

2009-2010 BROKER-IN-CHARGE ANNUAL REVIEW COURSE

SECTION TWO

COMPENSATION ISSUES

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LEARNING OBJECTIVE: Upon completing this Section, brokers-in-charge will be reminded of the laws and rules governing who may receive consideration arising from or related to a real estate transaction, who may not receive any such consideration, and any conditions pertaining to the sharing of consideration with others.

Introduction

The Commission frequently receives questions from licensees asking whether they may pay another broker a commission or a referral fee, or whether they may pay a referral fee to an unlicensed acquaintance who routinely sends them clients/customers, or give that person a gift certificate for \$150 to a nice restaurant, or buy that person tickets to a professional or collegiate sporting event, or could the broker's owner-client give the owner's neighbor some consideration for having sent a buyer or lessee who has made an offer on the property? This section will answer all those questions.

The law, actually, is very simple and very clear-cut, although some attempt to make it more complex than it is. We will begin with a review of the relevant statutes, the General Assembly's definition of brokerage activity, and will then apply these laws to specific facts. We will first discuss the easiest category, that of persons who *cannot* be paid, and will then turn our attention to the broader category of brokerage activity — who *may* be paid for it and under what, if any, conditions.

Antitrust Considerations

Before we discuss compensation issues, a brief reminder is warranted. To the extent that brokers and brokerage companies compete with each other to provide services to consumers, they are subject to the provisions of the federal *Sherman Antitrust Act*. The purpose of this Act is to promote competition in the marketplace among providers of goods or services to afford consumers choices concerning the purchase of such goods or services. Any act or agreement between or among competitors which appears to limit or restrict consumer choice might violate the Act. The *key is tacit or express collusion among competitors to set terms, thereby restricting choice*. Within the real estate brokerage arena, the two biggest snares are *price fixing* (whether the fee charged the property owner, the amount offered cooperating brokers, the duration of the agency agreement, etc.) and *boycotting*.

Price Fixing

For purposes of the present discussion, brokers need only understand the basic tenet that **brokerage fees are *always* negotiable**. Each firm should establish its own policy as to its fee structure and charges, amount of commissions, and the sharing of any listing commissions with cooperating selling agents, whether buyer agents only, or seller subagents only, or both. *Price fixing is prohibited by federal antitrust legislation*; if price fixing is shown to exist, it is an automatic violation of federal law. Most REALTOR® groups, as well as individual agents, are extremely sensitive to and scrupulously guard against any appearance of “price fixing,” both in establishing their fee structure as well as commission splits. Many MLS groups state in their rules that the MLS shall not fix, control, recommend, suggest or maintain commission rates or fees for agents' services or for the division of commissions or fees between cooperating agents.

Individual agents must be reminded that conversations with brokers outside of the company regarding commissions, costs, marketing strategies or sales policies may lead to charges of collusion or restraint of trade. Licensees are cautioned to disassociate themselves immediately from any persons engaging in such discussions. Every office should have a written policy addressing antitrust issues, which might include a prohibition against any associated broker discussing the firm's compensation, marketing or sales policies with any broker not affiliated with the company both during and after their association. Licensees certainly may explain their company's pricing policies to consumers, as consumers are not competitors. Nonetheless, such explanations should never refer to or compare pricing policies of other companies. Associates also must be trained to assiduously avoid certain statements, including:

- any reference to a "standard" or "going rate,"
- an inability to negotiate lower commissions due to the restrictions or rules of a trade association or any other organization, or
- a minimum term/duration for listing agreements.

Understand that antitrust laws do *not* prohibit a selling agent from contacting the listing company and asking whether it will pay him a greater fee than that advertised, e.g., MLS offers 2.5% to a buyer's agent and selling (buyer) agent requests 3%. Negotiations between two real estate companies or brokers concerning a possible co-brokerage arrangement between them does not violate the Sherman Antitrust Act. However, two brokerage companies (i.e., two firm licenses) agreeing that each would charge its owners x% and pay 45% of that to a cooperating broker would be collusion between competitors and would violate the Act.

Boycotting

If two separate companies agree to treat a third company less favorably than each treats other companies, the two colluding companies might be guilty of "**boycotting**" under the Act. Associates should be trained to avoid any insinuation that brokers who are not members of a particular group or trade association are less competent or "professional," nor should they express any negative opinion as to the appropriateness of a company's membership in or access to an association where that company offers less than full services. If a broker wishes to avoid antitrust issues, the phrase "most companies" should rarely, if ever, be used by a broker when discussing practices with a consumer, as it tends to create the impression of collective judgment or consensus among several companies.

*Brokers desiring more information and training materials regarding antitrust laws and compliance therewith are encouraged to order (or borrow from their local Board, if available) the 22 minute DVD entitled "**Antitrust and Real Estate**" produced by the National Association of REALTORS®. Additionally, NAR publishes a brochure by the same name, "**Antitrust and Real Estate; Antitrust Compliance Guide for REALTORS®**," which is a useful training tool and resource.*

General Prohibition Against Compensating Unlicensed Persons for Brokerage Services

The **Real Estate License Law** is found in **Chapter 93A** of the North Carolina General Statutes. The very first statutory provision (G.S. 93A-1) states:

...it shall be unlawful for any person, partnership, corporation, limited liability company, association, or other business entity in this State to act as a real estate broker, or directly or indirectly to engage or assume to engage in the business of real estate broker or to advertise or hold himself or herself or themselves out as engaging in or conducting such business without first obtaining a license issued by the North Carolina Real Estate Commission.... A license shall be obtained from the Commission even if the person, partnership, corporation, limited liability company, association, or business entity is licensed in another state and is affiliated or otherwise associated with a licensed real estate broker in this State.

“Real Estate Brokerage” Defined

What does it mean to “act as a real estate broker”? Paraphrased, the License Law defines a “**real estate broker**” as a person or business entity that:

- 1) lists, sells, buys, auctions,* leases, rents, sells leases, or offers to do any of the foregoing, or otherwise negotiates the purchase, sale or exchange of real estate or improvements thereon,
- 2) for others,
- 3) for compensation, valuable consideration, or the promise thereof.

[* NOTE: The statute, G.S.93A-2(a)(1), specifically excludes “a mere crier of sales” at a real estate auction from the real estate broker licensing requirement.] G.S. 93A-8 states that anyone who violates any of the statutes in Chapter 93A is guilty of a Class 1 misdemeanor.

Illegal Payments to Unlicensed Persons for Brokerage Services (including Referrals and Commission Sharing)

Based on the foregoing requirement that one hold a license to engage in and be compensated for real estate brokerage services, the GENERAL RULE OF LAW is:

No unlicensed person or entity (or licensee with a license on “inactive” status) may be paid for engaging in any activity or conduct considered to constitute real estate brokerage. This is true regardless of whether the person making the payment is a real estate licensee or an unlicensed person.

Brokers are forbidden by statute from “paying a commission or valuable consideration to any person for acts or services performed in violation of this Chapter.” [See G.S.93A-6(a)(9).] **Rule A.0109(g)** further reinforces this prohibition stating “... *a licensee shall not undertake in*

any manner, any arrangement, contract, plan or other course of conduct, to compensate or share compensation with unlicensed persons or entities for any acts performed in North Carolina for which licensure by the Commission is required.” Thus, **the sharing of compensation by a broker with unlicensed persons for brokerage activity is expressly forbidden.** Violations may subject the broker to disciplinary action.

Note too that a *broker whose license is on inactive status should be treated the same as an unlicensed person*, as the inactively licensed broker may not legally engage in any brokerage activity. This will be discussed more fully later in these materials.

The key to the ***prohibition is compensation/consideration paid for acts or services which require a real estate license***. If a license is required, then the person or entity must have an ***active broker license throughout the period that services are rendered*** in order to receive that compensation. Otherwise, the recipient is violating License Law and committing a misdemeanor.

Why are *unlicensed persons/entities* also prohibited from paying compensation or providing consideration to unlicensed persons for brokerage activity? Because North Carolina *criminal statutes* state that it is illegal to pay someone else to commit an illegal act. **G.S. §14-2.6., Punishment for solicitation to commit a felony or misdemeanor**, reads in part:

(b) Unless a different classification is expressly stated, a person who solicits another person to commit a misdemeanor is guilty of a Class 3 misdemeanor.

Thus, **it is illegal for any person or entity to pay compensation to or share consideration with an unlicensed person or entity for brokerage activity.**

Exceptions to General Prohibition Against Sharing Compensation with Unlicensed Persons

The two significant exceptions to the general rule against sharing compensation for brokerage services with unlicensed persons are discussed below.

Sharing Compensation with Parties to the Transaction

Licenseses are sometimes surprised to learn that *there is no law or rule prohibiting a broker from sharing his/her brokerage fee with a party to the transaction in which the broker is involved*. *Must a broker share his/her brokerage fee with an unlicensed party if the party requests it?* **NO**. *Must the party have a broker license in order to be paid?* **NO**. *Does it matter whether the agent sharing his/her brokerage fee is an agent of the property owner or a buyer/tenant agent?* **NO**.

Why can brokers (or other persons, for that matter) share a brokerage fee or give a rebate to a party to the transaction without breaking the law? Remember that what requires a license is acting as a broker which, by definition, requires representing *others*. Parties are the principals in the transaction, i.e., buyer, seller, lessor, lessee, and are representing their own interests. Because they are not representing “others,” they are not engaging in “acts which require a license.” On the contrary, they are *principals in and parties to the transaction and attempt to promote only their own interests*. **Accordingly, financial concessions or consideration, monetary or otherwise, may be given to a party. However, to the extent money or things of value are given to any party, they must be reflected on the HUD-1 settlement statement for complete disclosure. Additionally, if the buyer is receiving the consideration and is obtaining financing, then the lender must be told to avoid any charges of loan fraud.** Thus:

- A buyer’s agent may share a portion of his/her brokerage fee with his/her buyer client so long as this is disclosed on the HUD-1 and the buyer’s lender is aware of the arrangement.
- A seller’s agent may also share a portion of his/her brokerage fee with a buyer-customer so long as the seller agrees, it is disclosed on the HUD-1, and the buyer’s lender is made aware of the arrangement. Of course, a listing agent is not required to accept a buyer’s request that the listing agent share the commission with the buyer. The buyer may request it and the seller/listing agent either may agree or refuse. However, in any case, the listing agent must present the buyer’s offer and communicate the buyer’s request to his/her seller-client.

The bottom line is that the fact that the party (seller, buyer, lessor, lessee) does not have a real estate license is irrelevant and of no consequence. *Licensees may not tell a party to a transaction that they are prohibited from sharing consideration with the party because the party does not have a real estate license because, in this instance, that would be untrue and thus a misrepresentation* (either willful or negligent).

The three principles governing the sharing of a brokerage fee by an agent with a party to the transaction are:

- Any payments, concessions or rebates by an agent to the buyer **must be disclosed to the buyer's lender prior to closing**, preferably earlier, rather than later in the loan process, as it may impact the lender's loan to value (LTV) calculations and determination of the buyer’s eligibility for the loan. Failure to disclose may constitute loan fraud.
- Any payments, concessions or rebates by an agent to either the seller or the buyer **must be reflected on the HUD-1 statement**. The HUD-1 is supposed to reflect all monies received or paid to anyone related to that transaction. Failure to list any payments or other consideration may constitute loan fraud, whether paid at closing or outside of closing.

- If a licensee is sharing compensation with a party *other than his/her principal*, the licensee must have his/her principal's consent. It is highly recommended that the consent be in writing.

NOTE: The foregoing discussion is not intended to imply that licensees must or should share compensation or consideration with parties to the transaction. Rather, this is addressed because such requests from parties are not uncommon and licensees need to understand that they *may* share consideration with *a party to the transaction* if they choose, even if the party is unlicensed.

SO, as with many rules, the general rule against brokers sharing brokerage compensation with unlicensed persons has one primary exception, namely, brokers (or others) **may share compensation with a PARTY TO THE TRANSACTION.**

Note that technically the party/principal is *not* receiving a “brokerage commission,” as they are not licensed and are not acting as an agent; rather, they are receiving a gift or consideration or an unearned fee or whatever one might call it, but it is not “earned income.” The broker who pays the consideration will clearly deduct it as a business expense, if it was included as part of the broker’s gross income/revenue. The broker may well give the party a Form 1099 of some sort to evidence the miscellaneous or unearned income, depending on the amount.

Examples of Sharing Brokerage Fee with Parties/Principals

Example #1: A broker affiliated with a real estate company is approached by a buyer who wants to enter into a written exclusive buyer agency agreement for 45 days. The buyer is looking for a home in the \$400,000-\$450,000 range. The broker informs the buyer that the company expects to receive a commission equivalent to 3% of the purchase price of the home, but that the buyer will only be liable if the seller or listing agent will not cooperate. The buyer is willing to agree, but also wants the broker to agree to pay the buyer \$1500 of any commission the broker receives.

A) Must the broker agree? **No.**

B) If the broker refuses, is it possible the buyer will leave and hire another broker to act as his buyer agent who is willing to share a portion of his commission? **Yes.**

C) May the broker tell the buyer that he would love to share with the buyer, but that he cannot because the buyer doesn’t have a broker license? **No. Such a statement would be a “misrepresentation” (i.e., an untruth). The buyer does not need a license because he is not representing “others.”**

D) May the broker tell the buyer that he would love to share a portion of his fee, but that his company’s office policy or his broker-in-charge only permits associates to share with other duly licensed brokers? **Yes, if** in fact this is true!

E) May the broker agree to pay the buyer \$1500 from the broker's fee if the broker is the selling agent and is paid by the listing agent/seller? **Yes, absolutely!** Where would this agreement be evidenced? In the written buyer agency agreement and the lender would be informed of the \$1500 to be paid by the broker to the buyer at the time the buyer applies for a loan.

F) If the buyer agent agrees to pay the buyer-client, does s/he need the seller's permission? *Good question.* The answer is, *it depends.* If the broker is acting *only as a buyer agent, then no,* s/he does not need the seller's permission as the seller is not his/her client and is owed no fiduciary obligations. *However,* if the buyer agent has been transformed from a buyer agent into a dual agent (with proper consent of both seller and buyer) because it is an in-house listing, then the company has two principals, and the *seller principal has a right to know* that the broker is sharing some of its fee with the buyer client. Should the seller client care? Not really, as it does not change the amount the seller is contractually obligated to pay the brokerage company. It's just that the company or its affiliated agent has voluntarily agreed to share a portion of its/his fee with the buyer for whatever reasons.

Example #2: Listing company has an exclusive right to sell agreement with an owner. The owner has agreed to pay a commission equal to 6% of the purchase price and authorizes the listing company to share half of its fee with any buyer agent. The listing agent obtains an offer from an unrepresented buyer on Standard Form 2-T. In paragraph 4 the buyer offers \$400,000.00 for the property, with an asterisk (*) next to the offered price and a note to "see Paragraph 20." In Par. 20 the buyer has written: "This offer is contingent on the buyer receiving \$8,000 of the fee normally paid to the selling agent."

A) Could a licensee acting as an agent include similar language in an offer to purchase? **No.** Rule A.0112(b) prohibits a broker from suggesting or including any language concerning his/her compensation or commission in an offer to purchase. Requests for compensation by a broker must be separate from the offer. However, this buyer is not a licensee and is not bound by Commission rules, so s/he may include such language.

B) Must the listing agent show the offer to his/her seller-client? **Yes. Absolutely.** If the seller is inclined to accept the buyer's offer, *must the listing agent agree to pay \$8,000 of his/her/its commission/fee to the unrepresented, unlicensed buyer?* Not exactly. This is where education and office policy enter. The listing agent should explain to the seller that the company and the seller already have a contract between them (i.e., the listing agreement) whereby the seller agreed to pay the company a certain fee, and the company in turn agreed to share a portion of that fee in certain specified situations — namely with a selling *broker* who is acting either as a buyer agent or as a seller's subagent, depending on what the seller authorized.

The listing agent is not compelled to share his/her compensation beyond those specified situations, so the seller can not *make* the listing agent share. However, the listing agent may agree to give a portion of his/her/its fee to the buyer so long as 1) the seller consents, 2) the amount is on the HUD-1, and 3) the buyer's lender is told at loan application. If the buyer hired

a buyer agent, the listing company conceivably might be required to pay the advertised 3% to the selling agent which would be \$12,000. Perhaps the listing company might be willing to share \$8,000 (or some lesser amount) of its fee with the buyer, which might be sufficient to close the deal. Where would this be evidenced? In the offer to purchase and contract, as injected by the buyer, as it relates to consideration being paid to a party and not to a broker, so it does not violate Commission rules.

C) Can the listing company tell the buyer it is prohibited from paying him/her because s/he does not have a license? **No.** No license is required because the buyer is a party and is not representing others. It is totally legal for anyone to pay the buyer, as long as payments are disclosed to any lenders involved and are reflected on the HUD-1.

D) May the listing company tell the buyer that it refuses to share a portion of the Company's brokerage fee with unlicensed parties to the transaction as a matter of policy? **Yes**, if in fact that is true. What if the Company refuses to share, but the seller wants to accept the buyer's offer anyway — is the Company obligated to pay \$8,000 of its commission to the buyer under the terms of the sales contract? While it may depend on the wording, most likely not, because the Company is not a party to the sale/purchase contract and has not agreed to share its fee. The Company's obligation to share is governed by the terms of the listing agreement. The agent should caution the seller that if s/he accepts the offer as written by the buyer, the seller may be in a position where s/he owes the listing company the agreed listing commission *as well as being liable to the buyer* for the \$8,000 payment under the contract.

Example #3: A seller's residence has been on the market for more than four months and the seller is getting desperate. The listing agent is aware that the seller has begun posting notices around the neighborhood and in area retail stores announcing that he will pay \$3,000 to anyone who sends a buyer for his/her property. The listing agent should explain to the seller that it is illegal for the seller to offer consideration to an unlicensed non-party and for any unlicensed person to accept the seller's offer and receive the incentive for sending/referring a buyer to the property. Such an unlicensed payee violates License Law and could be charged with a misdemeanor for accepting the \$3,000, and the payor commits a misdemeanor as well under G.S. 14-2.6. However, the seller *could* advertise that s/he will pay \$3,000 (or whatever amount) towards closing costs to any *buyer* who makes a satisfactory offer.

Example #4: An apartment complex posts a huge notice outside its main drive declaring: "Free two months rent with one year lease!" Is this permissible? **Yes.** The apartment complex is offering a thing of value to persons who sign a one year lease and thus are parties to the lease transaction. Completely legal.

Could the apartment complex legally distribute flyers to their current residents offering free rent for two months to anyone who sends new renters to the office? **No;** existing tenants would be breaking the law to accept two months free rent for having referred new tenants to the

complex as the existing tenants are unlicensed persons who will not be parties to the new lease agreement, and the payor (apartment complex) has violated North Carolina criminal law.

Example #5: A limited liability company is interested in leasing a commercial property for ten years. [Note that a limited liability company may legally buy, sell, lease or exchange property in which the limited liability company has or takes an ownership interest through its *managers* without either the managers or the entity having a license, just as individuals may.] One of the managers of the limited liability company has an active North Carolina license, but has chosen *not* to act as a broker in this transaction, but rather just as a manager of the limited liability company. Part of the lease agreement ultimately reached between the lessor and the limited liability company/tenant calls for the lessor/landlord to pay \$5,000 to the lessee. Is this legal? **Yes.** To whom should it be paid? To the *party*. Who is the party? The *limited liability company*. Thus, the check would be made payable to the limited liability company itself, and *not* to any individual. How the limited liability company then chooses to allocate it among its members and/or managers is up to it.

Could the manager with the active broker license have acted as a broker in the transaction and received a commission? Yes, but once deciding to don the broker hat, s/he would have to comply with all license law and rules. Accordingly, s/he would need a *written* tenant agency agreement with the limited liability company (preferably signed by a manager in the company other than the broker-manager) before extending any lease offer. The broker should have made it clear when initially contacting the leasing broker or owner that s/he was acting as a broker for a company in which s/he was also a manager and, if applicable, an owner (member), and negotiated the amount of his/her commission, which would have been paid directly to the broker and not to the limited liability company.

Payments to Travel Agents for Vacation Rentals

There is only one other exception to the general prohibition against brokers sharing their brokerage compensation with unlicensed persons. Besides parties to a transaction, the only other unlicensed persons with whom a **broker** may share consideration are *travel agents who refer tenants to a broker for vacation rentals only*. The Vacation Rental Act and implementing rules were amended in 2002 to permit licensees to pay consideration (referral fees) to travel agents under certain specified conditions as described below.

Travel Agent Eligibility to Receive Referral Fees from Licensees

Licensees may pay “consideration” to travel agents (defined as a “person or entity ... primarily engaged in the business of acting as an intermediary between persons who purchase air, land, and ocean travel services and the providers of such services”) *so long as*:

- The travel agent, as part of the regular course of her/his business, only “introduces” the tenant to the broker and “...does not otherwise engage in any activity which would require a real estate license;” **AND**
- the travel agent does not solicit, handle or receive any monies in connection with the vacation rental.

Additional Requirements for Licensees Paying Referral Fees to Travel Agents

When undertaking to share consideration with a travel agent, brokers must:

- ***Prior to entering into a lease/rental agreement***, provide *the tenant* with a **written statement** advising the tenant to rely only upon the written lease agreement and the broker's representations about the transaction;
- **not pay** the travel agent until ***after the conclusion of the tenancy***; **AND**
- maintain records showing the vacation rental property, the tenant, the travel agent, the addresses of each, the dates of the tenancy, and the amount paid to the travel agent, which records must be kept for three years from the termination of the tenancy.

It is contemplated that under these parameters, a travel agent could contact a broker, inquire about the availability of vacation rentals in whatever location and for whatever dates the travel agent's customer seeks, and tentatively hold or reserve a property for the customer, all without violating the rule. However, the *broker* then must send *written confirmation* directly to the tenant, *receive any deposits or reservation fees directly from the tenant* (**not** from the travel agent, which is expressly prohibited by the rule if the travel agent wants to receive consideration from the broker) and otherwise deal directly with each other (broker and tenant) after the “introduction” afforded by the travel agent.

Compensating Affiliated Licensees

The next several pages will discuss the Commission’s interpretation of the law and rules concerning the compensation of licensees for brokerage services, as well as the compensation of licensed and unlicensed assistants.

NOTE: While the Commission will entertain complaints concerning improper compensation of both licensees and unlicensed persons in violation of the License Law and Commission rules, it will not hear cases involving *disputes about the sharing of compensation among licensees under a brokerage cooperation agreement between brokers or firms*. **Rule A.0109(f)** states: “*The Commission shall not act as a board of arbitration and shall not compel parties to settle disputes concerning such matters as the rate of commissions, the division of commissions, pay of brokers, and similar matters.*” Forums which may be available for compensation disputes include the applicable Board of REALTORS® for arbitration (which may

be mandatory if both brokers are REALTOR® members) or the courts of law, most likely regular District Court, or, depending on the amount in dispute, Superior Court.

Licensee Eligibility for Compensation

*To receive compensation for brokerage services, the recipient must have a license that is **current** (meaning renewal fee has been paid) **and** that is on **active** status. License pocket cards only indicate that the licensee has paid the necessary fee to *renew* his/her/its license; it *does not guarantee or certify that the license is on active status*. Commission **Rule A.0504(a)** provides:*

... The holder of a license on *active* status may engage in any activity requiring a real estate license and may be compensated for the provision of any lawful real estate brokerage service. The holder of a license on *inactive* status may not engage in any activity requiring a real estate license, *including the referral for compensation of a prospective seller, buyer, landlord, or tenant to another real estate licensee or any other party.* (Italics added.)

Requirements for Active License Status

Brokers NOT on Provisional Status. To have an active license, a broker NOT on provisional status (i.e., a “full” broker – one who has completed all required postlicensing education) must:

1) pay the \$40 license renewal fee on time (anytime between May 15 and June 30 each year);

AND

2) complete eight (8) hours of continuing education (CE), including the mandatory Real Estate Update course, prior to June 10 of each year.

NOTE: CE for most licensees (other than one who is a BIC or “BIC eligible”) consists of the 4-hour mandatory *Real Estate Update Course* and a 4-hour elective course. If the licensee is a BIC or BIC eligible, then s/he must take the *Broker-in-Charge Annual Review (BICAR) course* each year as his/her *elective* course beginning the first full *license year after* the license year in which s/he declared him/herself a broker-in-charge, *as well as* the mandatory Real Estate Update course each year.

If a broker not on provisional status does these two simple things each and every year, s/he will always have an active license, regardless of whether s/he is acting as a sole practitioner or is affiliated with another broker or firm. Maintaining an active license does not mean that the broker must be actively engaged in providing brokerage services. It merely means that the broker is eligible to engage in brokerage activity and may be paid for such activity, including referrals.

Provisional Brokers. To have an “active” license, a *provisional broker must renew his/her license in a timely manner and complete eight hours of continuing education, including the mandatory Real Estate Update course; however, unlike a full broker, the provisional broker must also be affiliated with a broker-in-charge in order to have an “active” license.* A provisional broker can pay the renewal fee each year and complete the required CE by June 10 of each year, but his/her license will still be on inactive status until such time as s/he finds a broker who is willing to act as the provisional broker’s broker-in-charge. *A provisional broker will be on inactive status whenever s/he lacks a broker-in-charge, even though s/he has completed all other requirements to maintain an active license.*

IMPORTANT NOTE: *Provisional brokers also must complete thirty hours of postlicensing education by their license anniversary date in each of the first three years in order to maintain active status.* Brokers-in-charge would do well to remember that, unlike “full” brokers, provisional brokers can be on active status the first week in July when the broker-in-charge does his/her record check of all associates, but *may become inactive or have their license cancelled during the license year* because they fail to timely complete the required postlicensing education by the anniversary date of their license issuance.

Firms. The “current” and “active” license requirements also apply to business entities holding a **firm broker license**. *If a firm’s license was expired or inactive during all or a portion of the time the brokerage services were performed by the firm’s agents (as agents of either the owner or the buyer/tenant), then the firm may not be entitled to collect any brokerage commission for its services.* In that case, the individual agents involved in the transaction, who are entitled to compensation only by virtue of their affiliation with the firm, also will not be able to collect any compensation. Their right to compensation depends on the firm’s right to compensation.

Payment of Compensation to Provisional Brokers

G.S. 93A-6(a)(5) prohibits a *provisional broker* from “accepting a commission or valuable consideration as a real estate provisional broker for the performance of any of the acts specified in this Article ... *from any person except his or her broker-in-charge or licensed broker by whom he or she is employed.*” Thus, *all commissions, bonuses, incentives or other compensation paid to a provisional broker for real estate brokerage activity must flow through his or her broker-in-charge or employing broker-firm.* If a provisional broker accepts compensation for brokerage activities from any person other than his/her broker-in-charge or employing broker/firm, then the provisional broker is subject to disciplinary action.

Payment of Compensation to Assistants

Payment to Actively Licensed Provisional Broker Assistant for Brokerage Activity.
The requirement that all brokerage compensation to provisional brokers be paid through the

broker-in-charge applies equally to compensation paid for brokerage activity to an actively licensed provisional broker who is assisting any agent affiliated with the company. The provisional broker assistant will only be on active status if s/he has a broker-in-charge. The broker (provisional or full) the assistant is helping is not acting as an independent broker, but rather is conducting his/her brokerage activity as an associated broker with a particular real estate company and is under the Company's broker-in-charge at that office.

In order for the provisional broker assistant to be able to engage in brokerage activity out of that office, s/he also must be under the supervision of the Company's broker-in-charge at the office where the associated broker is employed, and payment to the actively licensed provisional broker assistant for brokerage services must be made directly by the broker-in-charge. If the provisional broker assistant's broker-in-charge is at some other office, then the only services the assistant can provide the associate are clerical/administrative, as the assistant can only engage in brokerage activity out of the office where his/her broker-in-charge is located.

Payment to Assistants for Clerical/Administrative Functions. *Any broker or provisional broker may pay his/her assistant, licensed or unlicensed, directly for clerical/administrative functions.* However, as noted above, no broker or provisional broker associate may pay a provisional broker assistant directly for any *brokerage services* the assistant provided. Obviously, the assistant's compensation for brokerage services is coming out of the compensation due the associate they are assisting, but it must be paid by the broker-in-charge. Again, this restriction applies only to *compensation due for brokerage activities* performed by an *actively licensed provisional broker-assistant*. An assistant with an *active non-provisional broker license*, i.e., a full broker, could be paid directly by the affiliated broker s/he is assisting for both clerical and brokerage activities, *if permitted by company policy*.

An assistant with an *inactive* license, whether full or provisional broker, or an *unlicensed* assistant, may receive his/her wages directly from the broker s/he is assisting, *provided*, of course, that the assistant has not performed any acts requiring an active license, i.e. brokerage services.

IMPORTANT NOTE: Most assistants, licensed or unlicensed, are viewed by the IRS as W-2 employees when performing clerical or administrative tasks and someone should be withholding the appropriate FICA and taxes and sending it to the proper authorities. While the BIC may view the assistant as the associated broker's employee, the IRS may well view *the company* as the employer, because all the brokers at the office are working as agents of the company under the company's umbrella, which is why the company may be civilly liable for the conduct of its agents and support staff. Companies would be prudent to address the issue of ensuring proper tax withholding in its office policy manual.

Payment of Compensation to Brokers NOT on Provisional Status

There are no express statutory or rule restrictions as to the payment of compensation to “full” brokers. **In theory, a broker whose license is not on provisional status may receive commissions or other compensation for brokerage activities from anyone.** *However, if the broker transacts brokerage activities in association with and under the auspices of a brokerage firm, then most likely **the firm** owns the underlying agency agreement with the consumer, and thus any commissions arising from such transactions are due the brokerage firm.* It is then up to the brokerage firm to compensate the associated agent for his/her services pursuant to their underlying employment agreement. The concept that all brokerage compensation should flow through the company is reinforced by **G.S. 93A-6(a)(6)** which states that *a broker may not attempt to represent anyone outside of his/her employing brokerage company without the express knowledge and consent of all brokers-in-charge.* Thus, a broker should not be representing people “on the side” or receiving compensation, including referral fees, from brokerage activity outside of his/her employing firm unbeknownst to his/her broker-in-charge.

Company Policies Should Address Compensation of Affiliated Brokers. *Employing brokers and brokers-in-charge would be prudent to address the issue of affiliated broker compensation in their office policies and procedures manual.* If a company wants *all income* derived from the efforts of any of the company’s affiliated agents, whether called a commission, a rebate, an incentive, a bonus, a referral fee, a prize or reward, to be paid first to the company and the company then decides the allocation, then the company needs a rule in its policy manual to that effect. Otherwise, there would be nothing which necessarily would prevent a full broker from attending a closing and directing the attorney to write the commission check to the company, but to issue the bonus amount directly to the selling broker. (Provisional brokers do not have this ability as *all* brokerage compensation must come through the company.)

Affiliated Broker is Agent of Firm. Every broker should understand that *when they are working as an affiliated agent with a company, the company is their principal, and they owe the company the same fiduciary obligations that they owe a client/principal.* Thus, it violates the duties of loyalty, obedience and disclosure of all information for any affiliated broker to accept compensation for any brokerage activity, including referrals, conducted outside of the company without the express knowledge and consent of the broker’s broker-in-charge.

Payments to Licensees No Longer with Firm, Inactive Licensees or Former Licensees (License Expired)

When paying or sharing compensation, the **key question** is *whether all brokers (including any firms) were legally entitled to engage in brokerage activities throughout the period that services were rendered?* Did all the individual brokers who participated in the transaction have an active license while providing services? Were the firm real estate licenses of all companies involved in the transaction on active status throughout the transaction?

Basic Rule

If the licenses of the firm and individual agent were on active status throughout the period during which services were rendered (properties viewed, offers negotiated, contracts

signed, and post-contract issues addressed, e.g., property inspections, financing contingencies, etc.), ***then the firm may be paid and the firm may in turn pay the individual licensee, even if his/her license is inactive or expired at the time of payment.*** So long as all licenses were active while services were provided and the fee earned, then the licensees may receive the fee. However, if the individual's license was not on active status when the services were provided, then neither the individual licensee nor the firm may ever be paid. They all just did charity work.

Firm Entitled to the Commission

If brokerage services were provided through a licensed firm, *payment of the brokerage commission should always be made by the closing attorney to the firm that earned the commission*, not directly to any individual agent affiliated with the firm, even if the agent has a broker license or if the agent has left the firm. It is the **firm** that was the party to the agency agreement with the transaction principal (seller/lessor or buyer/tenant), not the individual agent. Accordingly, the firm is entitled to the compensation and it will then pay its current or formerly affiliated licensees according to the employment agreement with the licensee.

If a broker acting independently (not affiliated with a firm) earned a commission, then the brokerage commission should be paid by the closing attorney directly to the broker, even if his/her license is inactive or expired at the time of payment (assuming the broker ceased providing services when his/her license expired or became inactive).

Agent Has Left Firm or Has Inactive/Expired License

If an individual agent (broker or provisional broker) held a current and active license throughout the period during which brokerage services were rendered through the agent's former firm, then the firm with which the agent was associated may legally pay the agent's commission share to the agent, even though the agent is no longer associated with the firm and even if the agent's license is inactive or expired at the time of payment. Payment to the agent will be dictated by the terms of the agent's employment agreement with the firm.

Understand that the Commission is *not* saying here that a firm *must* pay its former affiliated agent, only that it *may* pay him/her if it chooses. Whether it must or should pay the individual may be governed by the company's office policies and procedures manual, and/or any employment contract with that individual agent, and/or principles of law or equity.

Provisional Broker with New Firm. If the agent who earned a commission while working with a firm is a *provisional broker* who now works with another company, then the former broker-in-charge has a choice. S/he may pay the provisional broker directly since s/he was the provisional broker's broker-in-charge at the time the commission was earned, *or* the provisional broker's former broker-in-charge may pay the provisional broker's commission to his/her current broker-in-charge to pass on to the provisional broker. [If the provisional broker's license is inactive or expired at the time of payment, then clearly the former broker-in-charge would pay the provisional broker directly, as there is no current broker-in-charge.]

Miscellaneous Situations

Agent Working on a Transaction After Leaving a Firm

Brokers-in-charge must be very careful in handling situations where an agent leaves a firm and associates with another firm, but has pending listing and/or sales transactions with the former firm. A **provisional broker** should not be allowed to continue working on a transaction once s/he has left the firm. Any other arrangement would be fraught with problems. A **“full” broker** *could* be lawfully associated with two firms with the express knowledge and consent of all brokers-in-charge, thereby allowing the broker to conclude any transactions still pending with the old company while beginning new transactions and consumer contacts with the new company. Brokers-in-charge who agree to such an arrangement should, however, consider potential liability issues for the broker’s actions and, at a minimum, have everyone involved sign a written agreement describing the arrangement.

Agent’s License Expired or Inactive

*When an agent who is working on one or more transactions allows his/her license to expire or go inactive for failure to timely complete all required education, the agent must **immediately cease all work** on any transaction until the problem is remedied and the license reactivated!*

Example #1: Mary is a provisional broker working with Prime Realty with Ted as her broker-in-charge. She has a written buyer agency agreement with a buyer who makes an offer and goes under contract May 15, with a July 2 closing date. By the end of June, the deal is ready to close – no issues remain to be negotiated. On June 27, Mary realizes that she failed to take her Update course that year, so her license will be inactive as of July 1. Can Mary still go to the closing just to make sure everything goes all right? **No**. Mary will not have an active license as of 12:00:01a.m. July 1 and should not be permitted to engage in any conduct that requires a license thereafter until she has remedied any deficiencies.

A) Can Ted go to the closing for Mary and pay Mary her commission split on July 3? **Yes**, even though Mary’s license is still on inactive status. Her license *was active* until 11:59:59pm on June 30 and she rendered all the services which earned the fee prior to that date. Thus, she may be paid now.

B) What if Mary had done all her CE that year, but announced on June 27 that as of July 1 she had accepted employment with Rainmaker Realty. Could she still attend the July 2 closing? **No**, because she no longer is affiliated with Prime Realty and cannot be, since she is still on provisional status and may only have one broker-in-charge at a time. Could Ted go to the closing for her and then pay Mary her commission split? **Yes**. To whom should he pay the fee? While Commission rules would allow Ted to pay Mary directly (since he was her supervising broker-in-charge in the transaction which generated the compensation), the suggested course is that Ted call Mary’s current broker-in-charge and ask to whom Ted should write the check.

*If a broker-in-charge allows an affiliated agent to continue working on a transaction or otherwise engage in brokerage activity after the agent's license has either expired or become inactive, then the firm jeopardizes its compensation by acting through someone who is not authorized to engage in brokerage services. **Both the firm and the agent may have forfeited any consideration to which each previously was entitled by rendering services when the agent's license was not properly on active status.***

One of the most painful (presumably) examples of this principle was an actual case a few years ago when a real estate company agreed to surrender its claim to a selling side commission of \$550,000.00 because the provisional broker/salesperson who acted as the buyer agent over an eighteen month period in this commercial transaction had never had his license properly activated with the company. Thus, even though the company's license was active, because it provided its services through an agent who had never been on active status as an affiliated agent with the company at any time during the transaction, *both the company and the agent forfeited the selling commission.*

Firm's License Expired or Inactive

If a firm allows its license to become inactive or expire, it is not entitled to operate as a brokerage firm and loses its right to be compensated for any brokerage activity performed illegally while the firm license is inactive or expired. Even though the firm's individual "full" brokers may still have active licenses, they no longer are associated with the company because the company no longer has a license on active status — it may not have any license at all if it did not pay its renewal fee! Generally, this will occur on July 1. If the company corrects the problem *immediately*, as in a matter of days, *and* has kept its doors shut and did not engage in brokerage activity during the period when it did not have an active license, then it may salvage claims to compensation earned for services performed prior to the date of license expiration or inactivation.

Typically, however, it may take the company several weeks, and occasionally months, to realize that it has dropped the ball and does not have a license (failed to pay renewal fee) on active status (lack of qualifying broker) and therefore is not authorized to engage in brokerage activity. If the company continues to provide services through its agents after its license expires or goes inactive, then both the company and its formerly associated brokers lose all claims to payment for post-deactivation services, as the licensees were acting as agents of a company which could not legally provide brokerage services. Such continued illegal activity may also impair or destroy claims for pre-deactivation services.

Payments to Business Entities Created by Broker Associates for Compensation Purposes

Brokers-in-charge may encounter situations where associated brokers create a business entity and want their brokerage compensation paid to their new entity, rather than having it paid directly to them as Form 1099 independent contractors. The *entity* created by the associated

broker (most commonly a “Subchapter S” corporation or a limited liability company) *first must apply for **and obtain** a firm broker license **before** any compensation may be paid to the entity.* Otherwise, the broker-in-charge of the employing company is paying brokerage fees to an unlicensed entity, contrary to State law. Thus, a broker-in-charge’s first question to the associate broker who wants his/her commissions paid to his/her entity should be: Where is your firm license? Until it is licensed, no fees earned from brokerage activity may be paid to the entity.

Every entity applying for a firm broker license must have a *qualifying broker*, namely, a principal in the entity (*officer* of a corporation, *manager* of a limited liability company) who possesses an *active broker's license* in good standing. A broker not on provisional status may wear all of the necessary hats; in other words, a broker can incorporate, own 100% of the shares of stock, name her/himself President and Treasurer of the corporation, and be both qualifying broker and, if necessary, broker-in-charge, thereby fulfilling all License Law requirements (assuming s/he also has complied with all incorporation prerequisites imposed under North Carolina law). Similarly, a broker may form a one member limited liability company and be the sole manager of his/her limited liability company. This scenario partially inspired the enactment of **Rule A.0110(h)** a few years ago, which currently reads:

- (h) A *licensed real estate firm is not required to designate a broker-in-charge* if it:
- (1) has been organized for the *sole purpose of receiving compensation* for brokerage services furnished by its qualifying broker through another firm or broker;
 - (2) is treated for tax purposes as a Subchapter S corporation by the United States Internal Revenue Service;
 - (3) has no principal or branch office; and
 - (4) has *no person* associated with it *other than its qualifying broker*.
- (Emphasis added.)

Example #2: Sam Producer conducts all of his brokerage activity as a full broker affiliated with XYZ Realty. Sam, on the advice of his CPA, decides to form either a corporation or a limited liability company (e.g., Producer Realty Inc/LLC) to allow commissions Sam earns through XYZ Realty to be paid to his business entity, rather than directly to Sam as an independent contractor. Once Sam has created his entity by registering it with the Secretary of State, Sam must next apply to the North Carolina Real Estate Commission for a firm broker license for Producer Realty Inc/LLC *before* his broker-in-charge at XYZ Realty may pay any of Sam’s commissions to Producer Realty. So long as:

- ✓ Sam formed Producer Realty for the sole purpose of receiving income that Sam earns elsewhere (at present, through XYZ Realty), and
- ✓ Sam is eligible to be qualifying broker and is the only person in or associated with Producer Realty, and
- ✓ the entity has no office (because Producer Realty is not engaging in brokerage under its umbrella; Sam is doing his brokerage under XYZ Realty’s umbrella.), *and*
- ✓ Producer Realty is taxed by the IRS as if it were a Subchapter S corporation, whether it is a corporation or a limited liability company

Then Sam will be qualifying broker for his company, but Producer Realty will not have any broker-in-charge, as it has no office, because it is not engaging in brokerage activities under its license. Producer Realty is a shell — it exists solely to receive compensation earned elsewhere and no brokerage activities are conducted under its firm license.

Brokers-in-charge would do well to remember that they are *prohibited from paying any brokerage compensation to any unlicensed entity or person and are subject to disciplinary action if they do so*. Not only should brokers-in-charge request proof of licensure for any entities created by associated brokers for compensation (e.g., the firm’s pocket card), but ***when checking the broker’s individual license renewal each year, they should also check to ensure that the broker renewed his/her firm’s license as well. If not, no further commissions or brokerage compensation should be paid to the entity until the broker reinstates the entity’s license.***

Comments

If the broker's entity *has any other person associated with it*, whether a shareholder or officer or member, licensed or unlicensed, or any affiliated broker paid on the entity’s payroll, **or** if the broker conducts *any brokerage activity under the name of his/her entity* (as opposed to XYZ Realty), then the *Rule A.0110(h) exception will not apply* and the broker must name a broker-in-charge for his/her entity (which may be the broker him/herself, unless s/he already is a broker-in-charge elsewhere). ***The A.0110(h) exception only applies when the broker's licensed entity exists solely to receive compensation that the broker earns elsewhere and no other person is in or affiliated with the entity.***

Note that only limited liability companies and corporations which ***meet all 4 requirements*** of Rule A.0110(h) will be eligible for the broker-in-charge exemption. Partnerships, whether limited or general, by definition will be ineligible as there will be more than one person in the partnership.

A sole proprietorship can not avail itself of this Rule A.0110(h) exception, because the exception applies only to *licensed real estate firms*, and sole proprietorships are expressly excluded from the Rule A.0502 definition of business entity. Rule A.0110(a) provides the only exception as to when a sole proprietorship need not have a broker-in-charge.

Who Can Create Entities for Compensation?

As a general rule, only “full” brokers have the ability to form an entity to receive compensation they earn through another real estate company. By contrast, a provisional broker can have an ownership interest in a real estate business entity, but unlike a full broker, can not wear all of the necessary hats (e.g., qualifying broker) to create a business entity to receive compensation earned by the provisional broker at another real estate firm.

A provisional broker who has an ownership interest in a real estate firm **EITHER** can engage in brokerage through his/her own licensed business entity **OR** can conduct his/her brokerage through another real estate company with which s/he associates, but can not do both. Why? The simple succinct answer: ***Because a provisional broker can only be supervised by and***

receive compensation from one broker-in-charge at a time. (See Rule A.0506(b)). For this and other reasons, provisional brokers are effectively precluded from establishing a business entity to receive compensation they earn through another real estate company. Their simple solution? Complete whatever postlicensing education is necessary to terminate the provisional status of their broker license and thereby become “full” brokers!

Sharing Compensation with Non-Affiliated Brokers/Firms

Everyone knows that a broker or brokerage firm may share earned brokerage fees with other brokers who are affiliated or associated with the broker or firm. Additionally, a broker or firm may share compensation for brokerage services with other brokerage firms or other brokers NOT affiliated with the broker or firm. This section explores those situations when compensation may be shared with non-affiliated brokers and brokerage firms.

Some might wish to draw a distinction between paying a **referral fee** to a non-affiliated broker versus **splitting a commission** with a non-affiliated broker as the selling or leasing agent. However, there really is no legal difference between referral fees and commission splits from the perspective of the License Law and Commission rules since they both constitute compensation for a brokerage service. The same legal principles apply, regardless of the amount of the compensation being paid. Consequently, the discussions in this section regarding the sharing of brokerage compensation make no distinction between these types of compensation.

Current and Active License Required

Just as a broker or brokerage firm must have a current and active license to earn a brokerage commission from a client, *any payment of a portion of a brokerage fee to another broker or firm must also be made to a person/entity who held a current and active license at the time the brokerage service(s) was performed*. Licensees can search the Commission’s website to determine the present status of a license; only the names of those individuals and companies that have an active license appear on the Commission’s website. Thus, if a particular name can not be found, then that licensee most likely does not have an active license at present. One can not search past license status on the website, but that information is available by obtaining the licensee’s license number and calling the Commission’s Information Services section. One can call without the license number, but may need to know the proper name on record for the licensee, since several licensees may have similar first and last names and the Commission does not show licensees by nickname.

Sharing Brokerage Fees Through Cooperative Listing Services

Most real estate sales transactions, especially residential sales, involve cooperation between non-affiliated brokers/firms. Brokers/firms earning brokerage fees are permitted to share or split earned brokerage fees with cooperating non-affiliated brokers/firms, but may not

necessarily be required to share brokerage fees with every licensed cooperating broker/firm. *The sharing of brokerage fees among non-affiliated brokers/firms is determined by agreements between the affected brokers/firms regarding the sharing of such fees. The most common agreements for sharing fees are agreements among brokers who are members of a “cooperative listing service.”*

A “cooperative listing service” is a membership organization formed by a group of brokers in a particular area for the purpose of cooperating with each other in the sale/lease of properties listed by member brokers. In North Carolina and elsewhere, the most well known cooperative listing services are those owned and operated by various local boards and associations of the National Association of REALTORS® and are called a “**multiple listing service (MLS)**”. These MLS organizations are separate and independent from each other listing service. *Only real estate companies who are members (“Participants”) of a particular listing service may reasonably expect the listing company to compensate the selling company without specifically confirming in advance the selling company’s entitlement prior to submitting an offer to the listing company. This willingness to share compensation, if offered, is a benefit of membership, but only extends to those Participants who have paid their dues to join that particular listing service.*

Note that the REALTOR® Code of Ethics requires REALTOR® members to “cooperate” with *all other brokers*, not just other REALTOR® members. The ethical standard does not define “cooperation” other than to state that it “... does not include the obligation to share commissions, fees or to otherwise compensate another broker.” “Cooperation” is defined in the REALTOR® Statement of Professional Standards #31 as an:

...obligation to share information on listed property and to make property available to other *brokers* for showing to prospective purchasers when it is in the best interest of the seller. An offer of cooperation does not necessarily include an offer to compensate a cooperating broker. Compensation in a cooperative transaction results from either a blanket offer of subagency made through MLS or otherwise, or offers to compensate buyer agents, or, alternatively, individual offers made to subagents or to buyer agents, or other arrangements as negotiated between listing and cooperating brokers *prior* to the time an offer to purchase is produced. [Italics added.]

Understand as well that *the member/participant is the real estate company or entity or an owner thereof*. The agents associated with the company may be called “users” or “subscribers,” depending on the listing service. Offers of compensation are made only as between the members/participants and the associated agents’ rights to compensation depend on their employment agreement with the Participant.

Sharing Brokerage Fees Outside of Cooperative Listing Services

While the only brokers who may expect “automatic” cooperation that includes compensation are the companies who have joined a particular cooperative listing service, such companies are not prohibited from sharing compensation with actively licensed brokers who are not members of that listing service. However, *brokers who are not members of the same cooperative listing service as the listing broker, and thus not entitled to presumed cooperation, should confirm whether the listing company will share compensation with them and in what amount before extending an offer on behalf of any buyer/lessee.* Those who “assume” that the listing company will compensate them even though they are *not* members of that particular service may be sorely disappointed.

Example #1: A broker is working with a buyer under a written buyer agency agreement which states that the broker anticipates receiving a commission equal to 2.5% of the purchase price, which the broker will first attempt to obtain from the seller or listing agent and the buyer will only be liable for the fee if neither the seller or listing agent will pay. The buyer’s broker is not a member of any multiple listing service. The buyer ultimately finds a property on which he wishes to make an offer. The broker prepares an offer on his buyer’s behalf, as well as a separate Request for Compensation for the broker’s fee, and submits both simultaneously to the listing broker, who is a member of the local MLS. Two days later the buyer agent receives a fax of the offer that has been accepted and signed by the seller, as well as a note from the listing agent declining the buyer agent’s request for compensation.

A) Does the buyer agent have any claim against the listing company for compensation? Probably not, because the broker is not a member of the listing broker’s MLS and thus is not entitled to the presumption of compensation available only to members. Because the broker failed to protect his own interests by determining the compensation issue *prior* to submitting the offer, he now has no claim against the listing company.

B) Can the buyer now retract his offer? **No**, because it already has been accepted by the seller and that acceptance communicated to the buyer agent, thereby creating a contract. The issue of the buyer agent’s compensation was not (and should not be) one of the terms or conditions of the parties’ contract to sell/purchase.

C) How can the buyer agent be paid if the listing company refuses to share its brokerage fee? The only person to whom the buyer agent can turn for payment is the buyer, pursuant to the terms of the buyer agency agreement. However, the agent may have a rather unhappy client when the buyer is told that s/he now owes the agent x number of dollars (e.g., \$5000 on a \$200,000 purchase) because the listing agent has refused to share. The buyer may well have offered less for the property had s/he known that s/he was responsible for his/her agent’s fee.

D) What if the buyer agent had requested compensation from the listing agent prior to submitting an offer and the listing company had declined? The buyer agent should have shared this information with his buyer client and allowed the buyer to decide whether s/he still wanted to make an offer and if so, how much. No doubt the buyer’s offer would be lower in this case, as the buyer’s costs have increased because the buyer must now pay his own agent. The buyer

agent may choose to attach a cover letter to his buyer's offer informing the seller and listing agent that one of the reasons his buyer's offer is lower than they might expect is because the listing company has refused to share compensation with the buyer agent.

Compensation Sharing Agreements “Should” Be Written

Fee-sharing arrangements between brokers should arise from an express or implied contract. Unless a broker has promised to pay a referral fee, there normally is no obligation. Most frequently the situation arises in “after-the-fact-referrals,” i.e., those made to an agent *after* s/he already is working with the referred buyer, in which case the local agent generally can not be compelled to pay a referral fee. Understand, however, that *unlike agreements with consumers which must be in writing to be enforceable against the consumer*, there is no requirement that cooperation or fee-sharing agreements **between brokers** must be in writing. The agreement may be oral, negotiated perhaps during a telephone conversation between the two brokers, but the problem will be proving what the terms of the agreement or understanding were if there is no written evidence of those terms and conditions. *A prudent agent will document any referral agreement or other fee sharing agreement by a confirming letter or email which sets forth the terms of the brokers’ understanding.* This will assist the payee later if s/he must sue the paying broker for breach of their agreement.

Maxwell v. Doyle

This principle is well illustrated in the case of Maxwell v. Doyle, Inc., 164 NC App, 319, 595 SE2d 759, decided by the North Carolina Court of Appeals in May 2004. The facts as recited in the Court's opinion were: Both Mr. Maxwell and Mr. Doyle were brokers practicing primarily commercial brokerage, the former in Cumberland County and the latter in Mecklenburg County and surrounds. Mr. Doyle had attempted over an extended period of time to persuade an owner of an apartment complex in Fayetteville to sell the property without much success. Doyle ultimately contacted Maxwell, who knew and had represented the complex owner, and told him that if Maxwell would open his past files to Doyle and help persuade the owner to list the property with Doyle, Doyle would split his commission equally with Maxwell.

Maxwell did as requested and arranged a meeting in September 2000 with the owner, Maxwell, and Doyle. Within two months of the initial meeting, unbeknownst to Maxwell, the owner entered into a listing and commission agreement with Doyle under which Doyle would receive a 2% commission upon the sale of the apartment complex. In late March/early April 2001, Maxwell learned while reading the local newspaper that the apartment complex had sold for \$14,000,000.00. He contacted Doyle for his share of the \$280,000 fee Doyle received. Doyle refused to pay Maxwell and Maxwell sued Doyle for the agreed fee. The trial court erroneously dismissed Maxwell's claim based on a procuring cause argument, and Maxwell appealed to the Court of Appeals, which reversed the trial court.

Court's Ruling

The Court of Appeals first noted that both parties devoted a large portion of their briefs arguing “procuring cause,” which concept did not apply to the parties' dispute. Citing a 1968 North Carolina Supreme Court case, the Court of Appeals held that *the procuring cause doctrine*

*applies to disputes between property owners and brokers concerning compensation, not to contractual compensation disputes between brokers. Rather, “a broker suing another broker for a division of a commission pursuant to an agreement between the brokers need not establish that he or she was a procuring cause of the sale. Instead, **the question is whether there was a breach of an enforceable contract between the brokers.**” (Emphasis added.) “To be enforceable, the terms of a contract must be sufficiently definite and certain” and there must have been a meeting of the minds as to all essential terms. “Where a contract does not specify the time of performance ..., the law will prescribe that performance must be within a reasonable time ... taking into account the purposes the parties intended to accomplish.”*

Applying these legal principles to the case at bar, the Court of Appeals held that Maxwell had proved that there was a valid contract between he and Doyle, the terms of that contract, and a breach of that contract. The only issue was whether the sale of the apartment complex occurred within a reasonable time following the initial meeting and the parties’ agreement, which issue was a question for the jury. Accordingly, the Court reversed the trial court’s dismissal of Plaintiff’s breach of contract claim and remanded the case back to the trial court for further proceedings. The parties ultimately settled the claim just prior to trial.

Listing Company Limitations on Sharing of Compensation

An interesting situation arises when a listing company wants to restrict the other brokers/firms with whom it will share earned brokerage fees. Typically, a listing company partially justifies the fee it is charging the property owner by explaining that the company anticipates sharing a portion of that fee with a broker who brings a buyer or tenant. The company seeks the owner’s permission to share a stated portion of its total fee with a broker acting either as a buyer/tenant agent or as a subagent of the owner or according to the company’s office policy (which most don’t have so this rarely applies) and obtains its owner’s written permission to share the firm’s fee in the underlying listing/leasing agency agreement. These agency agreements usually give blanket permission to share with *any* duly licensed broker acting as a buyer agent or seller subagent, if applicable, not just with those brokers who are members of the listing company’s MLS.

What if the listing company wants to impose the additional restriction that it will only share compensation with other members of its MLS? *In that case, the listing company should inform its property owners of this company policy during the initial listing solicitation, as it could influence who the owner hires. Failure to disclose the limitation up-front could also result in misrepresentation charges, as the company (assuming a standard NCAR agency agreement form is used) has told the owner that it will share a portion of its fee with **any** buyer agent or seller subagent, when in fact it will not.* If a company will not share with non-member brokers, or will share a lesser amount with non-member brokers, then the listing/leasing agency agreement should specify those conditions. For example, if the company will pay 50% of its agreed fee to any broker acting as a buyer agent who is a member of the applicable MLS, and

will pay 40% to a buyer agent who is not a member of the MLS, this should be disclosed to the owner at the time of listing and should be stated in the listing agreement.

What happens if a listing broker reneges on a commission sharing agreement with a non-affiliated selling broker? What recourse does the selling broker have?

Example #2: Jane is a broker in Jacksonville and is working with a buyer as a buyer agent. She sees a property located in a nearby town advertised in her local MLS that meets many of her buyer's criteria. The offer of compensation in Jane's MLS is 2% of the purchase price to a buyer agent. She learns that the listing broker has offered 3% to a buyer agent through the MLS which serves the city where the property is located. Jane contacts the listing broker and asks whether he will agree to pay her a 3% commission if her buyer makes an acceptable offer. The broker agrees and he and Jane enter into a written agreement stipulating that the broker will pay Jane a 3% commission. Jane's buyer falls in love with the property and the parties successfully negotiate a contract. The morning of closing Jane receives a call from the broker informing her that he will only pay her a 2% commission, rather than 3%.

Can/should Jane or her buyer client cancel the closing? **No.** The buyer has no legal grounds to withdraw from or cancel the transaction. The issue of Jane's compensation is not part of the Offer to Purchase and Contract nor should it be; thus, commission disputes are irrelevant to performance of the purchase contract. However, Jane's commission is the subject of a separate contract, signed by both the listing broker and Jane. Jane should bring that agreement to the closing and perhaps the broker can be persuaded to pay that which he agreed to pay. If not, Jane should *take whatever check the closing attorney is authorized to issue, but not cash it if it is not for the full amount due until she first has consulted an attorney.* Jane may need to sue the broker in Small Claim Court or District Court for the balance of any commission she claims is due.

Compensation to Foreign (Out-Of-State) Brokers

North Carolina licensees may compensate out-of-state persons or business entities who send them referrals or otherwise engage in brokerage services **outside of North Carolina so long as the person or business entity possesses an active real estate license in the state from which it operates.** The two main criteria are that:

1) the foreign licensee holds an active real estate license in the State from which s/he is conducting the brokerage activity;

AND

2) at no time during the transaction does the foreign licensee enter North Carolina related to that transaction.

If these two criteria are satisfied, then a North Carolina licensee may compensate a foreign licensee, whether in the form of a referral fee or a commission split. The key to the out-of-state (foreign) broker's ability to be paid for brokering a deal where the property is located in North Carolina is that the broker must physically remain in the state where s/he is licensed and conduct

all of his/her brokerage activity from that state and not enter North Carolina, unless s/he is licensed here.

Examples Involving Foreign (Out-of-State) Licensees

Example #3: Barbara Broker works with Sunshine Realty, LLC in residential sales. She receives a telephone call from Betty, a broker in Iowa whom she met at a trade convention. Betty explains that one of her very best friends is moving to North Carolina and needs a competent buyer agent and Betty of course thought of Barbara, and if Betty referred her friend to Barbara and the friend ultimately purchased a home using Barbara as her agent, would Barbara pay Betty a referral fee? May Barbara agree to pay Betty a referral fee of whatever amount/percent? **Yes, so long as:**

1) Barbara asks Betty whether her Iowa license is still active; if Barbara has any reason to suspect that Betty no longer has a license, she may wish to check with the Iowa Real Estate Commission.

2) Betty does not accompany her friend to North Carolina. If Betty comes to North Carolina and participates in the transaction in any way, even as a “friend,” she will forfeit her referral fee because she is engaging in brokerage activity in North Carolina without a North Carolina license.

3) If Betty is a salesperson or broker affiliated with a real estate company in Iowa, Barbara should make the check payable to the company. If Betty is a broker who is not affiliated with any real estate company, Barbara may issue the check to Betty directly.

Must the amount of the referral fee be on the HUD-1? No. Indirectly it is already on the HUD-1 as it is subsumed within Barbara’s fee. It would only need to be separately identified on the HUD-1 if Barbara was sharing part of her money with one of the parties, i.e., buyer or seller.

Example #4: What if the facts are basically the same as in #3, except Betty’s “friend” turns out to be her 28 year old son who is purchasing his first home. Betty wants Barbara to pay her a referral fee, but candidly acknowledges that she plans to accompany her son to North Carolina so he can have the benefit of her sage maternal advice.

May Barbara pay Betty a referral fee if Betty comes to North Carolina with her son and views various properties wearing “her mother hat”? **No.** Betty’s toes are now in a state where she is not licensed specifically related to a transaction in which she is not a party. She can not receive any consideration. However, knowing that this is what Betty wanted to do, could Betty and Barbara have reached some other agreement? *Sure.* Barbara pays Betty nothing, and instead agrees to share with Betty’s son, as a party to the transaction, an amount similar to what she was going to pay Betty. The amount Barbara is sharing with the son must both be on the HUD-1 and disclosed to the lender long before the closing.

Example #5: A North Carolina broker primarily handles listings and advertises her owners' properties on the internet. She receives a call from a broker in Idaho who has a buyer client who is interested in two of the broker's listings. The Idaho broker wants to know if his buyer makes offers which are acceptable to the broker's sellers, will she pay him a commission? May she? **Yes, so long as:** the broker is actively licensed in Idaho, engages in negotiations from Idaho, and does not come to North Carolina related to either of the two transactions. If all three conditions are fulfilled, the North Carolina broker may pay the Idaho broker the agreed commission. The buyer client obviously may come to North Carolina, but the Idaho broker who lacks a North Carolina license may not.

Example #6: A North Carolina broker is approached by a potential buyer from Florida who wants to see several of the company's listings. After reviewing the "Working with Real Estate Agents" brochure, the buyer chooses to have the broker act only as a listing agent and the necessary signatures are obtained on the bottom of the disclosure form evidencing seller agency. After viewing several properties, the buyer has narrowed it to three properties, at which point he mentions that he has a broker license in Florida and would the North Carolina broker be willing to pay him the selling side of the commission.

A) *Must the company agree to co-broke with the Florida broker-buyer?* **No**, in fact they are prohibited from "co-brokering," because the broker is physically in North Carolina and does not have a North Carolina license and thus cannot engage in brokerage in this state.

B) *May the company voluntarily agree to share consideration with the Florida broker?* **Yes**, because he also is a *party to the transaction* and does not need a license to lawfully receive consideration because he is not representing others. The amount of the consideration must be on the HUD-1 form and disclosed to the buyer's lender.

C) What if the Florida broker had called the North Carolina broker from Florida and negotiated payment of a referral fee or commission where the broker was in fact the buyer, as above?

While the Florida broker attempts to negotiate a fee legally by calling from a state where he is licensed, the North Carolina broker still should share any consideration with this prospective buyer under his buyer hat and not under his broker hat, particularly because any other foreign broker forfeits any agreed fee the moment s/he steps into North Carolina related to the transaction. Here, the broker will obviously enter the state because he is the party in the transaction, placing the conduct outside the definition of brokerage activity because the broker is not representing "others," which further supports sharing any consideration under his buyer hat, not his Florida broker hat.

Commercial Brokerage

The law and rules discussed above can't possibly apply to *commercial transactions* in North Carolina, do they? Actually, **yes, they do**. *There is only one set of License Law and*

Commission rules that govern all brokerage transactions in North Carolina. Thus, a foreign licensee who is physically present in North Carolina and acting as a broker (i.e., representing others), but who lacks a North Carolina license is *illegally engaged in brokerage activity* and is not entitled to receive any compensation or other consideration for his/her activity. Any broker who shares consideration with the foreign licensee who has entered North Carolina to represent others in the sale or lease of commercial property has violated License Law [G.S. 93A-6(a)(9)] and Commission rules [Rule 58A.0109(g)], and will be subject to disciplinary action. The North Carolina broker, as well as any unlicensed person who pays the foreign licensee who does not possess a North Carolina license, will also have committed a misdemeanor under North Carolina criminal law by violating G.S. 14-2.6. The foreign licensee also will have committed a misdemeanor by violating G.S. 93A-1.

Limited Non-Resident Commercial License

It is exceedingly easy for a non-resident salesperson or broker licensed in any other State or territory of the United States to apply for and obtain a North Carolina limited non-resident commercial broker license that would allow the foreign licensee to *legally* enter North Carolina, engage in a commercial transaction and be paid for that activity. The foreign licensee will not be required to complete any North Carolina education nor to take the State licensing examination. Rather, the foreign licensee must only complete and submit to the North Carolina Real Estate Commission an application for this limited non-resident commercial license (available on the Commission's website) with the requisite application fee (currently \$100), a criminal background report, and a license history from the state or territory where s/he is licensed and, assuming there are no negative character issues, the Commission will issue a limited non-resident commercial license to the foreign broker.

This license must be obtained *before the foreign licensee may physically enter North Carolina*. However, once issued, the license may be renewed each year by paying the applicable renewal fee (currently \$40) and will allow the foreign licensee to enter North Carolina whenever s/he wants in order to engage in *commercial transactions only*. In addition to the license, the foreign licensee must also have a written Declaration of Affiliation with a North Carolina broker and a brokerage cooperation agreement *before the foreign licensee physically enters North Carolina*. See G.S. 93A-9(b) and Commission Rules 58A.1801 through 58A.1810. *North Carolina brokers should be aware of this option and inform foreign licensees with whom they have contact of this possibility, rather than expose everyone to criminal conduct and risk the suspension or revocation of their license for illegally paying foreign licensees who are in North Carolina, but who lack a North Carolina broker license.*

Third Party Payments to Licensees (Kickbacks or Referral Fees)

Rule A.0109, "Brokerage Fees and Compensation," states in pertinent part:

(a) A licensee shall not receive, either directly or indirectly, any commission, rebate or other valuable consideration of more than nominal value from a vendor or a supplier of goods and services for an expenditure made on behalf of the licensee's principal in a real estate transaction without the written consent of the licensee's principal.

(b) A licensee shall not receive, either directly or indirectly, any commission, rebate or other valuable consideration of more than nominal value for services which the licensee recommends, procures, or arranges relating to a real estate transaction for a party, without full and timely disclosure to such party.

Kickback to Broker for Expenditure Made by Broker In Behalf of Broker's Principal to Provider of Goods or Services

Paragraph (a) basically requires disclosure to and written consent from a licensee's principal that the licensee may receive some consideration "of more than nominal value" for having made an expenditure to a provider of goods or services in behalf of the principal. What is "nominal?" The last sentence of Rule A.0109(e) defines "**nominal value**" as meaning "...*of insignificant, token or merely symbolic worth.*" It means a pittance, a token. It is not dependent upon nor related to the value of the property, goods or services provided.

If the broker recommends to his/her *principal* a provider of goods or services and expends the principal's funds for the recommended goods or services, then the rule requires the broker to have his/her *principal's written consent* in order to receive consideration (a "kickback") from the provider. Requiring the principal's *written consent* is intended to clearly evidence the principal's awareness of his/her agent's potential financial interest or incentive in selecting the provider, as the agent otherwise owes all duties of loyalty, obedience and disclosure of all information to his/her principal of any factors which might influence the principal's decision. The principal has a right to know from whom his/her agent is receiving any consideration so the principal may assess any potential bias or self-interest the agent may have, contrary to the agent's duty to promote the principal's interests, which are paramount to the agent's interests.

Example #1: A broker-property manager, as part of his/her management duties, engages a cleaning service to clean each managed property following each tenancy. The broker pays the cleaning service from rents collected on the managed properties prior to disbursing rents to the owners. The cleaning service then pays the broker each month a \$10 kickback for each property cleaned. The broker must have **written** consent from each property owner to collect the payments from the cleaning service.

Referral Fee to Broker for Recommending, Procuring or Arranging Services for a Party

Paragraph (b) requires disclosure by a licensee to **any party** (not just the licensee's principal) that the licensee may receive some compensation from a provider of services that the

licensee recommends, procures or arranges relating to a transaction. Although written disclosure is not required, it is highly recommended.

Example #2: A buyer's agent recommends a painter to a buyer-client. The buyer follows the agent's recommendation and uses that painter. The painter subsequently pays the agent a \$200 referral fee pursuant to a prior arrangement between the agent and painter. The agent must disclose to the buyer-client the referral fee arrangement *at the time the recommendation is made to the buyer*. The disclosure does not have to be in writing, but that is highly recommended.

Example #3: A broker specializes in vacation rentals at the beach, acting only as the owners' property manager. He typically suggests to tenants that they consider purchasing vacation rental insurance in case they are unable to fulfill their tenancy for whatever reason. He gives prospective tenants the names of three different insurers and tells the tenants to tell the insurers that he (the broker) recommended them. The insurers give the broker 5% of the insurance premium for every vacation tenant he sends who purchases a policy. The broker must at least orally inform every tenant that he may receive a referral fee if they purchase a policy from any of the insurers the broker recommends.

RESPA Restrictions on Referral Fees and Kickbacks

While Rule A.0109 permits third party payments to brokers acting as agents so long as the proper disclosure and consent requirements have been satisfied, the rule expressly prohibits any payments which may violate either the Real Estate Settlement Procedures Act (RESPA) or any HUD rules or regulations issued pursuant to the Act. **RESPA basically prohibits payment of any referral fees between or among any "settlement service providers" other than real estate brokers. Settlement service providers is fairly broadly defined to include virtually anyone providing a service related to the transaction, e.g., home inspectors, appraisers, attorneys, lenders, mortgage brokers, surveyors, pest inspectors, etc.**

RESPA does allow payment of "earned fees," namely, fees received for a particular service or goods provided. At present, this is how *rebates to brokers from home warranty programs* are being classified — it is a commission for having "sold" the policy. So long as the broker discloses to the party who purchases the policy that s/he will receive a fee, then the broker may receive the consideration as an earned fee, not as a referral. (If the purchaser is the broker's client/principal, then written consent is recommended.) The RESPA section of HUD has had a complaint before it regarding home warranty rebates to brokers since 2002, but is not believed to have rendered a decision yet as of November 2009. If it ultimately holds that such payments are nothing more than glorified referral fees, then it will be announced and such rebates will be illegal thereafter in all RESPA governed transactions. If HUD agrees that the rebates are "earned fees," then the practice may continue, so long as the broker discloses the rebate and has the consent required by Rule A.0109.

Recall that RESPA applies only to transactions involving "*federally related mortgage loans*," which by definition are loans made by "lenders" (broadly defined) or loans intended to

be sold to Fannie Mae, Freddie Mac or GNMA **that are secured by liens against one to four family owner-occupied residential real property.** It applies not only to residential purchase loans, but “reverse” mortgages, land installment sales contracts, and refinancing loans, so long as the funds come from a “lender” and are secured by a lien against one to four family *owner-occupied* real property. It does *not* apply to transactions involving liens against non-owner occupied residential real property (e.g., investment properties).

RESPA does *not* apply to:

- loans secured by property of 25 or more acres;
- loans for business, commercial or agricultural purposes (rental property = business);
- *temporary* financing, e.g. bridge loans, construction loans, etc. *unless* the loan is converted to permanent financing or used to transfer title to the first user, in which event the loan *would be* subject to RESPA;
- loans secured by vacant/unimproved real property *unless* loan proceeds are used to place or construct a structure or manufactured home on the property *within 2 years* of the settlement date;
- loans subject to assumption *without lender approval*;
- conversion of loan to new terms pursuant to the original note *so long as no new note is required*;
- bona fide loan transfers/sales on the secondary market.

Brokers must always comply with Rule A.0109 as to both disclosure and consent whenever they are acting as an agent in ANY transaction, even if RESPA does not apply. For more information concerning RESPA disclosure requirements and prohibited practices, licensees are referred to Chapter 13 of the *North Carolina Real Estate Manual* published by the North Carolina Real Estate Commission.

Payments to Broker From Anyone Other Than Broker’s Principal

Licensees are reminded that Rule A.0109(c), (d) and (e) was substantially revised effective October 1, 2008. ***The provisions of new subparagraphs(c), (d) and (e) apply only in sales transactions, both residential and commercial.*** The basic tenets of the new subparagraphs are:

1. No broker may receive any compensation, consideration, bonus, incentive, or rebate of more than nominal value *from his/her principal* unless the amount of that compensation, incentive, bonus, rebate or other consideration is specified in the appropriate *written* agency agreement between the broker and his/her client as required by Rule A.0104.

2. No broker may receive *any* compensation, incentive, bonus, rebate or other consideration *from any party or person other than his/her principal unless the broker fully and timely discloses to his/her principal the amount of all compensation/consideration* the broker expects to receive from such other party or person. The disclosure must include a *description of the value* of the compensation, bonus, incentive, rebate or other consideration *and the identity of the person* or party by whom it may be paid. The disclosure may be oral while showing

properties, but must be confirmed in writing *before the principal makes or accepts an offer to buy or sell.*

3. Note that the rule does not require a broker to disclose to someone not his principal the amount or form of compensation or consideration the broker may receive from his/her principal, nor must an individual broker disclose to his/her principal the amount of compensation the broker expects to receive from his/her employing broker (i.e., the Company).

4. A broker is obligated to disclose to his/her principal the value of any expected compensation/consideration whenever such consideration in any form is “of more than nominal value.” The last sentence of (e) defines “**nominal value**” as meaning “...**of insignificant, token or merely symbolic worth.**”

These revised sections of the rule were discussed extensively in Section 2 of the *2008-2009 Real Estate Update Course*. Licensees are referred to last year’s Update for an in-depth review of these provisions and examples of how to implement and comply with the rule’s requirements.

The underpinnings of the rule arose from the agent’s fiduciary duties of loyalty, obedience and disclosure of all information to his/her principal that may influence the principal’s decision in any given transaction, including an awareness by the principal of compensation being paid to the principal’s agent by other parties or persons that might result in the agent having a vested interest or bias in the principal purchasing one property over a different property. Because the listing company’s compensation is specified in the listing agreement and the listing company rarely receives additional compensation from third parties, the A.0109(c) disclosure requirements seldom impact the listing company. Similarly, a broker acting only as a buyer agent usually can readily ascertain and thus disclose the compensation offered by the listing company by consulting the MLS.

Disclosure Compliance When Acting as a Dual Agent

However, when a company is acting as a *dual agent*, the individual agents are to ***disclose to both principals the total amount of compensation the company will receive in the transaction.*** Since this compensation is specifically set out in the listing contract, disclosure to the dual agent’s seller-client is handled easily. The issue, then, lies in the dual agent’s disclosure to its buyer-client of the full amount of the commission the firm expects to receive.

While the listing contract sets out this information and presumably is in the listing transaction file, the broker-associates may not be given access to this information by their own firm. For some firms, the contracted-for compensation may not be captured in any readily accessible internal computer database, nor may it be inputted into the MLS. Thus, when buyer/dual agents working for such a firm are out of the office showing properties, they may not be able to readily determine the firm’s expected compensation as to any given property.

Example #4: Buyer agent makes appointments to show houses to her buyer-client on a Sunday. When the agent takes the buyer to see one of the scheduled showings, the buyer notices

a house across the street listed by the buyer agent's own firm and wants to see it. The buyer agent has had no opportunity to research this property in advance of showing and does not know what compensation her firm has contracted to receive from the seller. The MLS provides her with information about the amount or percentage of commission being offered to the buyer agent, but not the full commission. How does the buyer (now dual) agent satisfy her duty to timely disclose, at least orally, the firm's compensation (which generally should be prior to showing)? And, if upon showing the property, the buyer wants to make a written offer, how can the broker comply with the rule's requirement that she provide her client written confirmation of the firm's compensation prior to presenting an offer?

There are several avenues by which the company may facilitate agents' compliance with the rule. One is to make compensation information available on a company database accessible only by the firm's own agents. The firm could impose other restrictions to limit access to "need-to-know" situations only. Some firms may do this already, but others may not because the expense of creating the necessary programs would be prohibitive and/or for other reasons which they deem undesirable. Another possibility is that company policy may require the agent to contact the listing agent for the information, and to require the listing agent to keep that information and make it available in this circumstance. If the listing agent cannot be reached, then the agent showing the firm's in-house listing should be directed to contact other identified associates of the firm who have access to the information (e.g., the broker-in-charge, managers, a duty agent at the office, etc.).

What happens if the foregoing strategies fail and the agent is unable to immediately determine the firm's compensation? Under these circumstances, the buyer/dual agent should make a good faith estimate of the firm's compensation based upon what she reasonably knows, or should know, about the firm's listing practices and the property in question, and then proceed with the showing. Thereafter, the agent should check with her firm as soon as possible to confirm the accuracy of her disclosure and to promptly correct any discrepancy, in order to satisfy the rule's requirement that disclosure be made in sufficient time to aid a reasonable person's decision-making.

But what if the buyer wants to make an offer immediately, before the agent has been able to verify the firm's commission? The rule requires the agent to confirm the firm's compensation before the principal makes an offer to buy or sell. However, with all disclosure requirements, the Real Estate Commission will look at all the facts and circumstances surrounding a particular transaction before making a decision as to whether a broker behaved inappropriately. Some of the factors that would be considered in connection with a complaint that a consumer was not given full and timely disclosure of the firm's compensation as required by the rule will include:

- whether the broker gave the consumer a good faith estimate and how close the estimate was to the actual compensation to be paid;
- whether the broker had any reason to suspect the compensation might be different than disclosed;
- whether the compensation received was more, or less, than disclosed;

- what systems were in place by the firm to make the information available;
- whether the broker utilized the firm's systems but, because of unusual circumstances, was unable to obtain the necessary information;
- whether the failure to disclose was exceptional, or was it the standard operating procedure of either the broker or the firm; and
- all other relevant facts and circumstances concerning the particular transaction.

The Commission generally will not impose discipline against a licensee who has made an error acting in good faith, particularly when the licensee has taken reasonable steps to obtain and disclose the correct information, and when any error that occurred was corrected without harm or significant risk to a member of the public.