC has submitted the Commission's *License Activation and Broker Affiliation Form (REC 2.08)*.

The [License Activation and Broker Affiliation Form \(Rec 2.08\)](#) sets forth the:

- (1) provisional broker's:
  - (A) name;
  - (B) license number, type of license, and current license status;
  - (C) physical, mailing, and emailing addresses;
  - (D) public and private phone numbers;
  - (E) completed Postlicensing courses, if necessary;
  - (F) completed continuing education courses, if necessary; and
  - (G) signature.
- (2) broker-in-charge's:
  - (A) name;
  - (B) license number;
  - (C) firm's name and license number;
  - (D) physical, mailing, and emailing addresses;
  - (E) public and private phone numbers; and
  - (F) signature.

If the PB and BIC do not receive written acknowledgement from the Commission confirming the PB's active status within 30 days of the date shown on the form, the BIC must immediately terminate the PB's real estate brokerage activities pending receipt of the written acknowledgement of license activation from the Commission.

### ***Criteria for Assessing Proper Supervision of Provisional Brokers***

A BIC may be held accountable for all brokerage conduct of a PB because the PB cannot have an active license or engage in brokerage activity without a supervising BIC.

If a PB is affiliated with two BICs, as permitted by Rule 58A .0506(a), BOTH BICs will share supervisory responsibility and are accountable for the PB.

The Commission has developed criteria to guide in assessing how a BIC properly supervises a PB. The presence or absence of these factors will be considered along with all other pertinent information in arriving at a disciplinary decision.

As noted in the 2017-2018 BICUP course, the guiding criteria include:

- 1. Is the BIC available to assist, advise, and review the PB's practices and, is the PB available to be supervised?**

A BIC must be reasonably available to manage and supervise PBs. A BIC might consider providing their preferred contact information including office hours and

their availability via email and phone to all affiliated brokers, including PBs. Similarly, a PB must be available to be supervised by their BIC.

**2. Has the BIC established written policies and procedures under which all affiliated brokers are expected to operate?**

BICs are encouraged to develop office policies that explain procedures and establish expectations for all individuals affiliated with/or working for the firm/company. These written policies and procedures should also be available for the brokers. BICs should uniformly adhere to and enforce the policies in place.

The BIC can utilize the [BIC Best Practices Guide](#) as a resource to assist with the development of written office policies.

**NOTE:** The procedures within a firm/company's policy manual will vary depending on the brokerage practice. BICs should consistently review and edit the policy manual to incorporate any changes in brokerage practice.

**3. Does the BIC review and monitor the brokerage activities of PBs?**

The BIC should have regular meetings with PBs to review their agency agreements and disclosures and monitor their brokerage practices to ensure the PBs are adhering to License Law and Commission rules.

**4. Does the BIC hold regular meetings and otherwise assure proper implementation of and adherence to office policies and procedures?**

Regular meetings, regardless of the format, are essential. During a meeting, a BIC has the opportunity to convey any revisions in office policies, changes in legislative statutes, forms, or provide regulatory updates.

**NOTE:** Attendance at a regularly scheduled office meeting will not impact the status of an independent contractor for IRS purposes.

**5. Does the BIC provide ongoing quality training programs and materials to affiliated licensees and disseminate in a timely manner all regulatory information they receive pertaining to real estate brokerage practice?**

Orientation and training programs are encouraged for all newly affiliated licensees and PBs so they can become familiar with the firm/company's policies and procedures.

These programs are instrumental in providing brokers with the skills they need to successfully practice brokerage like how to:

- properly complete preprinted forms;
- utilize mandatory disclosures;
- create effective sales practices and advertising;
- measure and calculate square footage; and
- negotiate repairs.

#### **6. What is the experience level of the PB?**

A BIC should consider the experience level of the PB to determine the level of supervision that is needed. If a PB is new to real estate, the BIC may have to provide more supervision and assistance with transactions. If a PB has experience in a related industry such as mortgage or finance, the BIC must still provide supervision; however, the level of supervision may vary.

**NOTE:** Under no circumstances does the prior experience level of a PB excuse a BIC from their supervisory responsibilities under Commission Rules 58A .0506 and .0110, respectively.

#### **7. Has the BIC delegated supervisory duties to another broker in the office and, if so, what is the level of training and experience of that supervisory broker?**

A BIC may choose to delegate an experienced broker to mentor the PB. The experienced broker may assist them with completing transactions and providing appropriate agency representation to clients in accordance with Commission rules.

**NOTE:** Although a BIC may delegate duties, the BIC is still ultimately responsible for PBs under their supervision.

#### **8. In what types of activity is the PB engaged?**

Once a BIC agrees to affiliate a PB, the BIC should inform the PB of the brokerage activities they are permitted to practice by using an employment agreement.

However, because the BIC is responsible for the supervision of the PB, they are not relieved of this responsibility when a PB participates in activities unknown to the BIC. Therefore, a BIC should be aware of **all** of the brokerage activities conducted by a PB that may affect their supervisory responsibilities.

**NOTE:** If a PB chooses to participate in activities that are outside the scope of their employment agreement, the BIC may wish to use the permitted brokerage activities outlined in the written employment agreement as a defense if the Commission conducts an investigation.

**9. How many PBs does the BIC supervise and what is the ratio of supervisors to PBs?**

The Commission does not specify the number of brokers a BIC may choose to affiliate with their firm/company. However, each BIC must evaluate their ability to supervise all brokers according to Commission rules.

During an evaluation of their ability, a BIC should consider:

- their own knowledge of License Law and Commission rules,
- their availability to offer guidance and advice during transactions, and
- the experience levels of the brokers.

As discussed previously, a BIC may delegate some supervisory duties to an experienced broker. However, the BIC should still meet with all brokers periodically to review their transaction files, and ensure they are conducting proper advertising and maintaining their files per Commission rules.

In plain words, the BIC must ultimately decide how many brokers they can effectively supervise while adhering to their supervisory responsibilities. Although a BIC may delegate duties to other brokers, the BIC is still the person the Commission holds responsible for all affiliated brokers and the management of the firm/company.

**10. What, if any, corrective or remedial action does the BIC take upon learning of a violation of License Law or Commission rules by a PB for whom the BIC is responsible?**

During their supervision, a BIC is expected to be aware of the brokerage activities that are conducted by a PB. In brokerage, violations of License Law and Commission rules may occur, and when they do, a BIC should immediately attempt to provide corrective or remedial action.

If a violation occurs, the Commission expects the BIC to investigate the issue, intervene and question the broker(s) and involved parties, propose a remedy, and implement a corrective action.



A BIC should utilize this criteria established by the Commission to ensure proper supervision of PBs.

### ***Best Practices: Supervision of Provisional Brokers***

A BIC incurs more responsibility while supervising PBs. Therefore, it is essential that BICs consider adopting best practices such as:

1. limiting activities of PBs (e.g., no short sales, no dual agency, etc.) until established criteria (e.g., # of successfully closed transactions; education completed, etc.) is met;
2. being available and maintaining regular office hours for supervision of PBs;
3. sharing best contact information & procedure for PBs needing consultation;
4. assigning a competent experienced broker as a mentor for PBs;
5. establishing expectations of when PBs will physically be in the office or available virtually;
6. scheduling periodic meetings and training with PBs; and
7. reviewing transaction files of the PBs.

---

## **COMPLAINTS**

N.C.G.S. §93A-6(a), authorizes the Commission to take disciplinary action either on its own initiative or by complaint of any person. This authority allows the Commission to:

- investigate brokers and unlicensed activity;
- hold hearings on broker misconduct;
- issue subpoenas for records and to compel attendance of witnesses to testify at hearings; and
- impose sanctions for broker misconduct.

According to the Rule 58A .0601, a complaint must:

- be in writing;
- identify the respondent broker or firm; and
- apprise the Commission of the facts which form the basis of the complaint.

Also, individuals can access the [Complaint Form](#) on the Commission's website.

**NOTE:** The Commission can also initiate a complaint.

Upon receipt of a complaint, a Commission staff attorney evaluates the complaint to ensure that it falls under the Commission's authority. If it does, a case is opened. The case is first assigned to a Consumer Protection Officer (CPO), who initiates an investigation. The investigation is initiated when the CPO sends a *Letter of Inquiry* to the broker and/or firm against whom the complaint was filed.

Further, Rule 58A .0601 requires a broker/firm to submit a written response within 14 days of receipt of a *Letter of Inquiry*. The response must include:

- a full disclosure of requested information; and
- copies of all requested documents.

The Commission may also conduct field investigations. Field investigations are conducted when cases require witness interviews, trust account audits, or the examination of evidence that cannot be easily identified or obtained through written correspondence. Auditors/Investigators in the Regulatory Affairs Division conduct field investigations and then prepare written reports that are submitted to staff attorneys for evaluation.

**NOTE:** A broker who receives a *Letter of Inquiry* from the Commission should speak with their BIC about the allegations within the complaint. Additionally, a BIC may choose to review a broker's written response before it is sent to the Commission. However, a BIC cannot submit a written response on behalf of the broker. Further, the Commission expects a separate response from *each* party named in the complaint.

**NOTE:** *Letters of Inquiry* are sent via email. Therefore, it is imperative that brokers ensure that their contact information within their license record is current. Pursuant to Rule 58A .0103(b), every broker shall notify the Commission in writing of each change of:

- personal name,
- firm name,
- trade name,
- residence address,
- firm address,
- telephone number, and
- email address within 10 days of said change.

### ***Full Brokers: BIC Responsibility per Rule***

Most investigations conducted by Commission staff are handled via *correspondence*, meaning the CPO first sends a *Letter of Inquiry* to the broker/firm against whom the complaint was filed.

Although BICs are responsible for the supervision of all affiliated brokers; be aware that BICs don't automatically receive copies of *Letters of Inquiry* sent to affiliated brokers not on provisional status, i.e. "full" brokers. However, BICs will receive a *Letter of Inquiry* if an affiliated broker's alleged conduct falls within the standard categories of their supervision. If the affiliated brokers alleged conduct does not fall within the

standard categories, BICs will receive a *courtesy* notification that an affiliated broker under their supervision has received a *Letter of Inquiry*.

**Will the Commission investigate the BIC if a complaint is filed only against a full broker? It depends.** Let's analyze some questions to determine when the BIC may be held responsible for the alleged conduct of an affiliated full broker.

1. Does the alleged conduct of the affiliated broker fall within the standard categories of a BICs supervisory responsibilities as specified in Rule 58A .0110?
2. If the alleged conduct does not fall within the standard categories of a BICs supervisory responsibilities, did the BIC have knowledge?

If the affiliated broker's alleged conduct does not fall under the standard categories of a BICs supervisory responsibilities (e.g., ensuring all affiliated brokers adhere to agency agreements and disclosures, have active, current licenses, follow advertising rules, maintain and retain transaction files, and the proper handling of trust accounts), the Commission will analyze all of the factual allegations within the complaint. The Commission CPO will determine whether or not the BIC was aware of or participated in the transaction, and reasonably knew or should have known about the affiliated broker's alleged actions. To assist with determining a BIC's knowledge, the Commission will review the transaction files, the written correspondence of parties involved in the transaction, the BIC's communication with the affiliated broker, and written office policies.

Also, while the Commission is analyzing the BIC's knowledge, it will take into consideration whether or not a BIC has an office policy manual (preferably written) and/or provides regular, need-based training about the correct way to handle and address various issues that may arise in the company's brokerage practice. The existence of written office policies and documented trainings may help to shift more of the responsibility and liability for inappropriate brokerage activity directly to the individual broker-respondent. Be aware that merely having written office policies may not be adequate if the policies are not enforced at all or consistently.

Even though the BIC may be included in the investigation, the BIC may not *automatically* be responsible for the actions of the affiliated full broker. A BIC's responsibility is contingent upon the findings after a thorough review of the facts of each case.

BICs are expected to be aware of what is going on in their offices. A BIC should be aware of trust account maintenance, supervision issues and administrative matters. Further, BICs are likely to face disciplinary action when:

- an issue exists for an extended period of time without their knowledge, and/or
- they attempt to conceal an issue rather than intervene and correct it.

A BIC who attempts to intervene and resolve an issue and even voluntarily informs the Commission of the situation, will be in a better position with the Commission than a

BIC who refuses to accept responsibility for their own actions and the actions of their affiliated brokers.

On the other hand, if the alleged conduct of the affiliated full broker does fall within the standard categories of a BICs supervisory responsibilities (e.g. ensuring affiliated brokers adhere to agency agreements and disclosures, have active and current licenses, follow advertising rules, maintain and retain transaction files, and the proper handling of trust accounts), the BIC will probably receive their own Letter of Inquiry as a respondent and/or be contacted for more information by a CPO.

### ***Provisional Brokers: BIC Responsibility***

As noted previously, a BIC is responsible for supervising all PBs in all brokerage activity; therefore, the BIC is automatically included in any inquiry involving a PB. In plain words, if a PB receives a *Letter of Inquiry*, their supervising BIC will receive a *Letter of Inquiry* as well. The BIC is included because the PB cannot be on active status or be able to engage in brokerage without a supervising BIC.

Due to BICs being included in an inquiry involving a PB, it is imperative that BICs strongly consider using the Commission-created criteria to provide the appropriate level of supervision for PBs.

### ***Possible Civil Liability of BIC/Firm***

Although the Commission may not hold the BIC responsible for the alleged conduct of an affiliated broker, the firm/company may still be civilly liable for any acts or misconduct by an affiliated PB or full broker because they are acting as an authorized agent for the firm/company. Many complainants will not stop with just filing a disciplinary complaint with the Commission, but will also consider civil action.

**NOTE:** BICs may also want to include in their written office policies for affiliated brokers to notify them of any complaints/notices received from the Commission, governmental agencies, and/or attorneys threatening lawsuits.

**NOTE:** If a brokerage company carries errors & omission insurance (highly recommended), the BIC should be aware of the protocol that must be followed in order to keep the insurance in place when a complaint/lawsuit is filed.

## Remember Jake from Material Facts?



### KEY POINTS:

- Sam is the BIC of A+ Realty.
- Jake is a broker affiliated with A+ Realty and provides a listing presentation for Peter, a property owner.
- During the presentation, Peter informs Jake that he recently had a home inspection performed.
- The home inspection revealed water leakage in the basement and crawl space and a recommendation that experts be consulted to determine the cause and needed repair.
- Peter did not order further inspections to verify the issue or determine repair needs.
- Jake tours the property and observes no moisture or standing water.
- Jake does not ask Peter additional questions about the water leakage in the basement or crawl space.
- Peter lists the property with Jake.

- Peter selects “No Representation” on the *Residential Property and Owners’ Association Disclosure Statement* (RPOADS).
- During the listing period, there is no visible evidence of moisture or water.
- Jake does not mention Peter’s inspection report to any of the prospective buyers.

## QUESTIONS FOR DISCUSSION: Remember Jake from Material Facts?

### 1. What if Jake is a PB? Will the Commission investigate Sam, the BIC?

**Answer: Yes.** If a complaint is filed against Jake, a PB, the Commission will automatically investigate Sam. The Commission will investigate Sam because he is responsible for supervising all the brokerage activities of Jake.

Rule 58A .0506(d) specifically states:

*A broker-in-charge shall supervise the provisional broker in a manner that assures that the provisional broker performs all acts for which a real estate license is required in accordance with the Real Estate License Law and Commission rules.*

### 2. If Jake is a PB, will Sam, the BIC, be *responsible* for Jake’s actions?

**Answer: It depends.** Jake was informed by Peter that a home inspection indicated his property had water leakage in the basement and crawl space. Jake did tour the property but did not observe moisture or standing water. However, Jake did not ask further questions of Peter to determine whether or not repairs were needed for or had been made to the property. Due to Peter informing Jake of the water leakage, Jake was aware of material facts regarding the property prior to listing it and had an affirmative duty to disclose this information to all parties in the transaction.

Sam is the BIC, thus he is the primary person the Commission will hold responsible for the management of A+ Realty and the supervision of all affiliated brokers. Although Sam is required to ensure Jake is performing real estate activities in adherence to the law, the Commission will **not automatically** hold Sam responsible for Jake’s brokerage activities.

However, the Commission will automatically investigate Sam, the BIC, since a complaint has been filed against Jake, a PB. During the investigation, the Commission will review Rule 58A .0110. This rule states that the BIC is responsible for supervising provisional brokers associated with or engaged on behalf of the firm.

According to this rule, Sam must supervise Jake and during this supervision, ensure he adheres to Commission rules. To determine the responsibility of Sam, the Commission will utilize the ***Criteria for Accessing Proper Supervision of a Provisional Broker*** while reviewing the facts of the complaint.

For example, the Commission will evaluate whether or not Sam:

- assisted, advised, and reviewed Jake's practices during the transaction and whether Jake was available to be supervised;
- established written office policies and procedures for the firm/company relating to the mandatory requirement to disclose material facts to all parties in the transaction;
- conducted regular office meetings and ensured that the office policies and procedures that were established were in fact implemented and followed by the affiliated brokers;
- provided ongoing quality training programs and materials to affiliated brokers and disseminated this information and regulatory information in a timely manner;
- considered the experience level of Jake when determining his supervision level;
- delegated supervisory duties for Jake to another broker in the office and, if so, what was their level of brokerage and training experience;
- evaluated the types of activities Jake was engaged in while conducting brokerage;
- had an appropriate ratio of PBs, full brokers, and appropriately supervised all of them;
- investigated and intervened when he learned of Jake's failure to disclose material facts; and
- provided a corrective action to ensure Jake timely disclosed material facts in the future.

The Commission will use the findings from the investigation along with the criteria mentioned above to determine whether or not Sam appropriately supervised Jake and if Sam will be held responsible.

If the Commission finds that Sam has:

- developed written office policies and procedures about how and when to timely disclose material facts,
- supervised Jake during the transaction,
- conducted quality training programs, and
- intervened and corrected the issue,

Sam may not be held responsible for Jake's actions.

However, if during the investigation it is evident that Sam did not appropriately supervise Jake based on the criteria established by the Commission, Sam may be held responsible for Jake's conduct.

### **3. What if Jake is a full broker? Will the Commission investigate Sam, the BIC?**

**Answer: *It depends.*** If a complaint is filed against Jake, a full broker, Sam may or may not be the subject of an investigation. In an effort to determine whether or not Sam may be investigated, the Commission will ask the following questions during the course of the initial investigation:

- *Does the alleged conduct of the affiliated broker fall within the standard categories of a BICs supervisory responsibilities as specified in Rule 58A .0110?*
- *If the alleged conduct does not fall within the standard categories of a BICs supervisory responsibilities, did the BIC have knowledge?*

Specifically, a BIC is responsible for:

- ensuring all affiliated brokers adhere to agency agreements and disclosure requirements;
- assuring that each broker affiliated at the office has an active, current license;
- the conduct of advertising;
- retaining and maintaining records relating to transactions conducted by or on behalf of the firm; and
- maintaining the trust or escrow account of the firm and the records thereto.

If Jake is a full broker, his alleged conduct does not fall within the standard categories of supervisory responsibilities for Sam under Rule 58A .0110.



Therefore, the Commission will evaluate what Sam knew or reasonably should have known during the transaction.

According to the bulletin article, [“What is Common Knowledge”](#), the Commission assesses what the broker knew or reasonably should have known about facts. To determine what a broker actually knew, the Commission reviews the transaction file and written communications of individuals directly or indirectly involved with the transaction. Further, the Commission examines public records, completion of relevant courses, and the broker’s access to publications on the subject matter to determine what the broker should have reasonably known.

During an investigation, the Commission may ask Sam whether or not he was involved in the transaction or had information pertaining to Jake’s alleged conduct. If Sam had knowledge and did intervene upon receiving notice of an issue, propose a remedy and implement corrective action, the Commission may not investigate Sam. However, if Sam was aware of Jake’s alleged conduct and did not investigate the issue, propose a remedy, and implement corrective action(s), Sam may be in violation of Commission rules.

Conversely, it is quite possible that Sam did not have knowledge of Jake’s alleged conduct. Therefore, the Commission will evaluate the facts to determine whether or not Sam should have reasonably known about the issue to determine his responsibility.

A generalization cannot be made that a BIC will or will not be responsible for the conduct of a full broker. However, to reduce their responsibility, BICs should ensure that all affiliated brokers are supervised appropriately in adherence with License Law and Commission rules, they develop written office policies for the brokerage, and provide consistent communication with affiliated brokers.

**NOTE:** If a broker engages in conduct that violates License Law and Commission rules, the Commission expects BICs to investigate the issue, intervene and propose a remedy, and provide corrective action(s).

## Remember the Garage with Feet?



### KEY POINTS:

- Jessica is a buyer agent and she represents Sue.
- Sue would like to purchase a property in an older, established neighborhood.
- Jessica and Sue view a property.
- Rachelle, the listing agent, uses the tax records for the property and describes the property in the MLS as having 3264 square feet.
- Tom is Rachelle's BIC.
- Jessica measures the property and determines the square footage incorrectly includes 576 square feet from the garage.
- Jessica notifies Rachelle of the inaccuracy.
- Rachelle does not update the square footage measurements in the MLS.

## QUESTIONS FOR DISCUSSION: Remember the Garage with Feet?

### 1. What if Rachelle is a PB? Will the Commission investigate Tom, the BIC?

**Answer: Yes.** If a complaint is filed against Rachelle, a PB, the Commission will automatically investigate Tom. The Commission will investigate Tom because he is responsible for supervising all the brokerage activities of Rachelle.

Rule 58A .0506(d) specifically states:

*A broker-in-charge shall supervise the provisional broker in a manner that assures that the provisional broker performs all acts for which a real estate license is required in accordance with the Real Estate License Law and Commission rules.*

### 2. If Rachelle is a PB, will Tom, the BIC, be responsible for her actions?

**Answer: It depends.** Although Commission rules do not require the square footage measurements to be included in a listing, if a broker does include the square footage of a property, the broker must accurately represent this information. Further, once a broker includes the square footage measurements in a listing, this is considered advertising.

The Commission will automatically investigate Tom, the BIC, since a complaint has been filed against Rachelle, the PB; however, the Commission will not **automatically** hold him responsible for Rachelle's actions. During the investigation, the Commission will review Rule 58A .0110.

Specifically, Rule 58A .0110(g)(3) states the BIC is responsible for all advertisements conducted on behalf of the firm. Since Rachelle included the square footage measurements for the property in the listing and the listing is considered advertising, Tom may be responsible for Rachelle's misrepresentation of the square footage of the property.

Also, according to Rule 58A .0506(d), Tom must supervise Rachelle, and during this supervision, ensure she adheres to License Law and Commission rules. To determine the responsibility of Tom, the Commission will utilize the **Criteria for**

***Assessing Proper Supervision of a Provisional Broker*** while reviewing the facts of the complaint.

For example, the Commission will evaluate whether or not Tom:

- assisted, advised, and reviewed Rachelle's practices during the transaction and whether Rachelle was available to be supervised;
- established written office policies and procedures for the firm/company relating to the accurate representation of square footage;
- conducted regular office meetings and ensured that the office policies and procedures that were established were in fact implemented and followed by the affiliated brokers;
- provided ongoing quality training programs and materials to affiliated brokers and disseminated this information and regulatory information in a timely manner;
- considered the experience level of Rachelle when determining her supervision level;
- delegated supervisory duties for Rachelle to another broker in the office and if so, what was their level of brokerage and training experience;
- evaluated the types of activities Rachelle was engaged in while conducting brokerage;
- had the appropriate ratio of PBs, full brokers, and appropriately supervised all of them;
- investigated and intervened when he learned of Rachelle's misrepresentation of square footage; and
- provided a corrective action to ensure Rachelle accurately reported square footage in the future.

The Commission will use the findings from the investigation along with the criteria mentioned above to determine whether or not this incident by Rachelle is an isolated event, whether Tom appropriately supervised Rachelle, and if he will be held responsible.

If the Commission finds that Tom has:

- developed written office policies and procedures about how to effectively measure the square footage of a property and advertise square footage;
- advised Rachelle during the transaction,
- conducted quality training programs, and
- intervened and corrected the issue,

Tom may not be responsible for Rachelle's actions.

However, if during the investigation it is evident that Tom did not appropriately supervise Rachelle based on the criteria established by the Commission or have written office policies that were also enforced regarding square footage calculations, Tom may be held responsible for Rachelle's conduct.

### **3. What if Rachelle is a full broker? Will the Commission investigate Tom, the BIC?**

**Answer: It depends.** If a complaint is filed against Rachelle, a full broker, Tom may or may not be the subject of an investigation. In an effort to determine whether or not Tom may be investigated, the Commission will ask the following questions during the course of the initial investigation:

- Does the alleged conduct of the affiliated broker fall within the standard categories of a BICs supervisory responsibilities as specified in Rule 58A .0110?
- If the alleged conduct does not fall within the standard categories of a BICs supervisory responsibilities, did the BIC have knowledge?

Specifically, a BIC is responsible for:

- ensuring all affiliated brokers adhere to agency agreements and disclosure requirements;
- assuring that each broker affiliated at the office has an active, current license;
- the conduct of advertising;
- retaining and maintaining records relating to transactions conducted by or on behalf of the firm; and
- maintaining the trust or escrow account of the firm and the records thereto.

If Rachelle is a full broker, her alleged conduct of misrepresenting the square footage of a property does fall within the standard categories of supervisory responsibilities for Tom under Rule 58A .0110. As the BIC, Tom is responsible for all advertisements on behalf of the brokerage which includes advertising the square footage of a property.

During the investigation, the Commission will determine if Rachelle's misrepresentation of square footage is an isolated incident. Therefore, the Commission may ask Tom whether or not he was involved in Rachelle's transaction or had knowledge of her miscalculations of square footage for this listing. Further, the Commission may request to review Tom's written office policies and procedures regarding square footage measurements, specifically,

how to measure a property and/or the process for selecting vendors to measure properties.

After conducting the investigation, the Commission will evaluate the facts of the case, transaction files, and the existence of policies and procedures to determine whether or not Tom should be responsible for Rachelle's conduct. For instance, if the Commission determines that Tom had procedures and policies for square footage calculations for the brokerage company but Rachelle disregarded this information, Tom may not be responsible. However, if the Commission notices a lack of policies and procedures regarding square footage calculations and a pattern of brokers in the company misrepresenting square footage calculations, Tom may be responsible for Rachelle's conduct.

A generalization cannot be made that a BIC will or will not be responsible for the conduct of a full broker. However, to reduce their responsibility, BICs should ensure that all affiliated brokers are supervised appropriately in adherence with License Law and Commission rules, they develop written office policies for the brokerage, and provide consistent communication with affiliated brokers.

**NOTE:** If a broker engages in conduct that violates License Law and Commission rules, the Commission expects BICs to investigate the issue, intervene and propose a remedy, and provide corrective action(s).

---

## WRITTEN OFFICE POLICIES

BICs should carefully consider creating written office policies to assist them with procedures for supervising affiliated brokers.

Written office policies are considered essential by many experts. Policies and procedures can assist BICs with standardizing operational tasks, establishing expectations, and providing guidance for all affiliated brokers, employees, and other individuals who perform duties on behalf of the brokerage. Also, policies should be uniformly applied and enforced.

A BIC's written office policies should address:

- communication with the BIC, or BIC delegate,
- training requirements,
- meeting schedules,
- transaction/document review process,
- client/consumer interaction,
- current regulatory information, and
- how to handle issues that may arise while practicing brokerage.

**NOTE:** During an investigation, the Commission may review the written office policies of the brokerage. If a BIC has written office policies, it may reduce the brokerage's responsibility and risk if a complaint is filed with the Commission. Also, the BIC may want to consider having all affiliated brokers sign a dated statement acknowledging receipt of and agreement to abide by the company's policies.

---

## **BROKER-IN-CHARGE BEST PRACTICES GUIDE**

The Commission has created a [“Broker-in-Charge Best Practices Guide”](#) to provide brokers-in-charge with guidance regarding written office policies, records management, and trust account maintenance.

The Guide is posted on the Commission's website (ncrec.gov) under *Resources*.

---

## SUMMARY OF IMPORTANT POINTS

- **Broker:** This is the primary license status for a broker license and includes any licensee, other than the BIC, who is affiliated with the firm.
- **Broker-in-Charge (BIC):** The broker who has been designated as the primary person having sole responsibility for the supervision and management of an office.
- **Provisional Broker (PB):** This is the entry-level license status for an individual broker license and includes any licensee who has not completed 90-hours of the Postlicensing education program.
- A PB must be under the supervision of a BIC to be on active status AND legally provide brokerage services.
- In order for a broker to be designated as a BIC for a sole proprietorship, real estate firm or branch office, a broker must *first* attain BIC Eligible status by submitting an application on a form available on the Commission's website.
- When a broker submits the [Request for BIC Eligible Status and/or BIC Designation \(Form 2.25\)](#), they are certifying that:
  - their broker license is on active status but NOT on provisional status;
  - they have at least two years of full-time or 4 years of part-time real estate brokerage experience within the previous 5 years or are a North Carolina licensed attorney with a practice that consists primarily of handling real estate closings and related matters in North Carolina for 3 years immediately preceding application; and
  - they have completed the 12-hour Broker-in-Charge Course within one year prior to application or within 120 days of designation.
- A broker who wishes to serve as the BIC of an office must be designated as a BIC with the Commission.
- According to Rule 58A .0110(f), once a broker holds BIC Eligible status, they must submit [the Request for BIC Eligible Status and/or BIC Designation \(REC 2.25\)](#) to become the designated BIC for a sole proprietor, real estate firm, or branch office.
- A broker must maintain their BIC Eligible status and/or BIC Designation by:
  - renewing their license in a timely manner each license year,
  - keeping their license on active status at all times, and
  - completing the 4-hour mandatory BICUP and approved 4-hour continuing education elective.
- Rule 58A .0110(a) requires every real estate firm to have a broker designated by the Commission who meets the qualification requirements to serve as BIC of the firm's principal office and a different broker to serve in the same capacity at each branch office.
- A BIC may not be the BIC of more than one office location at a time and no office of a firm shall have more than one designated BIC.



- In addition to each office having a BIC, most broker-sole proprietors (including sole practitioners) must also be a BIC.
- A broker who is a sole proprietor must designate themselves as a BIC if the broker:
  - engages in any transaction where the broker is required to deposit and maintain monies belonging to others in a trust account;
  - engages in advertising or promoting his or her services as a broker in any manner; or
  - has one or more other brokers affiliated with them in the real estate business.
- The designated BIC is the primary person the Commission will hold responsible for the supervision and management of an office.
- The BIC has the responsibility to supervise affiliated brokers, employees, and others who perform duties on behalf of the brokerage.
- Rule 58A .0110(g) lists the specific responsibilities of a broker-in-charge as follows:
  - assure that each broker affiliated at the office has complied with Rules .0503, .0504, and .0506 of this Subchapter;
  - notify the Commission of any change of firm's business address or trade name and the registration of any assumed business name adopted by the firm for its use;
  - be responsible for the conduct of advertising by or in the name of the firm at such office;
  - maintain the trust or escrow account of the firm and the record pertaining thereto;
  - retain and maintain records relating to transactions conducted by or on behalf of the firm, including those required to be retained pursuant to Rue .0108 of this Section;
  - supervise provisional brokers associated with or engaged on behalf of the firm at such office in accordance with the requirements of Rule .0506 of this Subchapter;
  - supervise all brokers affiliated at the office with respect to adherence to agency agreement and disclosure requirements;
  - notify the Commission in writing that he or she is no longer serving as a BIC of a particular office within 10 days following any such change;
  - complete the Commission's Basic Trust Account Procedures Course within 120 days of assuming responsibility for a trust account in accordance with G.S. 93A-6(g), however, the BIC shall not be required to complete the course more than once in three years; and
  - supervise all unlicensed individuals employed at the office and ensure that unlicensed individuals comply with G.S. 93A-2(c)(6).

- A BIC's responsibility for full brokers under Commission rules is limited to 5 things. The BIC has to ensure full brokers:
  - comply with **agency agreements and disclosures**,
  - have **current, active licenses**,
  - comply with **advertising** laws and regulations,
  - create, maintain, and **retain transaction files**, and
  - properly handle **trust money**.
- A BIC should establish some best practices to assist them with their supervisory responsibilities. A BIC may consider:
  - creating a reminder to check for active and current licensure;
  - developing a plan for reviewing all advertisements;
  - developing policies for using social media for brokerage activity;
  - reviewing all transaction files periodically for accuracy; and
  - implementing and following strict policies for the handling of all trust monies.
- The BIC must supervise all PBs affiliated with the office.
- Generally, a PB may perform the same acts as a broker whose license is not on provisional status as long as they are supervised by a BIC.
- A PB may not operate ***independently*** in any way.
- The BIC has more supervisory responsibilities with a PB than a *full* broker.
- A PB may engage in real estate brokerage activities immediately once the BIC has sent in the *License Activation and Broker Affiliation Form (REC 2.08)*.
- If the PB and BIC do not receive written acknowledgement from the Commission confirming the PB's active status within 30 days of the date shown on the form, the BIC must immediately terminate the PB's real estate brokerage activities pending receipt of the written acknowledgement of license activation from the Commission.
- A BIC may be held accountable for all of a PB's brokerage conduct, because the PB cannot have an active license or engage in brokerage activity without a supervising BIC.
- If a PB is affiliated with two BICs, as permitted by Rule 58A .0506(a), BOTH BICs will share responsibility and are accountable for the PB.
- The Commission has developed criteria to guide in assessing how a BIC supervises a PB. The guiding criteria are:
  - Is the BIC available to assist, advise, and review the PBs practices and is the PB available to be supervised?
  - Has the BIC established written office policies and procedures under which all affiliated brokers are expected to operate?
  - Does the BIC review and monitor the brokerage activities of PBs?
  - Does the BIC hold regular meetings and otherwise assure proper implementation of and adherence to office policies and procedures?

- Does the BIC provide ongoing quality training programs and materials to affiliated brokers and disseminate in a timely manner all regulatory information they receive pertaining to real estate brokerage practice?
- What is the experience level of the PB?
- Has the BIC delegated supervisory duties to another broker in the office and, if so, what is the level of training and experience of that supervisory broker?
- In what types of activities is the PB engaged?
- How many PBs does the BIC supervise and what is the ratio of supervisors to PBs?
- What, if any, corrective or remedial action does the BIC take upon learning of a violation of the License Law or Commission rules by a PB for whom the BIC is responsible?
- A BIC incurs more responsibility while supervising PBs. Therefore, it is essential that BICs consider adopting best practices such as:
  - limiting activities of PBs (e.g., no short sales, no dual agency, etc.) until established criteria (e.g., # of successfully closed transactions; education completed, etc.) is met;
  - being available and maintaining regular office hours for supervision of PBs;
  - sharing best contact information & procedure for PBs needing consultation;
  - assigning a competent experienced broker as a mentor for PBs;
  - establishing expectations of when PBs will physically be in the office or available virtually;
  - scheduling periodic meetings and training with PBs; and
  - reviewing transaction files of the PBs.
- N.C.G.S. §93A-6(a), authorizes the Commission to take disciplinary action either on its own initiative or by complaint of any person. This authority allows the Commission to:
  - investigate brokers and unlicensed activity;
  - hold hearings on broker misconduct;
  - issue subpoenas for records and to compel attendance of witnesses to testify at hearings; and
  - impose sanctions for broker misconduct.
- According to the Rule 58A .0601, a complaint must:
  - be in writing;
  - identify the respondent broker or firm; and
  - apprise the Commission of the facts which form the basis of the complaint.
- Further, Rule 58A .0601 requires a broker/firm to submit a written response within 14 days of receipt of a *Letter of Inquiry*. The response must include:
  - a full disclosure of requested information; and
  - copies of all requested documents.

- The Commission may also conduct field investigations.
- Field investigations are conducted when cases require witness interviews, trust account audits, or the examination of evidence that cannot be easily identified/obtained through written correspondence.
- Most investigations conducted by Commission staff are handled via *correspondence*, meaning the CPO first sends a *Letter of Inquiry* to the broker/firm against whom the complaint was filed.
- BICs are responsible for the supervision of affiliated brokers; however, they will not always receive a *Letter of Inquiry* or become the subject of a Commission investigation due to the alleged conduct of an affiliated broker.
- To determine whether or not the BIC is investigated, the Commission will ask the following questions:
  - Does the alleged conduct of the affiliated broker fall within the standard categories of a BICs supervisory responsibilities as specified in Rule 58A .0110?
  - If the alleged conduct does not fall within the standard categories of a BICs supervisory responsibilities, did the BIC have knowledge?
- The Commission CPO will determine whether or not the BIC was aware of or participated in the transaction, and reasonably knew or should have known about the affiliated broker's alleged actions.
- To assist with determining a BIC's knowledge, the Commission will review the transaction files, the written correspondence of parties involved in the transaction, the BIC's communication with the affiliated broker, and written office policies.
- The Commission will take into consideration whether or not a BIC has an office policy manual (preferably written) and/or provides regular, need-based training about the correct way to handle and address various issues that may arise in the company's brokerage practice.
- The existence of written office policies and documented trainings may help to shift more of the responsibility and liability for inappropriate brokerage activity directly to the individual broker-respondent.
- The BIC is automatically included in any inquiry involving a PB. The BIC is included because the PB cannot be on active status or be able to engage in brokerage without a supervising BIC.
- Even though the BIC may be included in the investigation, the BIC may not *automatically* be responsible for the actions of the affiliated full broker. A BIC's responsibility is contingent upon the findings after a thorough review of the facts of each case.
- BICs are likely to face disciplinary action when:
  - an issue exists for an extended period of time without their knowledge, and/or

- they attempt to conceal an issue rather than intervene and correct it.
- If a PB receives a *Letter of Inquiry* from the Commission, the PB's supervising BIC will also receive a *Letter of Inquiry*.
- A BIC incurs more responsibility while supervising PBs affiliated with their firm/company.
- Although the Commission may not hold the BIC responsible for the alleged conduct of an affiliated broker, the firm/company may still be liable for the acts of brokerage misconduct because the affiliated brokers are agents authorized to act on behalf of the firm/company.
- Written office policies are important for every brokerage.
- Written office policies can assist the BIC with standardizing operational tasks, establishing expectations, and providing guidance for all affiliated brokers, employees, and other individuals who perform duties on behalf of the brokerage.

---

## ANSWERS TO DISCUSSION QUESTIONS

For Discussion on Page 91

### *“Part of the Time”*

1. Hong is the BIC of ABC Realty. He has several full brokers under his supervision and one provisional broker, Lisa. Lisa has been practicing brokerage for seven months. During this time, Lisa has represented several clients without supervision.

Lisa has submitted all transaction documents to the firm within three days of receipt and has asked Hong to review the files with her for accuracy. Hong informs Lisa that since she is a former mortgage loan officer, he knows that she pays attention to detail, and he trusts that her files are accurate.

Lisa has assisted five buyer-clients with purchasing a home. Hong has not reviewed any of her transaction files.

Has Hong adhered to his BIC supervisory responsibilities for Lisa? YES/NO  
Why or not?

*Answer: No. Hong has not adhered to his supervisory responsibilities for Lisa. According to 58A .0506(d), Hong is responsible for ensuring that Lisa practices brokerage activities in accordance to License Law and Commission rules. Also, it may be questionable under 58A .0110(g)(7) whether Hong is supervising Lisa and ensuring she is adhering to agency agreements and disclosure requirements in each transaction if he is not reviewing her files. Further, it may also be difficult for Hong to show appropriate supervision of Lisa according to Rule 58A .0506(a), if he is not:*

- *having regularly scheduled meetings with Lisa,*
- *providing consistent communication,*
- *reviewing Lisa’s transaction files, and/or*
- *conducting workshops/trainings on how to complete proper documentation.*

2. Are there different requirements for the supervision of provisional brokers and full brokers?

*Answer: Yes. According to Rule 58A .0110, a BIC is required to supervise all affiliated brokers of the firm/company. Specifically, a BIC is responsible for ensuring all affiliated brokers, including full brokers, are:*

- *adhering to agency agreements and disclosure requirements,*
- *possessing active, current licenses;*
- *conducting advertising,*
- *retaining and maintaining records, and*
- *maintaining the trust or escrow account of the firm and the records thereto.*

*However, Rule 58A. 0506, indicates that a BIC must supervise the PB to a higher level, in a manner that assures that the PB performs all acts for which a real estate license is required in accordance with the Real Estate License Law and Commission rules. A supervising broker who fails to supervise a PB as prescribed in the Rule may be subject to disciplinary action pursuant to Rule 58A .0110(g)(6) and Rule 58A .0506, respectively. Further, BICs should utilize the criteria that the Commission established to assess whether or not they are appropriately supervising provisional brokers.*

## **21 NCAC 58A .0110      BROKER-IN-CHARGE**

- (a) Every real estate firm shall designate one BIC for its principal office and one BIC for each of its branch offices. No office of a firm shall have more than one designated BIC. A BIC shall not serve as BIC for more than one office unless each of those offices share the same physical office space and delivery address.
- (b) Every sole proprietorship shall designate a BIC if the sole proprietorship:
- (1) engages in any transaction where a broker is required to deposit and maintain monies belonging to others in a trust account;
  - (2) engages in advertising or promoting services as a broker in any manner; or
  - (3) has one or more other brokers affiliated with the sole proprietorship in the real estate business.
- (c) A licensed real estate firm shall not be required to have a BIC if it:
- (1) is organized for the sole purpose of receiving compensation for brokerage services furnished by its qualifying broker through another firm or broker;
  - (2) is treated for tax purposes as a pass-through business by the United States Internal Revenue Service;
  - (3) has no principal or branch office; and
  - (4) has no licensed person associated with it other than its qualifying broker.
- (d) A broker who maintains a trust or escrow account for the sole purpose of holding residential tenant security deposits received by the broker on properties owned by the broker in compliance with G.S. 42-50 shall not be required to be a BIC.
- (e) In order for a broker to designate as a BIC for a sole proprietor, real estate firm, or branch office, a broker shall apply for BIC Eligible status by submitting an application on a form available on the Commission's website. The BIC Eligible status form shall include the broker's:
- (1) name;
  - (2) license number;
  - (3) telephone number;
  - (4) email address;
  - (5) criminal history and history of occupational license disciplinary actions;
  - (6) certification of compliance with G.S. 93A-4.2, including that:
    - (A) his or her broker license is on active status;
    - (B) the broker has obtained at least two years of real estate brokerage experience equivalent to 40 hours per week within the previous five years or shall be a North Carolina licensed attorney with a practice that consisted primarily of handling real estate closings and related matters in North Carolina for three years immediately preceding application; and
    - (C) the broker completed the 12-hour Broker-in-Charge Course no earlier than one year prior to application and no later than 120 days after application; and
  - (7) signature.
- (f) A broker who holds BIC Eligible status shall submit a form to become the designated BIC for a sole proprietor, real estate firm, or branch office. The BIC designation form shall include:
- (1) the broker's:
    - (A) name;
    - (B) license number;
    - (C) telephone number;
    - (D) email address; and
    - (E) criminal history and history of occupational license disciplinary actions; and
  - (2) the firm's:
    - (A) name; and
    - (B) license number, if applicable;
- (g) A designated BIC shall:
- (1) assure that each broker affiliated at the office has complied with Rules .0503, .0504, and .0506 of this Subchapter;
  - (2) notify the Commission of any change of firm's business address or trade name and the registration of any assumed business name adopted by the firm for its use;
  - (3) be responsible for the conduct of advertising by or in the name of the firm at such office;
  - (4) maintain the trust or escrow account of the firm and the records pertaining thereto;
  - (5) retain and maintain records relating to transactions conducted by or on behalf of the firm, including those required to be retained pursuant to Rule .0108 of this Section;



- (6) supervise provisional brokers associated with or engaged on behalf of the firm at such office in accordance with the requirements of Rule .0506 of this Subchapter;
  - (7) supervise all brokers affiliated at the office with respect to adherence to agency agreement and disclosure requirements;
  - (8) notify the Commission in writing that he or she is no longer serving as BIC of a particular office within 10 days following any such change;
  - (9) complete the Commission's Basic Trust Account Procedures Course within 120 days of assuming responsibility for a trust account in accordance with G.S. 93A-6(g), however the BIC shall not be required to complete the course more than once in three years; and
  - (10) supervise all unlicensed individuals employed at the office and ensure that unlicensed individuals comply with G.S. 93A-2(c)(6).
- (h) A broker holding BIC Eligible status shall take the Broker-in-Charge Update Course during the license year of designation, unless the broker has satisfied the requirements of Rule .1702 of this Subchapter prior to designation.
- (i) A broker's BIC Eligible status shall terminate if the broker:
- (1) made any false statements or presented any false, incomplete, or incorrect information in connection with an application;
  - (2) fails to complete the 12-hour Broker-in-Charge Course pursuant to Paragraph (e) of this Rule;
  - (3) fails to renew his or her broker license pursuant to Rule .0503 of this Subchapter, or the broker's license has been suspended, revoked, or surrendered; or
  - (4) fails to complete the Broker-in-Charge Update Course and a four credit hour elective course pursuant to Rules .1702 and .1711 of this Subchapter, if applicable.
- (j) In order to regain BIC Eligible status after a broker's BIC Eligible status terminates, the broker shall complete the 12-hour Broker-in-Charge Course prior to application and then submit a BIC Eligible status form pursuant to Paragraph (e) of this Rule.
- (k) A nonresident commercial real estate broker licensed under the provisions of Section .1800 of this Subchapter shall not act as or serve in the capacity of a broker-in-charge of a firm or office in North Carolina.
- (l) A broker shall not be granted BIC Eligible status or designated as BIC of a firm if there is a pending Commission investigation against the broker.

*History Note: Authority G.S. 93A-2; 93A-3(c); 93A-4; 93A-4.2; 93A-9; 93A-38.5; Eff. September 1, 1983; Amended Eff. July 1, 2014; May 1, 2013; July 1, 2010; July 1, 2009; January 1, 2008; April 1, 2006; July 1, 2005; July 1, 2004; April 1, 2004; September 1, 2002; July 1, 2001; October 1, 2000; August 1, 1998; April 1, 1997; July 1, 1995; July 1, 1994; Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. May 1, 2018; Amended Eff. July 1, 2021; July 1, 2020; July 1, 2018.*

THIS PAGE LEFT INTENTIONALLY BLANK.

# Section 4

## Law & Rules Updates



### *“Life near the Farm”*

Mary, a prospective seller, is interested in listing her property. She contacts Angie, a broker with Z Homes, for a listing presentation. During the conversation, Angie asks Mary, “Where is your property located?” Mary states, “My property is located in Greene County.” Angie informs Mary that she practices brokerage in that area and can meet for a listing presentation.

The next day, Angie travels to Greene County. As she is driving to Mary’s property, she smells an odor. When Angie arrives at Mary’s property, the smell intensified.

Before Angie conducts the listing presentation, she reviews the agency agreements and disclosures with Mary. After the conversation, Mary decides to enter into a listing agreement with Angie and Z Homes.

After Mary enters into the listing agreement, Angie tours the property and begins to ask Mary questions so that she can gather information for the listing. As Mary is searching for the information, she mentions that she is eager to sell the property quickly because she is annoyed by the noise and smell of the hog farm located next to her property.

Does Angie have to disclose that Mary’s property is located near a hog farm?

- a) No. Angie has not verified the hog farm in the public records.
- b) Yes. Angie was made aware of material facts regarding the hog farm by Mary.
- c) No. Angie does not know whether the issues would be material to a buyer.
- d) Yes. A broker must disclose all agricultural activity within 1 mile of the property.

## **“BIC Eligible Status”**

Sue, a broker with XYZ Homes, would like to obtain *BIC Eligible Status*. On October 1, 2022, Sue completes Form 2.25 and requests BIC Eligible Status and BIC Designation simultaneously. She registers for the 12-hour Broker-in-Charge Course on November 2, 2022.

How long does Sue have to complete the 12-Hour BIC Course?

---

---

## **LEARNING OBJECTIVES**

By the end of this section, you should be able to describe updates to License Law and Commission rules that were effective on July 1, 2022.

---

## **OVERVIEW**

The Commission revised several rules with an effective date of July 1, 2022, in Chapters 58A, 58B, and 58H. The changes that directly impact brokers will be summarized in this section.

The rule revisions are reprinted at the end of this section. Also, all revised rules can be viewed on the Commission’s website.

**IMPORTANT NOTE:** A number of statutes and laws changed during the 2021-2022 legislative session. Some of the changes will impact brokers and brokerage. No discussion of the law changes will happen during the 2022-2023 Update Course, but you are welcome to contact the Commission if you have any questions.

**BEST PRACTICE:** Brokers can subscribe to the Commission’s mailing list to receive notice of rule making at <https://www.ncrec.gov/Home/Subscribe>.

---

## COMMISSION RULE CHANGES EFFECTIVE JULY 1, 2022

### Rule 58A .1712: Broker-In-Charge Course

#### Rule 58A .1712(a) and (b)

Rule 58A .1712(a) and (b) were amended by the Commission and became effective on July 1, 2022. In Rule 58A .1712(a), the Commission removed the verbiage that indicated the Broker-in-Charge Course is required for all brokers designating as a BIC and added the course is now required for a broker to obtain *BIC Eligible Status* to the rule language. Therefore, this addition clarifies that the 12-hour Broker-in-Charge course is needed by any broker who wants to attain *BIC Eligible Status*.

Prior to July 1, 2022, Rule 58A .1712(b), stated:

*In order to receive credit for completing the Broker-in-Charge Course, a broker shall:*

- (1) attend at least 90 percent of the scheduled instructional hours for the course;*
- (2) provide his or her legal name and license number to the course provider;*
- (3) present his or her pocket card or photo identification card, if necessary;*
- (4) personally perform all work required to complete the course; and*
- (5) complete the 12-hour Broker-in-Charge Course no later than 120 days after the broker registers for the course.*

Effective July 1, 2022, Rule 58A .1712(b) states:

*In order to receive credit for completing the Broker-in-Charge Course, a broker shall:*

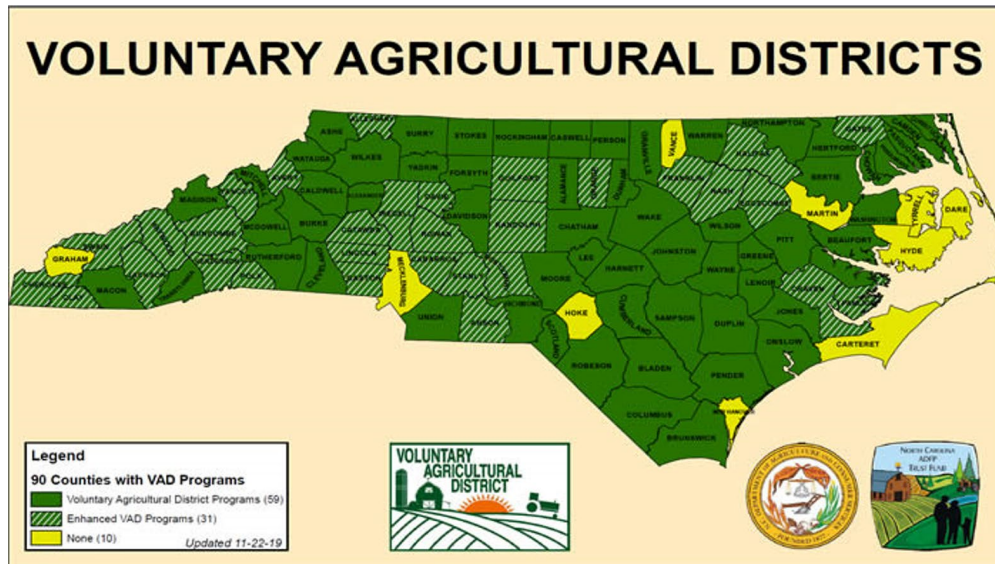
- (1) personally perform all work required to complete the course; and*
- (2) complete the 12-hour Broker-in-Charge Course no later than 30 days after the broker registers for the course and no later than the following June 10, whichever comes first.*

In plain words, Rule 58A .1712 requires brokers to take the 12-hour Broker-in-Charge Course if they wish to attain BIC Eligible Status. Also, they must personally perform all work that is required of the course and complete the course work no later than **30 days** after registration and no later than June 10, whichever comes first.

## Subchapter 58B: Timeshares

The Commission revised *Subchapter 58B, Time Shares*, to reflect the legislative changes that were made as a result of [Session Law 2021-163](#). This session law modernized the Timeshare Act.

## Senate Bill 605: N.C. Farm Act of 2021



[Senate Bill 605, the N.C. Farm Act of 2021](#), was signed into law on July 2, 2021. This bill allows for the establishment of voluntary agricultural districts.

Owners of farmland may elect to participate in the voluntarily agricultural district program that is administered by their local government as long as their farmland meets the requirements set forth in G.S. §106-737(4).

**What is the purpose of Senate Bill 605?** The purpose of agricultural districts are to decrease the likelihood of legal disputes, such as nuisance actions between owners and their neighbors. Owners may use their participation in the voluntary agricultural district as a defense to civil liability.

**What is required under Senate Bill 605?** G.S. §106-741(a) indicates all counties shall require that land records include some form of notice that reasonably alerts a person researching the title of a particular tract that such tract is located within one-half mile of the property line of any tract of land enrolled in a voluntary agricultural district.

***What does this mean for brokers?*** The Commission expects brokers to disclose a tract of land is located within one-half mile of the property line of any tract of land enrolled in a voluntary agricultural district if they *know* or *reasonably should know* of its existence. If a broker knew or reasonably should have known (e.g. geographic competence) that a tract of land was within one-half mile of the property line of any tract of land in the voluntary agricultural district, it rises to the level of a material fact and must be disclosed.

The Commission does not expect brokers to conduct a public records search to determine if a tract of land is within one-half mile of a property line of a tract of land in the voluntary agricultural district. Further, buyers should become aware of this information while conducting due diligence on the property and performing a title search.

---

## ANSWERS TO DISCUSSION QUESTION

For Discussion on Page 135:

### ***“Life near the Farm”***

Mary, a prospective seller, is interested in listing her property. She contacts Angie, a broker with Z Homes, for a listing presentation. During the conversation, Angie asks Mary, “Where is your property located?” Mary states, “My property is located in Greene County.” Angie informs Mary that she practices brokerage in that area and can meet for a listing presentation.

The next day, Angie travels to Greene County. As she is driving to Mary’s property, she smells an odor. When Angie arrives at Mary’s property, the smell intensified.

Before Angie conducts the listing presentation, she reviews the agency agreements and disclosures with Mary. After the conversation, Mary decides to enter into a listing agreement with Angie and Z Homes.

After Mary enters into the listing agreement, Angie tours the property and begins to ask Mary questions so that she can gather information for the listing. As Mary is searching for the information, she mentions that she is eager to sell the property quickly because she is annoyed by the noise and smell of the hog farm located next to her property.

Does Angie have to disclose that Mary’s property is located near a hog farm?

- a) No. Angie has not verified the hog farm in the public records.
- b) Yes. Angie was made aware of material facts regarding the hog farm by Mary.**
- c) No. Angie does not know whether the issues would be material to a buyer.
- d) Yes. A broker must disclose all agricultural activity within 1 mile of the property.

**Answer: (B) Yes.** *Angie received information from Mary at the listing presentation that made her aware of the hog farm that was located next to her property. Further, Angie practices brokerage in Greene County and has geographic competence of the area. Since Angie was aware of this information, she must disclose it to all parties within the transaction. Further, Senate Bill 605, N.C. Farm Act of 2021, requires a notice to be placed in the land records that the property is located within one-half of a mile of a property that participates in a voluntary agricultural district. However, if Angie did not know or have reasonable knowledge about the hog farm being located next to the*



*property, the Commission would not expect Angie to review public records to obtain this information. Buyers should become aware of a particular tract of land being within one-half of a mile of the property line of a tract of land in a voluntary agricultural district as they are conducting due diligence on a property (e.g., title search).*

### **“BIC Eligible Status”**

Sue, a broker with XYZ Homes, would like to obtain *BIC Eligible Status*. On October 1, 2022, Sue completes Form 2.25 and requests BIC Eligible Status and BIC Designation simultaneously. She registers for the 12-hour Broker-in-Charge Course on November 2, 2022.

How long does Sue have to complete the 12-Hour BIC Course?

**Answer:** *Sue registered for the course on November 2, 2022. Pursuant to Rule 58A .1712, she is required to personally perform all work required to complete the course and complete the course no later than 30 days after registration and no later than the following June 10, whichever occurs first. Further, in order for Sue to receive 4-hour CE credit for the course, she must complete the course by December 2, 2022.*

THIS PAGE LEFT INTENTIONALLY BLANK.

# Section 5

## LICENSING & EDUCATION



1. Justine, a full broker, did not complete CE during the July 1, 2021-June 10, 2022, CE period, and she did not renew her license in June 2022. Now her sister, Ashley, wants to purchase a house.

a) Can she represent Ashley?

---

b) Would the answer to (a) change if Justine had renewed her license by June 30, 2022?

---

2. Today is March 15, 2023, and Solomon's license has been expired since June 30, 2020. What must Solomon do to reinstate his license and return it to active status?

---

---

### LEARNING OBJECTIVES

By the end of this section, you should be able to:

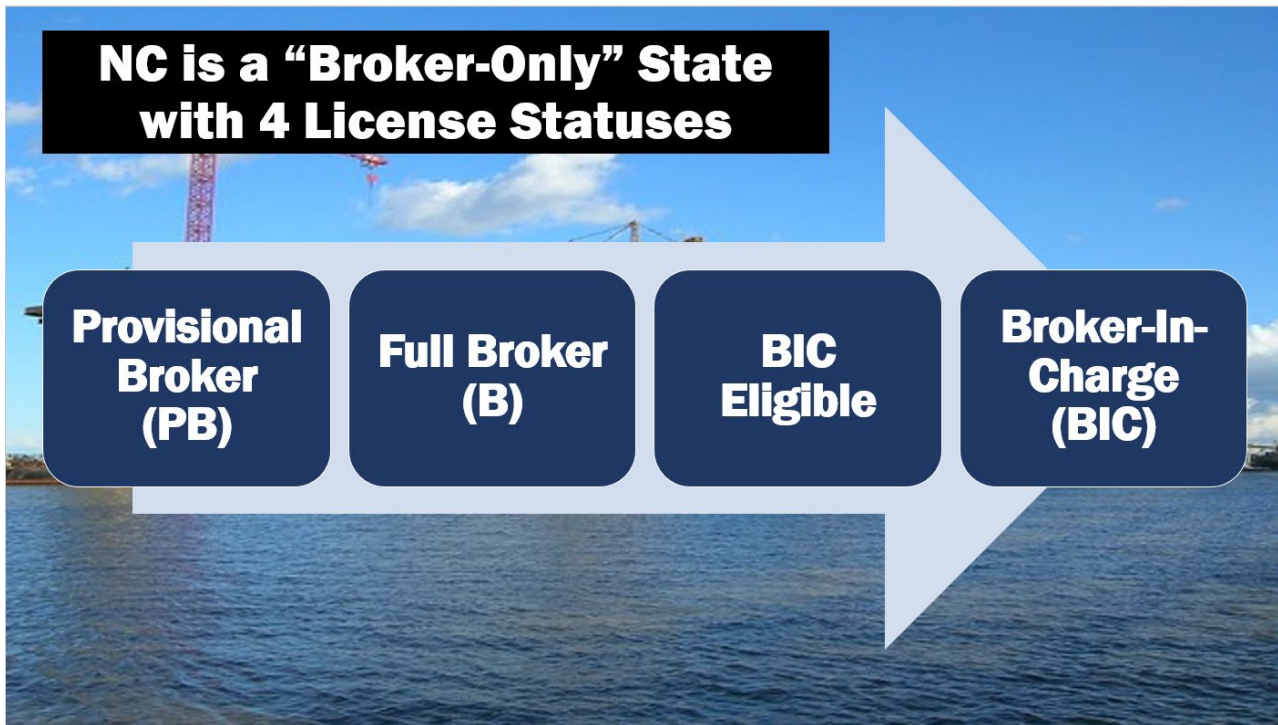
- define license categories and statuses;
- explain how to maintain a current and active license;
- describe how to attain *BIC Eligible* status;
- explain how to request or terminate BIC designation; and
- explain how to regain *BIC Eligible* status and BIC designation.

---

## LICENSE CATEGORIES AND STATUSES

### Category: Individual Broker License

North Carolina is a “broker only” state, meaning there are not separate salesperson and broker licenses. Instead, there are several statuses of the individual broker license as follows:



#### Provisional Broker (PB) Status

- Entry-level license status.
- A PB must be under the supervision of a BIC to be on active status and legally provide brokerage services.
- A PB must complete the 90-hour Postlicensing education program within 18 months after initial licensure to maintain active license status.

#### Broker (B) Status

- Primary individual license status.
- A “full” broker can engage in brokerage:  
as an affiliated agent of a real estate brokerage company  
(firm or sole proprietorship) under a (BIC),  
  
OR  
independently as a sole proprietor or an entity. In such case, the broker must also be  
designated as a BIC.

## **BIC Eligible Status**

This status is granted to a broker who has...

- satisfied the qualification requirements for BIC Eligible status;
- submitted a *Request for BIC Eligible Status and/or BIC Designation* form (REC 2.25); and
- successfully completed the *12-hour Broker-in-Charge Course* within one year prior to or 120 days after submitting form REC 2.25.

## **Broker-in-Charge (BIC) Designation**

- A broker with BIC Eligible status may be designated as broker-in-charge (BIC).
- Each real estate firm or sole proprietorship must have a different BIC for each office.
- A BIC is responsible for:
  - (1) assuring that all brokers employed at the office are maintaining active, current licenses and are maintaining up-to-date information in Commission records;
  - (2) notifying the Commission of firm name or address changes;
  - (3) advertising;
  - (4) maintaining trust/escrow account(s);
  - (5) retaining records;
  - (6) supervising affiliated provisional brokers;
  - (7) ensuring that all affiliated brokers are adhering to agency agreement and disclosure requirements; and
  - (8) notifying the Commission in writing that he or she is no longer serving as BIC of a particular office within 10 days following any such change.

## **Category: Firm License**

- This license is issued to a business entity, such as a corporation, limited liability company, limited partnership, general partnership, association, or joint business venture.
- A sole proprietorship does NOT need a firm license because no entity has been created.

## **Category: Limited Nonresident Commercial License (LCB)**

A limited nonresident commercial broker (LCB) license is a license issued to a person who:

- does NOT live in North Carolina (NC),
- has an active real estate broker or salesperson license in another state,
- wants to enter NC to engage in a commercial transaction, and
- must enter into a Declaration of Affiliation and a Brokerage Cooperation Agreement with a resident NC broker who will be responsible for supervising the nonresident.

This restricted license permits the nonresident to enter NC to engage only in “commercial real estate transactions” as defined in Commission Rule 58A .1802(1).

If the LCB obtains any home, business or delivery address in North Carolina, the individual must apply for and obtain a NC broker license in order to engage in brokerage.

---

## CURRENT AND ACTIVE LICENSURE

To lawfully engage in brokerage activity, an individual or entity must have a **CURRENT** real estate broker license on **ACTIVE STATUS** at the time the broker provides the brokerage services.

Renewing a license every year allows the person or entity to keep the license. If the person/entity fails to timely renew the license, the person/entity no longer has a license. One may renew and keep a license for years without it being on active status, but those with licenses on **inactive status** may **NOT** engage in brokerage services during that period.

### Current vs. Expired INDIVIDUAL BROKER Licenses



**CURRENT** license status means the broker timely renewed their license by paying the annual license renewal fee of \$45 and providing required information/disclosures during May 15-June 30.



**EXPIRED** license status means the broker failed to timely renew their license.

---

### ALL LICENSES EXPIRE ON JUNE 30.

**Brokers, firms, and LCBs must renew their licenses every year during May 15-June 30. A broker must have a Current license on Active status to legally engage in brokerage.**

---

The \$45 renewal fee...

- must be paid online at the Commission's website, and
- must be received by the Commission by 11:59:59 pm on June 30.

**There is no grace period.** If your license expires on June 30, you may not engage in brokerage activities beginning July 1. You may not resume brokerage practice until your license has been reinstated and is back on "active" status.

Brokers who serve in the military and are on active deployment during the renewal period may be granted special consideration under federal law.

## Reinstating an Expired Individual License (21 NCAC 58A .0505)

### License expired up to 6 months:

Pay \$90 reinstatement fee online ([www.ncrec.gov](http://www.ncrec.gov)).

NOTE: To regain active status, a license activation form [\(REC 2.08\)](#) must also be submitted.

### License expired more than 6 months and up to 2 years:

1. Successfully complete one 30-hour Postlicensing course within 6 months prior to submitting reinstatement application;
2. Submit a reinstatement application with \$90 application fee and all required documentation, including criminal background report; and
3. Submit license activation form [\(Rec 2.08\)](#).

-OR-

1. Submit a reinstatement application with \$90 application fee and all required documentation, including criminal background report;
2. Pass National and State sections of license exam; and
3. Submit license activation form [\(Rec 2.08\)](#).

### License expired more than 2 years: START OVER AS IF NEVER LICENSED

1. Successfully complete 75-hour NC Broker Prelicensing course;
2. Submit a license application with \$100 original application fee and all required documentation, including criminal background report; and
3. Pass National and State sections of license exam.

For a detailed review of reinstatement requirements, please visit the “Reinstate your License” page on the Commission’s website. You may also contact the Commission’s Education & Licensing Division for specific instructions.

## Current vs. Expired FIRM License

CURRENT firm license means the Qualifying Broker (QB) timely renewed the firm’s license by paying the annual license renewal fee of \$45 and providing required information/disclosures during May 15-June 30.

The QB (Qualifying Broker) must renew the firm’s license each year (as well as his/her individual broker license) and periodically verify with the North Carolina Secretary of State’s Office that the entity remains in good standing.

A firm that fails to renew its license by 11:59pm on June 30 will not have a license as of July 1.

## Reinstating an Expired FIRM License (21 NCAC 58A .0505)

### Firm license expired up to 6 months:

Pay \$90 reinstatement fee online ([www.ncrec.gov](http://www.ncrec.gov)).

NOTE: If the QB's individual broker license is on active status, the firm's license will be returned to active status as soon as the reinstatement fee is processed.

### Firm license expired more than 6 months and up to 2 years:

Submit a firm reinstatement application with \$90 application fee and all required documentation.

### Firm license expired more than 2 years:

Submit a firm license application with \$100 original application fee and all required documentation.

## Active vs. Inactive INDIVIDUAL BROKER Licenses

To legally receive any income from brokerage activity, including referral fees, you must have an ACTIVE North Carolina license at the time you provide the brokerage service or make the referral.

To maintain active status, brokers\* must both timely renew their licenses and complete the appropriate 8 hours of Continuing Education by June 10 each year.

\*Provisional Brokers must also timely complete Postlicensing Education and be affiliated with a BIC to maintain active status.

## Continuing Education (CE)

### MINIMUM REQUIRED CE:

<b>Provisional Brokers and non-BIC Eligible Brokers must take:</b>	<b>Brokers with BIC Eligible status/BIC Designation* must take:</b>
GENUP (General Update) AND ONE Commission-approved Elective  Between July 1 - June 10	BICUP (Broker-in-Charge Update) AND ONE Commission-approved Elective  Between July 1 - June 10

NOTE: To determine whether you have completed your required continuing education, log into your license record on the Commission's website ([ncrec.gov](http://ncrec.gov)).



If you don't complete the correct CE courses by June 10, your license will be changed to "inactive" status on midnight on June 30. You must CEASE all brokerage activity immediately. You may not resume brokerage practice until your license is back on "active" status.



***I took the Update in May but forgot to take an elective by June 10. Can I go online and take an elective on June 12?***

**Answer:** No. NC brokers may not take courses for CE credit from June 11 through June 30, and providers of NC real estate CE courses are not allowed to offer CE during this period. This period is used as an administrative period, during which CE providers upload CE course results and the Commission updates its databases to determine which brokers will have active status as of July 1.



***My license is Inactive because I didn't take CE. What do I need to do to reactivate it?***

**Answer:** It depends on how long your license has been on inactive status.

**Individual broker license on Inactive status with NO CE deficiency:**

Submit the License Activation form (REC 2.08 - available online).

**Individual broker license on Inactive status for LESS THAN 2 license years with a CE deficiency:**

Complete the current year's CE requirement in full (i.e., take the General Update + 1 Commission-approved elective),

AND

take either 1 or 2 approved electives to make up for the number of hours you did not complete during the preceding license year;

AND THEN

submit the License Activation form (REC 2.08 - available online).

**Individual broker license on Inactive status for MORE THAN 2 license years with a CE deficiency:**

Successfully complete two 30-hour Postlicensing courses within 6 months prior to submitting activation form,

AND

complete the current year's CE requirement in full (i.e., take the General Update + 1 Commission-approved elective);

AND THEN

submit the License Activation form (REC 2.08 - available online).

---



**The Commission doesn't automatically activate licenses.**

**A broker (or the BIC with whom the broker will be affiliated) must submit the License Activation form (REC 2.08) to notify the Commission of the broker's desire for Active status and of the office with which they will be affiliated and doing business.**

---



***Since entities don't take education, what determines whether a firm's license is on active or inactive status?***

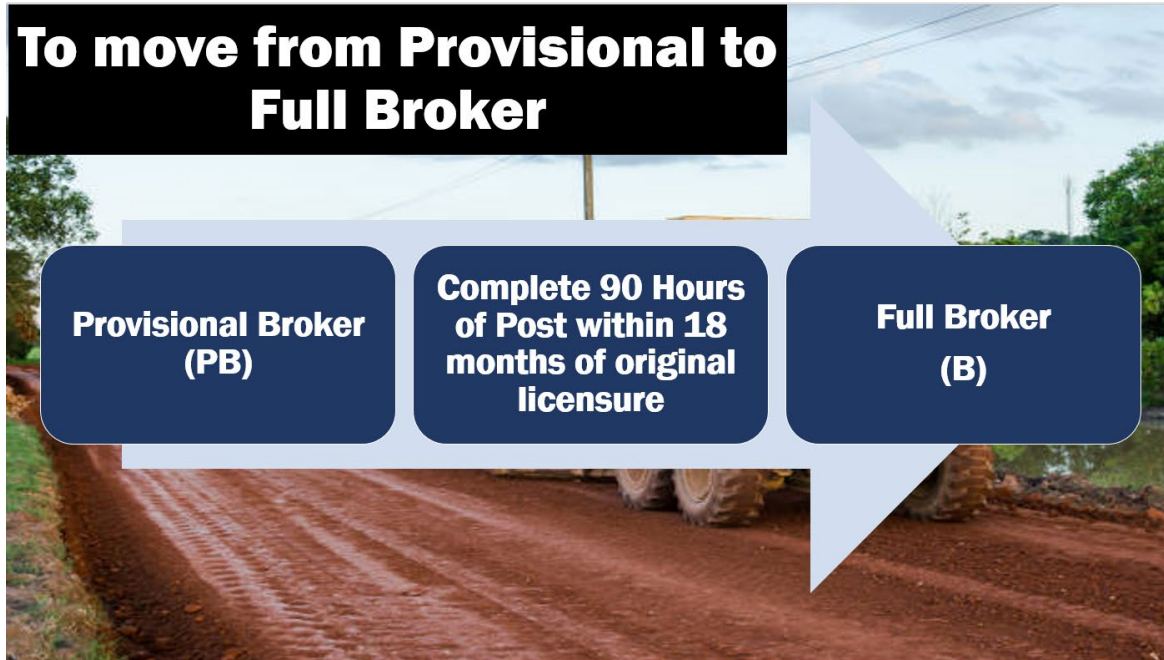
The firm must have a QB (Qualifying Broker) whose license is on active status. As long as the firm has an actively licensed QB, and the firm's license is timely renewed, the firm license will remain active.

If the QB's license expires or is inactive on July 1, the firm's license will also be inactive, meaning no brokers may engage in brokerage under the firm's umbrella. While losing a BIC only takes one office down, ***losing a QB takes the entire firm down.***

In such case, the firm license cannot be activated until either the QB's license has returned to active status or the firm appoints a new actively-licensed QB. Note that even if the firm license is active, the firm cannot legally perform brokerage at any office location without a designated BIC.

## Postlicensing Education

A PB must complete the 90-hour Postlicensing education program within 18 months of the date of initial licensure to maintain active license status.



***What are the Postlicensing courses?***

**Answer:** Post 301-Broker Relationships & Responsibilities, Post 302-Contracts & Closing, and Post 303-NC Law, Rules, and Legal Concepts. Course syllabi are available on the Commission's website.



***Do I have to take the Postlicensing courses in a certain order?***

**Answer:** No. Postlicensing courses may be taken in any sequence. However, the Commission recommends that you follow the course number sequence (301, 302, & 303), as course materials were developed with that sequence in mind.



***When do I have to complete the Postlicensing courses?***

**Answer:** A PB will be required to complete the Postlicensing Education program within 18 months of the date of initial licensure. In other words, all three Postlicensing courses - Post 301, Post 302, and Post 303 - must be completed within 18 months of the date of initial licensure in order for the PB to maintain active license status.



**Can I get CE credit for Postlicensing courses?**

**Answer:** No. Postlicensing courses do not provide CE credit.



**Are there course exams in Postlicensing courses?**

**Answer:** Yes, and you must pass the end-of-course examinations to successfully complete the courses.



**What happens if I don't take the Postlicensing courses before the deadline?**

**Answer:** If you do not take the courses before the 18-month deadline, your license will be placed on inactive status. You may NOT perform any brokerage activities or collect brokerage fees (including referral fees) while your license is Inactive. Refer to Rule 58A .1902.



**Where can I take the Postlicensing courses?**

**Answer:** The courses are offered by the same education providers that conduct the Prelicensing course. A list of approved certified education providers is available on the Commission's website.

### **SUMMARY: Maintaining a Current and Active License**

Provisional Brokers	"Full" Brokers (non-BIC Eligible)	Brokers-in-Charge AND Brokers with BIC Eligible Status
Renew license each year between May 15-June 30  Complete GENUP + 1 Elective by June 10 each year (after first renewal)  Complete three 30-hour Postlicensing courses within 18 months of licensure.  Maintain affiliation with a BIC	Renew license each year between May 15-June 30  Complete GENUP + 1 Elective by June 10 each year	Renew license each year between May 15-June 30  Complete BICUP + 1 Elective by June 10 each year

**NOTE:** To determine whether you have completed your required Postlicensing courses, log into your license record on the Commission's website (nrec.gov).



Tabitha has renewed her “full” broker license every year but hasn’t taken any CE since 2020.

- a. What is the status of Tabitha’s license? \_\_\_\_\_
- b. How many courses must Tabitha take to activate her license? \_\_\_\_\_
- c. Which courses must she take? \_\_\_\_\_
- d. Will Tabitha’s license be “active” once she completes the course(s)?  
YES / NO Why or Why not? \_\_\_\_\_
- e. Assume Tabitha was a BIC before her license changed to “inactive” status.  
Will that change the courses she should take now to reactivate? YES / NO
- f. When she reactivates, will she still be a BIC? YES / NO

---

## BIC ELIGIBLE STATUS AND BROKER-IN-CHARGE (BIC) DESIGNATION

If a broker wishes to designate as a BIC for a sole proprietorship, real estate firm, or branch office, a broker must FIRST have BIC Eligible status.

### Obtaining BIC Eligible Status

To qualify for and obtain BIC Eligible Status, a broker must:

1. hold a “full” broker license (not provisional) on active status;  
AND
2. have acquired at least **2 years of full-time** or 4 years of part-time real estate **brokerage experience within the previous 5 years** or be a North Carolina licensed attorney with a practice that consisted primarily of handling real estate closings and related matters in North Carolina for 3 years immediately preceding application;  
AND
3. submit the *Request for BIC Eligible Status and/or BIC Designation form (REC 2.25)*;  
AND
4. complete the Commission’s **12-hour Broker-in-Charge Course** no earlier than one year prior to and no later than 120 days after submission of form REC 2.25.



**What is “full-time” brokerage experience?**

**Answer:** The intent is that the individual’s primary occupation is real estate brokerage. Accordingly, the rough formula is:

50 weeks/year at 40/hours per week = 2000 hours/year x 2 years = 4000 hours total.  
Thus, if a broker has acquired 4000 hours of brokerage experience within a five year period, the broker may request BIC Eligible status.

Note: Merely taking the 12-hour *Broker-in-Charge Course* does NOT automatically make you BIC Eligible. You will not gain BIC Eligible status until you submit the ***Request for BIC Eligible Status and/or BIC Designation form (REC 2.25)***.



**What will happen if I obtain BIC Eligible status, but I don’t complete the 12-hour Broker-in-Charge course within 120 days?**

**Answer:** Your BIC Eligible status will be terminated, and it will not be re-granted until the course is completed.

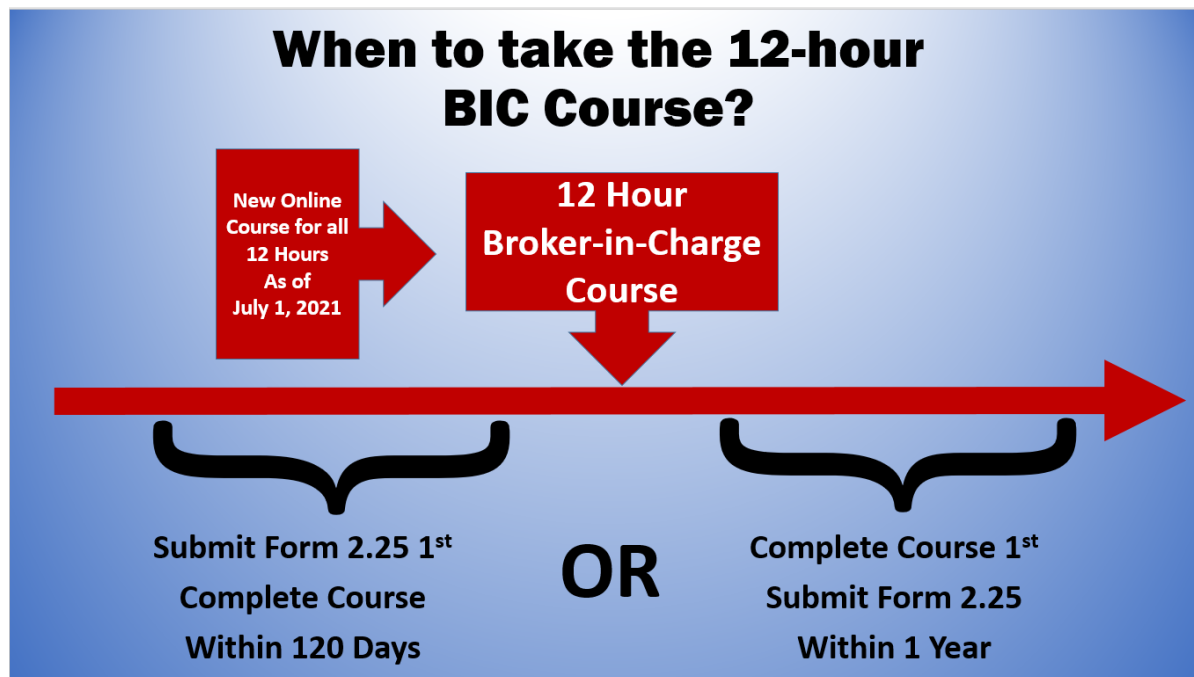


**I am a nonresident. Do I have to take the 12-hour Broker-in-Charge Course?**

**Answer:** Yes. The requirement to complete the 12-hour *Broker-in-Charge Course* applies to all brokers who wish to obtain BIC Eligible status.

## 12-Hour Broker-in-Charge Course

To obtain BIC Eligible status, a broker must complete the *12-hour Broker-in-Charge Course*. The course may be completed either within one year prior to application for BIC Eligible status or within 120 days after being granted the status.



The *12-hour Broker-in-Charge Course* is an asynchronous distance education course. Brokers must register for the course on the Commission's website. Brokers must complete the course within 30 days of registration.

Upon successful completion of the course, brokers will be awarded 4 hours of CE elective credit in the license year in which the course was completed.



**How many days does a broker have to complete the *12-hour Broker-in-Charge Course* after obtaining BIC Eligible status?**

A broker has 120 days to complete the *12-hour Broker-in-Charge Course* after obtaining BIC Eligible Status. If a broker fails to complete the *12-hour Broker-in-Charge Course* within the 120 days of obtaining BIC Eligible status, BIC Eligible status (and BIC Designation) will be terminated. The broker will not be granted BIC Eligible status (and, in turn, BIC designation) until the course is completed.



**How many days does a broker have to complete the *12-hour Broker-in-Charge Course* after registration for the course?**

A broker has 30 days to complete the *12-hour Broker-in-Charge Course* after registering for the course.

Note: A broker must complete the 12-hour BIC course within 30 days from the date of registration or by 11:59pm on June 10, whichever occurs first.



**What happens if I fail to complete the *12-hour Broker-in-Charge Course* within 30 days of registration or by 11:59pm on June 10?**

If a broker fails to complete the *12-hour Broker-in-Charge Course* within 30 days from the date of registration or by 11:59pm on June 10, the broker will be required to register and pay for the course again and will be required to restart the course. Access to the *12-hour Broker-in-Charge Course* is prohibited from June 11 through June 30 each year, per Rule 58H .0404.



**How much CE elective credit will a broker receive upon successful completion of the *12-hour Broker-in-Charge Course*?**

A broker will receive 4 hours of elective credit upon successful completion of the *12-hour Broker-in-Charge Course*.

## **Broker-in-Charge (BIC) Designation**

Once a broker has obtained BIC Eligible status, the broker may step in and out of active BIC designation by submitting a request form.

As long as the broker maintains BIC Eligible status by timely renewing his/her license and completing the correct CE each year, the broker will not be required to repeat the *12-hour Broker-in-Charge Course*.

### **Requesting Broker-in-Charge Designation:**

Submit the *Request for BIC Eligible Status and/or BIC Designation form (REC 2.25)*. You must indicate the firm or sole proprietorship for which you will be serving as BIC.

### **Terminating Broker-in-Charge Designation:**

If another broker submits a *Request for BIC Eligible Status and/or BIC Designation form* to be designated as the BIC at your office, your BIC designation will be automatically terminated when the new BIC's form is processed.

However, if you wish to be removed as BIC immediately, you may submit a *Request for Termination of Affiliation form (REC 2.22)*.





***I am not BIC Eligible, but I need to be designated as BIC right away. Can I request BIC Eligible status and BIC designation at the same time?***

**Answer:** Yes. The *Request for BIC Eligible Status and/or BIC Designation* form (REC 2.25) enables a broker to request both statuses at the same time.

## **Maintaining BIC Eligible Status and BIC Designation**

A broker may maintain BIC Eligible status and BIC designation by:

- renewing his/her license between May 15-June 30 each year;  
AND
- completing the BICUP (Broker-in-Charge Update) course plus 1 Commission-approved elective by June 10 each year.



***When do I have to begin taking the BICUP course?***

**Answer:** Per Commission Rule 58A .0110(h):

*A broker holding BIC Eligible status shall take the Broker-in-Charge Update Course during the license year of designation, unless the broker has satisfied the requirements of Rule .1702 of this Subchapter prior to designation.*

## **Loss of BIC Eligible Status and BIC Designation**

BIC Eligible status and BIC designation will be lost if:

- the broker's license is inactive, expired, surrendered, suspended, or revoked,  
OR
- the broker fails to take the BICUP course during any license year.



***What happens to the licenses of affiliated brokers in an office if a BIC's license expires or goes inactive?***

When a BIC's license expires or goes inactive on July 1, his/her office may not continue to provide brokerage services. The "full" brokers will still be on active status at the broker's home address since they will no longer be affiliated with the company, and all provisional brokers will be on inactive status since they do not have a supervising BIC.



## ***How can the office get back in business while the former BIC is expired or inactive?***

**Answer:** It depends on whether the former BIC was acting only as BIC for an office or was both the BIC for the office and QB for the entity.

### ***If the former BIC was serving only as BIC...***

The firm still has an active license, but brokerage services may NOT be legally provided at this office location without a designated BIC.

The QB may appoint a new broker to serve as BIC and direct that broker to submit a ***Request for BIC Eligible Status and/or BIC Designation form (REC 2.25)*** to the Commission. Once the form is processed, the newly designated BIC must file activation/affiliation forms (REC 2.08) to re-associate all full and provisional brokers with the office.

### ***If the former BIC was both the BIC and the QB...***

The firm's license will be on inactive status (assuming the firm's license was timely renewed) because it doesn't have a QB.

As long as the QB's license is expired or on inactive status the firm's license will also be on inactive status, meaning the company may NOT legally engage in brokerage anywhere in NC. The firm's license will remain on inactive status until EITHER the former QB activates his/her individual license OR the QB is replaced. To inform the Commission of a new QB, the ***Change in Qualifying Broker form (REC 2.20)*** must be submitted.

Then, the QB may appoint a broker to serve as BIC and direct that broker to submit a ***Request for BIC Eligible Status and/or BIC Designation form (REC 2.25)*** to the Commission. Once the form is processed, the newly designated BIC must file activation/affiliation forms (REC 2.08) to re-associate all full and provisional brokers with the office.

## Regaining BIC Eligible Status and Broker-in-Charge Designation

A broker who attains but later loses BIC Eligible status must complete the following steps in the order indicated to regain the status.

1. Do whatever is necessary to return the broker license to active status, i.e., pay reinstatement fee and/or complete required education;  
THEN
2. Submit the *License Activation form (REC 2.08)* to the Commission;  
THEN
3. Complete the Commission's *12-hour Broker-in-Charge Course*,  
AND THEN
4. Submit the *Request for BIC Eligible Status and/or BIC Designation form (REC 2.25)* requesting BIC Eligible status (and BIC designation if needed).

*NOTE: You must meet the qualification requirements for BIC Eligible status as prescribed by Rule 58A .0110(e)(6)(b).*

NOTE: To determine whether you have BIC Eligible status and/or BIC designation, log into your license record on the Commission's website ([ncrec.gov](http://ncrec.gov)).

---

## ANSWERS TO DISCUSSION QUESTIONS

### For Discussion on page 143:

1. Justine, a full broker, did not complete CE during the July 1, 2021-June 10, 2022, CE period, and she did not renew her license in June 2022. Now her sister, Ashley, wants to purchase a house.
  - a. Can she represent Ashley?  
**Answer:** No. Justine's license is expired, so she may not practice brokerage.
  - b. Would the answer to (a) change if Justine had renewed her license by June 30, 2022?  
**Answer:** No. Justine had not timely completed her required CE, so if she had renewed her license, it would now be on Inactive status. A current AND active license is required in order to legally practice brokerage.
  
2. Today is March 15, 2023, and Solomon's license has been expired since June 30, 2020. What must Solomon do to reinstate his license and return it to active status?  
**Answer:**
  1. Successfully complete 75-hour NC Broker Prelicensing course;
  2. Submit a license application with \$100 original application fee and all required documentation, including criminal background report; and
  3. Pass National and State sections of the license exam.

### For Discussion on page 153:

Tabitha has renewed her "full" broker license every year but hasn't taken any CE since 2020.

- a. What is the status of Tabitha's license?  
**Answer:** Inactive.
- b. How many courses must Tabitha take to activate her license?  
**Answer:** 4 courses totaling 68 hours (two 30-hour Postlicensing courses PLUS GenUp PLUS an elective)
- c. Which courses must she take?  
**Answer:** Two 30-hour Postlicensing courses PLUS current year's GenUp PLUS one Commission-approved elective.
- d. Will Tabitha's license be "active" once she completes the course(s)?  
**Answer:** No, because she still needs to submit the *License Activation & Broker Affiliation Form* (REC 2.08).
- e. Assume Tabitha was a BIC before her license changed to "inactive" status. Will that change the courses she should take now to reactivate?  
**Answer:** No, because she lost BIC Eligible status when her license became inactive.
- f. When she reactivates, will she still be BIC?  
**Answer:** No. She still needs to take the 12-hour BIC Course and file form REC 2.25.  
  
**Note:** At this point she may not have the requisite brokerage experience to qualify again to be a BIC.