

2009-2010 BROKER-IN-CHARGE ANNUAL REVIEW COURSE

SECTION ONE

DUAL AND DESIGNATED DUAL AGENCY REVISITED

Outline:
<u>Introduction</u>
<u>Rule A.0104 - Agency Disclosure and Agreements</u>
<u>Dual Agency - the Legal Aspects</u>
<u>Practicing Dual Agency</u>

Learning Objective: Upon completing this Section, brokers should have a better understanding of the distinctions between practicing basic dual agency and designated dual agency, the limits on the scope of their activities and services under each mode, and issues to be considered and addressed in the company’s policy manual as to the firm’s practice of both dual and designated dual agency.

INTRODUCTION

The *2007-2008 Broker-in-Charge Annual Review* focused almost exclusively on the agency disclosure and agency agreement requirements set forth in Commission Rule 58A.0104, but not much space was devoted to an in-depth discussion of dual agency and its subcategory of designated dual agency. Feedback from both instructors and licensees indicated that while most brokers basically understand buyer/tenant agency and seller/lessor agency (regardless of whether they implement it correctly), many brokers remain confused about when dual agency arises and how designated dual agency differs from regular dual agency. This section will explore these two closely related forms of principal representation, after a brief review of certain fundamental principles and rules.

Why review these agency law and rule issues in the BICAR course? Because all licensees, and especially brokers-in-charge, must comply with these laws and rules. For example, *brokers-in-charge are required by Rule A.0506(d) to actively and directly supervise provisional brokers in his/her office in a manner which reasonably assures that the provisional brokers perform all acts for which a real estate license is required in accordance with the Real Estate License Law and Commission rules.* In addition, *brokers-in-charge are responsible under Rule A.0110 for the proper supervision of all licensees employed at his/her office with respect to adherence to agency agreement and disclosure requirements.* Finally, the Commission considers *any violation of the common law of agency by a licensee to potentially constitute*

“improper dealing” under G.S. 93A-6(a)(10) and possibly also “unworthiness and incompetence” under G.S. 93A-6(a)(8). Thus, it is critically important that brokers-in-charge thoroughly understand and comply with agency laws and rules, and require compliance by affiliated licensees, to avoid the broker-in-charge being invited to explain his/her conduct, policies, training and enforcement efforts to the Commission.

Common Law of Agency and the License Law

The concept of “principal and agent,” whereby one person authorizes another to act on his or her behalf either in a particular matter or generally, goes back to medieval England. The English courts developed a body of law providing that when a person (the principal) engages the services of another person (the agent) to act in the principal’s behalf and entrusts the handling of a specific matter to the agent, the agent, because of his/her special relationship to the principal, acquires certain “fiduciary” obligations to the principal. These now well-known common-law fiduciary duties owed by an agent to his/her principal include:

Common Law Duties of an Agent to Principal

- loyalty,
- obedience (to all *lawful* directives),
- disclosure of all information known to the agent which may influence the principal’s decision in the specific matter,
- skill, care and diligence in the performance of services,
- accounting, and
- confidentiality, as to any personal information the agent learns about his/her principal.

*In sum, this means that a **real estate broker** is obligated to diligently use his/her special knowledge and skills to provide the contracted service, whether acting as the agent of a seller, buyer, landlord or tenant, and obtain the best possible result for his/her principal, **always placing the interests of the principal ahead of the interests of others, including the agent’s own interest.***

Common Law Duties of an Agent to Third Parties

Under the common law as developed over centuries by the English and American courts, an agent dealing with a third party on behalf of the agent’s principal owed no duties to the third party other than to deal with them “honestly and fairly.”

Modification of Agent’s Duties by Statutes/Rules

The common law fiduciary duties owed to *principals* by agents are alive and well in North Carolina and govern virtually all principal-agent relationships, including real estate brokerage relationships. The same is true for an agent’s duties to third parties. However, it is important to remember that “*common law*” developed by courts may be modified by statutes and administrative rules adopted pursuant to statutes. When a statute or rule conflicts with the common law, the statute or rule prevails.

Probably the *best example in the real estate brokerage area of statutory modification of common law principles is the Real Estate License Law provision that prohibits the **willful or negligent omission of material facts** by a real estate broker when dealing with **any party**. [G.S. 93A-6(a)(1).] This provision creates a statutory duty for brokers in any transaction to “discover and disclose” to **any** party involved in the transaction material facts relating to the transaction about which the broker has actual knowledge or reasonably should have knowledge. This statutory obligation clearly modifies and greatly expands the common law duties of an agent to a third party by requiring discovery and disclosure of material facts that an agent was not required to disclose under the common law.*

The same statute also impacts the broker’s common law duty of confidentiality to his/her principal. It overrides the duty to keep all personal information about the principal confidential by requiring the broker to affirmatively discover and disclose to all parties matters that rise to the level of “material fact.” However, only those matters that are material facts must be disclosed; the common law duty *not* to disclose to a *third party* confidential *personal* information about an agent’s principal remains intact, particularly if disclosure would be harmful to the interests of the principal.

Rule A.0104 - Agency Disclosure and Agreements

Disclosure Requirements

The rule first requires the broker to provide *all sellers and all buyers* with the “*Working with Real Estate Agents*” agency disclosure brochure at first substantial contact and to decide the broker’s agency status *before* the broker begins providing any services. This is mandatory in *all sales transactions*. It is not required in lease transactions, but a licensee may use the brochure to help explain agency concepts if s/he chooses, because s/he still will need a written agency agreement with his/her lessor/property owner *prior* to advertising or providing any property management or leasing services.

The **purpose of the agency disclosure brochure** is to alert the consumer to the choices s/he may have in working with a broker and to decide who the broker represents in the transaction. **It must be provided in ALL SALES TRANSACTIONS, commercial or residential, no exceptions.** It is a form of “Miranda” warning, in essence cautioning the consumer that “anything you say can and will be used against you if you do not hire me as your agent,” because *unless a principal-agent relationship is established with the consumer, the broker owes no fiduciary duties to the consumer and thus no duty of confidentiality with regard to information provided by the consumer to the broker. The consumer needs to know and understand his/her relationship with the broker before s/he reveals personal, confidential information.*

A broker should exercise caution in questioning sellers or buyers about their needs, price range, income, motivation, and other personal matters *before* the broker and consumer have decided whether they will work together and in what capacity. A buyer who is working with a

broker acting as a seller's agent or subagent may not wish to reveal income or other financial or personal information to the broker if the buyer understands that the broker is representing the seller, not the buyer, and must convey anything learned about the buyer to the seller.

Express Agency Agreements

Licenseses should understand that freedom of contract is alive and well when it comes to agency agreements. The broker and client basically may agree to any terms which are mutually acceptable, so long as none of the provisions are contrary to law or public policy. Rule A.0104 does not dictate the terms of any agency agreement beyond the four basic requirements listed below.

Rule A.0104 Requirements for Agency Agreements

All agency agreements must:

- be in writing,
- identify and be signed by all parties and state the broker's license number,
- have a definite termination date on which it automatically expires, and
- contain the fair housing non-discrimination language set out in A.0104(b).

Beyond these four points, the agency agreement can be as broad or as narrow, as long or as short, exclusive or non-exclusive, as the parties agree. Additionally, because the *real estate company is a party to the agency agreement/contract*, it may draft its own language or otherwise tailor its agency agreements as it wishes without risking unauthorized practice of law charges because: 1) it is not receiving any fee for what it is doing, and 2) it is not doing it for others, i.e., preparing a legal instrument/contract for a matter in which it (the broker/company) is *not* a party to the agreement. Nevertheless, real estate firm owners and managers are **strongly encouraged to have a real estate attorney assist in drafting any agency contract**. Brokers who are members of a trade organization may have preprinted agency contract forms available to them.

The bottom line is that ***the agency agreement is nothing more nor less than the employment agreement between the consumer and the real estate company/broker. It must be express from the outset in ALL brokerage relationships before any brokerage services are provided. It must address all terms of the agreement between the parties and, once in writing, may be enforced by either party in the event of breach.***

Express Agreement

“**Express**” means exactly that — an oral or written agreement concerning the terms under which the consumer and broker will work together. To be enforceable under contract law, the agreed terms minimally must address the specific services the broker will provide to the principal, the respective duties of the parties, the broker's compensation for providing the described services, and in what capacity the broker is working with the consumer, i.e., seller agent, buyer agent and/or dual.

The *only time* a broker will *not* have an *express or written* agency agreement with a consumer is when the broker is working with the buyer as a seller's subagent and is not affiliated with the listing company. That broker's transaction file will not have any written agency agreement with either the seller or the buyer, but the broker (seller's subagent) *minimally* will have the written disclosure from the *Working with Real Estate Agents* brochure wherein s/he notified the buyer at first substantial contact that the broker was representing only the seller's interest. The broker's agency relationship with the seller will be derived through a broker cooperation agreement with the listing broker/firm (or an MLS standard arrangement), who will have an agency agreement (listing agreement) with the seller that authorizes cooperation with other real estate firms/brokers acting as subagents of the seller.

When Must the Agreement Be in Writing?

While an agency relationship at common law could be oral or in writing, express or implied from conduct, Commission Rule A.0104 requires that *all agency relationships within a real estate brokerage context must be **express** and must be **in writing**, sooner or later*, depending on whether one is representing a property owner or a buyer/tenant. This is another example of how the common law of agency has been modified or superseded within a real estate brokerage context, this time by rule, rather than statute.

Agreements with Property Owners (Sellers or Lessors)

Agreement must be in writing from the outset. The rule pertaining to agency agreements when representing property owners is simple: *a broker may not provide any sales, leasing or management services for ANY property owner without having a **written** agency agreement **from the outset** of the brokerage relationship.* (This also is true where a broker agrees to hold or manage property owner association funds. The agency agreement *must* be in writing *before* the broker begins providing services or receives any association monies.) *It does not matter whether the broker is agreeing to provide full services or limited services – the agreement must still be in writing **before** the broker may provide the agreed services.* Failure to have a written agency agreement with a property owner may result in forfeiture of fees or commissions. The written agreement also should specify whether the owner authorizes the listing/leasing company/broker to cooperate with other firms/brokers and/or to act as a dual agent.

Licenses also should be aware that agency agreements for property management/leasing services are permitted a slight exception to the general rule that every agreement must state a definite termination date on which it automatically expires. In these cases, whether commercial or residential leasing or management, the rule requires the management agreement to contain a date on which it terminates “.... except that *an agency agreement between a landlord and broker to procure tenants or receive rents for the landlord's property may allow for automatic renewal so long as the landlord may terminate with notice at the end of any contract period and any subsequent renewals.*” (Italics added.)

Agreements with Buyers or Tenants

Oral agreement permitted on a temporary basis with conditions. When a company/broker's office policy allows its brokers to work with a buyer or tenant either as a buyer's

agent/tenant's agent or as a seller's agent/subagent, buyers/tenants have a choice as to how they wish to work with that broker. If after reviewing the disclosure brochure the consumer chooses to work with the broker as a buyer's agent/tenant's agent, s/he must also decide if s/he authorizes the company to act as a dual agent in "in-house" transactions. These decisions must be made *before* the broker begins to gather information from a buyer/tenant about his/her property needs and prior to showing listed properties to the buyer/tenant. While the agency agreement must be clear and express (rather than inferred or tacit), it may be **oral** at the outset *so long as* the buyer/tenant is free to work with other agents and is not obligated to work with any specific broker/company for any stated period of time. In other words, *the oral agreement may NOT be "exclusive" and may NOT obligate the buyer/tenant for any period of time. Any oral buyer/tenant agency agreement must be reduced to writing prior to any offers being made or received by the buyer/tenant.*

It is important for brokers to remember that *so long as a broker operates under an oral buyer/tenant agency agreement*, which by definition cannot bind or obligate the client to the broker, *the broker has no protection and will have no claim for compensation from the client if the client ultimately, either acting on his/her own behalf without help from any broker or acting through another broker, purchases/leases a property that had been shown to him/her by the broker.* While it is better to reduce buyer/tenant agency agreements to writing sooner rather than later, *at the latest* oral buyer/tenant agency agreements **must** be reduced to writing prior to any offer to purchase/sell or lease being made or received by the buyer/tenant. Each company should decide as part of its office policy whether it will allow its affiliated agents to work under oral buyer agency agreements, and if so, under what conditions.

Understand that while the "Working with Real Estate Agents" brochure is not required to be given to either the lessor or lessee in **lease transactions**, *there nonetheless must be an express agency agreement between the broker and the client prior to any brokerage services being provided, and any oral tenant agency agreement must be reduced to writing before any offers to lease are made or received.*

DUAL AGENCY – THE LEGAL ASPECTS

Background

Dual agency involves the simultaneous representation within one transaction of two parties with competing or opposing interests by a single agent/company. Dual agency has long been frowned upon in the law, and for good reason. Conceptually, dual agency presents a true dilemma. Theoretically, it is almost inconceivable that one agent/servant could effectively serve two principals/masters with opposing interests in the same transaction. How could one *possibly* be completely loyal to and obtain the best bargain for two parties with opposite interests at the same time? How could one protect confidential information about principal #1 while also having the duty to disclose to principal #2 everything known about principal #1 which might influence the decision of principal #2 in a transaction? Very good questions indeed!

Historical Undisclosed Dual Agency Under the Common Law. Historically, dual agency tended to arise when an agent for one party to a transaction did something that benefited the other party to the transaction and harmed his/her principal without the first party (the agent's principal) being aware of the agent's actions until later. When the harmed principal learned of the agent's actions and filed a lawsuit against the agent for breach of his/her duties to the principal, the court would find that the agent, based on his/her conduct, was actually working as an **undisclosed dual agent** because his/her actions in helping the second party amounted to the agent acting as an agent for both parties. Unless the agent's original principal provided "informed consent" for the agent to also assist the other party in the transaction, then the agent could be liable to the principal for any harm suffered by the principal due to the agent's actions. *The courts quite rightfully imposed a high standard of conduct on agents with regard to honoring their fiduciary duties to their principal and held agents strictly accountable to their principal for damages when they engaged in undisclosed dual agency.*

Statutory Prohibition of Undisclosed Dual Agency. With the advent of broker licensing in the various states in the early and mid-20th century came *license laws and administrative rules that uniformly contained provisions prohibiting brokers from acting for more than one party in a transaction without the knowledge and consent of all parties.* [See G.S. 93A-6(a)(4).] Eventually, statutes and rules further required that any consent to dual agency be *in writing.* [See Rule A.0104(d).] Thus, the common law prohibition against undisclosed and unauthorized dual agency became codified and then amended to require that the consent to dual agency be in writing.

Prior to the 1990s, buyer or tenant agency in residential sales and lease transactions was rare, although it may have been more common in commercial sales and lease transactions. Virtually all residential real estate brokers represented the property owner and the buyer or tenant was not legally represented by a broker, at least not under any written agreement. A major problem with this system, however, was that most buyers of residential property *thought* that the broker who had spent all this time with them over a period of days or weeks looking at properties and providing information to them was their agent, although legally this was not the case. The brokers were acting under contractual arrangements as the agent or subagent of the seller, but *buyers were not being informed or warned about the broker's role as a seller's agent.*

The problem was exacerbated by the fact that many brokers working with buyers would act as if they were in fact on the buyers' side, even though they were acting as seller subagents. This, of course, gave the buyers good reason to justifiably believe that the brokers were looking out for the buyer's best interest, and the courts frequently agreed with the buyers. *Improper behavior by sellers' agents created undisclosed dual agency situations which lead to civil liability under agency law.* (Even where a company complied with the statutory requirement to inform its clients which agent was representing the seller and which agent was representing the buyer, it still was found liable under the common law of agency for failing to obtain *informed consent* to dual agency. The company (Edina Realty in Minnesota) ultimately paid its seller-clients \$19 million in damages for its agents acting as undisclosed dual agents.)

Buyer Agency and Agency Disclosure Laws Revolutionize Brokerage Practices. The concept of *authorized* dual agency took a quantum leap in the real estate brokerage arena with the advent of **buyer agency** in the 1990s. The 1990s saw state after state adopt laws and/or rules mandating that real estate licensees disclose their agency status to customers. As a practical matter in the sales arena, this meant disclosing one's status as a seller's agent to prospective buyers. Once buyers began to understand, thanks to the disclosure requirements, that their interests were not being represented (at least not legally) by real estate licensees, they, not surprisingly, began to demand in large numbers that licensees serve them as a buyer's agent. At this point, real estate companies had to rapidly adapt to offering buyer agency services to prospective buyers, AND they were almost immediately presented with the dilemma of how to handle situations where a buyer-client wanted to make an offer on property owned by a seller-client of the company. The regulatory agencies in the various states responded by adopting statutes and rules to address these situations. In North Carolina, **buyer agency** was first expressly mentioned in Rule A.0104 effective July 1, 1993; the requirement for **written dual agency authorization** followed effective January 1, 1995; and **designated agency** provisions were added in 1997.

Dual Agency in North Carolina

Commission Rule A.0104(d) addresses dual agency as follows:

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

The typical dual agency situation arises when an agent or company represents (has an agency relationship with) opposing parties in the same transaction, i.e., seller and buyer, or lessor and lessee. It is the representation of opposite sides with their often diametrically opposed goals that constitutes dual agency.

How does the "Working with Real Estate Agents" brochure explain dual agency and its effects? Because use of the agency disclosure brochure is only required in sales transactions, it states that dual agency arises when the same company represents the seller and the buyer (although the same agency principles would apply if a broker was representing a lessor and lessee in the same transaction). As to the agent's/company's duties to each of its principals, the brochure states:

It may be difficult for a *dual agent* to advance the interests of both the buyer and seller. Nevertheless, a *dual agent* must treat buyers and sellers fairly and equally. Although the *dual agent* owes them the same duties, buyers and sellers can prohibit *dual agents* from divulging **certain** confidential information about them to the other party.

Some firms also offer a form of dual agency called “designated agency” where one agent in the firm represents the seller and another agent represents the buyer. This option (when available) may allow each “designated agent” to more fully represent each party.

If you choose the “dual agency” option, remember that since a dual agent’s loyalty is divided between parties with competing interests, it is especially important that you have a clear understanding of • what your relationship is with the *dual agent* and • what the agent will be doing for you in the transaction.

Recall that an agent must not only provide, but *review and explain* the agency disclosure brochure and the various agency options the agent’s firm offers to the consumer. Consent that is uninformed or unknowing is not effective consent. The brochure advises the *consumer to “have a clear understanding of ... what the agent will be doing for you in the transaction.”* Good question, which we will explore more fully shortly.

Legal effect of dual agency on agent’s duties to principals. *An agent acting as a dual agent owes the same fiduciary duties to both parties*, namely, loyalty, obedience, skill, care and diligence, confidentiality, accounting, and disclosure of all information. However, to advise or advocate on behalf of one principal might place the other principal at a disadvantage, yet in acting as an agent, the agent is charged with promoting and protecting his/her principal’s interest. How can the agent promote and protect both principals’ interests within the one transaction? Because of the identical, yet competing fiduciary obligations owed to each party, the agent effectively becomes more neutralized in his/her advocacy and advisory capacity. Instead, the obligation is to treat the parties fairly, impartially, equally and honestly, and to not engage in conduct which would give either principal an advantage over the other. *The agent still is expected to disclose any information s/he knows about either principal to the other principal unless the principals specifically relieve or excuse the agent from this duty in the dual agency agreement.* [The provisions in the form agency agreements promulgated by NCAR contain such language.]

What the consumer should understand at the disclosure stage is that **dual agency effectively neutralizes agents as to their advocacy roles, unless the company practices designated dual agency.** Dual agents will be conduits for information exchange between the parties and will attempt to assist the parties as they mediate and implement their agreement, but the broker may not advise or counsel or advocate for either party. If the company practices designated dual agency, some advocacy and advisory functions are restored, as will be discussed later in the section on designated agency.

Dual Agent Versus Facilitator or Transactional Broker

What is the difference between acting as a standard dual agent versus acting as a facilitator or transactional broker or intermediary as in some other states? *The principal distinction is the underlying foundation or authority for the relationship.* As mentioned at the outset of the dual agency discussion, agency is based on centuries old common law principles of master-servant or principal-agent and resulting fiduciary duties. Dual agency attempts to interpret and apply these common law agency principles in such a manner as to accommodate the realities of modern brokerage practice, which may encompass one company or broker

attempting to represent both sides in the same transaction and owing the same fiduciary obligations to both principals.

Some states have adopted statutes that define the role of real estate licensees as “facilitators” or “transactional brokers” or “non-agents” or some similar term when working with real estate consumers. The legislative body of any given state passes laws which define who may serve as a facilitator/transactional broker, what that person’s duties or obligations are to the various parties, and how the arrangement must be evidenced, e.g., oral or written agreement. Colorado in 1994 was the first state to enact legislation creating a “transaction broker” role, while also retaining a single agent role. Generally, a primary purpose of these statutes is to eliminate or greatly restrict the application of the common law of agency in real estate brokerage practices, and thereby minimize or eliminate the traditional fiduciary duties that an agent owes a principal under the common law.

Typically, the statutes will state that the transaction broker is not acting as an agent or advocate for any party. The statutes assiduously avoid referring to the broker as an “agent,” because s/he is not. The statutes also will specify the duties this non-agent transaction broker or intermediary has to the various parties in the transaction. Such duties may include: ▪ treating both parties honestly and fairly ▪ accounting for all monies received ▪ presenting all offers in a timely manner ▪ disclosing material facts about the property, but limiting the disclosure of personal information about a party and ▪ assisting the parties in complying with the terms and conditions of their contract. The statutes typically avoid creating any duty of “loyalty” that would commit the licensee to trying to obtain the best possible result for a particular party.

Consumer-broker relationships in North Carolina continue to be governed primarily by the common law of agency, as well as by statutory obligations imposed by the Real Estate License Law. There is no option in North Carolina for an agent to serve as a “transaction broker” or in some other “non-agent” capacity .

Designated Dual Agency

Understand that “*designated agency*” is a subcategory of dual agency that is not available to all brokers. Designated agency, which is merely a method of practicing dual agency, was first authorized by Commission rule in 1997 to permit brokerage firms practicing dual agency to handle their clients in a slightly different manner than is the case with standard dual agency. Unlike standard dual agency, designated agency was created by rule and was unknown at common law. Designated agency is intended to provide a mechanism for firms practicing disclosed dual agency to restore to their clients some of the representation and advocacy of client interests that is lost with standard dual agency.

Under the designated agency option, a firm that is acting as a dual agent because it has agency agreements with both the buyer and the seller in a particular transaction, continues to be a dual agent, but may “designate” or assign one or more of its affiliated broker(s) to represent only the interests of the seller and another broker(s) to represent only the interests of the buyer.

The various provisions of **Rule A.0104** which address designated agency are reprinted here.

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

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

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

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

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

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

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

Main Features of Designated Dual Agency Rule

- Once authorized by the seller and buyer, a company practicing designated dual agency with multiple affiliated agents may appoint one agent(s) to represent only the seller's interests and another agent(s) to represent only the buyer's interests. [Often, the listing agent is designated to represent the seller and the (former) buyer agent is designated to represent the buyer.]

- The names of the agents designated for each party must be disclosed to both parties prior to any offers being presented between those parties, but the rule does not require this disclosure to be in writing.
- An agent who possesses confidential information about one party to the transaction at the time of designation is not eligible to be named as the designated agent for the other party.
- The designated agents may be either full brokers or provisional brokers. The lone prohibition is that the broker-in-charge may *not* be the designated agent for one party if the designated agent for the opposing party is a *provisional* broker. [This is because the broker-in-charge is required to supervise a provisional broker in all brokerage activity and must have access to the transaction file and review what the provisional broker is doing, which destroys the separateness designated dual agency attempts to create.]
- A designated dual agent is prohibited *by rule* from disclosing confidential information about his/her designated principal to the firm's other client or the designated agent for that client without the consent of his/her designated principal *unless* the information relates to a "material fact."
- At the latest, *written* authorization for designated dual agency must be obtained from *both parties* by the time any oral buyer agency agreement is reduced to writing, which is required prior to any offers being made or received. *If the buyer agency agreement is in writing from the outset of the relationship, then both the listing agreement and buyer agency agreement need to include written authorization for dual or designated dual agency before any in-house listings can be shown.*

NOTE: The language of Rule A.0104(k) and (l) appears to prohibit a *designated* dual agent from disclosing information about his/her designated principal which does not rise to the level of material fact to the company's opposing principal (or designated agent for the opposing principal) without the consent of the broker's own designated principal, even if the principal's underlying dual agency agreement with the company does not place limitations upon the agent's (company's) duty to disclose all information to each principal when acting as a dual agent.

Requirement for Written Dual Agency Agreements

As noted previously, all agency agreements between a broker and a consumer must be express from the outset of the relationship. No exceptions are permitted. The agreement typically is between the company and the consumer, not the individual agent and the consumer, even though it is signed by the agent.

When Representing a Property Owner

When representing a property owner, the agency agreement must not only be express, but *must also be in writing from the outset of the relationship. The written agreement should indicate whether the owner allows the broker to act as a dual agent, and if so, whether*

designated dual agency is authorized. If there is no mention of dual agency in the listing agreement or management agreement, then the broker/company is only authorized to function as an owner's agent.

When Representing a Buyer/Tenant

Remember that Rule A.0104 allows brokers to work with buyers/tenants under an **oral** buyer/tenant agency agreement *so long as* it is non-exclusive and does not bind the consumer to the broker for any period of time. ***At the latest, the oral buyer/tenant agency agreement must be reduced to writing before any party extends or receives an offer from another party.*** Understand that *if an oral buyer agency agreement does not also address the issue of whether the broker may act as a dual agent, then the broker may only act as a buyer agent and may not show the buyer any properties listed with the broker's company, unless and until the broker explains dual agency to the consumer and obtains the consumer's oral consent.* The broker should clearly explain to his/her buyer-client that s/he is precluded from showing the buyer his/her company's listings so long as the buyer declines dual agency.

Suppose a company has a listing agreement with an owner who has not authorized dual agency, and also has a buyer-client under an oral buyer agency agreement who now wants to see the property. The company may enter into an *oral* agreement with *both* the seller and the buyer to represent each as a dual agent for that transaction. ***This oral consent to dual agency from all parties is permitted only so long as the agency agreement with the buyer/tenant remains oral. The moment the buyer/tenant agency agreement is or must be reduced to writing, so must the authorization for dual agency from all parties.*** The absolute latest point is prior to any offer being presented. However, if the buyer signed a written buyer agency agreement when the broker first started working with the buyer, then it must include authorization for dual agency or the broker will be precluded from showing that buyer any listings held by the broker's company, unless and until the broker obtains *written* permission from both the buyer *and* the seller authorizing dual agency.

Examples of Oral versus Written Consent for Dual Agency

Situation #1: Listing agreement does **not** authorize dual agency. Consumer contacts listing company to see the property. The broker reviews the disclosure brochure and offers to show the property as a seller agent, cautioning the buyer that nothing the buyer reveals is confidential and the buyer should act as if s/he were talking directly to the owner/seller. If the buyer agrees, the broker provides written notice of seller agency and shows the property.

Answer: Dual agency has not been attempted in this situation. The company already has one principal (the seller) who has not authorized its agent to function as a dual agent. The listing broker offers to work with the buyer as a seller agent, its only permitted avenue at present, and the buyer, having received the agency disclosure brochure and having been cautioned as to the lack of confidentiality by the listing agent, consents to the listing agent acting solely as a seller agent.

Listing/leasing agents may *always* work with prospective buyers/tenants *as owner agents only*, so long as the broker's agency status is disclosed and the buyer/tenant knowingly consents and does not insist on independent representation, i.e., a buyer or tenant agent.

Situation #2: Listing agreement does **not** authorize dual agency. A broker in the company is working with a buyer under an oral buyer agency agreement. The buyer now wants to see one or more of the company's listings.

Answer: If the oral buyer agency agreement does not already authorize dual agency, the broker first must explain dual agency to the buyer and obtain the buyer's consent. Then *before the broker may show the property*, the broker first must contact its other principal, the seller, explain dual agency and obtain the seller's consent *at least orally*. If the seller refuses to consent, then the property may not be shown to the buyer client. **NOTE:** Even though the listing agreement already is in writing and does *not* authorize dual agency, the seller's *oral consent to dual agency as to that buyer is sufficient only because the buyer agency agreement is still oral*.

If after viewing the property, the buyer wishes to make an offer, the buyer agency agreement first must be reduced to writing *and* must contain authorization for dual and/or designated agency before any offer is presented. Further, *the seller's written consent to dual/designated agency, as least for this buyer, must be obtained before the offer may be presented*. This may be done as an amendment to the listing agreement or as an addendum to the listing agreement, but it must be in writing *before* the offer is presented. Brokers are strongly advised to first obtain all necessary agency authorizations *in writing before* they prepare an offer. Otherwise, they may waste time preparing an offer they cannot present.

Situation #3: Listing agreement authorizes dual and designated agency. Buyer agency agreement is in writing and does not authorize dual agency. Buyer wants to see the company's listing.

Answer: In this situation, *because both the listing agreement and the buyer agency agreement already are in writing, oral consent to dual agency will not be sufficient*. The buyer client must first authorize the company **in writing** to act as his/her dual agent, at least for this property, *before* the buyer may be shown the property. If the written buyer agency agreement had already authorized dual agency, then there would not have been any impediments to either showing the property or preparing and presenting an offer.

Provisions in Written Dual/Designated Agency Agreements

What should be included in a written authorization for dual or designated dual agency? While the particulars of any dual agency agreement are up to the parties, *there are certain points*

that any such agreement should address if it is to properly serve the purpose of enabling the broker/firm to serve as the agent for both parties without violating its legal obligations to each party-principal.

Key Elements of Dual Agency Agreements

- Explanation of when dual agency situations are expected to arise.
- Authorization for broker/firm to act as a dual agent when dual agency situations arise.
- Explanation of broker's/firm's role as a dual agent, specifically those obligations of the broker/firm that are different from the obligations of an agent under the typical single agency agreement, such as the fact that the broker/firm will attempt to treat each party in a fair and impartial manner, but will not "advocate" for one party over the other or advise either in negotiation strategies.
- Acknowledgment by the principal that s/he has been provided the *Working with Real Estate Agents* brochure, that the dual agency role of the broker/firm has been fully explained, and that s/he understands the broker's/firm's role as dual agent.
- *Language relieving the company/broker from his/her/its duty to disclose confidential information about either principal which does not rise to the level of material fact.* Absent such a provision, the common law of agency would require the agent to disclose everything s/he knows about either principal to the other which might influence a principal's decision in the transaction.

Sample Dual Agency Language from NCAR Form 101

The dual agency language in the standard agency agreements promulgated by the North Carolina Association of REALTORS® in both its listing and buyer agency agreements may be instructive. For example, Paragraph 21 of NCAR Form 101, Exclusive Right to Sell Listing Agreement (©Jan 1, 2009), is reprinted in its entirety below, with acknowledgments to the North Carolina Association of REALTORS® for permitting its copyrighted material to be used for educational purposes. The language in both the **exclusive buyer agent and non-exclusive buyer agent agreements (NCAR Forms 201 and 203** respectively) is virtually identical to the language below, except "Seller" in the following is replaced by "Buyer" and "buyer" is replaced with "seller."

21. **DUAL AGENCY.** Seller has received a copy of the "Working With Real Estate Agents" brochure and has reviewed it with Firm. Seller understands that the potential for dual agency will arise if a buyer who has an agency relationship with Firm becomes interested in viewing the Property. Firm may represent more than one party in the same transaction only with the knowledge and informed consent of all parties for whom Firm acts.

(a) Disclosure of Information. In the event Firm serves as a dual agent, Seller agrees that without permission from the party about whom the information pertains, Firm shall not disclose to the other party the following information:

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

(b) Firm's Role as Dual Agent. If Firm serves as agent for both Seller and a buyer in a transaction involving the Property, Firm shall make every reasonable effort to represent Seller and buyer in a balanced and fair manner. Firm shall also make every reasonable effort to encourage and effect communication and negotiation between Seller and buyer. Seller understands and acknowledges that:

- (1) Prior to the time dual agency occurs, Firm will act as Seller's exclusive agent;
- (2) In its separate representation of Seller and buyer, Firm may obtain information which, if disclosed, could harm the bargaining position of the party providing such information to Firm;
- (3) Firm is required by law to disclose to Seller and buyer any known or reasonably ascertainable material facts. Seller agrees Firm shall not be liable to Seller for (i) disclosing material facts required by law to be disclosed, and (ii) refusing or failing to disclose other information the law does not require to be disclosed which could harm or compromise one party's bargaining position but could benefit the other party.

(c) Seller's Role. Should Firm become a dual agent, Seller understands and acknowledges that:

- (1) Seller has the responsibility of making Seller's own decisions as to what terms are to be included in any purchase and sale agreement with a buyer client of Firm;
- (2) Seller is fully aware of and understands the implications and consequences of Firm's dual agency role as expressed herein to provide balanced and fair representation of Seller and buyer and to encourage and effect communication between them rather than as an advocate or exclusive agent or representative;
- (3) Seller has determined that the benefits of dual agency outweigh any disadvantages or adverse consequences;
- (4) Seller may seek independent legal counsel to assist Seller with the negotiation and preparation of a purchase and sale agreement or with any matter relating to the transaction which is the subject matter of a purchase and sale agreement.

Should Firm become a dual agent, Seller waives all claims, damages, losses, expenses or liabilities, other than for violations of the North Carolina Real Estate License Law and intentional wrongful acts, arising from Firm's role as a dual agent. Seller shall have a duty to protect Seller's own interests and should read any purchase and sale agreement carefully to ensure that it accurately sets forth the terms which Seller wants included in said agreement.

(d) Authorization (*initial only ONE*).

_____ Seller authorizes the Firm to act as a dual agent, representing both the Seller and the buyer, subject to the terms and conditions set forth in Paragraph 21.

_____ Seller desires exclusive representation at all times during this agreement and does NOT authorize Firm to act in the capacity of dual agent. *If Seller does not authorize Firm to act as a dual agent, the remainder of this paragraph shall not apply.*

(e) Designated Agent Option (*Initial only if applicable*).

_____ Seller hereby authorizes the Firm to designate an individual agent(s) to represent the Seller, to the exclusion of any other individual agents associated with the Firm. The individual designated agent(s) shall represent only the interests of the Seller to the extent permitted by law.

NOTE: When dual agency arises, an individual agent shall not practice designated agency and shall remain a dual agent if the individual agent has actually received confidential information concerning a buyer client of the Firm in connection with the transaction or if designated agency is otherwise prohibited by law.

Key Points In Foregoing Dual Agency Language

- The client acknowledges receipt of the disclosure form (although the tear-off panel from the brochure is still required) and the agreement explains when dual agency arises.
- The client may either authorize or decline dual agency.
- If dual agency is authorized, the language in (a) and (b) defines the broker's role and limits the broker's duty to disclose certain "confidential information" about either principal.
- The principal acknowledges that the broker must disclose material facts required by law, but waives company liability for not disclosing other fact information of which a broker is aware, so long as the information does not constitute a "material fact."
- The language defines the *client's* role and obligations, specifically acknowledging that the client must make his/her own decisions as to what to offer or accept without counsel from the broker and understands that the broker is obligated to treat both party-principals fairly and impartially.
- The language attempts to have the client waive any claims against the broker arising out of his/her dual agency role (unless the broker is intentionally negligent or violates license law or rules in his/her conduct), and to impose a duty on the client to protect his/her own interests and to carefully review any proposed purchase/lease agreement to ensure that it includes all terms the client wants.
- The client has an opportunity to either approve or decline standard dual agency, as well as designated dual agency.

All in all, the quoted language is fairly thorough. *If the client is actually given an opportunity to read the agency agreement and have its terms explained, then the client truly may have knowingly and voluntarily entered into the agreement.* If the agency agreement is merely skimmed, with a few of the provisions highlighted or briefly explained by the broker, and the client is then instructed to "just sign here," the client may later have a valid argument that s/he did not understand what dual agency meant, and thus no informed consent obtained.

There have not been any reported legal decisions in North Carolina concerning dual or designated dual agency in brokerage transactions. Thus, whether such provisions are adequate to help protect a broker who otherwise fulfills his agency and brokerage obligations

cannot be stated with certainty, but such language may very well be adequate to support a lawful dual agency.

PRACTICING DUAL AGENCY

Must a company practice dual agency? Not necessarily; if it never tries to sell any of its listings to any of its buyer-clients, or lease its managed properties to its tenant-clients, then no, it need not practice any form of dual agency because it is not representing both principals with competing interests in the same transaction. Most likely such an office policy would be relatively rare if the company represents property owners as well as buyers or tenants.

Why would any client knowingly consent to a form of representation which deprives him or her of the counsel and expertise s/he sought in the first place by hiring a broker? Some might not; however, one reason for allowing dual agency might be that the company has numerous agents and extensive coverage in a particular geographic area and to refuse dual agency will significantly decrease the number of properties the buyer agent may show the buyer because it excludes the company's listings, or potential buyers to whom the listing company might show the property, if the seller excluded all of the company's buyer clients.

“Standard” Dual Agency

Query: What will a broker who is *acting as a standard (non-designated) dual agent* be able to do for his/her two principals?

The broker must treat both fairly, equally and impartially and act in good faith with/to each. A broker acting as a non-designated dual agent has the following duties and may perform the following services.

- S/he must *disclose all material facts to both principals*.
- The broker may provide standard transactional forms to each, such as Standard Form 2-T and related addenda, and assist each in completing the various forms, but *may not advocate on behalf of either party or advise either in negotiations*. The broker might provide the related Guidelines for a particular form if a party has questions about a provision, or suggest that a party confer with an attorney, if they want advice on how to complete the form or the legal effect of any provision.
- The broker could provide each party with information concerning comparable sales or perform a comparative market analysis (CMA) for each. In all probability, the broker prepared a CMA for the seller prior to advertising the listing, and, to treat both parties fairly and impartially, should be permitted to perform a similar service for his/her buyer-client. The CMA may, but need not, be the same CMA previously prepared for the seller, depending on the time elapsed since its preparation.

- A broker could inform each party of available resources to answer other questions a party might have.
- The broker must promptly deliver documents between the parties, including all notices, demands, repair requests, reports, etc., and may remind each party of impending deadlines that party must meet.
- The broker should attempt to facilitate communication and performance by each party of his/her contractual obligations.
- The broker will be accountable to both principals for any trust monies received.
- The broker may provide each party with a list of various service providers for each party's consideration, whether attorneys, home inspectors, lending institutions, appraisers, etc.
- A dual agent might assist both parties in determining issues such as whether a requested repair is a "necessary repair" under the terms of the contract or whether the buyer has demonstrated good faith efforts to obtain the requisite financing.
- The broker acting as a "standard" (non-designated) dual agent has the duty not only to disclose material facts to both principals, but to also disclose any information the broker has/knows about either principal to the other *unless* the parties have relieved the broker from this common law duty to disclose all information by the terms of the principal's agency agreement with the company/broker. (This is not necessarily true for designated agents.)

The dual agency language in most NCAR agency agreements attempts to excuse the broker from his/her duty to tell everything about each principal to the other. It is very similar to the language in Rule A.0104(k) and (l) which limits a *designated* dual agent's common law duty to disclose confidential information *about his/her designated principal* to the company's other principal, except the permission derives from contract, rather than by rule. *If such language exists in the agency agreement, then the broker may hold personal or confidential information about either principal in confidence during the agency relationship unless the information pertains to a material fact, in which case the law requires the broker to disclose.*

A Broker/Dual Agent May Not ... suggest to either party an amount to offer or counteroffer for the property. If a party is asking for advice on how to proceed in negotiations, the broker should suggest that the party consult the appropriate specialist, whether an attorney, or appraiser, or home inspector, or pest inspector, or surveyor, etc. *The broker/standard dual agent must refrain from recommending any course of conduct to one principal which might compromise the bargaining position of his/her other principal.*

Companies with Two or More Brokers

A real estate “company” is any business mode under which a broker, or group of people, decide to engage in real estate brokerage. It may be a sole proprietorship, which means one person owns the entire business and is personally liable for all debts and obligations of the business. The owner reports all revenues received minus operating expenses on Schedule C of his/her income tax return. A sole proprietor may be a one person operation or may have 50 brokers affiliated with his company. It merely refers to the business mode the broker has chosen. A “company” may also be a “*business entity*”, e.g., a corporation, limited liability company, limited partnership, general partnership, business trust, etc., which is separate and distinct from the individuals who claim an ownership interest. The degree of separateness depends on the type of entity formed. *Anyone who forms a business entity for the purpose of engaging in brokerage or receiving income from brokerage activity must first obtain a firm broker license for the entity.* (Sole proprietorships are *not* separately licensed because they are excluded from the definition of “business entity” under Rule A.0502(a).)

Example 1: Single Office

Top Notch Realty Services LLC has a firm broker license. It has one office with a broker-in-charge and two affiliated brokers, one of whom is on provisional status. Can this company practice dual agency?

Yes. If a single broker can represent both parties in the same transaction as a dual agent, then certainly a company with more than one broker can act as a dual agent. Absent *express authorization* to act as *designated* agents, the company and all three of its affiliated brokers may serve only as standard dual agents. All three must be impartial and none of the brokers may advocate or negotiate on behalf of either principal. *Whenever a broker is acting as a standard dual agent, s/he will be limited to providing those services discussed in the Standard Dual Agency section.*

Example 2: Multiple Offices

WeR Realty, Inc. has a firm broker license and maintains seven different offices, one in Wilmington, two in the Triangle, one in the Triad, two in the greater Charlotte area and one in Asheville. The company has 400 affiliated agents. A broker in the Triangle office is working with a buyer client who wants to purchase property in Buncombe County or surrounds. The buyer agency agreement is in writing and does not authorize dual agency. The broker shows the buyer client several different properties listed with various companies in the Asheville area, including a few listed with WeR Realty. Any problem?

Yes, there is a problem. WeR Realty just engaged in undisclosed dual agency without the knowing and informed consent of its buyer-client who had *not* authorized the company to act as a dual agent. But the buyer agent is from Raleigh and the listing was with the Asheville office — how can it be dual agency?? Because ***WeR Realty is one company*** — it has one taxpayer ID number, one firm license number and thus, just one umbrella, even though it has multiple offices scattered all over the State.

If the buyer agent obtained the buyer's oral consent to dual agency, could the broker at least show the property? *No*. The buyer first would have to *authorize dual agency in writing before s/he could see the property*, because the buyer agency agreement was already in writing. If WeR Realty's seller had not authorized dual agency in its listing agreement, then the seller's written consent to dual agency would also be required before the property could be shown to the buyer.

Example 3: Multiple Trade Names

What if WeR Realty Inc. engages in business not only in the name of WeR Realty, but also under two different assumed names (trade names), which are WeR Commercial and WeR Rentals. Would the outcome be any different from Example 2 if a broker working with WeR Commercial in Raleigh was acting as a buyer agent for a family friend who wanted to look at a residential property in Asheville listed with WeR Realty, Inc.?

No, the result would not be any different. There is still only one company, one firm license, and one umbrella under which all seven offices and all associated agents are working, even though the company holds itself out to the public under three different names. The trade names are just aliases for the one company – they are *not* separate entities.

Example 4: Multiple Related Business Entities

What if WeR Realty, Inc. created WeR Rentals LLC as well as WeR Commercial Inc and each had its own firm license? If a broker associated with WeR Rentals was showing a buyer property listed with WeR Realty Inc, would that broker be acting as a dual agent?

No, there is no dual agency, because in this fact situation each company is a separate business entity. Each has its own separate taxpayer identification number, separate Secretary of State identification number, and separate firm license, each of which must be renewed each year. For licensing purposes, these are three separate companies with three different umbrellas. Thus, a broker affiliated only with WeR Rentals LLC who is working with a buyer as a buyer agent remains solely a buyer agent when showing his/her client properties listed with WeR Realty Inc., because the listing company is a separate business entity from the business entity representing the buyer.

What if the rental and commercial entities were wholly owned by WeR Realty Inc — would that change the agency analysis? Not necessarily. The fact remains that each is a separate legal entity with separate tax numbers, separate Secretary of State identification numbers, separate firm license numbers, and thus, an agent affiliated with one of the three entities may show properties listed with either of the other two companies without being in dual agency, as a general rule. However, the brokers involved have a duty to advise their respective principals that the company representing the “other side” is owned by the company representing them.

Sole Practitioner

Can a sole practitioner/single broker act as a dual agent?	<i>Yes.</i>
Can a sole practitioner/single broker act as a <i>designated</i> dual agent?	<i>No.</i>

The agency rule has its own subparagraph which addresses the ability of a **sole practitioner** to represent both the seller and buyer in the same transaction. It is similar, but not identical, to the designated agent sections and states:

A.0104(n) When an individual broker represents both the buyer and seller in the same real estate sales transaction pursuant to a written agreement authorizing dual agency, the parties may provide in the written agreement that the broker shall not disclose the following information about one party to the other without permission from the party about whom the information pertains:

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

Thus, a broker who is a one-person shop still has the ability, if s/he chooses, to attempt to represent both a seller and a buyer in the same transaction acting strictly as a standard dual agent. Such a decision is up to the broker/owner/practitioner, subject to the proper informed authority and consent of both the broker's principals. Understand that *the North Carolina broker is acting as an agent for both principals and owes each the same fiduciary duties.*

Designated Dual Agency

Brokers should understand that *so long as the company only practices standard (non-designated) dual agency, then all of the company's affiliated brokers must treat both clients impartially*, whether the company has one office with ten brokers or fifteen offices statewide with 600 brokers. The ability of a broker to serve a client under standard dual agency is limited to those services set forth in the Section titled "*Standard*" Dual Agency.

Companies that wish to afford greater representation to its principals may choose to practice *designated* dual agency to allow the company to better advise and advocate for its clients by separating its representation of buyers and sellers between different agents. **Must a company practice designated dual agency? No.** It merely is an option available to companies that have no less than two brokers. Most likely the firm would need more than two affiliated brokers before the company could effectively practice designated agency, which is intended to restore for the benefit of the client some of the advisory and negotiating functions lost to a standard dual agent.

Designated agency might appear to be a more attractive alternative to the consumer if the consumer understood the difference between standard dual agency versus designated dual agency. The difference, of course, is that while the company and most of its affiliated agents remain neutral and impartial, those brokers designated to represent the buyer and seller respectively each retain their advocacy and advisory abilities for their designated client and owe their fiduciary obligations only to that client. Thus, the designated brokers may continue to

advise and counsel and make recommendations to their respective clients, so long as they did not possess confidential information about the other party at the time of designation.

Designated Agency in Small Companies

So all real estate companies have the option of practicing designated dual agency? Let us consider that question.

Example: Top Notch Realty Services LLC has a firm license and is a small company with only one office with a broker-in-charge, and two affiliated brokers, one on provisional status. Could Top Notch Realty Services practice *designated* dual agency?

In theory, yes, but it may not be possible in reality. To practice *designated* dual agency a company *minimally* must have *at least two full brokers*. A company with just a broker-in-charge and a provisional broker could *not* practice designated dual agency, due to the broker-in-charge's supervisory obligations over the provisional broker which destroys the separateness required. In the above example, however, Top Notch Realty could designate the full broker to represent one party and the provisional broker to represent the other party or the broker-in-charge could be designated for one party and the full broker designated for the other party.

Considerations for Practicing Designated Dual Agency

A search of Commission records in 2004 revealed that **86%** of all real estate companies in North Carolina only had **one office** and *over half of those only had one to three agents* affiliated with the company. Small companies may not find it feasible to practice designated agency, because all agents know too much about all clients. Recall that *a broker may not be designated to represent one party when at the time of designation that broker knows confidential information about the other party*. If a company only has two or three associates, chances are greater that those associates frequently confer with each other, share information about clients, and cover for each other. In such cases, the agents may know too much about all of their clients to permit them to practice designated agency. Thus, while a small company theoretically might practice designated dual agency, the safer course may well be standard dual agency (with appropriate language in the agency agreement concerning confidential information), if the flow of information within the office is open.

Understand that *all offices* must address the very real problem of protecting client confidentiality in general, whether as a seller agent, buyer agent or dual agent. However, larger companies with several agents and possibly multiple offices may find it fairly simple to practice designated dual agency. ***The primary concern is how to handle receipt and sharing of information as well as management of transaction files to prevent the dissemination of confidential information to any of the designated agents for either party about the other party.*** All other agents affiliated with the company who have *not* been designated for either party continue to act as impartial standard dual agents in the transaction, as does the company. They may not favor either party over the other. Only the brokers who have been designated to represent each party may act as an advocate for that broker's designated client.

Companies who practice designated dual agency should understand and impress upon their affiliated brokers that when practicing designated dual agency an honor system applies and the designated agents should not be snooping or attempting to circumvent the company's policies designed to preserve the confidentiality of personal information for both its clients.

Companies should consider the following issues in determining whether and how they will allow their agents to practice designated dual agency and incorporate those decisions and procedures into their written office policy manuals.

Sharing of Information within the Office

*How much and what type of information is shared among the brokers at sales meetings, general office meetings and training sessions? So long as the information relates to matters affecting the property only, there is less likelihood that other brokers are tainted with any personal information that would preclude them from being designated to represent a buyer-client. However, if a company allows its brokers to disclose a client's personal history, needs, wants, desires, present circumstances, etc. at general gatherings of office staff, for whatever purpose, agents present at such gatherings could be designated to represent the seller, but would *not be eligible* to be designated to represent the buyer, as they possess too much personal, confidential information about the seller. It might be that because of the personal information so freely (and imprudently?) disseminated, the company can only act as a standard dual agent in that transaction, because all affiliated agents are effectively excluded from being designated to represent the buyer's interests.*

Transaction File Maintenance

A company which chooses to practice designated dual agency should consider the issue of access to transaction files. The company should have one transaction file for its owner client, and a separate file for its buyer/tenant client. What is the company's policy regarding file maintenance during the pendency of the transaction? Are the individual agents allowed to keep the transaction file in their possession throughout the period of representation and only deposit it with the broker-in-charge once the transaction is concluded? *How can the broker-in-charge monitor whether the agency disclosures and agreements were timely given or review the advertising or the contract terms, if the file is not available to him/her?* (Remember that brokers-in-charge are also responsible for transaction file maintenance and preservation and ensuring that all the documents required to be kept by Rule A.0108 are in fact in the file.)

Perhaps office policy requires that the original transaction files remain in some central location within the office. When brokers need the file they can remove it while working with the client, leaving a note as to who has the file, and then replace it when finished. Perhaps office policy also defines what a "complete transaction file" is from both a listing/leasing perspective and a buyer/tenant agent perspective. A company might require the original transaction file to basically stay in the office, but permit the broker to make a duplicate working file for his/her use. The designated agent could then add personal notes or emails to his/her file, which might be merged with the office file at the conclusion of the transaction, depending on company policy.

What if office policy states that the only documents to be placed in the company's file during the pendency of the transaction or working relationship with any client are those documents required to be maintained by Rule A.0108, e.g., all offers, all contracts, all agency agreements, all mandatory disclosures, etc.? Is any of this information really confidential? If no confidential information is placed in an office transaction file by a designated agent during the pendency of the transaction, this would greatly reduce the need to worry about file segregation.

The *broker-in-charge always* needs to have access to all files*. The **sole exception* is that the broker-in-charge should not have access to the opposing party's file during a transaction if the broker-in-charge is the designated agent for the other party. (Remember that the "opposing party" could only be represented by a full broker, if the broker-in-charge is the designated agent for the other party.)

Some larger companies may consider implementing a centralized electronic system for maintaining transaction files with all relevant and necessary documents being scanned in to a system which can be accessed from any office. While this certainly may be "green" and earth-friendly, both laudable pursuits, might it complicate a company's ability to *monitor access* to its transaction files, if any broker with any office can tap into the central system and call up any file s/he wishes? Possibly, unless company policy prohibits designated agents from placing any confidential information about a client in the electronically maintained office files. A company that wishes to practice designated dual agency should consider how its transaction and record maintenance policies promote or frustrate confidentiality and separateness. A policy that the only documents contained within the primary office file during the working relationship with a client are those required by Rule A.0108, might lessen fears about violating client confidentiality through information in the transaction file.

Company policy should explicitly state, for the record, that when acting as a designated agent, a broker should not attempt to access information about the other party that might be available within the office. Brokers also should recall that *Rule A.0115 prohibits all brokers from disclosing price or other material terms of any offer without the consent of the offeror*. Thus, if a designated buyer agent comes across an offer made by some other buyer which offer the seller has rejected, the buyer agent can not disclose the amount or other material terms of that offer to his/her buyer-client without the express consent of the buyer who made the offer.

Post-Designation Receipt of Personal Information

The rule clearly states that a broker may not be designated to represent one party where that broker already possesses personal information about the other party at the time of designation. [See Rule A.0104(j).] What happens, however, when following designation for one party or the other, that broker subsequently learns something about the other side? Should s/he tell his/her designated principal? That's an excellent question and the answer is not known with any certainty because to date, no North Carolina court has considered a case involving designated agency.

Doesn't the rule address this? Not really. It says that the designated seller agents may not disclose certain information about the seller to the buyer without the seller's consent and,

similarly, the designated buyer agents may not disclose certain information about their buyer-client to the seller without the buyer's permission. But what if the buyer agent, post-designation, learns something about the seller — whether related to motivation or financial or health or marital situation or whatever — must the buyer agent tell his/her buyer client?

Because the underlying intent of designated dual agency was to restore a broker's ability to more fully perform all of his/her fiduciary duties to his/her principal, particularly advocacy and advisory functions, it might seem logical that if a broker *post-designation* learns confidential or personal information about the company's *other* principal, then s/he most likely should share that information with his/her designated principal. ***However, whether disclosure is appropriate may be influenced by how the broker acquired the information.*** Suppose the information is from a source outside of the office, for example, a neighbor informing the designated buyer agent about the seller's marital and financial woes while the buyer agent is at the property for the home inspection. Because the information comes from a third party, one could certainly argue that it is *not confidential* and that the designated buyer agent may share the information with his/her buyer-client.

On the other hand, if either designated agent receives personal or confidential information about the company's other principal due to a breach of office policy, the question becomes more difficult. Sharing such *internally acquired information* with the broker's designated principal may well expose the company to civil liability, if not disciplinary action, particularly if the company's dual agency agreement provides, as is typically the case, that non-material fact confidential information about one client will not be shared with the other client.

Another point to remember is that the primary relevance of post-designation receipt of confidential information about the other party is that presumably it may give one principal an advantage over the other *during the negotiation process*. If the parties are already under contract at the time the information is learned, it may have very little impact on the parties' respective *contractual* rights and obligations and generally *will not be grounds* for either party to avoid performing their contract, so long as neither *party* has committed any fraud or engaged in misrepresentation. In other words, the failure of *an agent* to disclose material facts may give rise to a legal action against the agent and his/her company, but would *not* allow the buyer to terminate the contact vis-a-vis the seller *so long as* the seller had not lied on the Residential Property Disclosure Statement.

Miscellaneous Issues

The following hypotheticals seek to illustrate various other matters related to a company's decision whether to practice dual agency, and, if so, whether to offer designated dual agency as well.

Hypothetical #1: WeR Realty, Inc. has a firm license and maintains seven offices across North Carolina in Wilmington, Raleigh, the Triad, Charlotte and Asheville. Could it decide as a matter of company policy that it will offer designated dual agency to its clients when the company's principals are represented by agents in different offices, but

that it will only act as a standard dual agent when both principals are represented by brokers affiliated with the same office?

Yes. Companies may elect to conduct their real estate brokerage business under any business model and under such terms and conditions as it may choose, so long as none of those choices violate State law, Commission rules, or public policy. Thus, the company may decide that because it is relatively easy to separate personal information about its seller-client when the listing is held by the Wilmington office and the buyer is represented by an agent affiliated with the Raleigh office, the company will act as a designated dual agent with specified brokers from the Raleigh office representing only the buyer and specified brokers from the Wilmington office representing only the seller. *The brokers designated to represent each party must be identified to the other party before any offers are presented.* However, if one office has both the listing and the buyer client, then the company's policy may provide that the company will only offer standard dual agency in that situation and the distinction must be explained to both principals.

Hypothetical #2: Can a company act as a standard dual agent for one party and as a designated dual agent for the other party *within the same transaction*?

No. Within any one transaction, the Company must act *either* as a standard dual agent for both parties, i.e., impartial, *or* assign designated dual agents for both parties. The playing field would not be level if the Company acted as a standard dual agent for the seller, and thus could give no advice or negotiating tips, yet acted as a designated dual agent for the buyer, who would have the benefit of the broker's advice, advocacy and negotiating skills. One would think that if a company offers designated dual agency, most consumers would choose that option to regain broker advocacy and counsel rather than choosing standard dual agency. However, if the seller has authorized designated dual agency in his listing agreement, but the buyer has only consented to standard dual agency in the written buyer agency agreement, then the Company may only act as a standard dual agent in that transaction, unless the buyer amends the buyer agency agreement to permit designated dual agency.

Hypothetical #3: Top Notch Realty Services LLC has one office and ten affiliated agents. Broker Bob is the listing agent for a property at 123 Main Street. The seller has authorized both dual and designated dual agency in the listing agreement with Top Notch Realty Services. Broker Bob also has been working for three weeks with a buyer under a written buyer agency agreement in which the buyer also has authorized both dual and designated dual agency. Buyer now wants to see the property at 123 Main Street.

Can Broker Bob be designated as the designated agent for either the seller or the buyer? Most likely *not*. As the individual agent who, on behalf of the company, has been working with the seller since the inception of the listing, Broker Bob probably possesses a great deal of personal information about the seller. He probably also has learned a great deal about the buyer's circumstances over the three weeks they have worked together. Broker Bob possesses too much personal information about both the buyer and the seller, which, under the rule,

prevents him from being designated for either. If the company wishes to proceed as a designated dual agent in that transaction, it must designate brokers *other than Bob* to represent the seller and buyer respectively.

Could Broker Bob continue in the transaction as a standard dual agent? *Yes.* If company policy allows and with the consent of the clients, Bob could continue to participate in the transaction and attempt to represent both parties' interests as a *standard dual agent*, with the concurrent reduction in advocacy/advisory abilities. If the agency agreement with both parties contained language similar to the NCAR forms as to the firm's practice of dual agency, then Bob also would be absolved of his duty to disclose non-material fact personal information about either party to the other.

Hypothetical #4: Top Notch Realty Services LLC has decided as a matter of office policy that it will offer *only standard dual agency* when such situations arise, but it will *not* practice designated dual agency. It also has decided as a matter of policy that it will not allow *single-agent* dual agency. Instead, the company appoints different brokers to represent the seller and the buyer. Does this automatically mean the company is acting as a designated dual agent?

No. A company may decide as part of its office policy that it will act only as a standard dual agent in all dual agency transactions, and will not offer designated dual agency. Nonetheless, it also may decide not to permit any of its affiliated brokers to represent both the seller and buyer simultaneously, for whatever reasons. Thus, it may appoint one broker to work with the seller and another broker to work with the buyer in the transaction, ***but these agents are not elevated to designated dual agency status so as to restore the advocacy/advisory functions, if the company's policy is that it does not offer designated dual agency.*** The fact that a company may choose to have different agents work with the parties in a transaction does not preclude the company from acting solely as a standard dual agent and the affiliated brokers must understand that they may not advocate for or advise either party in negotiation strategies. Rather, each will be restricted in the services each may offer to his/her assigned party to those services listed in the "*Standard*" *Dual Agency* subsection of this Section One.

If and how a company chooses to practice *designated* dual agency should be expressly stated in the company's Office Policies and Procedures Manual. The practice of designated dual agency entails attention to the matters discussed in this "*Considerations for Practicing Designated Dual Agency*" section.

CONCLUSION

Brokers-in-charge are responsible for supervising all agents in their office as to the agents' compliance with the agency disclosure and agreement requirements of Rule A.0104. Brokers-in-charge should have a clear understanding of the company's office policy as to the types of agency relationships the owners of the company allow its agents to practice. If dual

agency is permitted, is designated dual agency allowed and how is this accomplished? The broker-in-charge at any given office is responsible for training the agents associated with that office not only in the company's agency policies, but how to effectively implement those policies as well. *Agents must understand that failure to adequately explain the consequences of dual agency may later void any purported consent obtained from the consumer on the grounds that it was not "knowing and informed consent,"* which might lead to both disciplinary proceedings as well as subjecting the company to a civil lawsuit.

Agents should explain to consumers that dual agency will arise whenever the company is representing both the seller and the buyer or the lessor and lessee, and that because the company owes the same fiduciary duties to both sides, the ability to advocate for or advise the client typically is significantly reduced because of the inherent conflict in attempting to promote the interests of both parties. However, if designated agency is available under company policy, the broker could explain that different agents would be assigned to represent each principal, thereby restoring some of the advocacy and negotiating abilities.

*No properties listed or managed by the company may be shown to any buyer or tenant represented by the company as a buyer/tenant agent until and unless both parties have **expressly consented** to some form of dual agency.* Typically the owner's consent to dual agency will already be in the written listing or management agreement. Oral consent from the buyer/tenant will be sufficient *only so long as* the underlying buyer/tenant agency agreement remains oral. The moment it is reduced to writing, it must include written authorization for dual agency. Agents should also recall that unless the dual agency agreement expressly authorizes them **not** to disclose personal or confidential information about either party to the other (other than material facts), the agent **will be required under the common law of agency** to disclose all information s/he knows about either party to the other.

Not only must brokers-in-charge train their agents, they also must periodically check to see that each agent is following office policy both in providing agency disclosures and obtaining agency agreements in a timely fashion. A broker-in-charge might do this by randomly pulling transaction files to see if there is a signed signature panel in all sales files and evidence of an oral or written agency agreement in all files (except when acting as a seller subagent). Additionally, a broker-in-charge should meet periodically with each agent to learn how many buyers/tenants the agent is working with and how many listing or property management presentations the agent has made in the last two or three weeks and collect all the signature panels from the agency disclosure brochure for all those buyers and sellers, which records must be retained for three years.