

**2009-2010 UPDATE COURSE**  
**2007-2008 BROKER-IN-CHARGE COURSE**

# AGENCY DISCLOSURE & AGREEMENT REQUIREMENTS

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[Editor’s Note: The first section discussing agency disclosure obligations is a reprint of Section One from the 2009-2010 Real Estate Update Course. The later discussion of *written* agency agreements is a reprint of a portion of the 2007-2008 Broker-in-Charge Annual Review course materials.]

## INTRODUCTION

This section will review the agency disclosure mandate contained in **Rule A.0104, Agency Agreements and Disclosure**. Even though the rule has expressly required agency disclosure since 1995 (and the common law of agency long before that), far too many licensees still fail to comply with the requirements of Commission Rule A.0104, for whatever reasons, whether choice, ignorance, laziness, lack of understanding, inconvenience ... whatever. Licensees should realize, however, that they are subject to disciplinary action if they fail to timely satisfy the requirements of the agency disclosure and agreements rule. [Brokers-in-charge should recall that pursuant to Rule A.0110(a)(7), they are responsible for supervising “... *all licensees* employed at the office for which he or she is broker-in-charge *with respect to adherence to agency agreement and disclosure requirements.*”] While brokers-in-charge are responsible for supervising their associated agents’ compliance with the rule, this compliance

oversight does not in any way diminish each individual broker's responsibility to conduct his/her brokerage activities in accordance with the dictates of the law, as supplemented by Rule A.0104.

What most licensees fail to understand is that *these required agency disclosures are designed not only to protect the public, but licensees as well*. Engaging in unauthorized or undisclosed agency, particularly dual agency, may not only give rise to disciplinary action against the agent, the broker-in-charge and the company, but may also result in civil liability and monetary damages against the company.

These materials begin with a brief overview of agency principles under the common law of agency, as well as pursuant to statute or rule. Thereafter, the disclosure requirements of Rule A.0104 will be dissected and compliance discussed by applying the rule to various fact situations. *Agency is not as complex as people want to make it!* These materials attempt to demystify and simplify the agency disclosure aspects of the rule to assist brokers in complying with the Commission's agency rule and to provide education and training for those who do not understand. These materials will *not* explore the rule's requirements as to written agency agreements.

## BACKGROUND TO AGENCY PRINCIPLES

### “Common Law”

The concept of agency, namely, a principal who authorizes someone else, known as an agent, to conduct certain business on behalf of the principal and thereby bind the principal, dates back to the early days of England. The resulting law which evolved over time is known as the “*common law of agency*.” The common law is the source of the *fiduciary duties* an agent owes his or her principal, namely:

- 1) loyalty and obedience;
- 2) accounting;
- 3) disclosure of information;
- 4) skill, care and diligence; and
- 5) confidentiality (which may be subsumed under “loyalty”).

Under the common law, agency relationships could be express or implied from conduct, oral or written. An agent may only operate within the parameters of the authority conveyed by his or her principal, which might be very broad or very specific. Generally, a principal is not bound if an agent acts beyond the scope of his or her authority, unless the principal either ratifies the agent's act or it reasonably appeared to the innocent third party that the agent had the authority to do what he or she was doing.

Within the real estate brokerage arena, the prevailing custom for numerous decades was to view all real estate agents as agents of the seller. This view probably arose in part because it was the property owner who had the “thing,” i.e., the real property, to lease or sell and the property owner generally paid the agents who brokered the deal. Thus, all agents were “presumed” to be agents of the seller and the agent owed his/her fiduciary duties to the seller, *even if the agent never met the seller*.

One flaw with the system which had evolved was that buyers frequently were not aware that the brokers working with them did not represent their (the buyer's) interests. Rather, the agent represented the seller's interests and any information the buyer shared with the broker would or should be revealed to the seller. Another flaw was that many agents working with buyers as a seller's subagent in reality would tend to represent the buyer's interests to the detriment of their principal, the seller. As a result of these problems, revealed in a study by the Federal Trade Commission, the *concepts of mandatory disclosure of agency status and buyer agency sprouted* – the latter being agents who would represent the buyer and owe their fiduciary duties to the buyer, even though such buyer agents typically continued to be paid by the listing broker. Significant problems arose, however, when a buyer became interested in a listing held by the company which represented the buyer. These problems were illustrated in a case out of Minnesota which generated much discussion across the country.

***Dismuke, et. al. v. Edina Realty*** (1993 WL 327771)

In this 1993 case, a group of residential property owners who had entered into exclusive listing contracts with Edina Realty to market their homes sued the real estate company for breaching its fiduciary duties to the sellers by purporting to represent the buyers as a buyer agent in the transactions involving the sale of the property owners' homes, *without the informed knowledge and consent* of the sellers regarding the resulting dual agency. The real estate company argued that it had complied with the agency disclosure required by statute. Applicable Minnesota law at the time provided:

**§82.19 Prohibitions**

**(5) Disclosure regarding representation of parties.** (a) No person licensed pursuant to this chapter or who otherwise acts as a real estate broker ... shall represent any party or parties to a real estate transaction ... unless that person makes an affirmative written disclosure to all parties ... as to which party that person represents in the transaction. The disclosure shall be printed in at least 6-point bold type on the purchase agreement and acknowledged by separate signatures of the buyer and seller.

Edina Realty's form agency disclosure read:

**AGENCY DISCLOSURE:** Selling Agent STIPULATES HE OR SHE IS REPRESENTING THE \_\_\_\_\_ IN THIS TRANSACTION. THE LISTING AGENT OR BROKER STIPULATES HE OR SHE IS REPRESENTING THE SELLER IN THIS TRANSACTION. BUYER & SELLER INITIAL.

Buyers(s): \_\_\_\_\_ Seller(s): \_\_\_\_\_

The problem, of course, was that the disclosure did not address dual agency. No explanation was given to the sellers or buyers represented by the Company nor was the parties' consent or authorization obtained beyond the curt statement set forth above. The Court ruled that *while the above "Agency Disclosure" might satisfy the statutory standard, "...it cannot be characterized as either a full or adequate disclosure of all the facts under the common law."*

Accordingly, Edina was held to have violated its fiduciary obligations, particularly loyalty, to the plaintiffs as a matter of law. The Court noted:

*... the common law duty of a fiduciary to disclose to its principal all facts concerning a dual agency is clear:*

An inflexible rule of law declares that an agent vested with discretionary authority cannot represent two parties having conflicting interests without the principal's prior consent or subsequent ratification after full disclosure of all the facts. The underlying reason for the rule is the public policy to prevent fraudulent conduct." (Cites omitted.) [Italics added.]

The Court also cited precedent which held that *the principal need not show any actual injury or intentional fraud in order to prevail in a civil action against the undisclosed dual agent*. The only defense which will defeat the principal's claim of breach of fiduciary duty is proof either of the principal's prior consent or subsequent ratification of the acts after full disclosure of all facts.

As all parties acknowledged • that Edina Realty had in fact represented both the buyers and sellers in multiple transactions, • that the only agency disclosure which had been given was the one set forth above which failed to address dual agency (and thus did not satisfy the standard imposed by common law), and • because the law did not require the plaintiffs to show actual injury or intentional fraud, there was no factual issue to present to a jury; rather, plaintiffs were entitled to judgment "as a matter of law" that Edina Realty had breached its fiduciary duties by acting as an undisclosed dual agent. The Company ultimately entered into a *settlement* following a jury award under which the Company agreed to pay *nineteen million dollars* to its former clients as refunds of the commissions charged them.

This case provided a wake-up call to most licensees across the country, who realized that they were all vulnerable to the same accusation. It was about this time that the North Carolina Real Estate Commission revised its agency rule to require licensees to provide specific agency disclosures in writing to buyers and sellers at "first substantial contact" in an effort to inform and protect the public, as well as to help North Carolina licensees avoid the type of liability Edina Realty incurred for practicing undisclosed dual agency.

## **HISTORY OF RULE A.0104**

Commission Rule A.0104 came into being **February, 1976**, and was readopted September 30, 1977. At that time it read:

### **A.0104 Listing Contracts**

Every written listing contract shall provide for its existence for a definite period of time and for its termination without prior notice at the expiration of that period. It shall not require an owner to notify a broker of his intention to terminate the listing.

It remained *unchanged until July 1, 1989* when it was amended to add paragraph (b) requiring every listing contract to state that the listed property would be offered “... to all buyers, without respect to their race, color, religion, sex, national origin, handicap, or familial status.”

Another four years passed before the Rule was again amended effective *July 1, 1993*. These amendments for the first time mentioned written *buyer brokerage* contracts which, like listing contracts, were required to state a definite termination date and the non-discrimination language in paragraph (b) was expanded to include all brokerage services rendered by the broker pursuant to the listing contract or buyer brokerage contract.

### **January 1, 1995**

It was not until January 1, 1995, post *Edina Realty*, that Rule A.0104 was substantially revised to resemble more closely its current form. The title of the rule was changed from “Listing and Buyer Brokerage Contracts” to “Agency Contracts and Disclosure” to reflect its much broader application, and paragraphs (c) through (f) were added. For the **first time**, the Rule now dictated “*Every listing contract, buyer agency contract or other contract for brokerage services in a real estate sales transaction shall be in writing.*” Other newly added requirements included:

- Paragraph (c): All agreements for brokerage services in a real estate sales transaction must include a “***Description of Agent Duties and Relationships***” prescribed by the Commission, the text of which could not be changed by licensees. Immediately following the Description, the agreement was to contain a box which could be checked when applicable stating: “ **CAUTION:** This firm represents both sellers and buyers. This means that it is possible that a buyer we represent will want to purchase a property owned by a seller we represent. When that occurs, the agent and firm listed above will act as **dual agents** if all parties agree.” A copy of the original “Description of Agent Duties” is reprinted on the following pages.
- Paragraph (d): No individual or company could undertake to represent more than one party in a transaction without the *express written authority* of each party.
- Paragraph (e): A licensee working with a buyer as a *seller’s agent* or subagent must disclose his/her agency status *in writing* at the first substantial contact with the buyer, informing the buyer that the licensee represents only the seller’s interest, and must give the buyer a “Disclosure to Buyer from Seller’s Agent or Subagent” form issued by the Commission.
- Paragraph (f): A licensee acting as a *buyer agent* must *orally* notify the seller or his/her agent at initial contact that the licensee represents the buyer and must confirm this agency relationship in writing no later than the submission of an offer.

Thus, as of **January 1, 1995**, licensees were required for the first time:

- 1) to give prospective buyers or sellers a *written document* which attempted to *explain agency concepts* of principal and agent and resulting fiduciary duties at their “first substantial contact” with the buyer or seller,  
and
- 2) to obtain a *written agency agreement* with the seller or buyer *at the outset of the relationship*.

For the first time the rule also acknowledged the possibility of *dual agency*, which was permitted only with the *written agreement* of both parties.

Additional rule revisions during the summer of 1996 added language to (e) addressing agency disclosure requirements where first substantial contact occurs by telephone or electronically, and also added paragraphs (g) and (h) regarding agency disclosures, notices, and agreements in auction sale situations. 1997 saw the addition of paragraphs (i) through (n) which address the practice of dual agency and designated agency.

### **July 1, 2001**

The next major revisions to the rule occurred effective July 1, 2001, and produced a version of the rule very similar to the current rule. These changes:

- required all listing agreements to be in writing from the formation of the principal-agent relationship;
- allowed an agent to work with a buyer under an oral buyer agency agreement which must be reduced to writing not later than presentation of an offer;
- deleted the former “Description of Agent Duties and Relationships” which was to be included as part of every listing or buyer brokerage agreement and replaced it with a mandatory disclosure brochure entitled “*Working with Real Estate Agents*”;
- provided that written authority for dual agency must be obtained at the outset in most situations, but at the latest, prior to presentment of any offer.

Current Rule A.0104 shares much in common with its July, 2001 predecessor, although relatively minor revisions were made effective September 1, 2002, April 1, 2004, July 1, 2004, July 1, 2005, April 1, 2006, July 1, 2008, and July 1, 2009. It now requires, among other things, that ***all agency agreements be in writing*** and specifies when that must occur. Rule A.0104 as it exists as of July 1, 2009 is reprinted at the end of this Section.

Rule A.0104 governs two separate, but related, issues: agency ***disclosure*** and agency ***agreements***. The purpose of the disclosure requirement is to explain the various agency options available to a consumer (even if the particular company or agent does not practice all the options), to allow the consumer to make an *informed decision* – to knowingly consent to and authorize some form of principal-agent relationship or to knowingly decline to form such a relationship and remain a “customer” at arm’s length, entitled to fairness and honesty and

disclosure of material facts, but not loyalty, disclosure, obedience, accounting, confidentiality, or skill care and diligence.

## MANDATED AGENCY DISCLOSURES UNDER RULE A.0104

Disclosure requirements are intended to educate consumers concerning any choices they may have in a situation and to facilitate *informed decision-making* by the consumer. **Rule A.0104(c)** addresses the initial disclosure requirements and is supplemented by paragraphs (e) and (f) which also require certain disclosures *once an agency arrangement has been determined*. However, the initial disclosure mandate is found in **A.0104(c)** which states:

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

What does the foregoing rule require of licensees? Its main points are summarized below.

- Licensees must both provide *and review* the “Working with Real Estate Agents” brochure with *all buyers and sellers at first substantial contact*, i.e., in all *sales* transactions.
- The broker and consumer must then decide whether and in what capacity the broker and consumer will work with each other, e.g., buyer agent, seller agent, dual agent.
- If first substantial contact is not in person, then the broker should orally advise the consumer of his/her agency options and caution him/her not to disclose confidential information until the broker and consumer determine how the broker will work with the consumer. The broker must mail or otherwise transmit the “Working with Real Estate Agents” brochure to the consumer *within three days of the contact* and must then *review it* with the consumer as soon as possible thereafter and determine whether and in what capacity the broker will work with the consumer.
- The rule defines “*first substantial contact*.”

## Why “Mirandize” Both Sellers and Buyers?

Rather than viewing agency as some complex, mysterious concept created just to impede and frustrate licensees in their true life’s work (namely, getting paid to help others buy, rent, lease, sell or exchange real property), licensees simply should view agency disclosure as a type of real estate “*Miranda* warning.” It is designed to alert consumers that “anything you say may be used against you” until such time as the consumer chooses whether and how to work with the broker. *It warns the consumer not to reveal any confidential information until it is decided whether the broker will work for that consumer, thereby protecting the information, or whether the broker represents the other side and thus must reveal anything the consumer may share to the broker’s principal.*

Brokers must understand that **whenever they are acting as an agent, by definition, they must have a principal somewhere.** If the consumer does not want to hire the broker as his/her agent, then the broker must be authorized to act as the agent for the other party, and if that party refuses to hire the broker, then the broker cannot function in that transaction, as the broker has no principal. The disclosure brochure attempts to make consumers aware of both the choices, and the consequences of their choices.

Some may view the agency disclosure as relevant primarily for buyers, as they have a choice and may work with an agent as a seller’s agent or as a buyer’s agent. But why sellers? Do they really have a choice? Yes – to hire or not to hire an agent or company. Agency disclosure and review of the “Working with Real Estate Agents” brochure should occur no later than the listing presentation, if first substantial contact has not previously occurred. Sellers have the same right as buyers to know that nothing they say is confidential until they hire an agent.

A seller who interviews three different real estate companies and reveals information to each concerning his motivation for selling and the minimum price he will accept, has just published information to two different real estate companies he presumably will not hire. The agents of the two companies which never established an agency relationship with the seller now will be obligated when acting as buyer agents to share with any buyer clients who might be interested in that seller’s property any information they may have about the seller or the property.

*What sellers and buyers choose to reveal is up to them, so long as they have first been **timely warned** of the broker’s allegiance and whether information will be held in confidence.*

## “First Substantial Contact”

According to the rule, “*first substantial contact*” occurs when either the consumer or the licensee begins to act as if an agency relationship exists or when the consumer begins to disclose personal or confidential information to the licensee. *The rule requires licensees not only to give the disclosure brochure, but to **explain it as well.*** How long this may take may be influenced by several factors, including whether the consumer has previously bought, sold or exchanged real property and where, the consumer’s experience and sophistication in real estate transactions,

his/her educational background, his/her contact with other agents, and whether those agents fulfilled their obligations imposed by this rule.

The rule also recognizes that *first substantial contact may occur before the broker actually meets the consumer*, as is frequently the case when a real estate company or broker is contacted by an out-of-town buyer who wishes to purchase property in North Carolina and who is trying to arrange to see various properties while s/he is in North Carolina over a long weekend. To adequately assess the prospective buyer's needs and desires, the broker may need to learn not only the general property characteristics or features desired, which is not necessarily personal information, but also what price range the individual seeks, whether s/he has property s/he first must sell, the individual's income level and his/her ability to obtain financing, all of which *is* personal and confidential. *A broker may receive general information about a consumer's needs and wants in a property, but should not ask questions which may begin to elicit more personal information without first providing the mandatory agency disclosure.*

**Query: The Commission's "Working with Real Estate Agents" is a mandatory disclosure brochure. Must it be given in all brokerage transactions at first substantial contact?**

*No.* It is a mandatory disclosure brochure which must be given in all *sales transactions*. The rule does *not require* that the "Working with Real Estate Agents" disclosure be given in *lease transactions*, although a licensee may use the brochure/text to explain agency concepts to property owners or tenants prior to entering into the required written agency agreement if s/he chooses.

**Query: Does the "Working with Real Estate Agents" brochure apply to commercial sales transactions?**

*Yes.* The rule says "all sales transactions." All means ALL, whether commercial or residential SALES, the *disclosure must be given at first substantial contact with all prospective buyers and sellers.*

**Query: May a licensee change the text of the "Working with Real Estate Agents" brochure?**

*No!* A licensee may elect not to buy the glossy publication which the Commission offers for sale, and may instead download the text and give the disclosure on regular sheets of paper. *However, the licensee may not delete or otherwise alter any language contained in the text of the brochure itself.* A licensee may personalize the disclosure by adding the name, address and telephone number of his/her company.

### **"Personal" First Substantial Contact**

A consumer enters a real estate office, walks up to the front desk, and states that s/he wants to see the company's listing on 123 Elm Street. The receptionist calls a broker who comes out into the lobby, has a brief conversation with the individual, and then takes the individual in the broker's car to see the property on Elm Street, talking all the while about the features of the

house they are about to see, what the buyer is looking for, where the buyer is from, why s/he is moving, the price range and upper limits the buyer can afford, whether the buyer already has loan approval, etc. Is this appropriate? Is the broker acting as a seller agent or as a buyer (and thus dual) agent? Good question. Has that been determined? NO.

*A broker should never put a customer in his/her car or show a customer a property without first having provided and briefly reviewed the “Working with Real Estate Agents” brochure. The latest possible point in time when first substantial contact occurs is when a prospective buyer is shown a listed property.* The customer must *minimally* understand that there is no confidentiality and that s/he should be careful what s/he says to the broker, as the broker may be obligated to share any information with the seller. Having given the *Miranda* warning and reviewed the brochure, the customer and agent must then decide whether the agent will function as a seller agent, as a buyer agent, or possibly as a dual agent *before* the agent shows the consumer the property.

### **Practical Application**

The first question a broker should ask when contacted by a prospective buyer is: does our company have the listing? If yes, then the next question is: has the seller authorized dual agency? If the seller has *not* authorized dual agency, then the broker can only act as a seller agent when showing that property and must make it abundantly clear to the buyer that the company represents *only* the seller and that any information the buyer reveals to the broker must be shared with the seller-client.

If the seller *has* authorized dual agency, then the explanation may take longer if the prospective buyer is being offered a choice as to representation, as the buyer needs to understand the three agency choices: seller agency, buyer agency, dual agency, before s/he can make a knowing, informed decision.

If the Company does *not* have the listing, then why is that prospective buyer contacting this particular company/broker? Perhaps they just scrolled through a list of names of brokers and randomly picked one. More likely, the prospective buyer, or someone they know, had previous dealings with that broker. In either event, before the broker begins to gather information about the prospective buyer and show him/her various properties, the broker first must provide and review the *Working with Real Estate Agents* brochure with the prospect and determine whether the broker will work with the prospect as a seller subagent or as a buyer agent and, if the latter, whether dual agency is authorized. Brokers must understand that:

- if the consumer chooses buyer agency, but does *not* authorize dual agency, then ***the broker may not show that buyer any of the company’s listings.***
- if the consumer declines buyer agency, then the broker may only function as a seller (sub)agent; accordingly, the broker could only show that buyer properties listed with his/her real estate company or properties listed with other companies on which seller subagency is offered. If subagency is not offered, the property can not be shown by that broker.

**Query: Must a broker who is hosting an open house give the “Working with Real Estate Agents” brochure to every person who walks through the front door?**

No; the trigger remains first substantial contact. Many visitors are merely curious or looking for decorating ideas and are not really interested in purchasing. Others may be more serious and may ask generic questions such as square footage, number of rooms, the applicable school districts and list price, without crossing the first substantial contact line. However, if the conversation turns towards specifics, such as the amount of down payment, financing terms, upgrades or changes, etc., then the broker should stop the discussion and first address agency issues before proceeding to discuss the property. If the seller has not authorized dual agency, the on-site agent’s disclosure is simplified, as the broker can not work as a buyer/dual agent, but rather only as a seller’s agent. The broker should give the potential buyer the “Working with Real Estate Agents” brochure and explain that the broker owes the buyer the duty to reveal material facts, and to act honestly and fairly, but that the broker’s allegiance is to the seller and nothing the buyer tells the broker is confidential. If the buyer wants representation, s/he should hire a buyer agent. The on-site agent should complete the “Working with Real Estate Agents” signature panel, check the seller agency box at the bottom, and ask the buyer to acknowledge the disclosure by initialing.

**Query: What if a prospective buyer telephones the listing company while sitting in front of the property s/he wishes to see and asks if someone could allow him/her access?**

If a broker meets a buyer for the first time at the property itself, then upon arriving, the broker should ask whether the buyer is working with any agent and should give the prospective buyer the “Working with Real Estate Agents” brochure. The broker should explain that the buyer may have options in deciding how to work with a broker, but that for present purposes the broker represents only the seller and the buyer should act as though s/he was talking directly to the seller, as any information provided by the buyer to the broker will be shared with the seller. The broker should then ask the buyer to initial the notice to buyer from seller’s agent at the bottom of the signature panel to evidence their discussion and may then show the buyer the property. (Whether it is prudent from a safety aspect for a broker to meet a customer s/he has never met at a property with no prior screening should be addressed in the company’s office policy manual.)

### **First Substantial Contact by Telephone, Email, Other Electronic Means**

Any licensee who frequently interacts with out-of-town purchasers, whether in a commercial or residential sales transaction, must address the issue of how to provide the required disclosure *before* obtaining any confidential information about the consumer. For offices with affiliated brokers, the desired procedure should be part of the written office policies.

**NOTE:** Where first substantial contact occurs by telephone or other electronic means, the rule requires that the “Working with Real Estate Agents” brochure be sent to the consumer *within three days* of the first substantial contact. The rule does not say “three business days;” thus, “three days” means three *calendar* days with no exclusion for holidays or weekends.

**EXAMPLE 1:** A broker receives a telephone call from someone in Colorado who requests that the broker send him/her information regarding available properties in a particular city having 2000-2500 square feet, 4 bedrooms, at least 2.5 baths and not exceeding \$350,000 in price.

**Query: May the broker send the requested information without first orally explaining, or at least summarizing, agency concepts during the call?**

Yes, *so long as no personal or confidential information is sought or given.* The broker may obtain the caller's email address or fax number or mailing address and send the requested information.

**Query: Must the broker include the "Working with Real Estate Agents" brochure with the materials s/he sends the caller?**

In this scenario, first substantial contact has not yet occurred, so the broker would not be *required* to include the "Working with Real Estate Agents" brochure. However, is the broker not hoping that this caller may contact him/her again to discuss the available properties? Will the broker not need to cross this bridge at some point? Thus, why not include the brochure text in the materials provided to the caller, whether by mail or email or fax, just to make the caller aware of how brokerage is done in North Carolina and refer him/her to the Commission's website if s/he has any questions. Then when the caller again contacts the broker, the broker can review the "Working with Real Estate Agents" text, answer any questions, and proceed to determine how the consumer wishes to work with the broker. The broker also should make sure to obtain a signed copy of the signature panel from the prospective purchaser (or seller) for the broker's records/file to show his/her compliance with the rule.

**EXAMPLE 2:** A broker receives an email from someone in New York stating that the sender recently sold some property in Manhattan, that they have \$1.5 million they are looking to invest, that they need to be in North Carolina within 45 days to start their new job as CEO earning \$800,000 per year (before bonuses), that they don't want to move furniture twice, and they want minimally a 7000 square foot home with at least 6 bedrooms and 5 baths, a recreation/billiards room, a formal dining room, at least 3 acres of land and an in-ground covered pool — could you please send them some information as to available properties?

**Query: May the broker respond?**

The broker may respond and may include information on available properties, but should definitely include in the reply a copy of the "Working with Real Estate Agents" text, as well as an offer to explain it and work with the sender in whatever capacity the sender and broker ultimately agree.

**Query: Would it make any difference if the email had been sent to six different real estate companies simultaneously?**

Not really. While at least six different brokers in that community may now have valuable information about this buyer who may ultimately look at one of their company's listings, perhaps the buyer doesn't care and doesn't necessarily consider the information confidential. Nonetheless, any company/brokers responding to the email should include a copy of the "Working with Real Estate Agents" text, perhaps with a note advising the individual that information gratuitously provided is not confidential unless a principal-agent relationship is formed.

**Query:           What if the prospective buyer had *telephoned* the broker and began spewing all that personal information?**

The broker should attempt to intervene immediately and explain that nothing the caller tells any broker is confidential unless and until the caller enters into a principal-agent relationship by hiring a broker to be his/her buyer agent. The broker could hastily add that s/he would be happy to work with the caller, but that there are some state-mandated disclosures the broker must first provide the caller concerning the caller's agency options, which the broker should proceed to orally outline and explain. The broker could inform the caller that s/he will send information on available properties to the caller, but must also include the "Working with Real Estate Agents" brochure and mail or fax or email it to the caller within three days of the initial telephone call.

### **Summary re: First Substantial Contact by Telephone or Electronic Means**

**Contact by Telephone.** If first substantial contact occurs by telephone, a broker must explain basic agency principles and caution the person not to disclose any information s/he would not want the other side to know (i.e., the real estate *Miranda* warning) until it is determined how the broker will work with that caller. Within three days of the telephone contact, the broker must mail, fax, email or in some written form provide/transmit the "Working with Real Estate Agents" text to the caller. If there is further contact between the caller and the broker, they should first review the "Working with Real Estate Agents" brochure and discuss the agency issues, then decide whether and in what capacity the caller wishes to work with the broker *before* proceeding to set appointments or discuss specific available properties. Prudent brokers should be able to document both the date and to whom the brochure was sent to demonstrate their compliance with the rule.

**Contact by Other Electronic Means.** If first substantial contact occurs through a written medium with no associated oral communication, whether by fax, email, website, or other means, the broker should provide a copy of the disclosure in his/her written reply. Companies who routinely interact with non-local consumers might consider posting the "Working with Real Estate Agents" text on the company's website or having it available in their computer system to facilitate transmission to or reference by remote consumers. Once the disclosure has been provided, brokers must review it with the consumer and decide in what capacity the consumer wishes to work with the broker *before* obtaining any confidential information from the consumer.

**Documentation of Compliance.** The broker should obtain a signed copy of the panel as proof of the broker's compliance with the rule, or some written acknowledgment from the consumer that s/he has received and read the brochure and the broker has explained it and

answered any questions the consumer may have. The signed signature panel or other written evidence of compliance is one of the documents required to be retained for three years under Rule A.0108.

## **Internet Sites and Virtual Office Website (VOWs)**

With the advent of modern technology, many licensees now display listings on an internet website or **virtual office website (VOW)**, so long as they have the requisite consent. Websites which merely allow a consumer to view available properties for lease or sale (generally the latter), but do not require any registration or the “capturing” of any information about the consumer are considered brokerage advertising forums and may be referred to as **Internet Data Exchanges (IDXs)**. The only activity occurring at such sites is the sharing of information (data) about various properties. According to the “Frequently Asked Questions on the VOW Policy and the Model VOW Rules” published by the National Association of REALTORS®, the *distinction between an IDX and a VOW is as follows*:

*Q.9.1: An IDX site is considered advertising — and listing brokers’ consent is required before another broker may advertise the other brokers’ listings. A VOW is considered online brokerage. Listing brokers’ consent is not required to display on a VOW any listing otherwise available to MLS participants and subscribers for Internet display.... A website that offers online MLS listing searching capability that does not comply with the detailed requirements of the VOW policy is, by definition, an IDX site. [Emphasis added.]*

*It appears that so long as a licensee’s website merely affords review of available properties, whether by a link or some other means, and remains in the realm of advertising, then the disclosure requirements of Rule A.0104 are not activated because the broker and consumer have not had any contact. The broker may not even be aware of who has visited his/her website. If a consumer sees a property that interests him/her, s/he would then initiate contact with the broker by some means, whether by email to an address provided on the website or by telephoning the broker, etc., and disclosure would be accomplished as discussed in the two preceding sections.*

### **“Virtual Office Website” Operated by REALTOR® Members**

While many websites may be IDXs, some IDXs may also have a feature that allows a consumer to cross-over and visit a broker at his/her “virtual office” to gain even more information about a property. What then makes a website a “virtual office website” as opposed to an IDX? **NAR’s VOW Policy** (the “Policy”) defines a **virtual office website** in Section I.1 as follows.

For purposes of this Policy, the term Virtual Office Website (“VOW”) refers to a Participant’s Internet website, *or a feature of a Participant’s Internet website*, through which the Participant is capable of providing real estate brokerage services to consumers *with whom the Participant has first established a broker-consumer relationship (as defined by state law)* where the consumer has the opportunity to search MLS data, subject to the Participant’s oversight, supervision, and accountability. [Emphasis added.]

The policy continues in Section II.1 to require:

A Participant may provide brokerage services via a VOW that include making MLS active listing data available, *but only to consumers with whom the Participant has first established a lawful consumer-broker relationship*, including completion of all actions required by state law in connection with providing real estate brokerage services to clients and customers (hereinafter “Registrants”). *Such actions shall include, but are not limited to, satisfying all applicable agency, non-agency, and other disclosure obligations, and execution of any required agreement(s).* [Emphasis added.]

**The primary distinctions between an IDX and a VOW thus seem to be:** 1) the attempt to provide brokerage services via the website, versus merely displaying information, and 2) the level or depth of the information provided. What information may be displayed on an IDX versus a VOW often is governed by the rules of the applicable MLS. Generally, feeds for IDX purposes have fewer fields or screens and may only display information found on the property data listing sheet. Many more informational fields and/or property statuses may be shown on a VOW, including information such as days on market, and closed, pending, contingent, expired, and withdrawn listings. Whatever MLS information could be shared with a consumer in a brick-and-mortar office may be communicated via a VOW (but *not* an IDX).

Typically, the consumer must provide his/her name and email address to register on a VOW. Under **NAR’s VOW Policy**, a VOW also must have a “**Terms of Use**” agreement to which the consumer must consent, which terms of use minimally must include an acknowledgment by the consumer that s/he is entering into a consumer-broker relationship with the Participant (broker), among other provisions. According to NAR Policy, *a VOW may not permit the consumer to access property information until the Participant (broker) first sends the consumer an email to verify the validity of the email address and to confirm receipt of the Terms of Use.* The Terms of Use agreement may *not* impose any financial obligation on the consumer nor create an agency relationship between the Participant (broker) and the consumer. Rather, ***any agency agreement must be separate from the Terms of Use, must be clearly labeled as a representation agreement, and may not be accepted by the consumer with a mere “mouse click.”***

While there are many other requirements under the NAR Policy for operating a VOW, for present purposes the relevant point is that *the broker must first comply with agency disclosure and agreement requirements imposed by state law before the consumer is permitted access to the more extensive information provided on the VOW.* This is necessary even though all the broker may have at that point is the consumer’s email address and name, which does not rise to the level of first substantial contact under NC law. However, the NAR Policy requires that the consumer acknowledge in the Terms of Use that s/he has entered into some relationship with the broker. How can that be accomplished under Commission Rules until the requisite agency disclosure is provided and the prospective buyer (presumably) has elected either buyer agency or seller subagency? Thus, the chicken and egg dilemma — the consumer can’t be permitted access until there first is an agreement as to the broker and consumer’s working relationship and that can’t be accomplished until the consumer is aware of his/her options and the consequences of his/her decision.

## **Implementation of NAR Policy as to Agency Disclosure and Agreements**

How can this be accomplished on a virtual office website? It would appear that the virtual office website must not only contain the “Working with Real Estate Agents” text for the consumer to review, but there must be an opportunity for the consumer to discuss it with the Participant (broker) *and a decision must be made by the consumer as to how s/he wishes to work with the broker before access to the property information is permitted.* While the Terms of Use may be acknowledged by a mouse click under NAR’s VOW Policy, the agency agreement cannot be accepted by a mouse click under both North Carolina rules and the NAR VOW Policy.

### **Provision and Review of Brochure**

North Carolina brokers should develop a mechanism whereby the consumer and broker can review the *Working With Real Estate Agents* brochure and discuss it electronically. This might include a series of questions on the broker’s website specifically requiring the consumer to confirm that s/he has received the brochure, understands the possible roles of a broker, including buyer agency, seller agency and subagency, and dual agency, and asks the consumer to indicate how s/he wants to work with the broker. Ideally, links would be included to the relevant portions of the brochure when asking the consumer if s/he understands them, and when asking the consumer to choose one. In addition, *consumers must be given an opportunity to submit any questions and receive a response before being asked to commit to any sort of representation.*

Remember that sellers should not be given the option of working with an agent as a buyer’s agent, as that simply wouldn’t make sense, while buyers could be given the option of working with a broker as either a buyer agent or a seller’s subagent (if company policy permits). Companies offering dual agency should address it with both buyers and sellers and obtain the requisite consent.

### **Additional Disclosures or Explanations**

A company may add any other cautionary or explanatory notes necessary to assure the consumer’s understanding of the various agency roles and the company’s agency policies. These could be included on the company’s website or in its communication with the registrant when confirming the terms of use and establishing the agency relationship. Such comments might mention issues such as the lack of confidentiality if a broker is not acting as the consumer’s agent (i.e., principal-agent relationship must first be established) or that the company may work with a buyer under an oral non-exclusive buyer agency agreement for some undefined period of time (if company policy permits). If a buyer elects buyer agency, then dual agency also must be explained and the buyer’s consent to act as a dual agent obtained, if the buyer wishes to view or discuss any of the company’s listings via its virtual office website. Similarly, if a seller contacts a company via its virtual office website to list a property, then the disclosure must first be given, dual agency explained, and a *written* listing agreement entered into before any brokerage services could be offered.

### **Evidence of Agency Agreement**

Once the consumer acknowledges receipt of the Terms of Use and has indicated his/her assent to either seller agency or buyer agency, with or without dual agency, and the broker has obtained any required written agency agreements, then it appears the broker will have satisfied

the REALTOR® Virtual Office Website Policy requirements and may allow the consumer access to the property information available on the virtual office website, which, as mentioned previously, is more extensive than the information available on an Internet Data Exchange. NAR Policy states that any information a broker could share with a consumer if the consumer was in the broker's office, the broker may share with the consumer through his/her virtual office website, as it is intended to be an extension of the broker's office.

## **Virtual Office Websites Operated by Brokers *Not* REALTOR® Members**

While most of the foregoing discussion applies in principle to any internet brokerage website operated by any broker in North Carolina for the purpose of engaging in brokerage activity (rather than merely advertising/displaying available properties without capturing information about the consumer), a broker who is not a REALTOR® member is not subject to or regulated by the terms of the NAR VOW Policy. A non-REALTOR® broker website must be operated in compliance with North Carolina License Law and Commission Rules, but there would not necessarily be a mandatory Terms of Use policy imposing an obligation on the broker to first establish a consumer-broker relationship prior to providing access to the information on the website. Instead, *the non-REALTOR® broker's agency disclosure requirements would be governed by the "first substantial contact" standard enunciated in A.0104(c), as if the consumer walked into the broker's office or contacted the broker by electronic means.* Obviously, the broker also must comply with all other requirements of Rule A.0104.

Thus, if the only information captured in a consumer's visit to a broker's website relates to name and email address, and possibly physical address, telephone number and other generic, relatively non-personal data, the broker may be able to allow the consumer to explore the available information without first providing the "Working with Real Estate Agents" disclosure and confirming the agency relationship because first substantial contact has not yet occurred. However, *the moment the broker begins requesting more personal information about the consumer, e.g., price range, income, desired features, sale of existing home, etc., or the consumer or broker begin to act as if an agency relationship exists, then first substantial contact has occurred and the broker must provide and review the "Working with Real Estate Agents" disclosure and determine the working relationship with the consumer before continuing to work with or providing more information or access to the consumer.* When in doubt, err on the side of earlier disclosure and determination of agency relationship and one rarely will run afoul of the agency rule.

What will a non-REALTOR® broker have displayed on his/her website? Most likely, s/he will be able to post information concerning his/her company's listings, and information on listings held by other brokers **IF** the broker has obtained the requisite consent of the listing agent/company. A non-REALTOR® broker will *not* have access to any MLS data, as s/he is not a member of the underlying association and licensing agreements with providers of MLS data feeds typically prohibit them from providing access to non-REALTORs®.

## Required Notices

### Notice to Buyer from Seller Agent

If all the customer wants to do is see the property and either is unwilling to discuss agency in depth or does not want to work with a dual agent (assuming the company has the listing and the seller has authorized dual agency), then the broker may work with the buyer as a seller's agent, so long as the buyer understands that interacting with the broker is like talking to the property owner directly. Further, the **broker must disclose his/her seller agency status in writing** as required by **Rule A.0104(e)** which states:

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

The original "Notice to Buyer from Seller's Agent or Subagent" used from 1995 through July 2001 was a full page long. This former lengthy notice was replaced in 2001 with the little box at the bottom of the signature panel on the "Working with Real Estate Agents" brochure which the buyer should initial acknowledging that the buyer is aware that the broker represents only the seller. *Licensees minimally should secure the buyer's initials on the signature panel of the disclosure form.* Companies which *only represent sellers* and thus do not practice dual agency may wish to provide a more detailed disclaimer and notice to buyers alerting them to the fact that the company acts only as seller agents representing only the seller's interests, and that anything the buyer discloses to any broker affiliated with the company will be revealed to the seller. Note too that *if the first substantial contact is not in person, the broker is to immediately notify the consumer that the broker already represents the seller and must transmit written confirmation of seller agency within three days of the contact.*

**EXAMPLE:** A broker advertises numerous listings on his website, as well as through the cooperative listing service's website. The broker receives an email from a consumer in Kansas who expresses an interest in two of the listings, requests more information about the properties, and writes that s/he must be in North Carolina within sixty days to start a new job earning \$95,000.00 per year and is under contract to sell his/her property in Kansas and expects net cash proceeds of \$80,000.00. How should the broker respond?

The broker should notify the consumer by reply email that at present the broker represents only the seller, and that while s/he is happy to work with the buyer and owes the buyer disclosure of all material facts, honesty and fair dealing,

the broker is not there to protect the buyer's interest and nothing the buyer tells the broker is confidential. The broker should include the "Working with Real Estate Agents" text with a completed signature panel checking the seller agent box in any attachments s/he may send with the requested property information, as these disclosures must be made within three days (calendar days) of the initial email.

### **Notice to Seller of Buyer Agency**

Buyer agents are required to *orally* notify the seller or the seller's agent at **initial contact** that the agent is acting as a buyer agent. The buyer agent must *confirm this status in writing no later than time of delivery of an offer*. **Rule A.0104(f)** states:

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

Thus, when contacting a listing agent to obtain permission to show a property to a buyer-client, the buyer agent should affirmatively disclose to the seller's agent (or the seller directly, if unrepresented), that the agent is acting as a buyer agent. If the agent working with the buyer fails to inform the seller or seller's agent of his/her agency status, the listing agent should ask the agent in what capacity s/he is working with the buyer, rather than *assume* that the agent is acting as a buyer agent. *There is no presumption that an agent working with a buyer is acting as a buyer agent*. There must be an ***express agreement*** between the buyer and the agent as to whether the agent is acting as a buyer agent or as a seller subagent. While buyer agency certainly may be more common, there is nothing which prevents a buyer from declining buyer agency and choosing to work with an agent as a seller subagent.

**Query: If showing appointments are made through a reservation center provided through the MLS or some entity *other than* the listing company, must a buyer agent identify his/her agency status when contacting the reservation center?**

No; the rule says the buyer agent must identify his/her agency status at the initial contact *with the seller or the seller's agent*. The reservation center staff is not viewed as being subagents of all the sellers; they are providing an administrative scheduling service only and contact with such a reservation center does not constitute contact with the seller or the listing company. If however a buyer agent contacts the listing company directly to schedule a showing, then s/he should volunteer his/her agency status when scheduling the appointment, regardless of whether the phone duty person or listing broker asks.

Note too that the broker working with the buyer *shall* provide *written confirmation* of his/her agency status *no later than the time of delivery of an offer* to the seller or seller's agent. This written disclosure is *mandatory*, not discretionary. The standard Offer to Purchase form utilized by most licensees facilitates providing this notice at the very bottom of the form where the selling agent is to write his/her individual license number, the company's name, and then check one of three boxes indicating that s/he is acting as a buyer agent or as a seller subagent, or as a dual agent. *It is incumbent on the selling agent to check one of the three boxes or to otherwise provide written confirmation of his/her agency status no later than delivery of an offer.*

**Query:           What if a buyer or seller refuses to sign the panel on the “Working with Real Estate Agents” brochure?**

Licensees should explain that the *brochure is a mandatory disclosure form*, that it expressly states that “This is not a contract,” and that the parties' signatures are needed primarily to show the broker's compliance with Commission rules (although the acknowledgment is even more important when the broker is working with a buyer as a seller's agent). If the party will not sign the panel, will they initial it? If not, the broker should complete all available blanks, write “refused to sign” and see if the party will initial that. Very few consumers, if they truly understand the form, should have any problem in signing or at least initialing the form. *Generally, a consumer's lack of understanding as to the brochure's purpose is directly attributable to the licensee's failure to adequately explain it.*

The signature panel merely acknowledges the broker's compliance with required agency disclosures under Rule A.0104(c) and *does not even indicate that the broker and consumer have agreed to work together yet in any capacity* (unless the bottom box re: seller agency is checked and initialed). If the consumer has any questions about the legitimacy of the brochure (because other agents with whom they have dealt failed to mention it or for whatever other reasons), point out the Commission's address and telephone number on the back and invite the consumer to contact the Commission to answer any questions they may have (and perhaps provide the names of all the brokers who showed them properties without providing or discussing the brochure!).

## **RECORD-KEEPING REQUIREMENTS**

Rule A.0108 requires that *all mandatory disclosures be retained for three years*. The “Working with Real Estate Agents” brochure is a mandatory disclosure form in all sales transactions and, accordingly, at least the signature panel must be retained for three years.

**Query:           What about all those signature panels collected from prospective buyers who wasted the broker's time and gas for three weeks acting under an oral buyer agency agreement, never made an offer on anything, and never signed a buyer agency agreement. What “file” is there? What must be retained?**

There probably is not much of a file, other than perhaps a few MLS sheets, the broker's notes, and the signature panel of the “Working with Real Estate Agents” brochure, which should

have been reviewed and signed and oral buyer agency agreed upon *before* the broker began chauffeuring the prospective buyer all over the county. *Brokers-in-charge would be well-advised to implement some system in their office to store these miscellaneous agency disclosure forms/panels for these “looker” clients for the three years required by Rule A.0108.*

*The same holds true of signature panels arising from listing presentations where the seller hires a different company. As previously mentioned, the real estate “Miranda” warning should be given to sellers during the initial listing presentation so they understand that nothing they disclose is confidential until they hire a company, thereby forming the agent/principal relationship. If the seller interviews four companies, s/he will only hire one; thus, there will be three brokers/companies who have the disclosure panel, but no listing. While there may be more of a “file” in cases where the company is competing for a listing, there still may not be many documents in that file which Rule A.0108 requires a company to keep, other than the signature panel from the mandatory agency disclosure form which must be kept for three years. Whether the entire file should be retained depends on the company’s office policies and procedures. Licensees may retain **no less than** those documents specified in Rule A.0108, but office policy may always require more than the minimum prescribed by rule.*

**Query: What if a lender wants to hire my company to sell all their foreclosed properties during the next year? How many “Working with Real Estate Agents” panels must I have? Or what if an investor wants to hire me to act as his/her buyer agent to purchase 20 residential properties over the next 18 months?**

Understand that the “Working with Real Estate Agents” brochure must be given to all buyers and all sellers at the first substantial contact so they understand what their options are in working with an agent. ***The scope of that agency is then defined in the agency agreement.*** Thus, *where a party at the outset wants to hire a company or broker to represent it in the same capacity in multiple transactions over a period of time, the agent must give the “Working with Real Estate Agents” brochure at the first substantial contact, and may then have one agency agreement which details the terms of the parties’ employment arrangement.*

In the above Query, it would be an exclusive listing agreement in which the lender hires the company/broker to list and sell all its foreclosed properties within a certain geographic area over the next twelve months, or a buyer agency agreement in which the investor hires the agent to be his/her exclusive buyer agent to purchase twenty residential properties in a specified area over the next eighteen months. The agreement should state the duties each party (principal and agent) owes the other, the compensation to be paid, a date on which the agreement and agency relationship automatically terminates, and the fair housing non-discrimination language required by A.0104(b). The agent could then make a copy of the original “Working with Real Estate Agents” panel and the agency agreement to include in each individual transaction file, but would not need new agreements for each file.

Understand that it only is where the client at the beginning of the relationship is willing to enter into an agency agreement authorizing the broker to represent the client in the same capacity in multiple transactions that one “Working with Real Estate Agents” brochure will suffice.

*Where there is any time lag in enlisting the broker's services in any given transaction, then a new "Working with Real Estate Agents" brochure must be provided, explained and signed. In other words, if a property owner hires a broker/company today to list three properties for the owner, and three weeks from now wants to retain the broker to list an additional five properties, and two months from now hires the broker to list an additional eight properties, then that broker/company should have three separate signed "Working with Real Estate Agents" panels with different dates and three separate listing agreements, one for listing the original three properties, another for the five properties, and a third for the eight properties. The same practice applies to a buyer/tenant who hires a broker at different times to assist the buyer/tenant with purchasing/leasing different properties. Similarly, if a seller/lessor client now wishes to hire a company/broker to act as his/her buyer/tenant agent, or vice-versa, then a new "Working with Real Estate Agents" brochure will be required to explain the different capacity in which the broker may work with the client, followed by the applicable agency agreement.*

**[Editor's Note: the remainder of these materials is a reprint of a portion of the 2007-2008 Broker-in-Charge Annual Review Course.]**

## **WRITTEN AGENCY AGREEMENTS UNDER RULE A.0104**

The opening paragraph of **Rule A.0104** sets forth the requirements governing agency agreements. It states:

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

The rule's primary dictates as to agency agreements may be summarized as follows, and will be discussed in greater detail thereafter:

- No agent may represent a ***property owner*** in any capacity, sales, lease, or exchange, without having a ***written agency agreement***, either a listing agreement or property management agreement, ***from the outset of the relationship***.
- An agent may work with a buyer or tenant under a ***non-exclusive oral buyer/tenant agency agreement*** which must be ***reduced to writing prior to presentment of any offers***. If the agreement seeks to bind the tenant/buyer to a particular company for a set period of time or restrict the buyer/tenant's ability to work with other agents, then it must be in writing from the onset of the restrictions.
- ***All*** written agency agreements must contain a ***definite termination date*** on which date the agency relationship ends. Note that there is an exception of sorts for property management agreements; while they must have a definite termination date, they also may provide for automatic renewal for a similar term as long as the owner may terminate prior to the renewal.
- Agreements for services connected with the management of a ***property owners' association*** must now be ***in writing from the inception of the relationship*** as well.
- Agreements between licensees to cooperate or share compensation are expressly exempted from the rule and need ***not*** be in writing as they are not considered brokerage service agreements. The rule only governs ***licensees' interactions with consumers for the provision of brokerage services***. [Note that the requirement that broker affiliation agreements be in writing between North Carolina resident brokers and non-resident limited commercial brokers arises under Commission Rule A.1807, not under Rule A.0104(a).]

In addition to being in writing, always from the inception of the relationship when representing a property owner or owners' association, and no later than offer presentment when working with a buyer or tenant initially under an oral agency agreement, the only other general requirements under Rule A.0104 are that all agency agreements must have a definite termination date and must contain the non-discrimination language required by subparagraph (b), reprinted below. Provisions which may be included in dual and designated agency agreements will be discussed later.

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

[*Editor's Note (in original)*: Chapter 41A of the North Carolina General Statutes is the North Carolina Fair Housing Act. It defines “family” as including a single individual, and “familial status” as: “...one or more persons who have not attained the age of 18 years being domiciled with: (A) A parent or another person having legal custody of the person or persons; or (B) The designee of the parent or other person having custody, provided the designee has the written permission of the parent or other person. The protections against discrimination on the basis of familial status shall apply to any person who is pregnant or is in the process of securing legal custody of any person who has not attained the age of 18 years.”]

Other than having a definite termination date and including the fair housing non-discrimination language, the terms of an agency agreement are negotiable between the agent and the consumer. The agency agreement basically is nothing more nor less than the employment contract between the licensee (agent) and the consumer (principal) specifying what services the licensee undertakes and is authorized to perform for the consumer and the consideration the consumer will provide the licensee upon successful performance of the licensee’s tasks. The parties are free to contract as they choose and the agreement may be as broad or as limited in scope as the parties mutually agree. *North Carolina does not* prescribe any particular services nor *specify any level of minimum services which a licensee must provide a consumer. The only requirement under North Carolina law is that whatever services a licensee renders must be performed competently and in accordance with North Carolina License Law and Commission rules.*

## **Agency Agreements with Property Owners**

The rule is very simple and straightforward. ***No licensee may represent any property owner or provide any services on behalf of a property owner unless and until the agent obtains a written agency agreement signed by both the property owner and the agent on behalf of the real estate company.*** This is true in all cases, whether the property owner wishes to sell, lease or exchange his/her property. While a licensee may expend time and energy gathering information concerning the applicable market to prepare for a listing or management presentation, this is considered research. The licensee has not yet been hired and is not acting as the property owner’s agent to the world at large.

Recall that at the initial listing presentation, the agent must give to and review with the seller the “Working with Real Estate Agents” disclosure brochure. The agent should caution the seller *not to reveal any personal or confidential information to the agent until the seller decides whether to hire the agent’s company.* This is because if the seller does *not* hire the agent, and the agent subsequently is hired as a buyer agent by a buyer who is interested in the seller’s property, the agent will be required to disclose whatever he knows about the seller to the buyer.

Note that the rule does *not* require that the “Working with Real Estate Agents” disclosure be given in lease transactions. Thus, an agent is not obligated to provide the disclosure form when the agent meets with the property owner and attempts to persuade the owner to hire the agent’s company to manage the owner’s property. Nonetheless, a conscientious agent will at

least give the owner/lessor the oral “Miranda warning” during his/her presentation to alert the owner that nothing the owner says is confidential unless the owner hires the agent’s company. While not required, the agent may choose to give the owner/lessor the “Working with Real Estate Agents” form to help explain agency concepts. However, before an agent may render any services on behalf of a property owner, the agent must have a written agency agreement with the owner.

### **A Property Owner’s Choices**

Once agency concepts have been explained to the property owner, his/her initial decision is which real estate company/agent to hire. The only other agency choice an owner has is whether to authorize dual agency, thereby permitting the company/agent to also represent buyers or tenants who might be interested in purchasing or leasing the owner’s property. While the agent/company might want the ability to work as a dual agent for financial reasons, *the decision is the owner’s to make after being fully informed of the consequences.*

*Licensees should clearly explain that their ability to advocate for and advise the owner is significantly curtailed if they are a dual agent.* This is because the agent now is representing both parties with competing interests in the same transaction and owes each party the same fiduciary duties of loyalty and obedience, accounting, skill, care and diligence and disclosure of information, which is difficult to achieve in reality. While the typical dual agency addendum/agreement attempts to restrict the agent’s duty to disclose information about each party to the other, it does *not* lessen the duties of loyalty, obedience, accounting, or skill, care and diligence owed to both parties.

In many cases, a dual agent becomes more of a courier or messenger, transmitting documents and communications between the parties, but *not* advocating for or advising either party. A dual agent may not show any favoritism or partiality to either party. ***A dual agent can not negotiate on behalf of either party nor advise either party as to how that party should respond,*** as to exercise skill, care and diligence on behalf of one, would be unfair to the other party to whom the agent owes the same duty. If the company practices designated agency, then this option should be fully explained to the owner, which may make dual agency more palatable, since advocacy and ability to advise is retained to a greater extent under designated dual agency. However, in small offices, designated dual agency may not be feasible.

As in any other contract, the agency agreement must identify the parties to the contract, specify the duties and obligations of each, the consideration underlying the contract (i.e., the agent’s services and the compensation due from the principal) and the date when the contract, and thus the agency relationship, shall automatically terminate. It must also include the fair housing non-discrimination language set forth in Rule A.0104(b). If dual and/or designated agency is authorized, the agreement should so state.

### ***Agency Forms***

Licensees who are members of the North Carolina Association of REALTORS® may use any of the several forms published by the trade association. Licensees who are *not* REALTOR® members may not use any forms which have the REALTOR® logo. Non-member licensees must find other sources for their agency agreements, whether adapted from a reputable real estate

forms book or prepared by an attorney hired to draft appropriate agreements for the licensee to use with owners, buyers, lessees, and for dual agency, if applicable. Licensees also may attempt to prepare their own form, which is permitted, since the licensee is a party to that contract, although this is highly inadvisable. Whatever the source of the form, licensees should review it carefully to ensure that it complies with all Rule A.0104 requirements.

Agency forms available to REALTOR® members for use with property owners include Exclusive Right to Sell Listing Agreements for both improved property (Form #101) and vacant land (Form #103), Exclusive Property Management Agreements for long-term rentals (Form #401) and vacation rentals (Form #402), Exclusive Right to Lease and/or Sell Listing Agreements for commercial transactions (Forms #570, #571 and #572), and a Property Management Agreement for commercial property (Form #591). There also is an Exclusive Right to Sell Listing Agreement for use in auction sales (Form #601). While all of the foregoing agreements bind the property owner to the licensee for a stated period of time and are “exclusive,” meaning the owner may not use any other agent or sell or lease the property on his/her own and will still be liable to compensate the agent if they do, there is no requirement under state law or Commission rules that the agreement be exclusive. However, the exclusivity feature helps protect the licensee, who will expend time and money advertising the property, showing it to potential buyers or lessees, and otherwise promoting it. Without such a clause, the agent could invest time and money only to have the owner sell or lease it him/herself or through another agent and refuse to pay the listing agent/company.

Examples of various REALTOR® forms, including Form 101, Exclusive Right to Sell Listing Agreement for residential transactions, Form 401, Exclusive Property Management Agreement for long-term residential rentals, and Form 570, Exclusive Right to Lease and/or Sell Listing Agreement for commercial transactions, are reprinted at the end of these materials, following the current “Working with Real Estate Agents” text.

**[Editor’s Note: the referenced agency forms are NOT appended to this article.** *The current forms may be viewed at [www.nc.living.net](http://www.nc.living.net) by clicking on “Consumer Information” and scrolling down to Sample NCAR Forms. Alternately, the forms may be accessed on the Commission’s website under “Related Links.”]*

**Query: What if after a listing expires, the seller does not wish to extend the listing agreement, but wants the agent to leave the agent’s sign on the property and agrees to pay the agent if the agent finds a buyer?**

The agent should reduce that limited agreement to writing and have the owner sign it. The agreement should state that the agent has the owner’s permission to leave his sign on the owner’s property for a stated period of time and that if the agent produces a buyer on terms acceptable to the owner, the owner will pay the agent a specified sum. The fair housing non-discrimination language of A.0104(b) should also be included, as well as a termination date for the new agreement.

### ***Automatic Renewal for Property Management Agreements***

As mentioned earlier, all agency agreements must contain an automatic termination date on which date the agreement expires. However, there is a slight exception for property management agreements. While they still must state a date on which the agreement automatically terminates, they also may contain a clause which allows "... the automatic renewal so long as the landlord may terminate with notice at the end of any contract period and any subsequent renewals." For example, the original agreement states that it is for a one year period and will terminate at midnight on August 31, 2008, but will automatically renew for an additional one year term each year on the anniversary date, unless the owner notifies the agent in writing in August of any given year that the owner elects to terminate the management agreement.

### ***Limited Services Agreements***

While traditional "full service" listing agreements are routinely used at present in North Carolina, other options are becoming more available. One option is a limited services agreement whereby the licensee contracts only to advertise the property, typically in a multiple listing service to which the property owner does not have access, for a stated period of time for a flat fee, but to provide no other services, i.e., no open houses, no advice or assistance with contract negotiations, repair issues, etc.. This limited services agreement still must be in writing, must state the date on which it expires, and must include the fair housing non-discrimination language.

While the licensee may limit the services s/he provides, s/he cannot limit or disclaim his/her liability for those services, which must be provided competently. The licensee should not rely on the owner's description of the property for the multiple listing service advertisement. Rather, the licensee still must inspect the property to confirm that it has the stated number of bedrooms, bathrooms, and other rooms, and must assure that the correct square footage (if reported) is included in the MLS advertisement. Where the property has a septic system, the advertised number of bedrooms should not exceed the number allowed by the septic permit. The licensee will be responsible for the accuracy of his/her advertisement and may be disciplined for misrepresentation if there is false information. Reliance on the owner's statements will not be an adequate defense, particularly if the agent failed to visit the property. The licensee also should inform the property owner of any necessary disclosure forms the owner must provide consumers, such as the Residential Property Disclosure Statement and lead-based paint disclosure forms where applicable. However, the licensee may include a clause in the limited services agreement disclaiming liability for the owner's independent actions.

### ***Fee for Services Agreements***

Another type of listing agreement is a fee for service option. Under this method, the licensee presents the owner with a list or menu, as it were, of services the licensee can provide and next to each service is the fee for that service. The owner then checks which of the various services s/he wants the licensee to furnish and adds up the corresponding fees for each to arrive at the total fee. In North Carolina, such an agreement still must contain an automatic termination date and the fair housing non-discrimination language, as well as be signed by both the owner and the licensee.

## Agency Agreements with Buyers/Tenants

Unlike the situation with an owner where an agent can function only as the owner's agent (or as a dual agent, if authorized by the owner), an agent whose services are solicited by a buyer or tenant may work with that buyer/tenant *either* as a buyer/tenant agent, *or* as a seller's subagent, *or* as a dual agent. Because of these choices, an agent who is contacted by a customer who is interested in looking at and/or purchasing real property must give to and review with the customer the *Working with Real Estate Agents* brochure at the outset of the first substantial contact with that customer *before eliciting any information about the customer's needs or wants or any personal information about the customer. Once the agent has reviewed the brochure with the customer, the two then must decide whether and in what capacity they will work together before they do anything else.*

While the "Working with Real Estate Agents" disclosure form is *not* required to be given in lease transactions, an agent who is approached by a tenant who wants the agent to *represent the tenant* should still explain the tenant's options, must warn the tenant that no information the tenant provides the agent is confidential unless the tenant hires the agent as his/her tenant agent, and then discuss in what capacity the tenant wishes to work with the agent. While it may be rare in a residential lease situation for the tenant to seek representation for him/herself, it may not be as uncommon in a commercial context. Typically an agent in a residential lease situation represents only the property owner, which is fairly apparent to the prospective tenant, and does not seek to act as a dual agent. Nonetheless, *where a tenant wants to hire an agent to be on the tenant's side, the agent, while not required to give the "Working with Real Estate Agents" disclosure form, must still have at least an express oral agreement with the tenant to act as a tenant agent before the licensee may show the tenant properties.*

### Seller/Owner Subagency

If the prospective buyer or tenant *does not want to enter into a buyer/tenant agency agreement, either oral or written*, then the agent's only option is to work with the buyer or tenant as a subagent of the owner. The agent should remind the buyer/tenant that as a seller/owner subagent, his/her allegiance is to the property owner and the agent will be obligated to convey any information the buyer/tenant reveals to him/her to the seller/lessor.

From a terminology standpoint, one should understand that *the property owner's "agent" is the real estate company*, as it is the company which is a party to and holds the agency agreement/ contract with the property owner, not the individual agent who solicited the property owner. However, since the company has no real being or corpus of its own, it can only act through its affiliated agents, who thus are the agents of all property owners or buyers or tenants with whom the company has an agency agreement. However, in the business, these affiliated agents typically are referred to or viewed as "subagents" of the company's clients, since the company is the "agent." Interestingly, one frequently hears the term "seller's subagent" which is used to refer both to the affiliated agents of the company that holds the agency agreement, as well as to agents affiliated with other companies who wish to show the listing company's properties to buyers or tenants with whom these other agents are working as "customers." However, one rarely says that the agents affiliated with the company that holds the agency agreement with the client are "lessor subagents" or "buyer subagents" or "tenant subagents;"

rather, they are called buyer agents, tenant agents and property managers, even though the company still is the primary agent and is the party to the agency agreement with the client.

### ***Sales Transactions***

An agent who encounters a buyer who declines representation and chooses to remain a “customer,” should check the box on the signature panel of the “Working with Real Estate Agents” brochure indicating that s/he will be working with the buyer as a seller’s subagent, obtain the buyer’s signature, and then may proceed to look for and show the buyer properties. The agent should take care not to act or give the impression that s/he is acting as buyer agent by advising the buyer how to negotiate or otherwise advocate for the buyer when the agent is working as a seller subagent.

**Understand that** *if a buyer chooses to work directly with the listing agent or firm, then the listing agent/firm can only work with the buyer as either a seller’s agent, and must disclose their seller agency status in writing to the buyer at first substantial contact, or as a dual agent, if authorized by their seller-client and the buyer. A listing company has no other choice when showing its own listings. If the seller has not authorized dual agency in any form, then the listing company may only work with the buyer as a seller’s agent.*

Agents not affiliated with the company that holds the listing may also encounter buyers who choose not to enter into an oral or written buyer agency agreement following review of the “Working with Real Estate Agents” disclosure form. Similarly, these agents may only work with the buyer-customer as a seller’s subagent and must disclose their status in writing to the buyer prior to showing the prospective buyer any properties. **Note** that *such cooperating agents may not show the buyer any listings where seller subagency is not offered by the listing company.* If a buyer wants to view such properties, then the buyer must enter into a buyer agency agreement, whether oral or written, at least for that property. This can become complicated if the buyer later wishes to revert to being a “customer” to view other properties, as information gained while acting as a buyer agent will no longer be confidential once the agent resumes working with the buyer as a seller subagent.

### ***Lease Transactions***

Because the “Working with Real Estate Agents” form is not required to be given in lease situations, there is no box to check indicating that a tenant has declined to enter into an oral or written tenant agency agreement and that the agent will be working with the tenant as a subagent of the owner/lessor. However, the Rule A.0104(e) requirement that a seller’s agent or subagent notify the buyer in writing at first substantial contact of his/her seller (sub)agency only applies in *sales transactions*. There is *no required initial written notice to prospective tenants from owners’ agents in lease transactions.*

In residential lease situations, agents typically represent only the property owner which generally is apparent to prospective tenants. Further, the agent rarely attempts to represent the tenant’s interest, thereby becoming a dual agent. However, a cautious residential lessor-agent might orally remind a tenant that s/he represents only the landlord’s interest and that nothing the tenant says will be held in confidence. Similarly, while not required, a lessor-agent in a commercial lease situation might verbally notify a prospective tenant that s/he represents only

the lessor/property owner. If the tenant still wishes to work with the lessor-agent without representation, a prudent agent might consider preparing a letter or other written document simply stating that the tenant wishes to work with the agent, but has declined tenant/dual agency, that the agent will be working with the tenant as a (sub)agent of the owner/lessor, and that the agent has advised the tenant that the agent's fiduciary duties are owed to the owner/lessor and that any information the tenant provides the agent will be conveyed to the owner/lessor.

### **Buyer/Tenant Agency Agreements**

If the buyer/tenant wants the agent to work with him or her as a buyer/tenant agent, then the agent and buyer/tenant need to agree on the scope and terms of that representation. While Commission rules allow an agent *the option* of working with the buyer/tenant under an *oral buyer/tenant agency agreement*, **it is strongly recommended that the agent obtain a written agency agreement at the earliest possible time.**

### **Oral Buyer/Tenant Agency Agreements**

If the buyer/tenant is unwilling to enter into a written buyer/tenant agency agreement at the outset, then *the agent may agree to work with the buyer/tenant under an oral buyer/tenant agency agreement*, but the terms of that agreement should be clearly understood by both the agent and the client. To avoid confusion, **the Commission strongly recommends that the agent send the buyer/tenant a letter confirming the terms of their oral buyer/tenant agency agreement.** The letter not only should confirm that the agent will be working with the buyer/tenant under an oral buyer/tenant agency agreement, but additionally should set forth any understanding concerning compensation, whether dual agency is authorized, and any other agreed upon terms. It might further mention that a written buyer/tenant agency agreement will be required after a certain period of time or before any offer may be prepared or tendered on the buyer/tenant's behalf, whichever first occurs.

The agent also may wish to include a statement in the letter indicating that the agent is ready and willing to enter into a written buyer/tenant agency agreement with the client at any time prior to preparing an offer to purchase or lease. This clause may assist licensees who belong to a voluntary professional trade association to comply with the association's ethical rules. For example, Article 9 of the National Association of REALTORS® Code of Ethics states:

REALTORS® ... shall assure *whenever possible* that agreements shall be in writing, and shall be in clear and understandable language expressing the specific terms, conditions, obligations and commitments of the parties. A copy of each agreement shall be furnished to each party upon their signing or initialing.  
*(Italics added.)*

**REMEMBER** that *under an oral buyer/tenant agency agreement, an agent may not restrict a buyer/tenant's right to work with other agents or on his or her own nor seek to bind the buyer/tenant to that agent for any period of time.* In other words, **oral agreements are non-exclusive** and the buyer/tenant is free to work either independently or with any other agent and may be a party to multiple oral buyer/tenant agency agreements simultaneously. *If the agent wishes to garner the buyer/tenant's loyalty and prohibit the buyer/tenant from working with*

*other agents or on his/her own for any period of time, then the buyer/tenant agency agreement must be in writing.*

The July 2001 relaxation in Rule A.0104(a) allowing oral buyer/tenant agency agreements was designed to address the initial reluctance of some buyers, in particular, to enter into a written buyer agency agreement before they had an opportunity to become acquainted with the agent. Nonetheless, *written agency agreements remain highly desirable and are preferred.* Agents are urged to **obtain written buyer/tenant agency agreements at the earliest possible opportunity.** It would be reasonable to request such a commitment after the buyer/tenant and agent have worked together for some period of time.

### ***Written Buyer/Tenant Agency Agreements***

The buyer/tenant agency agreement ***must be in writing not later than the time one of the parties makes an offer to sell, lease or exchange to another party.*** If the buyer/tenant refuses to sign a written buyer/tenant agency agreement prior to presenting an offer, then the agent **may not present an offer on the buyer/tenant's behalf.** As a practical matter, *an agent operating under an oral buyer/tenant agency agreement should not even prepare an offer to purchase or lease on his/her client's behalf unless and until the buyer/tenant has signed a written buyer/tenant agency agreement formally authorizing the agent to function as the buyer/tenant's agent in compliance with Rule A.0104(a).*

If an agent does prepare an offer *prior to obtaining a written buyer/tenant agency agreement from his or her client,* and the client then refuses to sign a written buyer/tenant agency agreement, **the agent may not convey the offer to the property owner** despite Rule A.0106, "Delivery of Instruments." This is because the agent would be violating Rule A.0104(a) which states: "... A broker shall not continue to represent a buyer or tenant without a written agreement when such agreement is required by this Rule." *Licensees will not be compelled to comply with one rule where to do so will cause them to violate another rule or statute.* Thus, under the foregoing scenario, the agent could not submit the offer and would be compelled to cease working with the buyer/tenant as a buyer/tenant agent where the buyer/tenant refused to sign a written agency agreement.

### ***Content of Written Buyer/Tenant Agency Agreements***

Understand that the Commission's agency rule does *not* specify the terms of the buyer/tenant agency agreement beyond the requirement that it contain the fair housing non-discrimination language, a definite termination date and be in writing prior to presenting any offer. Otherwise, the parties are free to contract as they wish and may undertake to provide any services, create obligations and pay whatever consideration as mutually agreed, so long as the terms are neither illegal nor against public policy.

Again, for those licensees who are REALTOR® members, there are various agency forms available for their use from their trade association. These include the Exclusive Right to Represent Buyer (Form #201) and an Agency Disclosure and Non-Exclusive Buyer Agency Agreement (Form #203), both of which are intended for use in residential sales transactions and are reprinted at the end of these materials. Form #201 is similar to the exclusive right to sell agreement in that it prohibits the buyer from seeking property on his/her own or using any agent

other than the company holding the agency agreement and obligates the buyer to pay a commission to the buyer agent company if the buyer enters into a contract to purchase during the period that the buyer agency agreement is in force. The Non-Exclusive Buyer Agency Agreement was introduced later to satisfy the Commission's requirement that a buyer agency agreement be in writing before any offer may be presented. While the buyer does agree to use the company's services for a stated period of time, it does not expressly prohibit the buyer from working with other agents or seeking property on his/her own, nor does it obligate the buyer to pay the company any fee.

The North Carolina Association of REALTORS® has also promulgated similar forms for use by its members when representing buyers or tenants in commercial transactions. One is an Exclusive Buyer/Tenant Representation Agreement (Form #530) and the other is a Non-Exclusive Buyer/Tenant Representation Agreement (Form #532). Additionally, it has forms for its members' use in both residential and commercial situations whereby the buyer/tenant agent may confirm his/her buyer/tenant agency to the listing/leasing company and request/confirm the listing/leasing company's agreement to cooperate with and compensate the buyer/tenant agent, as well as forms for a buyer agent's use in requesting compensation from an unrepresented seller. As examples, see Forms 220 and 150 also reprinted at the end of these materials. The North Carolina Association of REALTORS® also has forms for renewing or amending agency agreements and for prematurely terminating an agency agreement and releasing the former client.

Again, licensees who are not members of a REALTOR® association may not use any form which bears the REALTOR® trademark. Rather, such licensees must find other sources for their buyer/tenant agency forms, whether from a reputable real estate forms book or from an attorney the licensee or company has hired to prepare appropriate buyer/tenant agency forms for the company's use. While licensees may attempt to craft their own buyer/tenant agency forms since they are a party to that contract, it is not recommended.

**Query: Must a brokerage company allow oral buyer/tenant agency agreements?**

No. Rule A.0104(a) does not *compel, but merely allows* oral buyer/tenant agency agreements for what hopefully would be a relatively short period of time until the agent and buyer/tenant have an opportunity to become acquainted. However, a company may decide as a matter of office policy that all agency agreements with that company must be in writing from the inception of the relationship, whether with property owners, buyers or tenants. It is within a company's prerogative to adopt whatever internal office policies and rules it wishes, so long as such policies do not conflict with law or rules. A company might decide that it will allow its agents to work with a buyer/tenant under an oral buyer/tenant agency agreement only for a limited time, e.g., up to two weeks, after which the buyer/tenant either must sign a written buyer/tenant agency agreement or the company will terminate the agency relationship. Alternatively, the company may allow its agents to require a non-refundable retainer of some amount to help cover the agent's gas expenses and time expended which will be applied against the commission if the buyer/tenant purchases/leases using the agent's services.

Because the rule does not dictate the terms of any agency agreement, other than requiring a definite termination date and the fair housing non-discrimination language, companies may creatively explore other options to address the company's needs. Some may find that requiring buyers/tenants to sign a *non-exclusive* written buyer/tenant agency agreement before beginning to work with the buyer or tenant suffices as it satisfies the rule's requirement that the agreement be in writing, but does not alienate buyers/tenants by restricting them only to that company. The agreement could include compensation provisions which apply if the client does purchase or lease as a result of the company's services, but such compensation provisions are *not* included as part of the standard REALTOR® non-exclusive buyer/tenant representation agreements.

Other companies have found that requiring an initial exclusive written agreement but limiting its duration to a fairly brief period, such as ten days or two weeks, and providing for renewal thereafter if mutually agreed, better serves the company's purposes. In this case, the buyer/tenant agrees to use only that company's services and no other for the stated period, but if either the consumer or agent decide they can not work together, they need only ignore each other for a few days before the agreement automatically terminates. If they do work well together, the original agreement may be extended in writing or a new agreement signed by both the agent and consumer. **Bottom line:** it is up to each company to decide how it wishes to conduct its brokerage activities and protect its interests, while still complying with the requirements of the Commission's agency rule.

**Query: If a buyer/tenant is working with an agent under an oral buyer/tenant agency agreement and the buyer/tenant subsequently enters into a written exclusive buyer/tenant agency agreement with another company, does the written buyer/tenant agency agreement automatically supersede the oral agency agreement?**

No. Technically, a subsequent written agreement with another company or agent does **not automatically** terminate or cancel a prior oral buyer/tenant agency agreement; however, all the buyer/tenant must do is orally notify the agent with whom s/he has the oral agency agreement that s/he is terminating their agency relationship, which either party can do at any time under an oral agreement. (**Remember,** *oral* buyer/tenant agency agreements can neither restrict the client from working with other agents or on his/her own nor bind the client to the agent for any specific period of time.) The termination notice may be oral, just as the original agreement was oral. While prudence might suggest writing a letter to confirm the oral termination of the relationship, it is not required. Procuring cause issues may arise from the agent's standpoint, which is why a confirmation letter at the outset evidencing the terms of the parties' oral agency agreement is highly recommended. However, if the oral buyer/tenant agency agreement was silent as to the company's/agent's entitlement to compensation, the company may have a more difficult time claiming any compensation as there never was any agreement between the buyer/tenant and company on that issue.

**Query: What if an agent has been working with a buyer or tenant under an oral agency agreement and the buyer/tenant now wants to make an offer on a property, but refuses to sign a written buyer/tenant agency agreement. What are the agent's options?**

First, an agent should not begin preparing any offers until s/he has a signed written buyer/tenant agency agreement. The agent should explain to the client that the agent is not permitted under Commission rules to continue to represent the client as a buyer/tenant agent and to extend an offer on the client's behalf without a *written* buyer/tenant agency agreement. At the very least, the client should be willing to enter into a written buyer/tenant agency agreement for a specific period of time limited to just the property on which they wish to make the offer. If the offer is not accepted, then the agent and client may resume operating under their prior oral agency agreement. Recall too that written agreements need *not* be exclusive; they may contain whatever terms the parties mutually agree upon so long as none of the terms contravene law or public policy. Thus, a *non-exclusive* buyer/tenant agency agreement would suffice to allow the agent to extend an offer, so long as the agency agreement was in writing. However, if the client absolutely refuses to sign *any* agreement confirming the buyer/tenant agency status, then *the agent may not continue to represent the buyer/tenant as a buyer/tenant agent*, and may be compelled to walk away from the transaction. The agent clearly may not submit an offer purporting to act as a buyer/tenant agent, as to do so would violate the express provisions of Rule A.0104(a).

While it is ***highly undesirable and is neither recommended nor encouraged***, it should be noted that it is not an automatic (i.e., *per se*) violation of either Commission rules or statutes for a buyer/tenant agent to terminate that agency status and convert to a seller's subagent ***if very specific conditions are first observed, namely:***

1. The agent must **clearly explain** to his/her client that if the agent changes hats and switches to a seller's subagent, then the agent will be representing *the seller's interests and not the buyer/tenant's interests* and will owe a duty to the seller to ***reveal any and all confidential information the agent may have learned about the buyer/tenant during the course of their relationship.***
2. The agent must officially terminate the oral buyer/tenant agency relationship and obtain the now former client's *written consent* to work with him/her as a seller/lessor's subagent. (It is *strongly* recommended that the written consent include a clause acknowledging that the former buyer/tenant-client has been advised and understands that the agent will have a duty to and must reveal any confidential information about the buyer/tenant to the seller.)
3. The agent must have the *consent of the property owner and/or the listing/leasing firm to act as a owner's subagent in the transaction.*

If all of the foregoing three criteria are satisfied, then the agent may proceed to prepare and present an offer to the property owner as a seller/lessor's subagent. It is doubtful that this situation will arise frequently in the real world, as it is believed that many buyers/tenants would refuse to allow their former agent to switch to and act as a seller/lessor subagent if they fully understand that confidential information not only may, but *must* be revealed. However, there may be instances where the agent and buyer/tenant have not worked together for any significant period and/or the buyer/tenant has been fairly close-mouthed and has not shared any personal

information with the agent and therefore does not feel threatened by the agent's duty to reveal what s/he knows about the buyer/tenant to the property owner.

Again, **this practice is not recommended and should be avoided**, particularly since there are other ways of satisfying the rule without the shift in allegiance, such as the written buyer/tenant agency agreement limited to just the subject property or a written *non-exclusive* buyer/tenant agency agreement. However, transforming from a buyer/tenant agent into an owner subagent is not absolutely prohibited under license law and rules **IF proper disclosures are made and the requisite informed consent is obtained from both the former buyer/tenant-client in writing and from the owner or owner's agent.**

## Dual Agency

Dual agency occurs when a company attempts to represent both sides in the same transaction, whether seller and buyer or lessor and lessee. The problem, of course, is that the company has an inherent conflict, as it owes the same fiduciary duties of loyalty and obedience, accounting, confidentiality, skill, care and diligence, and disclosure of information to two different parties whose interests are diametrically opposed. For example, how can an agent satisfy the duty to hold personal information about his/her principal confidential, yet simultaneously fulfill the duty to disclose all information s/he knows about one party to the other? It is nigh impossible. A licensee, whether an individual or a company, may be disciplined under License Law for "...acting for more than one party in a transaction without the knowledge of all parties for whom he or she acts." [G.S.93A-6(a)(4).] The statute is supplemented by **Commission Rule A.0104(d)** which states:

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

Dual agency most commonly arises within a brokerage firm when one of the company's buyer/commercial tenant clients wishes to see property listed with or managed by the firm. The firm already has a written listing agreement or property management agreement with the property owner and thus is an owner's agent, as are all agents associated with the brokerage firm. However, the company also has an oral or written buyer/commercial tenant agency agreement with its buyer/ commercial tenant client and is acting as a buyer/tenant agent, as are all agents affiliated with the company. How can a company effectively represent two parties with opposing interests in the same transaction?? *Very carefully.*

Understand that the following discussion of the **rules pertaining to disclosure of dual agency and written consent for dual agency apply to ALL real estate transactions in which an agent or brokerage firm seeks to represent both parties.** Thus, this discussion of dual agency rules and requirements apply to real estate *sales* transactions, *lease* transactions *or exchanges* of real property pursuant to Rule A.0104(d) and (i) where the company/agent represents both parties.

### **Obtaining the Owner's Consent**

The concept of dual agency must be discussed with the owner at the time the original agency agreement is signed and the agent must obtain written authority to act as a dual agent, using the North Carolina Association of REALTORS®'s dual agency addendum form or some other form. [NCAR Form #550 for commercial transactions, Form #901 for residential sales transactions, reprinted at the end of these materials.] If the property owner does not authorize dual agency, then either the listing company's buyer/tenant client cannot be shown the property, or the owner must again be approached and his/her consent to dual agency sought and obtained *before* the property may be shown to the company's in-house buyer/tenant.

If dual agency was not addressed at the initial listing/leasing presentation, then the dual agency portion of the *Working with Real Estate Agents* brochure should again be reviewed at least with the seller (though not required with a lessor), and dual agency explained to the property owner, including an explanation of the agent's reduced advisory and negotiating abilities unless the firm practices designated agency, so the owner can make an informed decision. *Failure to fully explain the ramifications of dual agency could invalidate an owner's purported consent, as it would not be "informed."* If the owner declines to authorize dual or designated agency, then his/her property may not be shown to an in-house buyer/tenant client. If the owner does consent to dual and/or designated agency, the property may be shown to an in-house buyer/tenant client. However, the owner should be orally advised *prior to the showing* that the buyer/tenant also is represented by the firm and that the firm will be in a dual agency situation for this showing.

*Ideally, the owner's **written** consent to dual agency will be obtained prior to showing the property to any in-house buyer/tenant clients, but if that is not possible, then **at the very least** the owner must be informed that a dual agency situation is presenting itself and his/her **oral consent** obtained.* The oral disclosure must be given to comply with the statute which forbids licensees from "acting for more than one party in a transaction without the *knowledge* of all parties for whom he or she acts." **Rule A.0104(i)** reiterates the statutory requirement, stating:

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

Thus, **disclosure** must occur as soon as one ventures into any dual agency territory, including designated agency. It is highly preferable to obtain *written authorization* for dual agency *from both the owner client and the buyer/tenant client prior to showing the property* to an in-house buyer/tenant. **WRITTEN authorization is required by rule where both the agency agreements with the property owner and with the buyer/tenant already are in writing.** It is

*only* where the company is still working with the buyer/tenant under an *oral* buyer/tenant agency agreement that *ORAL consent to dual agency* by the owner and buyer/tenant will suffice to allow the property to be shown to the company's buyer/tenant client. However, such oral consent must be reduced to writing *prior to presentment of any offer* from either party to the other. If both agency agreements with the property owner and the buyer/tenant already are written and do not permit dual agency, they first must be amended in writing to allow dual agency, at least as to that particular individual or property, or the property cannot be shown.

### **Obtaining the Buyer/Tenant's Consent**

If the agent working with the buyer/tenant already has a *written* buyer/tenant agency agreement, then, like the owner's situation, the issue of dual agency should have been discussed during the review of the *Working with Real Estate Agents* brochure and the buyer/tenant's *written* authorization for dual agency either obtained or denied at the time the buyer/tenant agency agreement was signed. If the written buyer/tenant agency agreement does not address dual agency, then the agent must orally advise the buyer/tenant that they are entering into a dual agency situation *and* must obtain *written permission* for dual and/or designated agency *prior to showing the client the property*.

If the agent is working with the buyer/tenant under an *oral* buyer/tenant agency agreement, there obviously will be no pre-existing written authorization. The agent should have discussed dual agency when reviewing the *Working with Real Estate Agents* brochure at least with the buyer at their first substantial contact and should have inquired as part of their oral buyer/tenant agency agreement whether the buyer/tenant would authorize dual agency if it arose. If so, this authorization could have been memorialized in the agent's letter of confirmation to the buyer/tenant regarding the terms of their oral buyer/tenant agency agreement. Where there is no *written* agency agreement and thus no written authorization for dual agency, *the agent must at least orally advise the client prior to showing the client the property* that they are entering into a dual agency situation *and obtain the client's oral consent*. Again, *oral consent to dual agency is only sufficient where the underlying buyer/tenant agency agreement is still oral and has not yet been reduced to writing*.

If not earlier obtained, ***WRITTEN consent/authority to engage in dual agency must be obtained from both the owner and buyer/tenant no later than the time by which the oral buyer/tenant agency agreement must be in writing, which is NOT LATER THAN the time one of the parties makes an offer to purchase, sell, lease or exchange real estate to the other party***. As a practical matter, written consent to dual agency should be obtained from both parties prior to any negotiations or offers being prepared, as without the written consent of both parties, no offer may be presented.

### ***Disclosure of Information by Individual Dual Agent***

As mentioned previously, a company or agent who practices dual agency is confronted with the dilemma of how to effectively represent and fulfill his/her fiduciary duties to both opposing parties simultaneously. While neither the Commission's agency rule nor most dual agency agreements allow the disavowal of the agent's duties of loyalty, obedience, accounting, or skill, care and diligence, the rule allows the parties to agree to limit *an individual dual agent's* duty to disclose certain information about each party to the other. Specifically, **Rule A.0104(n)**

allows a seller and a buyer who are represented by an *individual broker* in the same sales transaction to limit *in their dual agency agreement* the information the individual broker (sole practitioner) may provide either party about the other without the party's consent. The information which may not be disclosed without consent includes:

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

Disclosures which may be required by statute or rule include a party's inability to consummate a transaction due to foreclosure or bankruptcy or inability to convey marketable and insurable title to the property or inability to qualify for a loan upon the stated terms despite diligent, good faith efforts. It also includes material facts about or concerning the property, which licensees are compelled by both the License Law and Commission rules to affirmatively discover and disclose. *While no agency agreement may absolve a licensee from the duty to disclose material facts, parties in their agency agreements may excuse an agent from the duty to otherwise disclose all information the agent has about each party to the other and to retain personal information confidential unless release is authorized by the party.*

**Rule A.0104(n)** addresses the situation of a single broker/sole practitioner who attempts to represent both parties to a transaction. The broker still must orally disclose to all parties from the outset that he or she is attempting to represent all of them. S/he also must have *written authorization* for the dual agency relationship from the outset, unless s/he is working with the buyer under an oral buyer agency agreement in which case both parties' consent must be in writing *no later than* the agent presenting an offer on behalf of either to the other (though earlier is better).

### **Designated (Dual) Agency**

A company which practices straight dual agency, but not designated agency, cannot avail itself of the provisions of Rule A.0104(n) and must disclose all information it has about either party to the other *unless* the parties in their dual agency agreements or addenda choose to limit the company's common law agency duty to disclose all information. Understand that ***designated agency is still dual agency*** – *it just is a specialized form of dual agency which retains more advisory and negotiating abilities of the agents who are designated or assigned to represent each party.* If the firm practices designated dual agency, then the broker-in-charge may designate certain agents to represent only the seller and other agents to represent only the buyer *once the parties have expressly authorized designated agency.* Again, the authorization may be oral only if the company is still working with the buyer under an oral buyer agency agreement; otherwise, the authorization must be in writing. Rule A.0104 subsections (j) through (m) addressing designated agency apply in real estate *sales* transactions. Rule **A.0104(j)** states:

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

The primary requirements for designated agency thus include:

- Express approval and consent to designated dual agency by both or all parties which *must be in writing* by the time the dual agency agreement must be in writing under A.0104(d), i.e., no later than presentment of any offer when working with a buyer/tenant client under an oral buyer/tenant agency agreement.
- Agents for the buyer and seller cannot be designated to represent a party if they have received any confidential information about the other party. If it is a small company, for example 3 or 4 agents, and everyone knows everything about both parties, then the company can only function as a straight dual agent and cannot practice designated agency in that transaction.
- The broker-in-charge can be a designated agent for one of the parties only where the other party is represented by a non-provisional broker. Because a broker-in-charge must supervise all provisional brokers, the confidentiality and advocacy aspect would be destroyed where one party was represented by a provisional broker as the broker-in-charge must have access to the provisional broker's file and must supervise the provisional broker in the transaction.

Subsection (k) states in part that an individual broker designated to represent the seller "...shall represent only the interest of the seller..." and subsection (l) states that an individual broker designated to represent the buyer "... shall represent only the interest of the buyer ...." Each subsection further allows the parties to restrict information their designated agent might otherwise be required to reveal, similar to the provisions of Rule A.0104(n) quoted above, including information pertaining to the price, terms or conditions of sale, a party's motivation for engaging in the transaction, or other information the party has identified as confidential, unless disclosure is required by statute or rule. The company is to identify to the buyer and seller which agents have been assigned to represent each party no later than presentation of the first offer. This disclosure may be oral.

**Query: ABC Realty Company is a large company which has five offices located in two adjoining counties. Each office has its own broker-in-charge, as required by Commission rule. A total of 100 agents, including provisional brokers and full brokers work for ABC Realty. The office on Main Street has a listing at 626 Elm Street. An agent from an office in the adjacent county is working with a buyer client under a written buyer agency agreement and makes an appointment to show the property at 626 Elm Street. Is this OK?**

It depends. Is the company in dual agency? *Absolutely.* The fact that the agents are from two different offices in two different counties is irrelevant. The fact is they are both agents for the same company which is operating under one firm license. Even if the company has 50 different offices, the result will be the same, *so long as it is one company.* Thus, one first must ask whether the seller authorized dual agency and/or designated agency. If not, the property may not be shown unless the seller is first contacted and his/her consent to dual agency is obtained. Similarly, if the buyer client has not authorized dual agency in his/her agency agreement, his/her consent to dual agency must first be obtained before s/he can be shown the property. Because both agency agreements already are in writing, oral consent is insufficient. Each agent first must obtain a written amendment to the existing listing and buyer agency agreements expressly authorizing dual and/or designated agency. If each party authorizes designated agency, then the agent already working with each party can be designated for each by each agent's respective broker-in-charge and the "firewall" will be much easier to maintain since the agents actually work out of different offices.

**Query: Two companies have similar names as they both are franchisees of the same national franchisor, but each is separately licensed. One company has a listing on South Blvd. An agent from the other company has a buyer client who wants to see the property. Is this OK?**

Yes. There is no conflict and no dual agency, as while the companies have similar names, they are two separate entities which are operating under two separate firm licenses. Accordingly, the buyer agent from Company #2 may show Company #1's listing without any disclosure other than notifying the listing agent that the agent from Company #2 is acting as a buyer agent.

**Query: Buyer Smith represented by an agent from We R Buyers makes an offer on a listing held by ABC Realty, which offer is accepted by Seller Jones. The contract is contingent on Smith selling his/her home. Because We R Buyers only represents buyers and does not handle listings, Buyer Smith approaches ABC Realty about listing Smith's home. May they do so?**

Technically, this is not a dual agency situation within the traditional sense, as ABC Realty is not representing both parties in the same transaction. Rather, it is representing two property owners. However, the issue inherent in dual agency, namely, the opportunity to obtain confidential information about parties whose interests may be oppositional and the duty to disclose all information an agent has to his/her principals also arises here, as ABC Realty clearly may learn information about Smith which would be of interest to Jones. Thus, ABC Realty

might be best advised to refer Smith's listing to another company to avoid placing itself in a situation where it may have a conflict of interest in representing these two clients, where one "client" is the opposing party in a transaction with another "client." If it chooses to tread on this thin ice, ABC Realty must first disclose its potential conflict of interest to both Smith and Jones and obtain their informed, knowing consent to represent both owners. If ABC Realty invites trouble by taking both listings, it might also be prudent to treat this situation similarly to a dual agency situation and obtain written agreements from both Smith and Jones authorizing the company to represent both as sellers and to excuse the company from any duty to disclose confidential, non-material information gained through its representation of each to the other. What, however, would be Jones' incentive to agree to this?

Conflicts of interest may often arise when a company is representing several buyers. What if two or more buyers become interested in the same property and are bidding against each other? Where both buyers are represented by the same individual agent, the agent is compromised as s/he knows what each buyer is offering or is willing to offer and thus can not effectively advise either, as to exercise skill, care and diligence on behalf of one, will be to the detriment of the other to whom the agent owes the same duties. If the company has multiple agents, then the broker-in-charge may consider designating separate agents to represent each buyer more fully with neither agent to have access to the other's file. However, this can not be done without the express consent of both buyers once they are aware of the company's inherent conflict in attempting to represent both buyers for the same property. Again, if the company continues to represent both buyers with the buyers' knowing, informed consent after full disclosure, the company would be well advised to obtain both buyers' consent to the continuing representation in writing with whatever caveats or restrictions the company deems advisable as to disclosure of information. The more valiant and prudent course may be to refer one of the buyers to another company, rather than struggle to represent each effectively.

**[Editor's note** (included in original materials): In a similar situation where a sole broker felt uncomfortable in attempting to represent two buyers who were competing for the same property, she chose the higher road and approached one of the buyers, explained her dilemma and asked if she could refer that buyer to a colleague who was very capable. The buyer consented. Of course, the seller ultimately accepted the offer extended by the buyer she referred to the other broker, and that broker received the commission and she received a referral fee. However, a couple of years later when the former buyer-client wanted to sell that property and buy a larger property, he returned to the original broker for representation, as he was impressed by her ethics, honesty and integrity and wanted her to represent him in his contemplated transactions, even though he was pleased with the services rendered by the other broker.]

## MISCELLANEOUS COMMENTS

### Auction Sales

Note that Rule **A.0104(g)** expressly states that subparagraphs (c) - "Working with Real Estate Agents" disclosure form to buyers at first substantial contact, (d) - dual agency, and (e) - written disclosure of seller subagency at first substantial contact, of Rule A.0104 *do not apply to licensees representing **sellers** in auction sales transactions. **However, A.0104(a) still applies***

*and requires a written listing agreement between the seller and a broker from the outset of the relationship.* Be aware that **Rule A.0104 does apply in its entirety to licensees representing buyers in auction sales**; in other words, licensees representing buyers must have reviewed the *Working with Real Estate Agents* brochure with their buyer-client *and* have a *written buyer agency agreement* with their client *prior to submitting any bids*. While licensees representing buyers in auction sales need not disclose their buyer agency status in writing to the seller at the time they bid, they must confirm it in writing “...*no later than* the time of execution of a written agreement memorializing the buyer’s contract to purchase...” pursuant to **Rule A.0104(h)**.

### **Superseding Agency Duties**

Generally, agents should retain any personal information acquired about a client during the course of their representation of that client in confidence even after the agency relationship has terminated, unless disclosure is required by law or rule. However, there are situations where an agent’s duties to a current client may supersede their now expired obligations to a former client. One example is where a company/agent has a listing, but the listing does not sell during the six months that the company’s listing agreement is in effect and the seller now hires a different company to list his/her property. While the property is listed with the second company, the former listing agent is working with a buyer client under a written (or oral) buyer agency agreement and that client wishes to see the property. The buyer agent no longer has any fiduciary obligations to his/her former seller client, but does have current fiduciary obligations to his/her current buyer client to disclose any and all information about his/her former seller or the property which may influence the buyer’s decision to purchase and how much to offer. While some may view this as unfair, the seller ultimately holds the cards, as the seller may reject any offer presented by any buyer represented by the seller’s former listing agent, if the seller feels the buyer has an unfair advantage. On the other hand, the buyer may make an attractive offer to the seller which s/he is inclined to accept, notwithstanding what the buyer may know about the seller.

Similarly, an agent who previously was a buyer/tenant agent, but who was later discharged by that buyer/tenant, and who now is a listing or leasing agent for a property owner for property on which the former buyer/tenant client wants to make an offer must reveal whatever s/he knows about the buyer/tenant to the property owner who is the agent’s current principal. The identity of the agent who is representing the property owner should be obvious to the buyer/tenant. Whether the buyer/tenant chooses to make an offer anyway, is up to the buyer/tenant. There is no compulsion for the buyer/tenant to offer to purchase or lease the property where his/her former buyer/tenant agent now represents the property owner. It is totally the buyer/tenant’s prerogative.

### **Principal’s Interests are Primary**

The bottom line is that when acting as an agent, the agent owes his/her fiduciary duties to his/her principal and is supposed to *place the principal’s interests ahead of the agent’s own interests*. An agent should assiduously avoid any self-dealing and should disclose any potential bias to his/her principal. The following court case is a prime example of how an agent should *not* act. It involved deceptive practices which violated both Real Estate License Law, Commission rules and common law agency principles.

**Gosai v. Abeers Realty and Development Marketing, Inc., Samuel P. Swett, et. al.**  
*166 NC App. 625 (2004)*

**Facts:** Samuel Swett was the president, principal broker and broker-in-charge of Abeers Realty and Development, dba Abeers Realty. In April, 2000, Swett approached Mr. and Mrs. Gosai, who he previously had represented as buyers in another transaction, and told them that he had a friend who had a house and lot for sale in Boone which might interest them and showed them the property. Swett then prepared an Offer on behalf of the Gosais offering \$130,000 for the property which was accepted by the seller. The Offer indicated that Swett and Abeers Realty were acting as a dual agent. In reality, Swett had purchased the property, which was condemned, for \$29,000 in March 2000 and had titled it in the name of a third party (Jordan). Swett failed to disclose to the Gosais his ownership interest in the property, the fact that it was condemned (the chimney was separating from the building), or that he was going to reap a \$100,000 profit.

On June 8, 2000, Jordan executed a General Warranty Deed transferring title to the property to Abeers Realty, allegedly for \$30,000, although no consideration was paid. The Gosais closed on June 19, 2000, paying \$25,000 in cash and executing a Note and Deed of Trust to Abeers Realty for \$105,000, the balance of the purchase price. The Gosais paid \$17,000 in interest on the note between July 2000 and June, 2002. In July, 2002 the Gosais filed a lawsuit seeking to rescind the Note and Deed of Trust and for damages, claiming fraud and unfair and deceptive trade practices by Swett/Abeers Realty.

**Held:** The trial court found that Swett and Abeers Realty had acted as an implied buyer agent under the common law of agency and therefor owed fiduciary duties to the buyers which included the duty to disclose all material facts and their failure to so disclose constituted fraud and unfair and deceptive trade practices. The trial court rescinded the note and awarded the buyers \$117,000.00 in damages, which the Court of Appeals affirmed. Citing precedent, the appellate court noted: “*A broker can neither purchase from nor sell to the principal unless the latter expressly consents thereto with full knowledge of all the facts and circumstances.*” Further, any time a fiduciary appears to act incompatibly with his/her duties, s/he must show that s/he acted in a fair, open and honest manner with his/her principals.

The Gosais also filed a complaint with the North Carolina Real Estate Commission against Mr. Swett which was actively prosecuted, but which was dismissed prior to final adjudication when Mr. Swett was killed in an airplane crash.

The above case should also give licensees pause who, when selling their own property, also consider acting as a buyer agent. While not technically illegal if the buyer wishes to hire the licensee after full and informed consent, if problems arise, what jury would believe that the licensee, acting as the buyer agent and thus owing fiduciary duties to the buyer, would really put the buyer’s interests ahead of his own interests as owner of the property being sold or leased? It is *extremely* ill-advised to attempt to represent the opposing party’s interest where the licensee also is a party to the transaction. The Commission does not recommend that licensees engage in such conduct.

The documents identified below were referenced in this article; the current version of these forms may be found at [www.nc.living.net](http://www.nc.living.net) or linked from the Commission's website, [www.ncrec.gov](http://www.ncrec.gov):

- 1) NCAR Form 101: Exclusive Right to Sell Listing Agreement – 4 pages
- 2) NCAR Form 401: Exclusive Property Management Agreement – 6 pages
- 3) NCAR Form 570: Exclusive Right to Lease and/or Sell Listing Agreement (commercial) - 5 pages
- 4) NCAR Form 201: Exclusive Right to Represent Buyer – 3 pages
- 5) NCAR Form 203: Non-Exclusive Buyer Agency Agreement – 1 page
- 6) NCAR Form 220: Confirmation of Agency Relationship, Appointment & Compensation – 1 page
- 7) NCAR Form 150: Unrepresented Seller Disclosure & Fee Agreement – 1 page
- 8) NCAR Form 901: Dual Agency Addendum (residential) – 2 pages

### **Agency Rule A.0104 as of July 1, 2009:**

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

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

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

(c) In every real estate sales transaction, a broker shall, at first substantial contact directly with a prospective buyer or seller, provide the prospective buyer or seller with a copy of the publication

"Working with Real Estate Agents," set forth the broker's name and license number thereon, review the publication with the buyer or seller, and determine whether the agent will act as the agent of the buyer or seller in the transaction. If the first substantial contact with a prospective buyer or seller occurs by telephone or other electronic means of communication where it is not practical to provide the "Working with Real Estate Agents" publication, the broker shall at the earliest opportunity thereafter, but in no event later than three days from the date of first substantial contact, mail or otherwise transmit a copy of the publication to the prospective buyer or seller and review it with him or her at the earliest practicable opportunity thereafter. For the purposes of this Rule, "first substantial contact" shall include contacts between a broker and a consumer where the consumer or broker begins to act as though an agency relationship exists and the consumer begins to disclose to the broker personal or confidential information.

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

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

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

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

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

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

**(j)** When a firm represents both the buyer and seller in the same real estate transaction, the firm may, with the prior express approval of its buyer and seller clients, designate one or more individual brokers associated with the firm to represent only the interests of the seller and one or more other individual brokers associated with the firm to represent only the interests of the buyer in the transaction. The

authority for designated agency must be reduced to writing not later than the time that the parties are required to reduce their dual agency agreement to writing in accordance with Paragraph (d) of this Rule. An individual broker shall not be so designated and shall not undertake to represent only the interests of one party if the broker has actually received confidential information concerning the other party in connection with the transaction. A broker-in-charge shall not act as a designated broker for a party in a real estate sales transaction when a provisional broker under his or her supervision will act as a designated broker for another party with a competing interest.

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

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

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

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

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

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

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

*History Note: Authority G.S. 41A-3(1b); 41A-4(a); 93A-3(c); 93A-9; Eff. February 1, 1976; Readopted Eff. September 30, 1977; Amended Eff. July 1, 2009; July 1, 2008; April 1, 2006; July 1, 2005; July 1, 2004; April 1, 2004; September 1, 2002; July 1, 2001; October 1, 2000; August 1, 1998; July 1, 1997; August 1, 1996; July 1, 1995.*