

2019-2020 BICUP Course

Section Eight RECORD RETENTION



1. John, a broker, explains the WWREA brochure to Beth and enters into an oral buyer agency agreement with her. After two weeks of working together and viewing various properties, John and Beth agree to terminate the oral buyer agency agreement. John discards the WWREA acknowledgement panel that Beth had signed, because he never entered a written agency agreement with her.

Has John complied with License Law and Commission Rules? Why or why not?

2. Bob, a broker, closes several transactions a month. For efficiency purposes, he scans all of his documents immediately upon receipt to the firm's online storage system. Once he has done this, he shreds his original files. Bill, the BIC, informs Bob that he is in violation of Rule 58A .0108.

Is Bill correct? Why or why not? _____

3. Sara, a broker, prefers corresponding with all of her clients via text and email messages. She believes this provides her clients with exceptional customer service. Beth, one of Sara's buyer-clients, texts Sara an authorization to offer \$378,000 on a property. Sara responds, "Okay, I will complete the Standard Form 2T-Offer to Purchase and Contract for your review and signature." Sara then drafts the offer and emails it to Beth, and, in turn, Beth signs it. Sara then submits the offer to the seller.

What documents must Sara retain in the transaction file for Beth Buyer?

LEARNING OBJECTIVES

This Section will review the record retention requirements for brokers in real estate transactions.

After completing this section, you should be able to:

- describe the responsibilities of the broker and BIC related to record retention;
- describe the types of documents & files that must be retained; and
- identify the length of time records should be retained.

RESPONSIBILITY FOR RECORD RETENTION: BIC OR BROKER OR BOTH?

COMMISSION RULE 58A. 0108

According to Rule 58A .0108, brokers shall retain records of:

- all sales, rental, and other transactions conducted in their brokerage capacity,
- whether the transactions are pending, completed, or terminated.

This rule mandates that all brokers are responsible for retaining transactional files and documents related to their brokerage activity.

The record retention requirements apply:

- from the inception of the agency relationship;
- while the transaction is pending;
- when the transaction is consummated; or
- after the agency agreement is terminated.

According to Rule 58A .0110(g), a designated BIC shall:

- maintain the trust or escrow account of the firm and the records pertaining thereto;
- retain and maintain records relating to transactions conducted by or on behalf of the firm, including those required to be retained pursuant to Rule 58A .0108.

A BIC and broker are both responsible for retaining records. The BIC must ensure the firm has copies of all documents and complete transaction files; the broker must also have copies of their transactions.

Note: Rule 58A .0108 (d), specifies that a broker shall provide transactional documents to the firm or sole proprietorship with which they are affiliated within three days of receipt.



What happens if an office closes?

Pursuant to Rule 58A. 0502(g)(7), the Qualifying Broker of a business entity shall assume responsibility for retaining and preserving the transaction and trust account records of the firm upon termination of his or her status as qualifying broker until a new qualifying broker has been designated with the Commission or, if no new qualifying broker, is designated, for the period of time records are to be retained by Rule 58A .0108.

Best Practice: It is important for BIC's and brokers to ensure that they are complying with the Identity Protection Act when they are retaining the personal, confidential information of consumers.

The Act can be read here:

https://www.ncleg.net/EnactedLegislation/Statutes/HTML/ByArticle/Chapter_75/Article_2A.html

WHICH RECORDS MUST BE KEPT?



ABC Realty allows affiliated brokers to post the firms' listings on social media sites.

Sue, an affiliated broker, receives a message from Amy, a prospective buyer, on social media. Amy inquires about one of the firm's listings and discloses her eagerness to view the property as well as her maximum budget.

Sue immediately sends the PDF version of the WWREA brochure to Amy using the direct message thread. Amy and Sue review the brochure together via a telephone conference.

After the telephone conference, Sue reviews her messages to retrieve the acknowledgement panel that Amy sent back with her signature.

What must Sue do to ensure compliance with Rule 58A .0108? _____

DOCUMENTS AND FILES THAT MUST BE RETAINED

The following records must be kept during a pending, completed, or terminated transaction according to Rule 58A .0108(b) *if these are a part of the transaction*:

- Offers/Contracts of Sale
 - During the course of negotiating, a broker will have a multitude of documents like the initial offer and possibly multiple counteroffers before the offer is accepted. The rule specifies that offers to purchase must be kept; therefore, ensure that all offers are retained and not just the accepted offers.
 - The final contract of sale, all addenda, and any back-up contracts.
- Written Leases
 - According to the Statute of Frauds, lease agreements for more than three years must be in writing. Furthermore, it would be wise for a broker to keep all documents that include negotiated terms and notes that become a part of the lease.
- Agency Contracts
 - N.C.G.S. §93A-13 and Rule 58A .0104(a) require every broker to have an express agency agreement with a client before providing brokerage services. Further, Rule 58A .0104(a) mandates that an agency agreement must be in writing before the presentation of an offer.
 - Brokers often assist their clients in procuring multiple properties under one agency agreement. This is permissible as long as the broker retains a copy of the agreement in each transaction file or in a central location with a reference of the agreement in each transaction file.
- Options
 - It is an option to hold an offer to sell open for a set period of time and gives the other party to the option contract a legal right to either accept or not accept the optionor's offer to sell during the time period of the option.

- Trust or Escrow Records
 - A broker should retain documentation (i.e. electronic or paper receipt) for every deposit and disbursement from the trust account that explains the purpose of the funds received or disbursed to others. All checks, deposit tickets, and ledgers must indicate the following:
 - date of deposit and/or disbursement;
 - the amount of funds received and/or disbursed;
 - the purpose of funds received and/or disbursed;
 - the address of the subject property in the transaction; and
 - the payor or payee.
 - A BIC must keep the following records:
 - Bank statements;
 - Canceled checks;
 - Deposit tickets;
 - Ledger sheets;
 - Journal, check register, or check stubs;
 - Payment record sheets for property owner associations
 - Copies of earnest money checks, due diligence fee checks, receipts for cash payment, contracts, and closing statements in sales transactions;
 - Copies of leases, security deposit checks, and property management agreements and statements;
 - Covenants, bylaws, minutes, management agreements, and quarterly statements for owners' associations;
 - Invoices, bills, and contracts paid from the trust account; and
 - Any other documents necessary to explain record entries
- Earnest Money Receipts
 - A document should be kept that evidences submission of an earnest money deposit. This document may include emails, ledger sheets, copies of cleared checks, closing documents, and/or HUD-1 forms.
- Disclosure Documents
 - Examples:
 - Lead Based Paint Disclosure statement for sales and leases of residential properties built before 1978.
 - Working with Real Estate Agents (WWREA) brochure for all sales transactions.
 - Residential Property and Owners Association Disclosure Statement (RPOADS)
 - Mineral, Oil, and Gas Rights Disclosure Form (MOG)

- Closing / Settlement Statements
 - If a transaction closes, copies of all closing documents must be retained in the file. Examples include Closing Disclosures and HUD-1 forms.
- Brokerage Cooperation Agreements and Declarations of Affiliation
 - The broker cooperation agreement and declaration of affiliation agreement with a limited nonresident commercial licensee must be kept in the transaction file. In addition, any corresponding documents used between the resident NC broker and the limited nonresident commercial licensee must be retained.
- Broker Price Opinions (BPOs) and Comparative Market Analyses (CMAs) with notes and supporting documentation
 - The documentation from a client requesting a BPO/CMA, market data, comparables used to list or purchase property, and the BPO/CMA of the subject property must be kept in the transaction file.
- Sketches, Calculations, Photos, and other documentation used or relied upon to calculate square footage
 - Brokers must ensure that the information they use to calculate the square footage of a property is retained in the transaction file. If the services of an appraiser are used, then the documentation utilized by the appraiser must be kept in the file as well.
- Advertising used to market a property listed for sale or lease
 - Brokers utilize a multitude of digital, print, and media to advertise listed properties. All digital, print, and media advertisements must be retained.
- Any other records pertaining to real estate transactions
 - Technological advances have afforded brokers the opportunity to communicate, negotiate, and transact brokerage using text, direct message, and electronic mail. Brokers are responsible for retaining all of these records.

The retention of records is vital in understanding a transaction file and ultimately providing supporting documentation for a potential complaint allegation.



Where must records be kept?

Many transactions are conducted electronically amongst brokers and their clients. Many negotiations are faxed, emailed, or text to the respective parties while the transaction is pending. Therefore, it is essential for the BIC to specify where electronic files and paper documents must be kept to satisfy the retention requirement.

Rule 58A .0108(c) states:

All records shall be made available for inspection and reproduction by the Commission or its authorized representatives without prior notice.

The rule does not mandate a broker having a specific location for their records. It only requires that the records must be kept. Therefore, the records can be kept at an off-site storage facility, electronically in a cloud, or in a storage room at the office or broker's home. The location of the stored files is not as pertinent as the ability to retrieve the files upon notice and provide a copy to the Commission upon request.

Note: Commission auditors / investigators may show up at any time [without notice] at the BIC's address and require immediate access to transaction files and records.

HOW LONG MUST RECORDS BE KEPT?

Records must be retained for three years after:

- all funds held by the brokers in connection with the transaction have been disbursed to the proper party or parties, or
- the conclusion of the transaction, whichever occurs later.

If, during the course of a transaction, a broker's agency agreement is terminated, the broker shall retain such records for three years after:

- the termination of the agency agreement, or
- the disbursement of all funds held by or paid to the broker in connection with the transaction, whichever occurs later.

A broker must document their brokerage activities correctly to ensure they start the "retention of records clock" appropriately. It is imperative that a broker understands that a transaction does not have to close in order for the "clock" to start.

In other words, every agency agreement must be retained, whether a closing resulted or not.



When do brokers submit records to the firm or sole proprietorship?

Rule 58A .0108(d) states:

Brokers shall provide a copy of the:

- *written agency disclosure and acknowledgement thereof when applicable,*
- *written agency agreement,*
- *contract,*
- *offer,*
- *lease,*
- *rental agreement,*
- *option, or*
- *other related transaction document*
*to the firm or sole proprietorship with which they are affiliated **within three days of receipt.***

NOTE: The law does not prevent a BIC from implementing more restrictive requirements to ensure that the firm has a record of pending, completed, or terminated transactions from a broker.

For example, an office policy may state:

- A broker must submit original transaction documents and files to the firm upon receipt.
- A broker must scan transaction documents and files into an electronic management system upon receipt.

A BIC may create more restrictive policies for record retention; however, an affiliated broker still has the ability to maintain their own files or have immediate access to them to comply with License Law and Rule.

A reasonably prudent real estate broker would keep a copy of their transaction documents and submit the appropriate transaction files to their firm according to License Law and Commission Rules.

Note: If a broker leaves the firm or sole proprietorship in which they are affiliated, the primary copies of the transaction files must stay with the firm. However, the broker may request to make copies of all transactional documents before they transition to another firm.

CASE: What money?



Read the following case summary.

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

PARTIES:

The complaining witness was the president of the Property Owners' Association. The Respondents were a husband who was the Qualifying Broker and BIC of the firm and his wife who served as the manager of the owners' association.

COMPLAINT:

On May 27, 2016, the President of the Property Owner's Association filed a complaint with the North Carolina Real Estate Commission indicating that the Respondents failed to: (1) submit financial records upon request, (2) failed to obtain approval from the board for reimbursements of expenditures, and (3) failed to provide receipts and invoices for expenditures.

FACTS:

The complaining witness, the President of the Property Owner's Association (POA), filed a complaint against the Respondents on May 27, 2016. The complaint alleged that the Respondents managed the POA from February of 2014 until September 17, 2015. The POA requested financial information (i.e. receipts and invoices) while the POA and Respondents were in a property management agreement. However, the Respondents failed to submit the financial records upon request, failed to obtain approval from the board for reimbursements of several expenditures, and failed to submit receipt and invoices for expenditures. Subsequently, the POA terminated the management agreement of Respondents.

Upon the Board submitting a notice of termination to the Respondents, the POA had \$2,472.00 in the trust account. Respondent wife wrote two checks \$1,200.00 each to the brokerage firm from the trust account the next day. The balance left on the account was \$72.00. The Respondent wife emailed the POA treasurer on October 19, 2015, and stated that the first check was for correspondence she had with an attorney upon request from the board President. The memo line of the first check stated "research and development pull and prep documents, etc." Respondent wife indicated that the attorney researched the general statutes at a rate of \$75.00 per hour. She also stated that \$200.00 was used to prepare documents for the new management company. Respondent wife never disclosed the name of the attorney and during the course of the investigation it was never revealed which board member requested the services.

The Respondent stated in the same email on October 19, 2015, that the second check was written to cover the following expenses: (1) a \$750.00 for an early termination fee, (2) \$250.00 was for the failure of the POA to provide notice of the breach, and (3) a \$200 fee was for the cancellation of the property management agreement. Also, in the memo line of the second check, the Respondent wrote “letter prep, annual assessments, and termination fee.” The investigators at the Commission sent Letters of Inquiries, emails, and telephoned the Respondents. The attempts by the investigators went unanswered and documentation was never received from the Respondents.

Main Points - What money?

- February 2014 - September 2015, Respondents managed the POA.
- May 27, 2016, President of POA filed a complaint with NCREC.
- The allegations in the complaint stated the Respondent:
 - failed to provide financial information to the board upon request,
 - failed to get approval from the board for expenditures, and
 - failed to provide receipts or invoices for expenditures.
- POA President provided Respondent wife notice of termination for the property management agreement.
- Upon receiving a notice of termination, the POA Board had a balance of \$2,472 in the trust account.
- Respondent wife wrote two checks against the trust account for \$1,200 each.
- Respondent stated in the memo line of the first check “research/development pull and prep documents.”
- The Respondent stated in the memo line of the second check “letter prep, annual assessments, and termination fee.”
- The Respondents failed to respond to Letters of Inquiry, emails, and phone messages from the Commission.

Evaluation and Discussion - What money?

Errors made by the Respondents:

Related Law and Rule Considerations - What money?

Dishonest Dealing and Accounting

N.C.G.S. § 93A-6(a)(2) states:

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

N.C.G.S. § 93A-6(a)(7) states:

- The Commission has the power to suspend, revoke, reprimand, or censure any licensee if they fail within a reasonable time, to account for or to remit any monies coming into his or her possession which belong to others.

N.C.G.S. § 93A-6(a)(8) states:

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

N.C.G.S. § 93A-6(a)(10) states:

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

N.C.G.S. § 93A-6(a)(15) states:

- The Commission has the power to suspend, revoke, reprimand, or censure any licensee if they violate any rule adopted by the Commission.

Delivery of Instruments

Commission Rule 58A .0106 requires:

1. Every broker shall deliver a copy of any written agency agreement, contract, offer, lease, rental agreement option, or other related transaction document to their customer or client within three days of the broker's receipt of the executed document.
2. Upon the request of a property owner, a broker shall deliver a copy of any lease or rental agreement within five days.

Related Law and Rule Considerations - What money?

Dishonest Dealing and Accounting

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1. Every broker shall deliver a copy of any written agency agreement, contract, offer, lease, rental agreement option, or other related transaction document to their customer or client within three days of the broker's receipt of the executed document.
2. Upon the request of a property owner, a broker shall deliver a copy of any lease or rental agreement within five days.

Retention of Records

Commission Rule 58A .0108 requires:

1. A broker shall retain records of all sales, rentals, and other transactions conducted in such capacity, whether the transaction is pending, completed, or terminated.
2. The broker shall retain records for three years after all funds held by the broker in connection with the transaction have been disbursed to the proper party or parties or the conclusion of the transaction, whichever occurs later.
3. If the broker's agency agreement is terminated prior to the conclusion of the transaction, the broker shall retain such records for three years after the termination of the agency agreement or the disbursement of all funds held by or paid to the broker in connection with the transaction, whichever occurs later.
4. All records shall be made available for inspection and reproduction by the Commission without prior notice.

Broker-in-Charge

Commission Rule 58A .0110 requires:

1. A designated BIC shall maintain the trust or escrow account of the firm and the records pertaining thereto.
2. A designated BIC shall retain and maintain records relating to transactions conducted by or on behalf of the firm.
3. A designated BIC shall supervise all brokers employed at the office with respect to adherence to agency agreement and disclosure requirements.

Handling of Trust Money

Commission Rule 58A .0116 requires:

1. Prior to depositing trust money into a trust or escrow account that bears interest, the broker having custody over the money shall first secure written authorization from all parties having an interest in the money. Such authorization shall specify and set forth in a conspicuous manner how and to whom the interest shall be disbursed.
2. Every broker shall safeguard any money or property of others that comes into the broker's possession in a manner consistent with License Law and Commission Rules.
3. A broker shall not convert the money or property of others to their own use, apply such money or property to a purpose other than that it was intended for, or permit or assist any person in the conversion or misapplication of such money or property.

Accounting for Trust Money

Commission Rule 58A .0117 requires:

1. A broker shall create, maintain and retain records sufficient to identify the ownership of all funds belonging to others. Such records shall be sufficient to show proper deposit and disbursement of such funds into and from a trust or escrow account and to verify the accuracy and proper use of the trust or escrow account.
2. Upon the written request of a client, a broker shall no later than ten days after receipt of the request, furnish the client with copies of any records retained as required by Rule 58A. 0108 of this Section that pertain to the transaction to which the client was a party.
3. All trust or escrow account records shall be made available for inspection by the Commission or its authorized representatives in accordance with Rule 58A .0108 of this Section.

Trust Money Belonging to Property Owners' Associations

Commission Rule 58A .0118 requires:

1. The funds of a property owners' association when collected, maintained disbursed, or otherwise controlled by a broker, are trust money and shall be treated as such in the manner required by Rules 58A .0116 and 58A .0117 of this Section.
2. A broker who undertakes to act as a manager of a property owners' association or as the custodian of trust money belonging to a property owners' association shall provide the association with periodic statements that report the balance of association trust money in the brokers possession or control and account for the trust money the broker has received and disbursed on behalf of the association.
3. Such statements must be made in accordance with the broker's agreement with the association but not less frequently than every 90 days.

Complaints/Inquiries/Motions/Other Pleadings

Commission Rule 58A .0601(e) requires:

1. During the course of an investigation of a licensee, the Commission, through its legal counsel or other staff may send the licensee a Letter of Inquiry requesting the licensee to respond. The Letter of Inquiry, or attachments thereto, shall set forth the subject matter being investigated.
2. Upon receipt of the Letter of Inquiry, the licensee shall include a full and fair disclosure of all information requested.
3. Licensees shall include with their written response copies of all documents requested in the Letter of Inquiry.

ANSWERS TO DISCUSSION QUESTIONS

For Discussion on page 111

1. John, a broker, explains the WWREA brochure to Beth and enters into an oral buyer agency agreement with her. After two weeks of working together and viewing various properties, John and Beth agree to terminate the oral buyer agency agreement. John discards the WWREA acknowledgement panel that Beth had signed, because he never entered a written agency agreement with her. Has John complied with License Law and Commission Rules?

Answer: No, John has not complied with the rule. Once the broker's agency agreement terminated, John must retain the records for three years after the termination of the agency agreement or disbursement of all funds, whichever occurs later.

2. Bob, a broker, closes several transactions a month. For efficiency purposes, he scans all of his documents immediately upon receipt to an online storage system. Once he has done this, he shreds his original files. Bill, the BIC, informs Bob that he is in violation of Rule 58A .0108.

Is Bill correct? Why or why not? _____

Answer: No, Bill is not correct. Rule 58A .0108, does not state a broker must keep the original file(s). It specifies that all records shall include copies of any documents pertaining to the real estate transaction. Therefore, as long as a copy is available, an original copy does not have to be kept to comply with the rule.

3. Sara, a broker, prefers corresponding with all of her clients via text and email messages. She believes this provides her clients with exceptional customer service. Beth, one of Sara's buyer-clients, texts Sara an authorization to offer \$378,000 on a property. Sara responds, "Okay, I will complete the Standard Form 2T-Offer to Purchase and Contract for your review and signature." Sara then drafts the offer and emails it to Beth, and, in turn, Beth signs it. Sara then submits the offer to the seller.

What documents must Sara retain in the transaction file for Beth Buyer?

Answer: Sara must retain the text message thread with Beth Buyer, as well as the offer and email she submitted to the seller.

For Discussion on page 113

ABC Realty allows affiliated brokers to post the firms' listings on social media sites.

Sue, an affiliated broker, receives a message from Amy, a prospective buyer, on social media. Amy inquires about one of the firm's listings and discloses her eagerness to view the property as well as her maximum budget.

Sue immediately sends the PDF version of the WWREA brochure to Amy using the direct message thread. Amy and Sue review the brochure together via a telephone conference.

After the telephone conference, Sue reviews her messages to retrieve the acknowledgement panel that Amy sent back with her signature.

What must Sue do to ensure compliance with Rule 58A .0108?

Answer: Sue must download her direct message thread from her social media account that she used to communicate with Amy. Also, she must keep the acknowledgement panel with Amy's signature.

Case Outcome - What money? on pages 119-123

Errors identified during the Commission's Investigation

- Respondent wife failed to provide financial statements regarding the property owners' association trust account
- Respondent wife failed to get approval from the property owners' association for various expenditures
- Respondent wife failed to provide receipts or invoices when requested
- Respondent wife withdrew \$2,400 from the property owners' association trust account and failed to provide invoices for these expenditures
- Respondent wife failed to respond to the Letter of Inquiry from the Commission
- Respondent husband failed to maintain and retain records as BIC of the firm
- Respondent husband failed to supervise the Respondent wife's brokerage activities
- Respondent husband failed to respond to the Letter of Inquiry from the Commission

Law & Rule Violations identified during the Commission's Investigation

- N.C.G.S. § 93A-6(a)(2) - Making any false promises of a character likely to influence, persuade, or induce
- N.C.G.S. § 93A-6(a)(7) - Failing, within a reasonable time, to account for or to remit any monies coming into his or her possession which belongs to others
- N.C.G.S. § 93A-6(a)(8) - Being unworthy or incompetent to act as a real estate broker in a manner as to endanger the interest of the public
- N.C.G.S. § 93A-6(a)(10) - Conduct which constitutes improper, fraudulent or dishonest dealing
- Commission Rule 21 NCAC 58A .0106-Delivery of Instruments
- Commission Rule 21 NCAC 58A .0108- Retention of Records
- Commission Rule 21 NCAC 58A .0110-Broker-in-Charge
- Commission Rule 21 NCAC 58A .0116-Handling of Trust Money
- Commission Rule 21 NCAC 58A .0117-Accounting for Trust Money
- Commission Rule 21 NCAC 58A .0118-Trust Money Belonging to Property Owners' Associations
- Commission Rule 21 NCAC 58A .0601-Complaints/Inquiries/Motions/Other Pleadings

Sanctions Imposed by the Commission

- Respondent Wife- Permanent Revocation of Real Estate License
- Respondent Husband - Permanent Revocation of Real Estate License
- Firm- Permanent Revocation of Real Estate License