SECTION TWO
2013-2014 Broker-in-Charge Course materials

ADVERTISING ISSUES

Learning Objective: Upon completing this Section, brokers-in-charge should have a better understanding of the laws, regulations and rules impacting advertising, their responsibilities for the acts of their associated brokers when acting as a broker-in-charge, and factors to be considered when formulating office advertising policies.

INTRODUCTION

One of the seven obligations a broker-in-charge is charged with performing for his/her office is responsibility for "the proper conduct of advertising by or in the name of the firm at such office." [**Rule A.0110(i)(3)**.] To assist brokers-in-charge in fulfilling this duty, this Section will first review Commission rules pertaining to advertising, followed by a review of applicable laws and regulations governing advertising content and potential consequences of non-compliance, examples of actual advertisements seen in the past year, and will conclude with a discussion of factors to be considered in determining office policy.

ADVERTISING

Commission Rule A.0105 - Advertising

As mentioned in the 2013-2014 Update Course materials, REC **Rule A.0105** titled "***Advertising***" was revised as of April 1, 2013. The primary change was to move two sections pertaining to business names and assumed names to **Rule A.0103**, ***Broker Name and Address***; the content remaining in Rule A.0105 was not changed significantly, other than to expressly require the owner's **written** consent to advertise, previously inferred by virtue of Rule A.0104. ***Rule A.0105 applies to all forms of advertising, marketing or promoting a licensee's services or properties belonging to others****, whether direct mail, email, internet advertising, printed matter, business cards, placemats, refrigerator magnets, etc.* The primary components of the rule are threefold:

1) provisional brokers may not advertise without the consent of their broker-in-charge and must include the name of their BIC or the real estate company in all advertising;

2) brokers may not advertise or display signage for lease or sale without the owner's written consent; and

3) brokers may not engage in "blind advertising;" that is, the advertisement must alert the public to the fact that they are contacting a broker.

Rule A.0105(a), titled "***Authority to Advertise***," states:

(1) A *provisional broker* ***shall not*** advertise any brokerage service or the sale, purchase, exchange, rent or lease of real estate for another or others *without* the consent of his or her broker-in-charge *and* without including in the advertisement the *name of the broker or firm* with whom the provisional broker is associated.

(2) A broker shall not advertise or display a "for sale" or "for rent" sign on any real estate without the written consent of the owner or the owner's authorized agent.

[Emphasis added.]

Written Consent - A.0105(a)(2)

As mentioned, the advertising rule now expressly requires a broker to have the *written consent* of the owner before advertising a property or displaying a for sale or for rent sign on any real estate. This reinforces the Rule A.0104 requirement that *all agency agreements with property owners for any brokerage service must be in writing prior to the broker providing any services*. Since the agency agreement must be in writing prior to furnishing any services, it is logical to include the written permission to advertise in the employment agreement between the broker and the consumer.

"Planting" Signs

Normally, signage will be posted on the property that is for sale or lease, but what if a broker wants to post signage on real estate other than the property for sale or lease? The broker

has no agency agreement with that property owner because the broker is not attempting to represent that property owner. *Must the broker have the written consent of the owner of the real estate on whose property the sign will be posted/planted* ***before*** *erecting the sign?* While written permission always is best as it minimizes, if not eliminates, disputes, the rule is not construed presently to require the written permission of an owner of real estate who consents to placement of a sign on his/her property that is not being sold or leased. ***Minimally****, oral consent is required, however, to avoid trespass charges.*

Directional Signs

What about directional signs to an open house — must the listing broker have the written consent of all owners in whose yards s/he wishes to place the directional sign? Again, while written consent is clearest, many non-seller property owners may be willing to consent orally, but are reluctant to sign any document that a broker unknown to them may present. However, the *broker must obtain* ***at least the oral consent*** *of such property owners to avoid charges of trespass*, as persons are not at liberty to plant signs wherever they wish. What about displaying signs in a ***public right of way***? This generally is not permitted by the governmental unit that is responsible for maintaining the public right of way and may result in signage being confiscated by the appropriate authority that then charges the broker for the return of his/her signage or possibly destroys it.

Brokers must also be aware of ***local ordinances and/or restrictive covenants*** in subdivisions, either or both of which may regulate the display of signs within that locality or neighborhood. These ordinances may define different types of signage, the permissible dimensions, font size, illumination and permissible placement. For example, Raleigh's city ordinance defines "sign" as:

> Any temporary or permanent identification, description, animation, illustration, or device, illuminated or nonilluminated, which is visible from any right-of-way and which directs attention to any realty, product, service, place, activity, person, institution, performance, commodity, firm, business or solicitation, including any permanently installed or situated merchandise or any emblem, painting, banner, poster, bulletin board, pennant, placard or temporary sign designed to identify or convey information.

It defines "signs" as including "... an identification or advertising device, including billboards which are permanent in nature...." and further defines many of the included terms, such as billboards, posters, banner, temporary sign, etc. Brokers must also be aware of additional restrictions as to the size and placement of signs that may be imposed by owner association bylaws or rules within gated communities.

Provisional Brokers - Rule A.0105(a)(1)

All advertising by a provisional broker must satisfy the rule's two requirements, namely, that:

1) the provisional broker has his/her *broker-in-charge's consent to advertise*, and

2) the ad contains the *name of* the provisional broker's broker-in-charge or the *brokerage company* with which the provisional broker is associated..

Brokers-in-charge would be well-advised to implement some policy or procedure that allows them to review their provisional broker's advertising *before* it is disseminated. While brokers not on provisional status are not required by rule to have the consent of their broker-in-charge before they advertise, brokers-in-charge nonetheless are responsible for supervising **all advertising** being done by *any licensee* in their office as the advertising generally is being done in the name of the company, since the company holds the agency contract, and may be liable for the acts or representations of its affiliated agents. How a broker-in-charge supervises the content of ads will be considered when discussing office policies.

Name of Brokerage Company or Broker-in-Charge

Understand as well that *a provisional broker may not advertise in his/her name only*, due in part to the reality that a provisional broker cannot be independent; to have a license on active status, a provisional broker must *always* work in affiliation with a real estate company under a broker-in-charge whenever engaging in brokerage activity. Thus, the name of either the company or the broker-in-charge must appear in all advertisements, including business cards, in addition to the provisional broker's name. *Must the advertising or business cards state that the broker is on provisional status*? No. Whether a broker *not* on provisional status is required to include the company or broker-in-charge's name in his/her advertising depends on company policy, as there is no rule determining the issue. A company could easily resolve this issue in all instances by requiring all advertising by any associated agent to include the company's name, since all agents are acting on behalf of the company, rather than as independent entrepreneurs.

Rule A.0105(b) - "Blind Ads"

Rule A.0105(b) addresses the other basic requirement, namely, that the advertisement "... clearly indicate that it is the *advertisement of a broker or brokerage firm* ....", thus banning blind ads. This subparagraph reads in its entirety:

> (b) Blind Ads. A broker shall not advertise the sale, purchase, exchange, rent or lease of real estate, for another or others, in a manner indicating the offer to sell, purchase, exchange, rent, or lease is being made by the broker's principal only. Every such advertisement shall conspicuously indicate that it is the advertisement of a broker or brokerage firm and shall not be confined to publication of only a post office box number, telephone number, street address, internet web address, or e-mail address.

No signage or form of print or media advertising placed by a licensee may give the impression that the property is being marketed for sale, exchange or lease by the property owner directly when in fact the property owner has hired a licensee to represent the property owner in the transaction. The same holds true when a licensee is representing a buyer or lessee and advertises the principal's desire to purchase or lease property. (The primary exception would be a limited listing agreement where the broker agrees to publish the property information in the MLS, but the public is instructed to contact the owner directly for showings, etc..) The clear intent of the rule is that the public know who they are contacting; thus, *the name of the broker or brokerage company must appear in the advertisement and on any signs*. In fact, a few years ago the mandate was rephrased from "...shall clearly indicate ...." to "...shall *conspicuously* indicate ..." to emphasize the desired prominence. As discussed above, the name of a provisional broker alone is insufficient. *If it is clear from the name of the company that it is engaged in real estate*

brokerage, then the term "broker," need not appear after the company name, e.g., Smith Realty Company, or Carolina Real Estate, Inc. ***If only an individual broker's name appears in the ad, then the term "broker" should follow the person's name***.

"Broker-Owner"

Note that Rule A.0105 expressly applies to brokers *when advertising property belonging to "another or others."* It does ***not*** apply when the broker is buying, selling or leasing property in which s/he has an ownership interest as that is not "brokerage," i.e., the temporary or permanent transfer of an interest in real estate *for others* for consideration. Thus, *must a broker disclose that s/he is a licensee when advertising property s/he owns*? No, not from the Commission's perspective, although the ***Commission strongly recommends that a licensee at least orally disclose to consumers that s/he is licensed***. If the licensee has hired a broker to represent him/her in the transaction, then no disclosure by the broker-owner is necessary since it should be clear to the other side that a broker-agent is involved. *However*, while the Commission does not require disclosure of licensure in advertising and on signage when the broker is a party-principal, brokers who are Realtor® members are reminded that the Realtor® Code of Ethics requires licensure disclosure in all advertising.

Other than the affirmative requirement that the advertisement identify the source as a broker or brokerage company, the rule doesn't dictate the content of the advertisement. It doesn't mandate inclusion of a telephone number, or email address, or web address, or physical address; those matters are left to the preference and discretion of the individual, as influenced perhaps by office policy. Obviously, some contact information will be included to facilitate communication between the broker and the public.

The Commission does not require brokers to maintain a physical address where the public may visit them. However, any broker providing any brokerage services (other than perhaps simple referrals as a sole proprietor) will have an "office" somewhere as defined in Rule A.0110(a), even if it is in the broker's home, and must provide that address to the Commission so the Commission knows where to find the broker, if desired. Otherwise, the broker may limit his/her contact with the public to telephone and email, and meet consumers in either the consumer's location or public places. Alternatively, the broker/sole practitioner could have his/her office at home, but arrange to have access to a conference room or other meeting space when necessary to confer with consumers. Understand, however, that a broker whose office is in his/her home will have that location listed as the broker's office address on the Commission's website *unless* the broker has a post office box as a delivery address and instructs the Commission to publish the office delivery address only. (See revised G.S. 93A-4(b2) briefly discussed in Section Four of the 2013-2014 Update Course materials.)

"Teams" or Entities within Entities

Over the past decade or so, the concept of "teams" appears to have become more popular. The question then arises as to the liability of the broker-in-charge at XYZ Realty, Inc., with whom all the team members are officially associated in Commission records, to fulfill his/her broker-in-charge duties, i.e., supervise transaction files, advertising, agency disclosures and agreements, etc., for the team members? Part of the difficulty in determining this issue precisely, lies in the myriad forms these "teams" may take.

Situation #1

Some teams are comprised of brokers, provisional or non-provisional, who are associated solely with XYZ Realty, Inc. under Sally Smith as their broker-in-charge. Generally, these brokers have agreed to cooperate on transactions in some form, and to have all production reported primarily under one broker's name. The team may identify themselves as "Mary Jones of the Peggy White Team, XYZ Realty" and publish both the individual broker's cell phone number and XYZ's office number in its advertising. So long as the team leader, Peggy, does *not* create an entity (thus requiring a firm license), she and all members of her team still only have one official affiliation in Commission records and that is with XYZ Realty under Sally as broker-in-charge. XYZ Realty is the party to the agency agreements with the consumer and Sally is responsible for all of the broker-in-charge duties as to all of her affiliated agents. The holding out to the public as "The Peggy White Team of XYZ Realty" is believed to be for "branding" purposes relating to considerations extraneous to Commission concerns. *So long as the advertising includes the name of the brokerage company with whom all the agents are associated and for whom they all work (XYZ Realty), it complies with the rule*.

Situation #2

What if Peggy decides to create "The Peggy White Team, Inc." by filing the appropriate documents with the NC Secretary of State. Peggy is the only shareholder and officer in her corporation and has formed it primarily to enable Sally to pay Peggy's commissions to her corporation, rather than paying Peggy directly. *Peggy must first obtain a firm real estate license for her corporation* ***before*** *Sally may pay Peggy's commissions to the corporation*, but so long as Peggy's corporation is for compensation only and otherwise meets the requirements of Rule A.0110(d), Peggy will be the qualifying broker for her entity, but *her corporation will not have a broker-in-charge as it is not engaged in brokerage*. Peggy will still be reflected only as an associated broker with XYZ Realty in Commission records. While she also will appear as qualifying broker of her company on Commission records, she will *not* be an associated broker with her company, because her company has no office since it has no BIC.

Situation #3

What if Sally ultimately decides that Peggy should officially associate all of her team members with Peggy's corporation on Commission records? To do this, Peggy must first request designation as broker-in-charge of her corporation, and then must file affiliation forms (REC Form 2.08) to affiliate each team member with her company. *However*, both Peggy and all team members must be *dually affiliated* on Commission records; *all must show as associated brokers with The Peggy White Team under Peggy as broker-in-charge* ***and*** *with XYZ Realty, Inc. under Sally*. Why? Because Peggy's company is not really engaged in brokerage under its own umbrella; rather it and all of its associated agents are acting as subagents of XYZ Realty that is the primary agent of the consumer.

Who has final responsibility for the broker-in-charge duties as to the six brokers on Peggy's team, all of whom have two brokers-in-charge? The Commission views XYZ Realty as the primary agent having privity of contract with the consumer. XYZ Realty and Sally will bear ultimate responsibility from the Commission's perspective for the transaction files, the trust monies, the advertising, the agency disclosures and agreements, and the actions of its associated agents and subagents. While Peggy also has duties as broker-in-charge to make sure that her associated brokers maintain active licenses, comply with the agency disclosures and agreements

rule, and may otherwise assist Sally in fulfilling the seven BIC duties, having Peggy as a secondary BIC, as it were, does not lessen or eliminate Sally's obligations for her affiliated agents. While both Sally and Peggy will be accountable for their respective associated agents' conduct, Sally will bear greater responsibility than Peggy, particularly regarding the trust monies, transaction files and advertising, as all of that is being done under XYZ's umbrella.

Note that *no provisional broker may officially be affiliated with Peggy's corporation*. Why? *Provisional brokers* are not permitted to work for multiple companies simultaneously as they *may only have one broker-in-charge at any given time*. While a provisional broker could informally work with Peggy's team, that provisional broker nonetheless would be solely under Sally's supervision and must receive all brokerage compensation only from Sally or XYZ Realty, and not from Peggy or her corporation.

Advertising Considerations with Teams

This subsection discusses the assumed name and division of BIC responsibilities, if applicable, between the "team" and the real estate company with which the team is affiliated under the various scenarios set forth above. While a fuller explanation may be found below, the following table attempts to summarize the upshot of this discussion.

"Team" arrangement	**Is either Team or XYZ Realty using an assumed name that must be registered?**
Situation #1: Informal team, no entity	Branding only, but XYZ Realty's name ***must*** appear in *all advertising with the team name*. If not, then team name may be trade name for XYZ Realty that should be registered.
Situation #2: Entity with firm license for compensation only; agents *not* dually affiliated. * see first full paragraph p.9	Neither entity is using an assumed name so long as the name used in advertising is the same as that registered with the NC Secy of State, Corporations Division. However, Peggy may need to be BIC of her company if she's using the name of a licensed entity in her advertising.*
Situation #3: Entity with firm license and *all full broker team members dually affiliated on NCREC records*. **See first full paragraph p. 10	Neither entity is using an assumed name so long as the name used in advertising is the same as that registered with the NC Secy of State, Corporations Division. Peggy must definitely be a BIC as she has agents associated with her company (& agency agreements should name both companies**).

Assumed Name?

The team name most likely does *not* need to be registered as an assumed name in any of the foregoing situations for reasons explained in more detail below.

Situation #1

In Situation #1, so long as the team name includes the surname of a full broker (and often the first name as well), the broker's identity should be clear to the public. However, *because the team is not functioning as either an entity or a sole proprietorship, the* ***name of the brokerage company with which the team is affiliated*** **must** ***be included in all advertising, including business cards***. Not to include the name of the licensed brokerage company may create the impression that the team is a company when, in fact, it is not.

Should XYZ Realty register "The Peggy White Team" as one of its assumed names? XYZ Realty Inc is not doing business under any name other than its legal name, XYZ Realty, which is included in all advertising. The public could easily locate the company both in the NC Secretary of State Corporation Division's records, as well as on the Commission's website and see all associated agents. Thus, in the Commission's opinion, XYZ need not register the team name as one of its aliases in this situation so long as its name appears in all advertising.

While perhaps unlikely due to lack of branding benefits, what if the team name did not include a full broker's surname? For example, what if the team called itself "Property Scouts of XYZ Realty" or "Peggy's Property Scouts of XYZ Realty," would that affect the answer? No, ***so long as*** XYZ's name is included in ***all*** advertising, marketing and promotion. If the name of the brokerage firm is omitted and the team is permitted to advertise only in the name of the team, i.e., Peggy's Property Scouts, then arguably that is a business name or assumed name that XYZ Realty has now adopted as an alias. The team name must be registered with the Register of Deeds by its owner (see GS 66-68), but who owns the name? There is no entity or sole proprietorship underlying the "team" and absent some business structure, it can't own anything. Thus, it would fall to XYZ Realty to register the team name as one of XYZ's aliases **if** it permits the team to advertise without including XYZ Realty's name in all advertising.

> ASIDE: It is a legal oxymoron to have a sole proprietorship working for another company. A full broker may have a sole proprietorship under which s/he engages in property management for others and of which s/he is BIC *and* may also be affiliated with a separate real estate company through which s/he engages in commercial or residential sales. In the latter situation, however, the broker is merely an affiliated agent with the sales company being paid as an independent contractor. The broker's sole proprietorship is completely separate and distinct from his/her role as affiliated broker.

Situations #2 & #3

Must the name of the team be registered in either Situation #2 or #3? In both situations an entity now exists that is both registered with the NC Secretary of State and possesses a firm broker license issued by the Commission. If the public wants to learn who the principals are and who the affiliated brokers are (if any), they could do so by accessing either website or contacting the applicable agency. Accordingly, *there is no need to register the team name so long as it uses its legal name as registered with the Secretary of State in its advertising*. (Brokers are referred to the discussion of assumed names and registration thereof found in the 2013-2014 Update Course materials, Section 4, under the review of revised Rule A.0103.)

How does the creation of an *entity* that must have a firm license in order to receive brokerage compensation, namely, The Peggy White Team Inc, impact advertising considerations compared to Situation #1 where there is no entity and the name is used for branding purposes? While the intent may be to use the name merely for branding purposes, that name now belongs to a licensed entity, regardless of whether the entity has any associated agents. From the Commission's view, the fact that a *licensed entity is now advertising brokerage services, even in conjunction with XYZ Realty, means that Peggy should be BIC of her corporation*, even if she otherwise qualifies for the A.0110(d) BIC exception.

Could Peggy name her corporation "Peggy's Property Scouts, Inc." and use it for compensation purposes only, and still conduct her brokerage through XYZ Realty as "The Peggy White Team?" Yes; this is Situation #1. Peggy would not need to be BIC of her corporation so long as she otherwise met the Rule A.0110(d) requirements and was not using her corporation's name in any advertising.

Must XYZ Realty register the team's name as one of its assumed names if the team is an entity? Again, XYZ Realty is not really doing business under any name other than its legal name, and in this case, its subagent has its own firm license and is appropriately registered and licensed, so there is no perceived need for XYZ Realty to register any assumed name.

Difference between Situations #2 and #3?

What difference is there between Situations #2 and #3? In **Situation #2**, Peggy has a licensed entity that is a "shell" — it exists merely to receive compensation for brokerage services Peggy provides through a separate company under the supervision of a broker-in-charge. Peggy's company has no "office" as it is not engaged in brokerage activity, nor does it have *any* affiliated agents. This is an example of a rather rare and specialized category of entity where the entity has a *firm license on active status*, because it both timely *renews its license annually* and constantly has a ***qualifying broker*** (not to be confused with BIC), but the company/entity has no associated agents because it has no BIC, and thus no office anywhere because it is not engaging in brokerage under *its* umbrella. The company has a license solely to enable it to legally receive compensation arising from brokerage services provided by its qualifying broker (Peggy) through a separate real estate company (XYZ Realty). *Note*: if Peggy is paying anyone other than herself through her corporation, whether a licensee or an unlicensed assistant, then she would be required to be or have a BIC for her company.

Situation #3 is completely different; here you have two legally separate and distinct entities, both licensed and each having its own qualifying broker and broker-in-charge, and both having affiliated agents. However, by definition, all agents who are affiliated with Peggy's company must also appear on Commission records as affiliated agents with Sally's company, because in reality Peggy and all of her team members are conducting their brokerage activities under XYZ Realty's umbrella as agents or subagents. Actually, other than Peggy, the primary affiliation for all dually associated brokers in Commission records should be with Sally at XYZ Realty with Peggy's company as a secondary affiliation. Commission records would reflect Peggy's primary affiliation as being broker-in-charge of her company, with XYZ Realty being her secondary affiliation.

An additional wrinkle in Situation #3 is that because you have two licensed entities both with affiliated agents providing services to the same consumers, *the **agency agreements** in all transactions involving any of Peggy's team members/agents should include the names of **both** entities*, i.e., XYZ Realty Inc and The Peggy White Team Inc or Peggy's Property Scouts Inc., authorizing each entity and its associated agents to represent the principal. Further, XYZ Realty and Peggy's company should have an agreement, preferably in writing, specifying responsibility for at least transaction files and trust monies. Absent an agreement, XYZ Realty would be held primarily liable for the transaction files, trust monies, advertising, agency agreements and *all* provisional brokers (since none can be affiliated with Peggy's company), as *all* are working as affiliated agents under XYZ Realty's firm license.

What benefit is to be gained by compelling Peggy to formally associate her team members with her company? The question is debatable. The primary option it permits pertains to compensation, i.e., does Sally pay Peggy all compensation due Peggy's company and Peggy then is responsible for paying her associated brokers and unlicensed staff, if any, *OR* does Sally pay agreed amounts to each broker directly, since each is also an affiliated broker with her company? While Sally may gain assistance from Peggy in supervising the dually affiliated brokers as they now have two BICs, Sally could seek the same practical assistance from Peggy as team leader, without the brokers having to affiliate with Peggy's company. While the Commission would expect both BICs to fulfill their A.0110 duties as to their respective brokers, Sally most likely would be held to the higher standard given the structure of the relationship, but each case is assessed on its own facts.

So long as Situations #1 or #2 exist, Peggy will not be a BIC and all brokers will appear as affiliated agents only with XYZ Realty on Commission records, except possibly for Peggy. If in Situation #2, Peggy uses her firm's name in advertising, then she should declare herself BIC of her entity, because it is licensed and is holding its name out to the public, but her company will have no agents other than Peggy, whose secondary affiliation would be with XYZ Realty.

"Satellite Offices"

Be aware of licensing issues and who is working for whom. For example, Sally has 40 agents associated with XYZ Realty at 123 Main St. Six of these agents work on Peggy's team, under Situation #2, but none of the 6 agents are officially affiliated with Peggy's company. Several new licensees want to affiliate with Sally's company but she is running out of space at 123 Main, so she asks Peggy to go find her own location and to take her team members and open a satellite office. Peggy leases office space at 401 Elm St.

Could Peggy and her six team brokers operate out of the Elm Street office, but still appear as affiliated agents under Sally at the Main Street office? No, because they are not working out of the Main Street office. They must create an office location on Elm St by filing a Broker-in-Charge Declaration (REC 2.04) and then must file an affiliation form (REC 2.08) to associate each licensee who will be working from the Elm St location. It matters not what label the company affixes to this location, whether satellite office, branch office, extension office, etc.; the point is that to have an "office," there must be a BIC.

While the intent is to create a branch office of XYZ Realty, Peggy instead sends in a BIC Declaration form requesting that she be declared BIC of *her* company, The Peggy White Team,

Inc., doing business as XYZ Realty at 401 Elm St and then sends six affiliation forms to associate her six brokers. Absent other instructions, this will cause Peggy and the six brokers to be removed as affiliated brokers under Sally at the Main St office. While Peggy and her six brokers may think that they are still working as associated brokers with XYZ Realty, they are not; from the Commission's perspective, the seven now work only for the Peggy White Team Inc at Elm St, because no one has told the Commission about any connection or relationship with XYZ Realty, who still holds the agency agreements, the transaction files, the trust monies and pays commissions directly to Peggy's brokers. The attempt to do business as XYZ Realty is ineffective, because an entity isn't allowed to use the legal name of a separate entity as its business or trade name.

This is a "does not compute" moment from a regulatory perspective; why would Peggy's company be involved in transactions belonging to a separate company and why would that company hold the files, any trust monies and be paying Peggy's agents? What should happen to effectuate the parties' intent is that Peggy should declare herself BIC at Elm St of *XYZ Realty* and then affiliate her brokers at XYZ's branch office location. It is then clear that Peggy is not operating under her own company at Elm St, but at a new office location for XYZ Realty as it grows. If Peggy is not BIC of her corporation because she qualifies for the A.0110(d) compensation only exception, then her corporation's business address may be her home address. If, however, she must be BIC of her corporation because she is advertising using the corporation's name, or because her agents are dually affiliated with both XYZ and Peggy's corporation, then her corporation's business address must also be Elm St so Peggy may be both BIC of her company, as well as BIC of XYZ's branch office location. The primary affiliation for all should continue to be XYZ Realty, with any affiliation with Peggy's company being secondary.

CAVEAT: The foregoing discussion attempts to convey the Commission's position as to the covered topics. While the expressed opinions may shape Commission policy, they apply only to Commission Staff and licensed brokers, and neither dictate nor govern policies that may be adopted by other associations, agencies or entities.

Rule A.0105(c) - Limited Non-resident Commercial Broker

The only other disclosure required by the advertising rule beyond those discussed above is the final subparagraph pertaining to a very small group of brokers who hold a North Carolina "limited nonresident commercial license." These individuals do not reside in North Carolina and are affiliated with a real estate company located in another jurisdiction. They apply for and obtain a limited nonresident commercial license that permits them to enter North Carolina, engage in a commercial lease or sales transaction under the supervision of an affiliated North Carolina full broker (although that broker need not be a BIC), return to their home state and be paid. The advertising rule requires that any advertisement by or including the name of a limited non-resident commercial licensee specifically identify the licensee as a "Limited Nonresident Commercial Real Estate Broker."

Content of Advertisements

Accuracy of Information

While Commission rules don't dictate what must appear in advertising, other than the limited disclosures discussed above, other State or Federal laws and regulations impact content, such as state and federal Fair Housing laws and federal Truth-in-Lending laws. Within these legal parameters, a broker may determine the content of his/her advertising, marketing, promotions, etc. and the information s/he chooses to publish. The bottom line from an accountability standpoint is: ***are the representations and information being provided accurate and what inquiries, if any, did the broker make to verify the accuracy of the broker's statements?*** *The broker creating the content is primarily responsible for verifying the accuracy of the information, but the broker-in-charge, who is responsible for supervising* ***all*** *advertising emanating from his or her office, should review the content as well, particularly if the broker is still on provisional status.*

"Permitted Occupancy"

Brokers should exercise caution and check their facts before making representations about permitted uses or occupancy, whether in a sales or lease transaction. When making statements concerning occupancy, brokers should check local ordinances or restrictive covenants for limitations on the number of unrelated occupants. Such limitations may be found in definitions of "single family" use. Similarly, where a building has on-site sewage disposal, brokers should be alert to the limitations imposed by the original or most recent improvement permit, that should be found in public records. In other words, if the dwelling is only permitted for three bedrooms, then it may only be advertised as having three bedrooms, not the four or five it appears to have because the current owner or occupant is using what was intended as a den or playroom or huge walk-in closet as a bedroom.

Recall that in permitting on-site sewage systems, the health department assumes two persons per bedroom. Thus, a permit for a three bedroom dwelling may be advertised as sleeping six, not more. However, even if the permit is for three bedrooms, thus potentially sleeping six, a local ordinance or restrictive covenant that only allows up to four unrelated people to occupy the dwelling will restrict the permissible occupants from six to only four. Refer also to the discussion in Section One of HUD's interpretation of reasonable occupancy standards when dealing with familial status that might allow more than two persons per bedroom.

There is at least one inquiry pending in Regulatory Affairs wherein the complainant alleges that the listing company marketed a very nice house in 2007 as having four bedrooms, when in fact the septic permit from 1994 was for only three bedrooms. The home appeared to have four bedrooms, each having closets and windows, the owners had been paying taxes on a 4 bedroom house, and a house down the street with an identical floor plan was listed as a four bedroom home as permitted by its septic permit. The current owners didn't discover the discrepancy until recently when they were preparing to sell the property and became aware of the original septic permit. It also appeared from earlier documents that the original owners and builder were aware of the 3 bedroom septic limitation and amended their sales contract to provide for a 3 bedroom house with a bonus room, rather than the four bedroom house initially intended. Rather than perpetuate the problem, the current owners decided to pay to upgrade the

septic system to support four bedrooms so they could legally advertise the property as having four bedrooms.

"Sold" Signs

Brokers should also exercise caution in declaring property "SOLD" on their signage. If in fact the closing has not occurred, then the property is not sold yet. It may be "under contract" or the "sale pending," but it is not a done deal, as much as the broker may wish it were, until the settlement meeting has been held *and* the deed recorded. To indicate otherwise is misleading, if not outright misrepresentation. Understand as well that brokers have no right to refuse to present an offer they may receive from an interested purchaser even though the property already is under contract. Rule A.0106 requires brokers to present ALL offers immediately, but in no event later than five days from receipt. It is the *seller's* place to decide what s/he wants to do with any given offer, although brokers should advise their seller-client that if they already are under contract, then the seller may only accept offer #2 as a back-up offer/contract, using the appropriate addendum. If the seller has further questions, s/he should consult a lawyer.

"Coming Soon" Signs

The Commission has received inquiries of late regarding "coming soon" signs that generally are attached to For Sale signs bearing a broker's name, contact information and company name. Apparently, the owner wants to sell the property, but is not quite ready to market it for whatever reason, yet the owner wants to stimulate interest and alert the public to the owner's intent to list the property in the not too distant future. The confusion lies in what "coming soon" means; is the property not yet listed, or is it listed but not yet available to show? Either way, by planting a sign the broker has begun to market and promote the property, holding himself or herself and the company out to the public as being authorized agents of the seller. Accordingly, the company must first have a written agency agreement with the owner.

*A broker must **always** have a written brokerage (agency) agreement with an owner **before the broker may provide <u>any</u> brokerage services to an owner in any capacity***. In addition to the advertising rule (Rule A.0105) that requires written permission from an owner to display a For Sale or For Rent sign, the agency agreements and disclosure rule (*Rule A.0104*) applies and requires that

> "... Every agreement for brokerage services between a broker and an owner of the property to be the subject of a transaction must be in writing and signed by the parties from the time of its formation."

Thus, *regardless of the scope of the desired brokerage services, no services may be provided to or on behalf of an owner until the broker first has a **written brokerage agreement** specifying the services the broker is authorized to provide and the owner's obligations to the broker*. How limited or extensive the contracted brokerage services will be and what consideration is due the brokerage company is up to the parties to determine and state in their written brokerage agreement. To satisfy the agency rule, the written brokerage agreement must be signed by all owners and the broker and dated, and should identify:

- the individual broker both by name and license number,
- the name of the company with which the broker is affiliated,

- the names of all owners and the address/location of the subject property,
- a description of the brokerage services the owner authorizes the broker to perform,
- a definite termination date on which the agreement expires, and
- the non-discrimination language required by Rule A.0104(b).

If the brokerage agreement authorizes the broker to begin marketing or promoting the property before it is ready to be shown, then *the broker must disclose in the advertising/marketing materials that the property currently is unavailable to be shown and, preferably, the anticipated date it may be available for showing*. Brokerage companies who belong to cooperative listing services should be aware that the listing service most likely has its own rules concerning listings and the timeliness of property information submitted to it.

Recent *Real Estate Bulletin* Articles

Licensees are referred to two articles published in the *NC Real Estate Bulletin* in 2013. The first was in the May 2013 issue titled "New Brokerage 'Coming Soon'" and cautioned against negligent misrepresentation. The first article generated so many questions that a follow-up article titled "'Coming Soon' Revisited" appeared in the October 2013 edition of the *Bulletin*. The following questions and answers are excerpts from the October 2013 article. [Emphasis added.]

Q: I have a client who is ready to list, but needs to clean up the inside and make a few repairs. Can I list the property but not show it until it's ready, and can I place a "For Sale" sign in the yard with a "Coming Soon" sign rider to generate interest in the meantime?

A: Maybe. You must first enter into a written agency agreement with the owner that authorizes you to advertise the property. Once you have that, you can place a sign in the yard. If the property is not ready to be shown TO ANY potential buyers, you may attach a "Coming Soon" rider. Remember that your sign must comply with Rule A.0105 Advertising.

Q: My client wants me to list his home but he's not ready to sign a listing agreement yet. Can I advertise his property as "Coming Soon?"

A: Maybe. A broker is prohibited from advertising property belonging to another without first entering into a written brokerage agreement. The brokerage agreement must comply with the requirements of Rule A.0104, Agency Agreements and Disclosure, but the owner could limit the agreement to advertisement of the property as "Coming Soon" only. If that is the case, the *broker may place a "Coming Soon" sign in the yard but may **not** place a "For Sale" sign*, as the owner has not listed the property for sale. Under those circumstances, the *broker may not advertise or disclose a list price and may not show the property to **any** potential buyers*.

Q: My client wants to list now, but she doesn't want a lot of traffic in her home. I'd like to take the listing and place a "Coming Soon" sign, either as a rider to a "For Sale" sign or as an independent sign, in the yard, but not advertise the property in the multiple listing service and only show it to a few buyers I know are interested in that type of property. That way I can generate leads without opening her home to a lot of traffic.

A: No. Once the property is listed for sale it should be available for viewing by any interested buyers unless legally and specifically excluded by the seller. For example, a seller

may direct you to not advertise the property on a particular site or not to show the property to a specific person *as long as the basis of the denial is not discriminatory*. By limiting the market of potential buyers to those within a broker's firm or those with a business relationship to the broker or another broker, you may subject yourself to a claim of discrimination or even antitrust violations. In addition, you are likely doing a disservice to your seller client. Limiting potential buyers may also limit the potential selling price of the property. If you belong to a multiple listing service, you may be required to enter a new listing within a certain period of time. Post-dating a listing to avoid a problem with the MLS could be considered a misrepresentation. If you are a member of the North Carolina Association of REALTORS®, this type of conduct may constitute a violation of their Code of Ethics as well.

The October 2013 *Real Estate Bulletin* article quoted above concluded with the following caution:

> Remember, the goal is to sell the property under the most favorable terms for your client, not yourself. If you client isn't prepared to have buyers view the property, that means none, including your own or your buddy's. Please call the Regulatory Affairs Division at 919-875-3700 if you have further questions about this or any other topic.

Other Pre-Advertising

Following a similar track, a broker in Virginia using Facebook is attempting to organize regional networks of brokers who will market new listings only to other brokers who have joined the network *before* any broker places the property information in any MLS. According to a July 22, 2013 article in Inman News, the network concept was an expansion of the traditional Tuesday morning broker meeting where agents would exchange information about upcoming properties, but rather than sharing within one company, the sharing would be online with any broker who joins the network. The founder, Frank Llosa, sees it as "...a way for agents to generate buzz for a property, including showings and offers, before it's listed in the MLS." There are numerous websites available to brokers or owners who wish to advertise property online. Factors to consider in making these decisions will be discussed later in the Office Advertising Policies section.

In the network situation above, a broker clearly must have a written listing agreement with the owner and not just written permission to plant a "coming soon" sign, because the broker is advertising the property with the intent to solicit offers and engage in negotiations as the owner's authorized agent, just as if s/he had placed a "For Sale" sign in the yard. The property is officially being "marketed," just in an alternate forum. According to the Inman article, a recent study done by MLSListings, Inc. found that in some northern California markets "pocket listings" increased from 15% of total home sales in 2012 to 26% during the first quarter of 2013. The California Association of Realtors® apparently has issued a white paper on "the pros and cons of off-MLS listings." Those interested in reading the article titled "Agents Marketing Homes through Facebook Groups before MLS" might find it at www.inman.com.

Laws/Regulations Governing Content

State and federal fair housing laws and regulations clearly impact advertising content and what may and may not be said. However, these laws and regulations were discussed in Section One, Fair Housing, to keep related content together and that discussion will not be repeated here.

Federal Truth in Lending Laws

The federal Truth in Lending Act was originally enacted in 1968 and has been revised a couple of times in subsequent years, most notably in 1982 when the Act was simplified and Regulation Z was revised. The basic purpose of the Act is to provide consumers with full disclosure of the cost of credit, namely credit charges, which they may incur in certain "***consumer credit transactions***," i.e., those for a *personal, family or household purpose, where a finance charge is imposed or where repayment exceeds four installment payments*. ***Covered transactions include*** *personal consumer loans of $53,000 or less (as of 2013) and mortgages to individuals (regardless of amount) where the loan is not for a business, commercial, or agricultural purpose*. Purchase of residential property that will be primarily owner-occupied is covered, including both primary and secondary residences and vacation homes, but residential investment property that the purchaser intends to rent is considered a business purpose and would not be subject to Regulation Z.

While the Act itself applies primarily to lenders, Regulation Z governs ***any advertisement for consumer credit, regardless of who places the advertisement***, which is why brokers must be cognizant of its requirements. The relevant question is whether the advertisement promotes consumer credit. If it does, then the person or entity responsible for the ad must comply with Regulation Z. Enforcement of the Act lies with the Consumer Financial Protection Bureau (CFPB) that was created by the Dodd-Frank Act. The CFPB administers several regulations and the following laws: The Equal Employment Opportunity Act, the Fair Credit Reporting Act, the Truth in Lending Act, the Real Estate Settlement Procedures Act (RESPA), the Secure and Fair Enforcement for Mortgage Licensing Act (SAFE Act), and the Interstate Land Sales Full Disclosure Act .

Basically, when proofing advertising, be aware that *if any* ***numbers*** *are mentioned that relate to* ***financing costs or terms*** then it will trigger the requirement to *fully disclose all of the relevant financing terms in the same advertisement*. Numbers that will trigger full disclosure include:

- the amount of down payment (only $2000 down, or 5% down, or 95% financing), or
- monthly payment amounts (only $700 per month, or only $9 per $1000 borrowed), or
- the dollar amount of any finance charge (average interest less than $300 per month) or
- number of payments or period of repayment (e.g., 240 payments or 30 year mortgage)

The foregoing are all considered "trigger terms" which will require disclosure *in the same advertisement* of the following, namely:

- the amount or percentage of the down payment,
- the terms of loan repayment, and
- the annual percentage rate (using that term or "APR") and if adjustable, notice of same.

Note that **statements** that do not include any numbers generally are permissible and do not trigger disclosure of the other financing terms. Examples of permissible statements include: "no down payment," "low down payment," "low monthly payments," "long-term financing available," "low financing charges," or "no closing costs." Note as well that most of these statements don't really impart much information. How much is "low" or what time period is considered "long-term?"

APR Permissible

The only permissible financing number that may appear in an advertisement *without* triggering disclosure of all of the financing terms is the finance charges stated in terms of "annual percentage rate" or "APR," using either that term or the abbreviation. While the simple interest rate also may be included in the advertisement, it may be no larger than the font used to disclose the APR. (The APR virtually always will be higher than the simple interest rate because the debtor's costs to borrow the money is included in the calculation of the APR.) An advertisement may state just the annual percentage rate, using those specific words or the abbreviation (and *not* just the simple interest rate) *without* disclosing other financing terms that must be included if any of the other trigger terms are used.

Do Not Call and Do Not Fax

Federal and state "Do Not Call" rules apply to brokers whenever they attempt to promote their brokerage services via telephone. It is up to the owner of the real estate company to decide whether s/he will allow his/her affiliated agents to engage in "cold-calling," and if so, to train them well, as the company may be civilly liable for its agents' violations. *The office/company must check the national registry* ***at least once every 31 days*** *to update its lists* of individuals who have registered their residential or wireless telephone numbers and instruct their associated brokers to consult the list *before* telephoning any number to offer their services or otherwise solicit business. A company may access the registry via the Federal Trade Commission's website (www.ftc.gov) after obtaining an account number for the business. Lists for the first five area codes are free, with a current annual charge (Summer 2013) of roughly $58.00 for each area code after the first five.

General Rules & Record Requirements

Telephone solicitations not otherwise prohibited may be made only between 8:00 a.m. and 9:00 p.m. Any solicitor making a call must provide his/her name, identify the name of the company on whose behalf they are calling, and give either a telephone number or address where the consumer may contact the entity. A broker may telephone a consumer whose telephone number *is* registered only if s/he has *written permission* from the consumer or if the company has "*an established business relationship*" with the consumer, meaning that the company had an agency relationship with the consumer within the preceding 18 months or the consumer contacted the company to inquire about services within 3 months preceding the telephone solicitation.

The company must ensure that individual agents ***record the following information for each call****: the date, time, telephone number and name of the consumer contacted, the identity of the caller, copies of any script or publications used, and information about the caller, as the company must retain this information for 24 months from the date of the call*. The company should train its agents in the required protocol, which includes the caller identifying him/herself,

the purpose of the call and the nature of the goods or services being promoted at the outset of the call. **Penalties** for violating the federal Do Not Call regulations can be up to $11,000.00 per violation for interstate calls when the lawsuit is filed by the federal government and $500 per call if the lawsuit is brought by a state attorney general or by the consumer, with the possibility of treble damages if the violation is willful. Penalties under North Carolina law can be up to $500 for the first violation, $1000 for the second, and $5000 for the third violation or any others that occur within two years of the first violation.

Two new rules effective October 16, 2013 apply to *all* ***autodialed and prerecorded calls*** *and texts,* although it's doubtful that many brokers engage in such practices. Prerecorded or autodialed calls or texts must now have the express written consent of the number being contacted before calling or texting a cell phone or residential land-line. Additionally, the "established business relationship exception" has been eliminated as of October 16, 2013 for all autodialed and prerecorded texts and calls, which means such calls must always have the written consent of the consumer. If the call is manually dialed and doesn't contain a pre-recorded message, then it continues to be governed by the general Do Not Call rules discussed above.

For Sale by Owner

Be aware that the Federal Communications Commission has long held that "for sale by owner" and expired listings belonging to other companies are **not** excluded from the Act's provisions. In other words, brokers may **not** call persons attempting to sell their own property nor listings previously belonging to other companies if the individuals have registered their telephone number and if the purpose of the call is to solicit business. Brokers may call "for sale by owners" whose numbers appear on the do not call list to get information about the property, or arrange to preview the property, or if they have a prospective buyer who is interested in seeing the property, but not to solicit or offer their services as a broker to the owner. *A broker-in-charge should think carefully about allowing their associated brokers to call owners whose numbers are on the list, as it only takes one ill-advised sentence to violate the rule*, e.g., "Thank you very much, Mr. Owner, for sharing this information. I wish you the best of luck as you attempt to sell your house and if I can be of any assistance, please don't hesitate to call Wendy with XYZ Realty." Fine, until the final "and," at which point the balance of the sentence violates the legislation.

Do Not Fax

Recall too that since January 1, 2005, sending unsolicited advertisements to *any* fax machine, *business or residential*, is prohibited, including fax servers and personal computers. An unsolicited advertisement is "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission." There also is an "established business relationship" exception for this rule. Businesses may send unsolicited advertisements by facsimile to consumers and businesses with whom they have an *established business relationship*, but unlike the 18 month and 3 month time periods for the established business relationship exception for Do Not Call purposes, there do not appear to be any time limitations for the exception in the fax arena. However, the sender must include on the first page of the unsolicited fax both contact information and a Notice of how to "opt-out" of receiving future fax advertisements.

The business or entity sending any fax, or on whose behalf the fax is being sent, must identify itself on the first page of the fax or in the top or bottom margin of each page, must include a telephone number, and the date and time the fax is sent. ***Be aware*** *that the person on whose behalf the unsolicited advertisement is sent may be liable for any violations even if they did not physically send the fax themselves*. Further, while Federal laws usually prevail over conflicting State laws, in this instance the federal law expressly allows State law to be more restrictive than its federal counterpart. While North Carolina has enacted laws concerning telephone solicitations, there are no state laws at present regarding unsolicited facsimile transmissions. Fines under Federal law are $500 per fax, with treble damages for willful violations, and any recipient may file a private lawsuit alleging a violation.

CAN-SPAM

Brokers who promote their services by sending unsolicited emails to consumers generally must comply with the ***Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (CAN-SPAM)*** that became effective March 28, 2005. The Act applies to commercial electronic mail messages "...the primary purpose of which is the commercial advertisement or promotion of a commercial product or service." The Act does not apply to purely informational messages, such as newsletters without advertisements, nor are "transactional or relationship messages" subject to its requirements.

Within a brokerage context, a "transactional or relationship message" would be an email to a client concerning either a pending transaction or the broker's representation of the client. If an email contains both a relationship message and advertisements, then the regulations provide that it will be deemed "commercial" and thus subject to the Act's requirements if *either*: 1) the relationship message is not "in whole or substantial part" at the beginning of the email's content, or 2) the subject line creates a reasonable impression that the message is commercial. A similar test is applied to "*mixed message emails*," i.e., those having both commercial and non-commercial content. If the subject line would lead a reasonable person to conclude that it is commercial in nature or if the primary purpose of the email's content is to advertise or promote a commercial product or service, then the email will be subject to the CAN-SPAM regulations. The Federal Trade Commission refers to this *mixed message test* as the ***"net impression" standard.***

Emails that are subject to the CAN-SPAM regulations must include:

- an accurate and valid return email address *as well as* a physical postal address; and
- a clear and conspicuous notice of the recipient's *right to opt-out* of receiving future emails *and the ability to exercise that opt-out provision online within the email* that must remain active for at least 30 days after sending the email.

The emails can't have misleading subject lines; rather, the email must clearly indicate that it is an advertisement or solicitation of services and the email sender-initiator must honor any opt-out request from a recipient within ten (10) days of receipt. There is no right of private action under the CAN-SPAM Act; enforcement of the Act must be initiated by a federal agency or a state attorney general. Penalties are $250 per message, up to a maximum of $2 million, with treble damages for willful violations.

PRACTICAL APPLICATION

Most of the following examples are based on advertisements seen in the past two years and are provided for licensees to assess, discuss and determine whether the advertisements comply with all applicable laws and rules reviewed in this section.

Case 1

HOME FOR SALE 501 Main St, Anywhere, NC List: $105,000

100% Financing avail. Own for much less than rent. $620/mo, Taxes and Ins included. 1yr Home Warranty included. LIKE NEW. Completely remodeled and UPDATED, Move in Ready Split Bedroom Ranch with LOW County Taxes ONLY! Updated kitchen, master bath with dual sinks, NEW Ice cold AC, all new lighting & electrical devices, NEW patio, NEW laminate, carpet and vinyl flooring. Fresh paint throughout. Washer & dryer included.

Call Mary Jones, XYZ Realty, at 929-783-6294.

Issues?

Case 2

Fabulous 3 BR, 3B brick ranch, 2350SF; impeccably maintained; hardwoods throughout, except FR. 2 gas FP. Recent kitchen updates. Beautiful landscaping on 3/4A lot. Convenient to everything, yet secluded. City water/sewer. Will disappear at only $349,900. Just $1690/mo P&I.* Taxes = $2456/yr.

*based on 5% interest, 30 yr fixed, 5.35%APR.

Call Mary Jones, XYZ Realty, at 929-783-6294.

Issues?

Case 3

New contemporary uptown 3 BR, 2 B condo, 1730 SF. Great views of city; centrally located. 2 parking spaces included. Last sold for $387,200 in 2007. Bank owned. City/County taxes = $2960/yr. $5920 currently due for 2012 & 2013. Previously listed at $249,900; now priced to sell at $199,900. Owner financing available. 5.875% APR.

Call Mary Jones, XYZ Realty, at 929-783-6294.

Issues?

Case 4

12 unit apartment building for sale. Good location, convenient to shopping, schools, parks. City transit stop within ½ block. A steal at $1,750,000. Owner financing possible, 20 yr max term with minimum of 20% down payment.

Call Mary Jones at 929-783-6294.

Issues?

OFFICE ADVERTISING POLICIES

More than half of the real estate companies in North Carolina are one person shops, whether operating as a sole proprietorship or as an entity with a firm license. The owner of the company usually is also the broker-in-charge (and qualifying broker, if an entity) and often is the only broker associated with the company; some choose to allow a few other brokers to associate with the company, but typically less than 10. In either of the foregoing instances, the BIC-owner typically will formulate office policy and determine how s/he wants various matters handled. Where the BIC is the lone agent for the company, the office policy may be in the BIC's head, but the moment that BIC allows others to associate with him or her, the office policy should be put in writing.

Other brokers choose to work for large companies having, for example, 400 associated agents working out of ten different locations, and may agree to be the BIC at one location supervising 63 associated brokers, both non-provisional and provisional. In this situation, the BIC may have very little input in formulating office policy and deciding how various issues should be handled, but the BIC must be thoroughly familiar with and able to explain the company's office policies (that most certainly are in writing), as s/he bears responsibility for enforcing those policies at the location where s/he is a BIC. One of the myriad issues office policy should address is advertising — where, when, in what forums, by whom, etc.

Recall that the Company typically has the agency agreement with the consumer and thus is the primary agent of the client, extending its services through its associated agents who are representatives and agents of the Company and for whose behavior the Company may be civilly liable. Within the company/affiliated broker relationship, the Company is the principal and the brokers are the agents who owe the Company the same fiduciary duties that they owe their clients, namely: loyalty and obedience, skill, care & diligence, accounting, disclosure of all information, and confidentiality. Because the Company is the master (principal) and the affiliated agents are acting under the company's auspices with its attendant liability, the Company may create general policies as to how its affiliated brokers should conduct their brokerage activities on behalf of the company *without* jeopardizing the brokers' independent contractor status.

Advertising Considerations

One of the first decisions a company must make is whether it chooses to join a professional trade association and, if so, does it further choose to become a participant in a cooperative listing service? Most cooperative listing services are separately owned and participating in one cooperative service does not provide access to other cooperative services. Each cooperative service has its own rules governing its operation and participants' conduct. While there may be similarity among some of the rules, they are not necessarily uniform.

One section of the 2013-2014 *Real Estate Update Course* materials briefly discusses the role of syndication in advertising; the primary point of the *Update* materials is to alert licensees

to their need to understand their company's advertising policies and elections so they may adequately explain to owners the various advertising options available under company policy when seeking the owner's knowing and informed permission to advertise. Since these advertising choices often are determined by one person on behalf of the entire company, and because that person usually is the BIC, considerations specific to internet advertising and syndication were reserved for these materials and will be reviewed in greater detail after "General Advertising Decisions."

General Advertising Decisions

Company owners and/or the BIC or whoever formulates advertising policy for the company may want to consider the following factors when establishing the office's advertising policy.

Company Name? Does the Company want its name to appear in all advertising, signage and on the business cards of all licensees affiliated with the company? If so, then office policy should state that the company's name must also appear whenever an agent's name appears in any advertising, regardless of whether the associated broker is on provisional status. Absent such a policy, associated brokers not on provisional status would not be required by any rule to include the company's name in their advertising, even though they are conducting their brokerage under the company's umbrella.

Direct Submission of Ads? May associates draft their own advertising or property information and submit it directly to either a cooperative listing service or some other advertising forum? If permitted, doesn't this policy effectively eliminate any opportunity the BIC may have to review and proof the content of the submission? Since the Commission will hold the BIC accountable for ***all*** *advertising* done by any agent in his/her office, would it not behoove the BIC to implement some system to review content before it is released for public consumption?

Recall too that provisional brokers may not advertise without their broker-in-charge's consent. Provisional brokers also need more supervision because they have no experience and are just beginning to apply the various principles they learned in prelicensing. Brokers-in-charge are strongly urged to ***adopt a policy where all advertisements must be reviewed by someone other than the agent that prepared it***. The BIC may design different templates to be used in different media and associates merely fill in blanks, which would simplify the BIC's review. Alternatively, all proposed advertising could be channeled through one person, who preferably has strong language skills and possibly an editing background, who reads and corrects all content or discusses questionable content with the broker.

Permissible Forums? May associated brokers advertise anywhere they wish without prior notice to or approval of the BIC? This probably is not wise; a BIC may find his company's listings or his agents marketing their services on placemats, pens, refrigerator magnets, tee-shirts, their Facebook page, the church bulletin, and who knows where. BICs, in conjunction with the company owners, if they are not the owner, should decide what advertising forums the company and its agents may use to distribute property information. Any associate who wishes to promote

him or herself or any listing using some other means must first have the written permission of the BIC.

Cold Calling? Are any or all associates permitted to call consumers to offer their services, thereby subjecting the office to compliance with the Do Not Call laws, periodic checks of the Do Not Call registry, and maintenance of detailed records?

Broker Websites? Does the company permit associates to have their own individual website and receive IDX feeds? If so, must the company's name also appear on the agent's website? Does the company permit an associate to advertise the company's listings on an agent's personal Facebook page or other social media?

Syndication? Does the company submit its listings only to a cooperative listing service, if a member, or does it authorize its listings to be released to one or more syndicators selected by the Company? Is the BIC familiar with the individual policies of each syndicator authorized by the Company? Has the BIC thoroughly briefed his/her associates regarding the company's advertising choices and what the authorized syndicators will do with the information so the company's agents can adequately explain these choices to the company's clients to enable the clients to make an informed choice as to whether they wish to consent?

Internet Advertising and Syndication Considerations

As mentioned earlier, one of the first decisions a company must make is whether it wishes to join a professional trade association and, secondarily, whether it also chooses to participate in a cooperative listing service. These trade associations and cooperative listing services are completely separate and distinct from the Real Estate Commission, establish their own bylaws, rules and requirements, and are not subject to the Commission's jurisdiction. While each listing service typically is independent from the others, there are certain common threads among them including: the Company is the Participant, not the individual agents, but often all agents associated with the Company must also be subscribers. Generally one person within the company is the liaison with the listing service and determines the advertising options for the entire company. Any property information sent to the listing service automatically will be released to the preauthorized sites selected by the Company unless the individual agent submitting the information indicates that the seller wishes to opt-out of any internet advertising.

The BIC or person making these advertising selections on behalf of the company often has the option of limiting display of the property information to just the cooperative listing service, in which case it usually may be accessed only by other members, but not the public, as many of these cooperative services don't have a public facing website. However, many cooperative listing services have contracted with a real estate listing syndicator who in turn has affiliate partners to which the company may elect to release property information. Once an agent in the company submits property information to the listing service that service forwards the information to the authorized syndicator for further dissemination to those outlets or partners each participating company has selected. Realtor.com is another listing website. Some cooperative services have the option of allowing a company to authorize release directly to Realtor.com without involving other syndicators. Additionally, many cooperative listing

services allow its members to receive listing information submitted to the service by other members via Internet Data Exchange (IDX) feeds which information members may then display on their individual websites, subject to the rules of the cooperative service regarding IDX feeds.

Individual Websites

A company that chooses not to belong to a cooperative listing service may still be able to advertise its listings on the internet by establishing an account with each desired website, such as Zillow, Trulia, Yahoo Homes, AOL Real Estate, RealtyTrac, Homes, RealtyStore, among many, many others. To make an informed decision as to sites on which the company may allow information to be displayed, the broker-in-charge should *at least* review the terms of use of each site being considered, as all are not equal. A prudent broker might also request a list of that site's downline subscribers who may display the information, if such a list is not available on the website. If the BIC is not the person who determines the company's advertising policy, it still would behoove the BIC to *read the terms of use of each website* to which the company has authorized the release of information, *so the BIC is aware of and can explain to his/her associated brokers how their clients' property information may be used once internet release is authorized*.

The authorized website's terms of use may allow that website to do all sorts of things with the property information submitted. The BIC, the associated agents and the property owners should be aware of what those possibilities are. An example is the following excerpt taken verbatim from Zillow's Terms of Use as posted on its website as of May 2013 and reprinted here for ease of reference, even though included in the 2013-2014 Update Course materials as well. (Note: bold and italics added to highlight/emphasize, but not found in original.)

> 3. **Materials You Provide; Account Use; Privacy; Third Party Web Sites**. For materials you post or otherwise provide to Zillow in connection with the Services (your "Submission"), *you grant Zillow an irrevocable, perpetual, royalty-free worldwide license to (a)* use, copy, distribute, transmit, publicly display, publicly perform, reproduce, *edit, modify, prepare derivative works of or incorporate into other works*, and translate your Submission, in connection with the Services or in any other media, and *(b) sublicense these rights, to the maximum extent permitted by applicable law*. Zillow will not pay you for your Submission or to exercise any rights related to your Submission set forth in the preceding sentence. Zillow may remove or modify your Submission at any time. For each Submission, you agree to provide accurate and complete information and represent that you have all rights necessary to grant Zillow the rights in this paragraph and that the Submission complies with Section 2(a) above. You are solely responsible for all Submissions made through your Zillow user account or that you otherwise make available through the Services.
>
> Zillow will not use client contact information that is uploaded by agents into Zillow's Agent Hub portal for any purpose.
>
> You may not share your Zillow user account with others. You are responsible for all actions taken via your account. Zillow will treat your use of the Services in accordance with its Privacy Policy. Certain Zillow functionalities may involve the ***distribution of your Submission to third party Web sites over which Zillow has no control***. *Zillow is not responsible for and makes no warranties or representations pertaining to these third*

party Web sites, including but not limited to the content, availability, or functionality of such Web sites. ***You are responsible for ensuring that your Submission complies with the terms of use associated with any such third party Web site and you understand that your Submission and your use of a third party Web site will be treated in accordance with that third party Web site's own privacy policy***.

12. NO WARRANTY. ZILLOW PROVIDES THE SERVICES "AS IS," "WITH ALL FAULTS" AND "AS AVAILABLE," AND THE ENTIRE RISK AS TO SATISFACTORY QUALITY, PERFORMANCE, ACCURACY, AND EFFORT IS WITH YOU.

Zillow's Terms of Use apply to accounts opened directly with Zillow. For accounts governed solely by Zillow's terms of use the *company consents* not only to Zillow's terms of use, but also to the *terms of use of any third party website* that receives or collects the property information from Zillow's website/database. Zillow disclaims any control over such third party websites stating instead that ***the broker*** is responsible for the accuracy of the information on these unidentified third party websites. How does one monitor content on an unknown website? Note too that the *broker consents to* Zillow *altering the content of the information submitted* to it by the broker.

While each individual website will have its own terms of use, it would not be surprising to find similar language on other popular websites allowing the site to alter the content and/or further distribute the information in some manner.

Listing Syndicators

Whether a company gains any protection from each individual website's terms of use by employing a listing syndicator may depend on the syndicator selected and that syndicator's agreements with its partners. ListHub is one of several companies providing real estate listing syndication services. It is operated by Move, Inc. and claims to have over 450 Multiple Listing Services in its national network, including 22 MLSs in North Carolina, as of September/October 2013. According to ListHub, it will only accept property listing information directly from cooperative listing services or feeds from brokerage franchises supported by ListHub; thus, a company that doesn't participate in a cooperative service or isn't part of a supported franchise network will not be able to open an independent account with ListHub. Two other real estate listing syndicators are Point2Agent and Lead Galaxy.

If a company participates in a cooperative service, then it may have the option of authorizing transmission from the listing service to a listing syndicator if the cooperative service has established such a relationship. It is not recommended however that the company merely authorize the cooperative listing service to transmit information to a listing syndicator and authorize the syndicator to allow its partner sites to access the information without first reviewing all applicable terms of use. A full list of ListHub's publisher partners can be obtained at www.listhub.com and click on "Publisher List."

Alternatively, a company may decide to restrict release of its listing information to just three or four major websites, whether through an account with a listing syndicator or separate

accounts with each of the four separate websites. Each brokerage company must decide as a matter of policy whether it will engage in syndication and if so, what sites it will authorize. When a broker consents to send information to a chosen site, *the broker **generally** is consenting to **that site using the information according to that site's terms of use***. However, if a company has authorized the provision of information to individual websites through a listing syndicator, the company should investigate what, if any, safeguards the syndicator seeks to impose to protect the company's property information.

Syndication Safeguards?

One question is how the property information is provided from the syndicator to the individual websites authorized by the company. While "re-syndication" in lay terms may loosely mean distributing the information to sites other than the immediate recipient-site, there is more than one way to distribute that information. True "*resyndication*" in industry parlance apparently means that the initial recipient transmits the information from its database to another website's database where, presumably, it may be saved, altered, and distributed to others. Alternatively, the site receiving the information may "power" other sites. In the "*powered by*" method, the property information remains in the primary recipient's database and consumers searching on secondary sites may view the property information only as displayed on the primary site. The secondary sites don't have the information in their database and presumably have less ability to alter the information.

ListHub appears to use both methods of delivery. The property information feeds it receives from the listing service are in turn fed to the primary publisher partners chosen by the real estate company. Thus, the property information is within both ListHub's database and the primary publisher's database. However, the primary publishers are prohibited by contract with ListHub from re-syndicating the information; instead, the primary publishers are only authorized to allow their downline sites to access the information using the "powered by" method, so the property information remains on the primary publisher's database and is not transmitted to the secondary or tertiary site's database.

In addition to the delivery method, some listing syndicators have their own specific terms of use or contracts to which other websites must agree if they wish to be a primary recipient or publisher partner in the syndicator's network. One example is ListHub which informs the Commission that its *contracts with its primary publisher partners supersede the individual partner's terms of use*, thereby affording greater protection of the property data. Some of these contract provisions designed to protect the property data include the following:

- resyndication is prohibited, but "powering" other sites is permitted;
- listing data may only be used for consumer display;
- restrictions on use of the property data for derivative works or non-display uses;
- listing data may not be used once the property is off the market; and
- express reservation of intellectual property rights to the content owner.

Internet Advertising Factors

In determining company policy regarding what modes of internet advertising the company will permit in disseminating information about the company's listings, the person(s) making that decision might consider the issues discussed below.

1. If the company participates in a cooperative listing service, then use of the property data by other members will be regulated by the service's rules, including those participants/ subscribers who receive IDX feeds from the cooperative service. However, if the company authorizes the cooperative service to release that property information to other sites, those sites generally are free to use the information according to their respective terms of use, absent other contractual agreements. What method is used to disseminate the property information — resyndication? Powered by only? A combination of both?

2. A broker controls what data appears in the property information *only so long as it remains within a cooperative listing service.* The moment release is authorized to any site other than the cooperative service, then that site usually may alter, edit or otherwise redact the information presented according to that site's terms of use. Thus, it is important that the person establishing company advertising policy *research the contracts and/or terms of use of any syndicator or website to determine what protections, if any, are afforded and what the broker is agreeing to when selecting that site as an information recipient.* For example, ListHub states that its primary publisher partners are precluded by contract from changing any information as received from the cooperative service via ListHub in the core data fields, such as status, price, bedrooms, baths, etc.

   Nonetheless, complaints regarding altered property information appearing on various websites are not uncommon, particularly in the absence of contractual use limitations. *Why would the information be altered?* There are several possible reasons, such as:

   ● The recipient website may not have the same data fields as the provider site, so some of the original information may not appear. For example, one popular website has no field for half-baths, so even though the information originally submitted clearly discloses 3 full baths and 2 half-baths, this site will indicate the property has 3 baths with no mention of the half-baths (or 5 baths, without clarifying).

   ● Some sites will search public records, such as tax records and recent sales, and alter the property information to reflect a different square footage or, despite the listed sales or rental price, may interject the site's own "estimate of value" for the property, based on the site's review of information gathered from undisclosed sources.

   ● Some sites will invite public comments and provide a field where others may insert their remarks about the property, whatever they may be.

3. How frequently do the selected websites receive and update the property information and how quickly does revised information appear in the property information on that site? Be

aware that some sites will not remove the property from the "active" category even after notification that it has sold, as volume of listings impacts the site's allure to consumers. For example, in the Florida fair housing case discussed at the end of Section One, the subject property sold in August **2012**, but as of ***March 13, 2013*** (*7 months later*!) the property information, including the offending phrase, was still listed on Realtor.com as "Active with Contract." Are timeliness issues addressed in either the syndicator's or website's contracts/terms of use?

4. Does the property information displayed still name the listing company, agent and contact information? On several major websites, when a consumer clicks on the property, *there will be no reference to the listing company*; instead, the names and contact information for 2-4 brokers will appear who may not be affiliated with the listing company at all; rather, the small print above the broker information states that the listed brokers would be happy to act as *buyer agents* for the consumer. Consumers may not understand this subtlety and might easily get the impression that the depicted brokers are either the listing agent or at least affiliated with the listing company. Thus, the broker should discover whether the terms of use of a given website require the listing broker's information to be displayed?

The surest way a broker (and thus the owner-client) may retain control over the advertised property information is to decline any internet advertising, but obviously that will limit the property's exposure. Another option might be to allow display of the property information, but to omit the property address on any internet advertising. Some systems will allow "Feature Opt-outs" where an owner can indicate refusal of any website that applies an automated estimate of value or allows public comments. While these opt-outs are not necessarily binding on third-party websites, those websites that insert estimates of value or allow public comments often will reject and refuse to post a listing that contains such restrictions.

Some commentators suggest that these opt-out features may create a false sense of security or control in the broker or owner that is in fact illusory. As noted in an August 13, 2013 article "Sellers Can't Control What Is Said on the Internet" by Bob Hunt appearing in the *Realty Times*: "Better that we clearly and explicitly tell our sellers that, once their listing goes electronic, we simply cannot guarantee any control over where it goes or how it is used."

BROKER RESPONSIBILITIES

Brokers clearly are responsible for all information that they prepare and submit to any advertising medium. They further have a duty to promptly update the property information as it changes, whether due to newly discovered information or a change in the status of the listing, at least in any forum/medium in which the broker directly placed the information.

A broker who seeks an owner-client's permission to publish property information on the internet should fully disclose the various options available to the client based on the company's advertising policies. If the company is a participant in a cooperative listing service, then the

broker should explain that entering the property information only into the cooperative service will permit access only by member brokers and that the general public will *not* be able to find or view the property information online unless release is authorized to at least one website, even though the property may be promoted in print materials or other media. This limited exposure will likely affect the marketability of the property.

A broker-in-charge should review the Terms of Use of any and all websites to which s/he authorizes the direct release of property information to learn what that site will do with the information and, if possible, discover: how many additional websites to which that site will release the property information and by which method, how frequently the chosen site updates its property information and feeds the update to its subscribers, whether the site will remove the property from active listings once the property is sold, and to what extent the site typically alters the information submitted. If the company uses a listing syndicator, the broker-in-charge should review the syndicator's policies, discover how the property information will be provided to other sites (resyndicated or powered by) and what if any restrictions the syndicator imposes by contract or otherwise on sites receiving the property information.

All of this information should be relayed to the firm's broker-associates so they in turn may explain the company's internet advertising policies to owners, so the owner-principal may make an informed decision. It is also ***strongly recommended*** that *if a company chooses to allow property information to be sent to a website that allows public comment by others and/or that interjects its own opinion of value, that the broker specifically mention these aspects to the owner and confirm the owner's consent to that website receiving the owner's property information*. If the owner doesn't want insertion of value estimates or others' comments, then one can try to opt-out of those features, understanding that it may or may not be successful.

Both the licensee preparing the advertising content and the BIC will be responsible for the property information directly provided to authorized sites or other advertising media. Additionally, brokers must provide enough information to a seller-owner for the owner to make an informed choice about where and how the property should be advertised. The Commission will examine each case based on its particular facts and surrounding circumstances. Factors influencing that assessment might include:

- to what extent the broker-in-charge/broker investigated the website or syndicator and its practices,
- the criteria or rationale underlying the company's office policy in choosing various websites over others,
- the broker's attempts to monitor the accuracy of the information wherever published,
- the significance of any incorrect information advertised,
- whether the information appears on a site chosen by the broker or redistributed to another site (the more remote the site, the less responsibility the broker bears),
- the ease or difficulty in correcting any false information and the reasonableness of the broker's efforts to do so, and, of course,
- the extent to which the broker advised his/her owner-client of the benefits and consequences of internet advertising in seeking the owner's consent.

If a company repeatedly experiences problems with a particular website, the company should seriously consider withdrawing permission for information to be released to the originating website.

In sum, brokers-in-charge should periodically conduct refresher training sessions in the dos and don'ts of advertising and attempt to stay abreast of recent developments, particularly within the financing/TILA/Regulation Z arena and fair housing, and share these developments with their associates. They should also have *written office policies* regarding approved advertising/marketing options. If the broker-in-charge is not a detail-oriented person, then s/he should seriously consider delegating review of all advertising/promotional materials to an individual well trained in both Truth in Lending and fair housing laws and regulations, who ideally has a background in journalism or editing. A BIC may also consider purchasing a software program that will flag suspect statements or terms. While the BIC may allow someone or something else to review all draft advertising, it does not alter the bottom line, namely: ***the BIC remains responsible for all advertising emanating from his/her office***.

Answers to Practical Application Examples

Case 1: Violated TILA/Regulation Z. The broker, with the best of intentions, merely wished to emphasize the point that a purchaser would pay less for the monthly mortgage than s/he would pay in rent. However, how can one calculate the monthly P&I payment unless one knows the interest rate, the term of the loan, and the amount of the down payment? Further. the "100% owner financing" statement also would have triggered disclosure of all the material loan terms. "Owner financing available" would have been acceptable.

Case 2: Almost perfect, but there is one critical bit of information missing which renders this ad a violation of TILA, namely, the amount of the down payment. The stated monthly P&I is based on a 10% down payment.

Case 3: This ad contains no violations. Yes, there are lots of numbers in the ad, but they state facts unrelated to financing. The statement that owner financing is available is perfectly acceptable and the only number that relates to financing is the APR stated as such which is permitted.

Case 4: TILA does not apply to this ad because it relates to commercial property. Remember, TILA only applies to mortgages where the loan is not for business, commercial or agricultural purposes. However, there is one violation in this ad. What is it??

Mary violated Commission Rule A.0105(b) by failing to identify herself as a broker. If Mary is a provisional broker, then the company's name or her BIC's name must also appear in the ad. If Mary is a broker not on provisional status, then she may not be required to include the company's name, depending on office policy, but she should have included the word "Broker" after her name to alert the public that it was contacting a licensee and not the owner of the property.