

HANDLING COMPLAINTS

1. You are a BIC of a real estate firm. You've just returned from a quick lunch and the mail is waiting on your desk. On the very top is a brown envelope addressed to you with the North Carolina Real Estate Commission's address in the top left corner. What would the Commission be sending you in a brown sealed envelope? As a BIC, are you in trouble?
2. One of your affiliated brokers was convicted of a DWI in Virginia three months ago. Must the broker report the conviction to the Real Estate Commission? If so, how quickly must s/he report it?

INTRODUCTION

You've received a brown envelope. What does that mean? Typically, correspondence from the Regulatory Affairs Division related to investigations is mailed in brown envelopes. Oh. It's time to sit down, take a deep breath, and open the envelope. Letters of Inquiry are sent to brokers when a complaint has been filed or the Commission has received information that needs to be investigated.

While it may not be your favorite mail, ***do not ignore letters or other correspondence from the Commission!*** Failing or refusing to communicate with the Commission in response to an inquiry may lead to harsher disciplinary action than might otherwise be warranted by the underlying violation.

This Section will review a broker's duty to report criminal convictions or disciplinary actions to the Commission, as well as how to respond to a letter of inquiry and, as a BIC, how to handle such inquiries and prepare responses.

Learning Objectives

After completing this Section, you should be able to:

- define which violations must be reported to the Commission by when.
- explain brokers' duties to cooperate with, respond to and produce records for the Commission.

COMMISSION'S AUTHORITY

State law [G.S.93A-6(a)] authorizes the Commission to:

- 1) take disciplinary action either on:
 - A) its own initiative
 - or
 - B) the complaint of any person.
- 2) investigate licensees and unlicensed activity and hold hearings on licensee misconduct.
- 3) issue subpoenas both for records and to compel the attendance of witnesses to testify at hearings.
- 4) impose sanctions for licensee misconduct. Possible sanctions include:
 - A) License *Revocation* for a definite or indefinite period of time. A broker whose license is revoked *has no license*.
 - B) License *Suspension* for a stated period of time. A broker whose license is suspended still *has* a license but is prohibited from using it for a specified period of time.
 - C) *Reprimand*: A public statement of disapproval by NCREC. A broker who has been reprimanded continues to have an active license and may engage in real estate brokerage activities.

The Commission may also “ ... impose reasonable conditions, restrictions, and limitations upon the license...,” e.g., prohibit the licensee from becoming a BIC for three years.

If a license is *revoked* or *suspended* for any period of time, state law requires the Executive Director of the NCREC to transmit a certified copy of the disciplinary order to the Clerk of Superior Court in the county where the broker maintained his/her principal place of business for entry of the order in the judgment docket.

The Commission has jurisdiction over licensees; while it has no jurisdiction over unlicensed persons, it does have the *authority to seek injunctive relief* in Superior Court against unlicensed persons or entities who are engaging in real estate brokerage. The Commission has exercised this injunctive power in the past to initiate legal proceedings against unlicensed persons and obtain a court order directing the person or entity to cease engaging in brokerage until such time as they are properly licensed. Failure to abide by the court order may result in a contempt of court citation which, among other things, may include a period of incarceration.

Brokers' Obligations & Duties

In addition to timely renewing your license and completing an Update course and an elective by June 10 each year in order to have a license you can use (i.e., on "active" status), brokers also are required:

- 1) to report to the Commission **within sixty (60) days**:
 - A) any felony or misdemeanor conviction, or
 - B) disciplinary action by a governmental agency in connection with any occupational license, or
 - C) the restriction, suspension or revocation of a notarial commission; [Rule A.0113.]
- 2) to file a response to a Letter of Inquiry **within fourteen (14) days of receipt**. The response "... shall include a full and fair disclosure of all information requested..." and "... copies of all documents requested;" [Rule A.0601(e).]
- 3) to make their records available for inspection and reproduction by the Commission's representative **upon request and without prior notice**; [Rules A.0108 and A.0117(h).]

Reporting Criminal Convictions and Disciplinary Actions

Rule A.0113 requires licensees to file a written report **within 60 days** of the final judgment, order or disposition in the case of *any*:

1. felony or misdemeanor conviction regardless of where convicted;
2. disciplinary action by a governmental agency concerning any occupational license, or
3. the restriction, suspension or revocation of a notarial commission.

Examples:

Must I report an arrest? No, only convictions.

If I am found not guilty or I am granted a prayer for judgment continued (PJC), must I report that? No, because you have not been found guilty of an offense.

If a misdemeanor traffic offense is reduced to an infraction, must that be reported? No, because an infraction is not a misdemeanor or felony.

If I was convicted of driving while impaired six months ago while vacationing in Colorado must that be reported? Yes, because it at least is a misdemeanor, and possibly a felony. The rule says any misdemeanor or felony must be reported, regardless of where it occurs.

Failure to report a criminal conviction or disciplinary action by another governmental licensing agency *of this or any other jurisdiction* to the Commission as required only aggravates the situation and may lead to disciplinary action for the failure to report, even though the underlying conviction or disciplinary action in and of itself may not have resulted in disciplinary action by the Commission. While some licensees may think that if they don't report the conviction/disciplinary action, the Commission won't find out, they often are wrong. Such matters come to the Commission's attention in numerous ways.

HOW DOES THE COMPLAINT PROCESS BEGIN?

The vast majority of disciplinary cases opened every year are the result of *consumer complaints* against licensed real estate brokers. While no particular form is required, the Commission provides a standard complaint form on its website and encourages its use. [See REC 4.01F, “Complaint.”] Cases may also be opened because of a complaint by one licensee against another or on the Commission’s own initiative because of some matter or situation of which Commission staff becomes aware.

Rule A.0601, Complaints/Inquiries/Motions/Other Pleadings, requires that complaints:

- be in *writing*,
- *identify the broker(s)* complained against, and
- set forth the *essential facts* of the complaint.

Regulatory Affairs receives roughly 800-1000 complaints annually. Its policy is to investigate every consumer complaint, unless it fails to allege any cause or violation within the Commission’s jurisdiction. While the person complaining is not required to perfectly plead/articulate his/her case, it must appear that some violation of Real Estate License Law or Commission rules has occurred. Staff will consider the failure of a complaint to allege any facts that tend to indicate a violation of law or rules when determining whether and what resources to devote to any inquiry.

Anonymous Complaints

Will the Commission investigate an anonymous complaint?

Yes, if the information supplied by the complainant is sufficiently detailed to allow independent verification.

The Letter of Inquiry to the respondent-broker will include copies of all information contained in the original complaint the Commission received. Thus, if an “anonymous” complaint is sent from an email address, the email address will appear on the information provided to the respondent-broker. The Commission may not remove the email address before providing the respondent-broker with a copy. [The brokers who are the subject of the complaint are referred to as “respondents” and the person filing the complaint is the “complainant.”]

A person who files a complaint with the Real Estate Commission does *not* become a “party” to the case. A complainant is akin to an informant, who because of his/her special knowledge may become a witness if the matter goes to hearing, but who otherwise has no special standing before the Real Estate Commission. The only “standing” required of the complainant is a good faith belief in the truth of the allegations asserted.

Most Common Complaints

Other than monies missing from trust accounts, the most common complaints Regulatory Affairs receives include the following:

- Misrepresentation
- Contract problems
- Agency issues
- Loan Fraud
- Professionalism (or more accurately, the lack thereof)

When Will a Broker Learn that a Complaint Has Been Filed?

Upon receiving a complaint or other information, a staff attorney in Regulatory Affairs decides whether the complaint will be **investigated by correspondence or by a field investigation.**

*** Regulatory Affairs makes no assumptions concerning the facts of any case nor the truth of the allegations. ***

Whether the Commission sends you a Letter of Inquiry or knocks on your door, this is your opportunity to explain your side of the story to the Commission and to challenge what others are saying about you. Don't underestimate the importance of a thorough reply that addresses each point raised in the complaint. Know that ***in eighty percent (80%) of the Commission's cases, the decision not to prosecute is made by the Commission's legal counsel during or at the conclusion of the Commission's investigation.***

Correspondence Investigations

If most of the necessary information can be gathered by mail, then the case is referred to a "consumer protection officer" who writes to the responding broker and any witnesses to obtain statements and documents. A copy of the complaint and any documents the Commission received is included with the initial "Letter of Inquiry."

14 Day Reply Period: The broker should *respond in writing with his/her version of the facts within fourteen days of receiving the letter.* The letter may also request the broker to provide copies of various documents.

What if I need more than fourteen days to prepare my response and supporting documents?

If additional time is needed to prepare a thorough response, the broker should contact the staff person who wrote the Letter of Inquiry and request an extension of time to respond, which typically is granted. *The importance and effectiveness of a well-drafted response to an inquiry as a means of avoiding disciplinary proceedings can't be overemphasized!*

What to send?

- Review the letter to determine what is being requested. Review your transaction file.
- Write a chronological narrative of your involvement in the transaction as objectively as possible, responding to each allegation in the complaint and all questions in the Letter of Inquiry.
- Provide all requested documents, which sometimes may be the entire transaction file. Contact the case processor if you have any questions about what documents are desired.
- Identify anyone who might have personal knowledge of the transaction who could support your account.
- Review your email communications and any written correspondence and submit any documents that corroborate or support your statements.

If you wish to consult an attorney for assistance in preparing your reply, you certainly may. Know, however, that the Commission hasn't drawn any conclusions at this point and is merely inviting you to explain what happened in the transaction.

You must *always* respond in writing.

Failure to respond not only violates Commission rules but also leaves the broker basically defenseless, as the Commission has nothing to counter the allegations in the complaint.

Everything you send the Commission is public record.

Usually, copies of your reply and any documents you submit are sent to the individual who filed the complaint. If you feel some of the requested information is confidential, then contact the consumer protection officer to discuss how to handle the situation.

If you send a paper response to the Commission, don't include staples or worry about putting the documents in a notebook. The consumer protection officer will review all information submitted and may have some follow-up questions.

A broker's failure to promptly and fully respond to a letter of inquiry is itself an offense that may result in disciplinary action. The licensing statutes and Commission rules require brokers to maintain records of their transactions and trust accounts and to make these records available for inspection by the Commission's investigators without prior notice.

A broker who fails to respond completely only invites greater scrutiny. Failure to keep required records and make them available for inspection is considered to be a very serious offense. ***Brokers should provide the Commission's investigative personnel with complete and truthful responses. If the broker-respondent has a factual or legal defense, then it should be raised in the response.***

Knocking on Your Door: Field Investigations

Cases that require witness interviews, trust account audits, or the examination of evidence that cannot easily be identified and obtained through correspondence are assigned to auditors and investigators in the Regulatory Affairs Division who conduct a field investigation and then organize their findings in written reports that are submitted to staff attorneys. Field investigation resources are very limited and are reserved for the most serious cases.

Suggested Responses to Avoid When Contacted by the Commission

- "You don't have jurisdiction over me." (*Yes, we do, if you have an NC real estate license.*)
- "As you can see from the consumer's ranting, they are deranged and no credence should be given to anything they say." (*Tell us your side of the story!*)
- "Sorry, but I'm super busy right now and won't have a chance to get into this for a couple of months." (*Commission Rules require you to respond within 14 days.*)
- "Do you have any idea who I am? I'm a top producer who's been in the business for more than 20 years and have sold *millions* of dollars of property!"

- “This was a personal matter and the Commission shouldn’t get involved.” (If it involved brokerage activity for a fee, then it was business as well. Even if it didn’t, recall that licensees may be subject to disciplinary action when selling, leasing or buying their own property or if convicted of certain crimes involving moral turpitude. G.S.93A-6(b)(2)&(3).)
- “I’m not required to keep the documents you request.” (*Actually, you probably are.*)

Investigator Reports and Case Files

Investigating staff assembles reports and files in each case. Each case file contains the complaint, correspondence to and from witnesses, documentary evidence, notes and memos concerning witness statements, subpoenas, affidavits, and similar materials. These materials will be made available on request to respondent brokers and their attorneys and generally will be treated as public records as to inspection by disinterested parties. There are, however, narrow exceptions permitting the Commission to withhold materials in a case file from public examination when disclosure would frustrate an on-going investigation by the Commission or by another law enforcement agency cooperating with the Commission’s inquiry.

Possible Outcomes

Once an investigation has concluded and all the information and documents have been assessed, the consumer protection officer or investigator, in conjunction with a staff attorney, discuss the facts and what outcome might be appropriate. Staff debates the evidence and merits in each case to determine whether to proceed with disciplinary action or dismiss the case. As noted earlier, the vast majority of complaints are closed after investigation because legal staff decides for whatever reasons to dismiss the case.

Understand that ***having a case dismissed is NOT equivalent to a finding of innocence or not at fault.*** In many cases, the broker committed some violation, but in the grand scheme of things was it major or minor, intentional or inadvertent, how harmed was the consumer, and did the broker make it right? All of these factors are considered in determining whether to dismiss, dismiss and warn, or conditionally dismiss. A broker’s willingness to accept, rather than shirk, responsibility for his/her acts and to make the consumer whole (i.e., make it *right*) can significantly influence the outcome of the disciplinary proceeding.

If Regulatory Affairs believes that disciplinary action is warranted, it must first convince the Commission that “probable cause” exists to believe that a violation has been committed. Only cases where the evidence is strong and/or the violation is serious are referred to the Commission. **Don’t contact Commission members, directly or indirectly!** Probable cause submissions for the Commission’s consideration contain only a summary of the facts *without any names* and the Commission decides whether to proceed to a hearing or dismiss based solely on the facts presented. All brokers and consumers will be notified of the Commission’s decision.

If the Commission approves proceeding with the case, the broker at that point may contact the staff attorney assigned to the case to discuss possible settlement options. Only about 10% of all complaints go to hearing. A broker may seek legal representation at any stage of the proceeding.

BIC LIABILITY/RESPONSIBILITY FOR ASSOCIATED BROKERS

Will I as the Broker-in-Charge be notified whenever a complaint is filed against one of my affiliated brokers?

A BIC *will receive* a copy of any Letter of Inquiry sent to any *provisional broker* under the BIC's supervision. However, BICs don't automatically receive a copy of Letters of Inquiry sent to affiliated brokers not on provisional status, i.e., "full" brokers. The BIC may be contacted for information if the matter involves one of their supervisory responsibilities for full brokers or if the BIC or company was named as a respondent. A BIC is responsible for supervising all provisional brokers in all brokerage activity and is included in any inquiry involving a provisional broker, as the provisional broker would not be on active status and able to engage in brokerage without having a BIC. What is a BIC responsible for regarding his/her full brokers? The BIC must assure that all full brokers:

- 1) have a current and active license;
- 2) comply with advertising laws and regulations;
- 3) comply with Commission Rule A.0104 concerning agency disclosures and agreements.

Additionally, the BIC is responsible for maintaining all transaction files and trust monies and records for the entire office, regardless of whether the individual agent is a provisional broker or broker.

Considering that the Commission may not contact you immediately regarding any inquiry or investigation involving one of your full brokers, what office policies might you implement to proactively discover potential problems?

Suggested Written Office Policies

BICs who are truly one person operations with no other licensed or unlicensed individuals assisting them in their brokerage activity in any capacity may not need written office policies. But if you are a BIC of other brokers, provisional or full, you may want to consider the following suggestions for inclusion in your written office policy manual.

- 1) All affiliated brokers, both provisional and non-provisional, must notify you immediately upon receiving:
 - notice of **any** inquiry or investigation by **any** governmental agency, whether the NC Real Estate Commission or the NC Department of Justice or the NC Human Relations Board,
or
 - receipt of any demand letter from an attorney.

Your broker-associates may be intimidated or embarrassed upon receipt of an inquiry or attorney demand letter. Some may attempt to handle the situation on their own without involving you or the real estate company. This could result in poorly worded, incomplete or untimely responses that might escalate the situation. Understand as well that the company may be civilly liable for the acts of its affiliated agents and statements an agent makes in responding to an inquiry may expose the company to liability in a civil lawsuit.

Suggestion: Instruct any administrative assistant or office manager handling the mail to notify you *immediately* if **any** envelope with the Commission’s return address (especially a brown one!) is received by you or any agent affiliated with your office. Stress to your assistant/office manager that s/he should not wait until you return to the office to notify you; a lot can happen while waiting for you to return, even if only a few days later. Given the response deadline, you don’t want to waste any response time.

2) Require affiliated brokers-respondents to submit their proposed responses to you for review **before** submitting their response to the Commission. This assures a well-worded, thorough response that will increase the likelihood of quick resolution and/or possible dismissal of the complaint. Your office policy might require any broker-respondent to provide you with:

- a detailed timeline of the events/communications surrounding the scenario referenced in the complaint; this can be used as the outline for the logical order of the response letter;
- all supporting documentation (such as agency agreements, offers, contracts, addenda, emails, letters, texts, etc.) in order of date executed or received;
- a written response that addresses each point, charge, and/or question noted in the complaint or accompanying Letter of Inquiry;

As you review the proposed submission from your affiliated broker, verify that:

- 1) the timeline and explanation/summation of events does not omit any relevant activities or information;
- 2) vague and confusing pronouns (e.g. he, she, they) are replaced with actual names or identifying titles (e.g. the buyer-husband, the buyer’s agent, the listing firm);
- 3) statements that are supported by documents clearly refer to the supporting documents by name or an assigned number (e.g. see page 4 of listing agreement, see Email #4);
- 4) supporting documents are clearly named /numbered and provided in the order referred to in the response to facilitate review by Commission staff.

Training Needs

A complaint may indicate a need for additional training in your office. For example, if a complaint is filed against one of your affiliated brokers regarding inaccurate square footage calculations or non-disclosure of a material fact, additional training or instruction regarding these issues may be warranted. Similarly, you are reviewing your agents’ advertising and see a MLS listing that states: “Own for less than you can rent — only \$763 per month (P&I)” and describes the property’s features, but doesn’t contain any financing disclosures. Time for a refresher training on Truth-in-Lending/Regulation Z requirements?

The fact that a BIC provides regular and/or need-based training about the correct way to handle/address various issues that arise in the company’s brokerage practice will be considered by the Commission and may help shift more of the responsibility and liability for inappropriate brokerage activity to the individual broker-respondent.

Example: A complaint is filed against one of your affiliated brokers regarding a possible fair housing violation. The firm's training records show that two classes were recently offered about fair housing compliance and there are office-wide emails sent by the BIC regarding fair housing compliance suggestions. In this case, disciplinary action may be directed more against the individual licensee, rather than the BIC, even if the licensee is a provisional broker.*

***Caveat:** If, however, the fair housing violation occurred within the office's advertising of a property (rather than in conduct or oral statements), the BIC may still be subject to discipline, even with training programs, because the BIC is responsible for all advertising emanating from his/her office.

SUMMARY

Avoid disciplinary proceedings by...

- conducting brokerage acts in compliance with Real Estate License Law and Commission Rules.
- avoiding misrepresentations.
- disclosing material facts
- maintaining records to verify your conduct.
- answering questions and producing documents requested by Commission staff.

Bottom Line: When something goes wrong, don't just "fix it," *make it right!*