

# 2019-2020 General Update Course

## Section One COMPETENCE OF LICENSEES



1. Tina, a provisional broker with XYZ Realty, has been approached by a prospective client who wishes to purchase a commercial property. Tina has only worked on residential sales transactions since she was licensed, and she has not completed any Postlicensing courses or other education since her Prelicensing course. However, Tina's firm, XYZ Realty, offers both residential and commercial brokerage services.

How should Tina proceed with this prospective client? \_\_\_\_\_

2. Tom, the BIC of XYZ Realty, wants to add property management to the list of services his firm provides, but Tom does not have experience in property management. Due to his lack of knowledge, Tom hires Frances, a full broker, to oversee the property management transactions. Tom knows that Frances worked previously for a property management firm and that she assisted property managers in that firm.

Did Tom take the proper steps as BIC? Why or why not? \_\_\_\_\_

3. Sue, a full broker with 123 Realty, wants to assist a residential buyer with a purchase; however, she has only worked on commercial transactions since she was licensed. Sue's BIC tells Sue she cannot work with the residential buyer on her own and assigns another experienced broker to assist Sue with the transaction. Sue protests, stating that the majority of her Prelicensing and Postlicensing education focused on residential practice, so she feels she is fully competent to handle the transaction.

Who is correct? Why? \_\_\_\_\_

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## LEARNING OBJECTIVES

This Section will review the broker's duty to provide clients with skill, care, and diligence.

After completing this section, you should be able to:

- define key terms related to agency and fiduciary duties;
- describe the concept of skill, care, and diligence;
- identify ways to determine whether a broker is competent in his/her area of practice; and
- describe the BIC's role in assuring that licensees are competent in their areas of practice.

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## TERMINOLOGY

### Agency Concepts

- **Agency:** The relationship that exists when one person is authorized to act for and on behalf of another.
- **Principal / Client:** The person who authorizes another (the agent) to act on the principal's behalf within specified parameters and to whom the agent owes certain legal duties.
- **Agent:** The firm or sole proprietorship that acts for and on behalf of the principal within the bounds of the authority granted and who owes fiduciary (legal) duties to the principal.

### Agent's Fiduciary Duties

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, placing the other's interests before any self-interest.

A fiduciary must:

- be **loyal** to the principal and preserve personal, confidential information about the principal;
- operate in **good faith** to promote the principal's interests; and
- **disclose** all facts to the principal that may influence the principal's decision.

### Skill, Care, and Diligence

Agency law requires that a real estate broker, like any other agent, exercise a high degree of **skill, care, and diligence** in the conduct of the agent's duties.

The level of skill, care, and diligence required of a real estate broker is determined by:

- North Carolina General Statutes,
- North Carolina Real Estate Commission Rules,
- court decisions, and
- professional standards within the community.

An agent must exert reasonable diligence on the principal's behalf and strive to obtain the most advantageous bargain possible under the circumstances.

- A broker must exercise that degree of skill, care, and diligence that a *reasonably prudent real estate broker* would exercise under similar circumstances.
  - Agents who do not perform with the required degree of skill, care, and diligence, or are guilty of negligence or misconduct, not only are liable to the principal for any damages the principal may sustain but may have to forfeit any claim to compensation. The broker-agent will be liable to the principal for all damages that are a direct or "proximate" consequence of the negligence.

A *reasonably prudent real estate broker* would possess the knowledge and competence to represent a principal in a real estate transaction by:

- Providing reliable information on matters relevant to the transaction
  - A broker should be knowledgeable about the real estate industry based on the licensing and continuing education courses they have taken. In addition, a broker should conduct research regarding matters that affect buyers and sellers in the real estate industry so they can provide valuable information to their principal.
- Providing competent advice on a property's probable selling price
  - In an effort to provide competent advice on the probable selling price of a property, a broker should possess the requisite skill and knowledge of the industry to complete a comparative market analysis for their principal. A broker should never try to estimate the probable selling price of a property without completing a thorough analysis and researching the subject property.
- Discovering pertinent facts related to a property
  - Brokers should utilize their due diligence skills to research property-specific information to give to their principals.

- Effectively advertising a listed property
  - A broker should be knowledgeable about the area in which the property is located in an effort to advertise it effectively and not violate state and federal fair housing laws.
- Advising about offers
  - A broker who has knowledge of the market and effectively analyzes the probable selling prices of homes can efficiently assist their principals in determining the best offer to accept or submit for a transaction.
- Assisting with contract preparation
  - A broker should be proficient in understanding the terms, clauses, and language in contract forms to adequately assist their buyers and sellers in completing and reviewing forms in a transaction.

A broker who fails to exercise skill, care, and diligence while representing a principal is in breach of their fiduciary duties under agency law and License Law and Rules.

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## NC's BROKER LICENSE

Some states and jurisdictions offer separate real estate licenses for specialty practice areas, such as a property management. However, in North Carolina, there is only one type of real estate license for individuals, the **broker** license.

NC's *75-hour Broker Prelicensing Course* educates students on the basic principles of real estate. A broker who has successfully completed that course and who has passed the NC Real Estate License Examination is deemed to have the *minimal competency* to engage in brokerage in North Carolina. However, before engaging in any type of transaction, brokers should evaluate whether additional knowledge or skills are necessary to be able to provide skill, care, and diligence to their clients.



What special skills or knowledge must a broker possess in order to competently practice each of the following types of brokerage?

| Type of Brokerage               | Special skills or knowledge |
|---------------------------------|-----------------------------|
| Residential sales               |                             |
| Residential property management |                             |
| Commercial sales                |                             |
| Commercial property management  |                             |

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## QUESTIONS A BROKER SHOULD CONSIDER BEFORE ENGAGING IN A TRANSACTION

The next few pages proposes a model for brokers to use to assess their competence. In short, before engaging in a transaction, brokers should be asking themselves...

1. Am I authorized to engage in this type of transaction? *Aka, do I have my BIC's/company's permission?*
2. Do I have the necessary education and training to engage in this type of transaction?

For this discussion, the specialty areas of residential sales, residential property management, vacation rental management, and commercial sales and property management are used as examples. However, the “competence road map” may be (and should be) applied to any specialty practice area. Other examples of specialty areas include, but are not limited to short sales, foreclosures, land sales, historic properties, farmland, and ocean and lakefront properties.

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## RESIDENTIAL SALES

### DEFINITION

**Residential Sales Brokerage** is defined as any person, partnership, corporation, limited liability company, association, or other business entity who:

- lists or offers to list, sells or offers to sell, buys or offers to buy, auctions or offers to auction, or negotiates the purchase or sale or exchange of real estate; or who leases or offers to lease, or who sells or offers to sell leases of whatever character, or rents or offers to rent,
- residential properties,
- for others, and
- for compensation or something of value.



**Read the following scenario to determine whether the licensee acted competently.**

Sam is a provisional broker who just listed his first home. During the listing presentation, the seller indicated that he did not want Sam to practice dual agency.

Later, Sam receives a call from a prospective buyer (Dan) who wishes to purchase the property after viewing it through a virtual tour.

Sam and Dan meet, and Sam explains agency. While Sam is reviewing the WWREA brochure, he explains the concept of dual agency.

Dan signs an exclusive buyer agency agreement after the presentation and authorizes Sam to engage in dual agency. Sam then assists Dan with preparing an offer.

Did Sam act competently in this transaction? Why or why not?

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## DETERMINING COMPETENCE

### ***Question #1: Are you authorized to practice residential sales brokerage? (Aka, do you have your BIC's permission?)***

Before engaging in any type of transaction as a broker, including residential sales, a broker must obtain their BIC's permission to do so.

Here are a few reasons a BIC might prohibit a broker from practicing residential brokerage:

1. The company does not engage in these types of transactions. Even though residential sales is widely practiced by real estate brokerage companies, it is not practiced by every company.
2. The company has special policies regarding newly affiliated brokers, like requiring newly affiliated brokers to partner with more experienced brokers for a period of time before engaging in a transaction independently.
3. The BIC lacks the skill, knowledge, and experience to broker a residential sales transaction. A reasonable BIC knows that supervision is not possible when the BIC lacks necessary knowledge and skills.

### ***Question #2: Do you have the necessary education and training in residential sales transactions?***

If you have your BIC's permission to continue with a transaction, then you and your BIC should evaluate whether you may need additional knowledge or skills. The following questions will also help you decide.

#### **What courses or educational programs have you completed?**

As noted earlier, the *75-hour Broker Prelicensing Course* educates students on the basic principles of real estate, and it focuses on residential sales transactions. Although the course provides the education for minimal competency, there are many courses that will enable a broker to delve deeper into those basic concepts or to explore information that is specific to the local area or marketplace. Examples include:

- 90-hour Postlicensing Education program
  - This program is designed to encourage newly licensed (provisional) brokers to explore real world implementation of the more complex real estate concepts taught in the Broker Prelicensing course, such as agency formation and practice, contract preparation, and determination of material facts, etc. Also, the program exposes students to all real estate laws and rules that are unique to North Carolina practice, so that licensees from other jurisdictions who have opted out of the license examination will be appropriately prepared for brokerage practice in North Carolina.
- Courses related to residential properties offered by the National Real Estate Institute
- Courses that explain residential contract forms / documentation
- Courses related to local zoning or land use issues
- Courses related to pricing strategies for residential properties
- Courses related to negotiation strategies
- Accredited Buyer's Representative/ABR® Designation courses, offered by the Real Estate Buyer's Agent Council
- Certified Residential Specialist Designation courses, offered by the Residential Real Estate Council
- Seller's Representative Specialist Designation courses, offered by the Real Estate Business Institute

**Note:** Brokers who take “specialty” courses in any educational discipline may be eligible for equivalent continuing education credit. In order to receive this credit, brokers must complete the *Request for Continuing Education Equivalent Credit* (Form 7.13). This form can be found at: <https://www.ncrec.gov/Resources/Forms>

## Have you conducted residential transactions before?

If you have engaged in a residential transaction, you have probably been exposed to some of the “special considerations” of this type of transaction, such as:

- the types of questions that residential clients ask;
- residential contract forms and documentation; and
- CMAs.

If you haven't engaged in a residential transaction, you may find it helpful to *shadow* an experienced broker:

- interactions with potential clients
- observe their negotiation techniques, and
- methods used to complete contract documents.



**Note:** A broker may have an experienced mentor to assist them in conducting a residential transaction with the BIC's approval. A good mentor will possess the following skills:

- knowledge and experience in the area of real estate in which they are mentoring and the willingness to share information obtained,
- the ability to provide guidance, positive reinforcement, and constructive feedback regarding brokerage activity, and
- achievement of personal and professional goals in real estate.

It is important to remember the inexperienced broker will be held to the same standard as a broker who practices residential transactions regularly in the industry. Therefore, the broker should exhibit caution when solely relying on a mentor to complete an unfamiliar transaction.

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## RESIDENTIAL PROPERTY MANAGEMENT

### DEFINITION

**Residential Property Management Brokerage is defined as:**

- leasing / renting (or offering to lease or rent),
- for others; and
- for compensation or something of value.

Property managers may also engage in advertising, collecting funds, and organizing and maintaining records.



**Read the following scenario to determine whether the licensee acted competently.**

Sally is a sole practitioner and a BIC. Since she was licensed 6 years ago, Sally has practiced residential sales. She does not have a trust account, because her clients' funds are always held by other real estate companies or attorneys.

Recently, one of Sally's long-time clients asked her to act as a property manager for one of his residential properties. Sally agrees and they execute a property management agreement.

Is Sally competent to act as a property manager? Why or why not? \_\_\_\_\_

## DETERMINING COMPETENCE

**Question #1: Are you authorized to practice residential property management? (Aka, do you have your BIC's permission?)**

Before engaging in any type of transaction, including residential property management, a broker must obtain their BIC's permission to do so.

Here are a few reasons a BIC might prohibit a broker from practicing residential property management:

1. The company does not engage in these types of transactions.

**Note:** Some real estate companies that do not practice property management allow their affiliated brokers to engage in property management on the side. In other words, they allow the brokers to create their own entities and to obtain firm licenses for the entities. This allows them to engage in property management through their own, separate company. In these cases, the brokers and BICs must have a clear understanding of which transactions are handled through the sales firm versus the broker's own company.

**Example:**

Broker Yolanda is affiliated with XYZ Realty. XYZ only practices residential sales, but Yolanda wants to manage properties. Yolanda's BIC tells her she may not engage in property management on behalf of XYZ, but that she may operate her own separate property management company on the side.

Yolanda creates an entity, *Yolanda's PM Company, LLC*, registers it with the NC Secretary of State, and obtains a firm license from the Real Estate Commission. (In order to obtain the firm license, Yolanda must qualify to be the QB and BIC of *Yolanda's PM Company, LLC*.)

Going forward, Yolanda practices sales transactions under XYZ Realty and property management transactions under *Yolanda's PM Company, LLC*.

2. The company has special policies regarding newly affiliated brokers, such as requiring newly affiliated brokers to partner with more experienced brokers for a period of time before engaging in a transaction independently.
3. The BIC lacks the skill, knowledge, and experience to engage in a residential property management transaction. A reasonable BIC knows that supervision is not possible when the BIC lacks necessary knowledge and skills.

## **Question #2: Do you have the necessary education and training in residential property management transactions?**

If you have your BIC's permission to continue with a transaction, then you and your BIC should evaluate whether you may need additional knowledge or skills. The following questions will also help you decide.

### **What courses or educational programs have you completed?**

As noted earlier, the *75-hour Broker Prelicensing Course* educates students on the basic principles of real estate, but it focuses on residential sales transactions. Although the law allows a licensed broker to engage in property management once licensed, there are many courses that will enable a broker to delve deeper into the specialty practice area. Examples include:

- Property Management version of the General Update/BICUP course
- CE Elective courses dedicated to property management topics
- Courses related to certifications in international properties and accreditations as residential manager(s)
- CERTIFIED PROPERTY MANAGER® (CPM) Designation courses, offered through Institute of Real Estate Management
- Courses offered by the National Association of Residential Property Managers, e.g. Residential Management Professional (RMP®) and Master Property Manager (MPM®)

### **Have you conducted property management transactions before?**

If you have engaged in a property management transaction, you have probably been exposed to some of the “special considerations” of this type of transaction, such as:

- the types of questions that prospective tenants ask;
- leasing and management contract forms and documentation;
- administrative fees, deposits, and other fees;
- landlord and tenant laws, including the NC Tenant Security Deposit Act; and
- tenant screening issues.

If you haven't engaged in a property management transaction, you may find it helpful to observe an experienced broker or request the assistance of a mentor before attempting to represent clients in this type of transaction.

A broker may have an experienced mentor to assist them in conducting a residential property management transaction with the BIC's approval. However, the inexperienced broker will be held to the same standard as a broker who practices property management transactions regularly in the industry. Therefore, the broker should exhibit caution when solely relying on a mentor to complete an unfamiliar transaction.

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## CASE: Property Mismanagement



Read the following case summary.

Determine what, if any, errors were made by the broker(s) and which License Laws or Commission rules were violated.

### **PARTIES:**

The complaining witnesses are 6 disgruntled landlords. The Respondents are the QB/BIC property manager and her firm.

### **COMPLAINT:**

The Commission received 6 complaints from property owners that allege essentially the same set of violations: that Respondent does not inspect properties; that her failure to inspect properties has resulted in significant property damage; that maintenance work is invoiced and paid for but often the work is incomplete; that rents are not always collected on time; that TSDs are improperly used; and that the Respondent has failed to appear in summary ejection hearings.

### **FACTS:**

Respondent property manager was the qualifying broker and broker-in-charge and was the only licensee of her firm. She managed 46 units in addition to being a full-time school librarian. Her only help was an unlicensed handyman through which she contracted all of the maintenance.

According to some, but not all of the leases, Respondent was required to inspect the properties on a quarterly basis. Respondent admitted that she did not inspect the properties as often as required. The complainants produced evidence that demonstrated significant damage to properties and alleged that quarterly inspections would have caught and/or prevented some of the damages.

Respondent property manager exclusively used a maintenance company for all its maintenance needs. The sole employee of that company is not a licensed broker or contractor. The complaining witnesses alleged that they would be charged, or the Tenant Security Deposit would be charged, for maintenance performed by this company but the work would not be completed. The complaining witnesses paid other contractors to finish the jobs, thus paying double for the work.

On at least one occasion Respondent inappropriately used the Tenant Security Deposit. In one instance, one of the landlords complained that the tenant had not paid rent that month. Respondent wanted to take immediate action because she was friends with this particular landlord. She decided to use part of the Tenant Security Deposit to pay her landlord friend that month's rent. Respondent justified her actions claiming that the tenant was going to be evicted anyway. The tenant vacated the property the following month which was prior to the conclusion of the tenant's lease and still owed rent and other bills.

On at least two occasions Respondent failed to appear on behalf of her clients for a summary ejectment hearing. In one instance Respondent failed to show and still charged the landlord an appearance fee. When questioned on the matter, Respondent claimed the charge was for a different appearance, but the Commission's investigator did not find any evidence that the second appearance ever occurred. On the other occasion, Respondent sent the unlicensed handyman in her place. The magistrate dropped the case because Respondent failed to appear, but an appearance fee was charged and deducted from the Tenant Security Deposit.

Respondent maintained two trust accounts: one for rent payments and the other to hold Tenant Security Deposits. Respondent failed to properly list the purpose of disbursement on canceled checks and in the journal. Also, Respondent failed to prepare a monthly trial balance, but the accounts did reconcile. The Commission's auditor found a few instances in which owner balances were in the negative.

## **Main Points - Property Mismanagement**

- Respondent property manager was the QB and BIC and only member of her firm.
- She managed 46 units while being a full-time school librarian.
- Respondent was required to inspect most properties quarterly and indicated she did not do so.
- Complainants produced evidence that showed significant damage to properties that would have been prevented by quarterly inspections.
- Respondent manager used one maintenance company exclusively and charged tenants for work that was not performed or deducted it from their Tenant Security Deposit.
- Respondent used the Tenant Security Deposit of the tenant to pay the tenants rent for a month.
- Respondent failed to show for two ejectment proceedings on behalf of her clients and still charged the landlord an appearance fee.
- Respondent sent the unlicensed handyman to one of the ejectment proceedings, the magistrate dropped the case and the Respondent still charged the landlord an appearance fee and deducted it from the Tenant Security Deposit.

- Respondent maintained two trust accounts and failed to:
  - list the purpose of disbursements on cancelled checks and in the journal, and
  - failed to prepare a monthly trial balance although the accounts were reconciled.
- Commission’s auditor found instances where the owner balances were found to be in the negative.

## Evaluation and Discussion - Property Mismanagement

Errors made by Property Manager:

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## Related law and Rule Considerations - Property Mismanagement

### Competency

N.C.G.S. § 93A-6(a)(2) states:

- The Commission has the power to suspend, revoke, reprimand, or censure any licensee if they make false promises of character likely to influence, persuade, or induce.

N.C.G.S. § 93A-6(a)(8) states:

- The Commission has the power to suspend, revoke, reprimand, or censure any licensee if they act unworthy or incompetent as a real estate broker in a manner as to endanger the interest of the public.

N.C.G.S. § 93A-6(a)(10) states:

- The Commission has the power to suspend, revoke, reprimand, or censure any licensee if they engage in conduct which constitutes improper, fraudulent, or dishonest dealing.

## **Broker-in-Charge**

Commission Rule 58A .0110 requires:

1. A Broker-in-Charge of a firm must maintain the trust or escrow account of the firm and retain the records.
2. A Broker-in-Charge shall retain and maintain records relating to the transactions conducted by or on behalf of the firm.

## **Handling of Trust Money**

Commission Rule 58A .0116 requires:

1. A broker shall not disburse trust money to or on behalf of a client in an amount exceeding the balance of trust money belonging to the client held in the trust account.
2. A broker shall safeguard any money or property of others that comes into the broker's possession in a manner consistent with Real Estate License Law and Commission rules.
3. A broker shall not convert the money or property of others to his or her own use or apply such money or property to a purpose other than that it was intended.

## **Accounting for Trust Money**

Commission Rule 58A .0117 requires:

1. A broker shall create, maintain, and retain records sufficient to identify the ownership of all funds belonging to others.
2. A broker's records shall be sufficient to show proper deposit and disbursement of such funds into and from a trust or escrow account.
3. A broker shall no later than ten days after receipt of a written request by a client, furnish the client with copies of any records retained as required by Rule 58A .0108 of this Section that pertains to the transaction to which the client was a party.

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## **VACATION RENTAL MANAGEMENT: A SPECIALTY WITHIN A SPECIALTY**

### **DEFINITION**

A “vacation rental” is defined as a:

- residential property,
- used for vacation, leisure, or recreational purposes,
- for fewer than 90 days,
- by a person who has a permanent residence to which they plan to return.

Residential property that is the subject of a vacation rental agreement may include *condominiums, townhomes, single family homes, cottages, apartments, and etc.*

### **DETERMINING COMPETENCE**

#### ***Question #1: Are you authorized to practice vacation rental management?***

A broker must obtain the approval of their BIC before practicing this type of transaction.

A BIC may prohibit the practice of vacation rental management for several reasons such as:

1. The BIC lacks knowledge, skill, and experience in vacation rental management.
2. The company has policies that restricts vacation rental management.
3. The company requires brokers to partner with an experienced broker before engaging in vacation rental management.

#### ***Question #2: Do you have the necessary education and training in vacation rental management transactions?***

Once a broker obtains the BIC’s permission to conduct a transaction, the BIC and broker must collectively decide if the broker is competent to practice.



## What courses or educational programs have you completed?

Vacation rental management is a specialty within property management. Therefore, brokers must possess the foundational knowledge of property management by completing continuing education courses before attempting to practice vacation rental management.

A broker should be knowledgeable about the similar provisions in the Vacation Rental Act and the Residential Tenant Security Deposit Act regarding the disbursements of tenant security deposits in property or vacation rental management. The similarities are as follows:

1. Advance payments (i.e. security deposits and/or rent) must be deposited into a trust or escrow account.
2. A landlord or agent does not have the ability to post a bond for the security deposit.
3. A landlord or agent may not disburse security deposits prior to the termination of the tenancy or material breach by the tenant *except* to refund money to the tenant.

Also, the broker should know the three modifications the Vacation Rental Act provides to owners/landlords regarding the deposit such as:

- the owner/landlord cannot post a bond in lieu of maintaining an escrow account;
- the owner/landlord may deduct the amount of any long distance or per call telephone charges and cable television charges that the tenant was obligated to pay under the lease but failed to do so; and
- requires the owner/landlord to account to the tenant for the deposit within 45 days of the termination of the tenancy.

Examples of vacation rental management education include:

- Courses offered by the Vacation Rental Management Association
- CE elective courses dedicated to vacation rental management topics
- Courses offered through the NC Vacation Rental Managers Association

## Have you conducted vacation rental management transactions before?

If you have engaged in vacation rental management before, you are aware that the following fees may be paid out prior to tenancy:

1. Administrative fees that are permitted by the contract.
2. Fees owed to third parties for goods, services or benefits procured on the tenant's behalf.
3. Not more than 50% of the total rent due for the reserved period.

If you have not engaged in vacation rental management previously, you may find the assistance of a mentor beneficial or observation of an experienced broker necessary before representing clients.

**Alert:** It is a broker's duty to ensure that any applications, software programs or technology a broker uses in vacation rental management complies with License Law and Commission Rules. It is a broker's duty to ensure that any applications or software programs allow for the appropriate documentation of agency agreements and accurately account for trust monies.

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## COMMERCIAL BROKERAGE - SALES & PROPERTY MANAGEMENT

### DEFINITIONS

**Commercial Brokerage is defined as:**

- listing, buying, selling, leasing (or offering to list, buy, sell, lease),
- commercial properties,
- for others,
- for compensation or something of value.

**Commercial Real Estate is defined by Commission Rule 58A .1802 as follows:**

"Commercial Real Estate" means any real property or interest therein, whether freehold or nonfreehold, which at the time the property or interest is made the subject of an agreement for brokerage services:

(a) is lawfully used primarily for sales, office, research, institutional, warehouse, manufacturing, industrial or mining purposes or for multifamily residential purposes involving five or more dwelling units;

(b) may lawfully be used for any of the purposes listed in Sub item (1)(a) of this Rule by a zoning ordinance adopted pursuant to the provisions of G.S. 153A, Article 18 or G.S. 160A, Article 19 or which is the subject of an official application or petition to amend the applicable zoning ordinance to permit any of the uses listed in Sub item (1)(a) of this Rule which is under consideration by the government agency with authority to approve the amendment; or

(c) is in good faith intended to be immediately used for any of the purposes listed in Sub item (1)(a) of this Rule by the parties to any contract, lease, option, or offer to make any contract, lease, or option.

## DETERMINING COMPETENCE

***Question #1: Are you authorized to practice commercial brokerage? (Aka, do you have your BIC's permission?)***

Before engaging in any type of transaction, including commercial transactions, a broker must obtain their BIC's permission to do so.

Here are a few examples of reasons a BIC might prohibit a broker from practicing commercial brokerage:

1. The company does not engage in these types of transactions.
2. The company has special policies regarding newly affiliated brokers, such as requiring newly affiliated brokers to partner with more experienced brokers for a period of time before engaging in a transaction independently.
3. The BIC lacks the skill, knowledge, and experience to engage in a residential property management transaction. A reasonable BIC knows that adequate supervision is not possible when the BIC lacks necessary knowledge and skills.

***Question #2: Do you have the necessary education and training in commercial brokerage?***

If you have your BIC's permission to continue with a transaction, then you and your BIC should evaluate whether you may need additional knowledge or skills. The following questions will also help you decide.

### **What courses or educational programs have you completed?**

As noted earlier, commercial practice requires the most specialized education and training. Examples of commercial brokerage education include:

- Commercial version of the General Update/BICUP course
- CE Elective courses dedicated to commercial topics
- *Certified Commercial Investment Member (CCIM)* designation courses
- Society of Industrial and Office REALTORS® designation courses
- International Council of Shopping Centers
- Building Owners and Managers Association
- REALTORS® Land Institute

Brokers with the requisite skill, care, and diligence to engage in commercial transactions should certainly be able to define and explain various terms and concepts that are unique to commercial brokerage practice. Examples include:

- LOIs or Letters of Intent: negotiation instruments used during the initial stages of most commercial real estate transactions.
- Net Lease: the lessee, in addition to paying rent, is responsible for some or all of the expenses and costs relating to the property.
- Office Space: space that is used for clerical, management, professional or other similar functions.
- Retail space: space that is used to offer and sell goods or services to the consuming public.
- Industrial facilities: typically defined as facilities used for the manufacturing, storage or distribution of goods.
- Percentage leases: all or part of the rent is calculated with reference to a stated percentage of receipts from the business of the lessee. A common commercial lease involves a percentage of gross sales.

### **Have you conducted commercial transactions before?**

If you have engaged in a commercial transaction, you have probably been exposed to some of the “special considerations” of this type of transaction, such as:

- transaction cycles,
- market factors, and
- property types.

If you haven’t engaged in a commercial transaction, you may find it helpful to observe an experienced broker or request the assistance of a mentor before attempting to represent clients in this type of transaction.

NOTE: A broker may have an experienced mentor to assist them in conducting a commercial transaction with the BIC’s approval. However, the inexperienced broker will be held to the same standard as a broker who practices commercial transactions regularly in the industry. Therefore, the broker should exhibit caution when solely relying on a mentor to complete an unfamiliar transaction.

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## THE BIC's ROLE

Rule 58A .0110, states a designated BIC shall:

- 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; and
- supervise all brokers employed at the office with respect to adherence to agency agreement and disclosure requirements.

A competent BIC could delegate authority and authorize the broker to utilize the services of a mentor if the BIC does not possess the knowledge.

A BIC MAY delegate his authority if: (1) the mentor is within the same firm, (2) the mentor and broker agree with the mentorship, (3) and the BIC understands that the delegation of authority does not eliminate his/her duty to supervise affiliated brokers.



The BIC of an office engages only in residential transactions on behalf of his firm. One of the BIC's affiliated "full" brokers wants to begin working in commercial transactions. The broker has several years of experience practicing commercial brokerage at another firm.

What are the BIC's responsibilities for this "full" broker and how can the BIC ensure the broker is complying with License Law and Commission rules?

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## **DETERMINING COMPETENCE**

BICs who allow their affiliated brokers to practice all areas of brokerage should be knowledgeable about those brokerage areas as well. A BIC should not allow an affiliated broker to practice any area of brokerage the BIC is not competent to practice. Therefore, an affiliated broker should only have authorization to practice the areas of brokerage that the BIC practices and can adequately supervise pursuant to Rule 58A .0110.

The following questions will help BICs determine whether they possess the competency to supervise affiliated provisional and “full” brokers in various brokerage practice areas.

### ***Question #1: Have you obtained specialized education?***

A BIC who takes specialized educational courses and obtains certifications is a tremendous asset to the firm and its affiliated brokers. A BIC should obtain specialized knowledge in all brokerage areas the firm will practice before the BIC authorizes affiliated brokers to practice that specific type of brokerage.

### ***Question #2: Have you engaged in all types of brokerage transactions?***

If the BIC has not practiced in all areas of brokerage, it would be wise to limit the types of brokerage an affiliated broker practices until the BIC gains knowledge and/or experience.

### ***Question #3: Do you allow mentors to assist your affiliated brokers?***

BICs can delegate authority to mentors to assist their brokers in the firm with transactions, listings, and the completion of documents. However, BICs are responsible for the supervision of the broker although authority has been delegated to the mentor. If the BIC fails to exercise their duty of supervision over the brokers, they are in violation of Rule 58A .0110.

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## ANSWERS TO DISCUSSION QUESTIONS

### For Discussion on page 1

1. Tina, a provisional broker with XYZ Realty, has been approached by a prospective client who wishes to purchase a commercial property. Tina has only worked on residential sales transactions since she was licensed, and she has not completed any Postlicensing courses or other education since her Prelicensing course. However, Tina's firm, XYZ Realty, offers both residential and commercial brokerage services.

How should Tina proceed with this prospective client?

*Answer: Tina should notify her BIC of her clients' needs and request assistance from an experienced broker in commercial transactions or her BIC. If an experienced broker or the BIC is not available, Tina should consult with her BIC about referring the client.*

2. Tom, the BIC of XYZ Realty, wants to add property management to the list of services his firm provides, but Tom does not have experience in property management. Due to his lack of knowledge, Tom hires Frances, a full broker, to oversee the property management transactions. Tom knows that Frances worked previously for a property management firm and that she assisted property managers in that firm.

Did Tom take the proper steps as BIC? Why or why not?

*Answer: It depends. Tom should first register for some educational courses in property management before he hires Frances. Also, Tom should ask Frances about her responsibilities at the previous firm. Although Frances has familiarity with property management, Tom will still be responsible for Frances' actions; therefore, he should be knowledgeable about all of the brokerage activities practiced in the firm.*

3. Sue, a full broker with 123 Realty, wants to assist a residential buyer with a purchase; however, she has only worked on commercial transactions since she was licensed. Sue's BIC tells Sue she cannot work with the residential buyer on her own and assigns another experienced broker to assist Sue with the transaction. Sue protests, stating that the majority of her Prelicensing and Postlicensing education focused on residential practice, so she feels she is fully competent to handle the transaction.

Who is correct? Why?

*Answer: The BIC is correct. The BIC is responsible for supervising the affiliated brokers. Sue has not practiced residential transactions. Regardless of Sue's belief that she is knowledgeable about residential transactions, she needs the assistance of an experienced broker.*

## For Discussion on page 6

Sam is a provisional broker who just listed his first home with XYZ Realty. During the listing presentation, the seller indicated that he did not want Sam to practice dual agency. Later, Sam receives a call from a prospective buyer who wishes to purchase the property after viewing it through a virtual tour. Sam requests a meeting with Dan, the prospective buyer, to review the appropriate documents to create an agency relationship. While Sam is reviewing the WWREA brochure, he explains the concept of dual agency. Dan signs an exclusive buyer agency agreement after the presentation and authorizes Sam to engage in dual agency. Sam immediately assisted Dan with preparing the 2T, negotiating the earnest money deposit and the due diligence fee.

Did Sam's actions constitute minimal competency in conducting brokerage activities? Why or why not? \_\_\_\_\_

**Answer:** *No. Sam violated agency law by practicing dual agency without written authority from both parties in the transaction. Although Sam acquired written permission from Dan, the seller prohibited Sam from practicing dual agency when he listed his home. Therefore, Sam violated the fiduciary duties he owed to the seller.*

## For Discussion on page 9

Sally is a sole practitioner and a BIC. Since she was licensed 6 years ago, Sally has practiced residential sales. She does not have a trust account, because her clients' funds are always held by other real estate companies or attorneys.

Recently, one of Sally's long-time clients asked her to act as a property manager for one of his residential properties. Sally agrees and they execute a property management agreement.

Is Sally competent to act as a property manager?

**Answer:** *Probably not. Even though there is no separate license for property management, it is considered a specialty area of practice. It does not appear that Sally has any experience with the specialty area or that she has taken any special education to prepare her for these types of transactions. Consequently, Sally should complete special education and/or training in order to meet the fiduciary expectation of skill, care, and diligence.*



## Case Outcome - Property Mismanagement on pages 12-15

### Errors identified during the Commission's Investigation

- The Respondent indicated that they were going to act as an agent and property manager of the owner's property but failed to do so.
- The Respondent was incompetent.
- The Respondent collected the property management fee but failed to execute her duties in the contract.
- The Respondent failed to maintain the trust account and retain records.
- The Respondent failed to maintain and retain records relating to the transactions and disburse funds into and from the trust account.

### Law & Rule Violations identified during the Commission's Investigation

- N.C.G.S. § 93A-6(a)(2) - Making false promises
- N.C.G.S. § 93A-6(a)(8) - Being incompetent to act as a real estate broker
- N.C.G.S. § 93A-6(a)(10) - Conduct which constitutes improper, fraudulent or dishonest dealing
- N.C.G.S. § 93A-6(a)(15) - Violation of Commission Rules
- Commission Rule 21 NCAC 58A .0110-Broker-in-Charge
- Commission Rule 21 NCAC 58A .0116-Handling of Trust Money
- Commission Rule 21 NCAC 58A .0117-Accounting for Trust Money

### Sanctions Imposed by the Commission

- Property Manager - Suspension for a period of 12 months; Stayed after 3 months if the broker submitted a course certificate evidencing satisfactory completion of the *Issues in Answers in NC Real Estate Practice Course* within 4 months. The broker was prohibited from being a BIC or engaging in property management for a period of 5 years from the effective date of the Order.
- Firm - Voluntarily surrendered the firm real estate license and any renewal or reinstatement right it may have possessed.

## For Discussion on page 21

The BIC of an office engages only in residential transactions on behalf of his firm. One of the BIC's affiliated "full" brokers has several years of experience practicing commercial brokerage.

What are the BIC's responsibilities for this "full" broker and how can the BIC ensure the commercial broker is complying with License Law and Commission rules?

*Answer: According to Commission Rule 58A .0110, a BIC is responsible for\*:*

- *ensuring affiliated brokers maintain active and current licensure;*
- *all advertising placed on behalf of the firm / office;*
- *proper maintenance of the trust account;*
- *retention of firm/office records;*
- *ensuring brokers are properly disclosing agency and executing agency agreements.*

*\*Note that these responsibilities apply to all brokers who are affiliated with the BIC. However, the BIC has a significantly greater level of supervisory responsibility for provisional brokers. Per Rule 58A .0506, the BIC must supervise PBs, meaning the BIC has full responsibility for all of a PB's actions.*

*Following are some recommendations as to how a BIC may ensure effective supervision of brokers who are practicing in areas in which the BIC is not an expert:*

- *The BIC attends specialized trainings and workshops in commercial brokerage.*
- *The BIC creates a mentor system between experienced commercial brokers in the office.*

*A prudent BIC would cease allowing specialty practice until the BIC is reasonably sure they can supervise affiliated brokers.*