

# 2018-2019 General Update Course

## Section Four Agency Issues



Larry, a NC broker, is hosting an open house for another broker in his firm. When individuals arrive, he hands them a property brochure and tells them he isn't the Listing Agent but that he is available if they have questions. Shirley, a prospective buyer, tells Larry she is very interested in the property and wants to make an offer. Larry tells Shirley he has offer paperwork with him and will be happy to represent her and write up the offer. They sit down at the kitchen table, and Larry produces the WWREA brochure. He tells Shirley that the brochure explains all of his duties as a buyer's agent and then asks her to sign it. Then, he begins going through the offer paperwork with her.

Has Larry fulfilled his duties under the Commission's agency rule (58A .0104)?  
Why or why not? \_\_\_\_\_

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### LEARNING OBJECTIVES

After completing this Section you should be able to explain:

- the basic requirements of Commission Rule 58A .0104;
- when brokers are required to reduce agency agreements with buyers or sellers to writing;
- brokers' fiduciary responsibilities to clients; and
- the prohibition against undisclosed dual agency.

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## OVERVIEW

This Section will review the facts of several disciplinary cases related to agency disclosure and agreements.

The basic requirements of Commission Rule 58A .0104 are summarized as follows:

- AGENCY DISCLOSURE MUST OCCUR AT FIRST SUBSTANTIAL CONTACT (58A .0104(c))

The *Working with Real Estate Agents* brochure must be given and reviewed in ALL SALES transactions (commercial and residential) with all sellers and all buyers at (no later than) first substantial contact.

- LISTING & PROPERTY MANAGEMENT AGREEMENTS MUST BE IN WRITING FROM THE ONSET (58A .0104(a))

A broker representing a property owner in any capacity, whether in a sales or lease transaction, must have a written agency agreement with the property owner before providing any brokerage services on behalf of the property owner.

- BUYER AGENCY AGREEMENTS MAY BE ORAL UNTIL THE TIME OF OFFER (58A .0104(a))

A broker may work with a buyer or tenant under an oral agency agreement so long as the agreement is non-exclusive and doesn't bind the buyer or tenant to the agent for any specified period of time. In other words, the buyer or tenant is free to work with multiple agents simultaneously and the oral agency relationship may be terminated by either party at any time merely by oral notice.

- An oral agreement must address the same issues found in written agency agreements, such as services the agent will provide, the agent's compensation, whether the buyer/tenant authorizes dual agency if the situation arises, and how long the agent may work with the buyer/tenant before requiring a written buyer/tenant agency agreement.
- An oral agreement must be reduced to writing prior to the presentment of any offer by any party.

- UNDISCLOSED DUAL AGENCY IS PROHIBITED (58A .0104(i))

A firm that 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.

- DESIGNATED DUAL AGENCY (58A .0104(j),(k), and (l))

When a firm represents both the buyer and seller in the same real estate transaction (dual agency), 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.

- 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.

- AN OWNER-BROKER MAY NOT ACT AS A BUYER'S AGENT (58A .0104(o))

A broker who has an ownership interest in real property may not act as a buyer's agent during the sale of the property.

NOTE: Rule 58A .0104(o) includes an exception for commercial brokers, as follows:

*A broker who is selling property in which the broker has an ownership interest shall not undertake to represent a buyer of that property **except that a broker who is selling commercial real estate as defined in Rule .1802 of this Subchapter in which the broker has less than 25 percent ownership interest may represent a buyer of that property if the buyer consents to the representation after full written disclosure of the broker's ownership interest.***

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## CASE #D17-0482: THE BIC WHO WORE MANY HATS



Read the following case summary.

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

### **PARTIES:**

The Complainants were the husband and wife Buyers of a residential property. The Respondents were 1) the Buyer Agent who at the time of the purchase was the tenant of the property as well as the BIC of the Property Management (PM) Firm, 2) a Broker-associate of the PM Firm; and 3) the PM Firm.

## **COMPLAINT and FACTS:**

The subject property was managed by the Respondent/Firm and Respondent/Broker-Associate beginning in November 2010. In November 2013, the then-tenant vacated the property and the home was listed for sale with a different firm. The listing was withdrawn in early February 2014.

In early 2014, the Buyers knocked on the door of the home and inquired with the occupant if the home was still available for sale. The occupant/tenant was the BIC of the Respondent/Property Management Firm.

The BIC offered to act as a Buyer's Agent and contacted the owner about a possible sale. On or about March 14, 2014, the Buyers signed a Buyer's Agency Agreement and an Offer to Purchase (OTP), both prepared by the BIC. The Buyer's Agency Agreement did not address dual agency. Under "Other Provisions and Conditions" in the OTP, the BIC listed the forms: "Exclusive Property Management Agreement" and "Residential Rental Contract," an apparent reference to his lease and a Management Agreement with his firm. Although it appears that everyone believed the BIC was acting as a Buyer's Agent in the sales transaction, his and his firm's positions in the transaction were not identified on the OTP "Notice" page. [Note: The Seller was represented by a different firm.]

On March 23, 2014, a home inspection was conducted on behalf of the Buyers. The inspection report listed a few relatively minor items and noted that the inspector was unable to inspect the HVAC air handler because the access door was blocked by permanently installed shelving. The report recommended the removal of the shelving so that the air handler could be inspected. There is no evidence that the matter was addressed. On April 28, 2014, the Buyers closed on the purchase of the home for \$390,000, with the Listing Firm and the Buyer's Firm each receiving a \$9750 commission.

On or about May 14, 2014, the Respondent/Broker-Associate (who acted as the primary property manager for the property) mailed to the Buyers, who lived out of the area, a Property Management Agreement. The mailing included a cover-letter which noted that the Broker-Associate and Buyers spoke that day about the Buyers' recent purchase and the fact that the Respondent/Firm had been managing the property for "many years." The letter referenced an enclosed Property Management Agreement for the Buyers' signatures. The Agreement stipulated an 11% management fee and was signed by the Broker-Associate. The Buyers never signed the agreement; however, the Broker-Associate of the Firm, under the supervision of the BIC (who was still also the tenant), continued to manage the property, deducting the 11% fee from the \$1650 monthly rent for the next year and a half.

In 2015, the BIC-tenant notified the Buyers that he and his wife were in the process of identifying a property to purchase and that they anticipated vacating before the two year lease term ended in February 2016. Sometime during the summer of 2015, the BIC-tenant gave notice to vacate October 31, 2015, and, according to the Buyers, they made preparations to move into the subject property on November 1, 2015. In October 2015, the BIC-tenant notified the Buyers that he would not vacate in October 2015, but would do so in November 2015. The case evidence reflects that the Buyers protested this change and demanded that the BIC-tenant vacate by October 31.

On October 13, 2015, the BIC-tenant, the Property Management Firm, and the Buyers signed a lease termination agreement prepared by the Respondents which stipulated that the Buyers released the BIC-tenant and the Firm from any further liability or responsibility regarding the lease, which would terminate on November 30, 2015. Additionally, it stipulated, over 45 days from the end of the lease and prior to any inspection by the Firm, that the Firm would return the full tenant security deposit (TSD) to the BIC. An additional handwritten clause stated that the BIC-tenant would pay \$5000 to the Buyers upon their signing the agreement. According to the Buyers, this was partial compensation for the costs they incurred due to the BIC-tenant's 30-day delay in vacating the property. The BIC-tenant vacated at the end of November 2015 and his full \$2475 TSD was returned to him by the firm on December 4, 2015.

The Buyers took occupancy in early December 2015. Email evidence reflects that they began to complain to the Firm almost immediately about the lack of cleanliness of the home and about health issues that the Buyer/husband began to experience within days of occupying the property. A December 24, 2015, email from the Buyers to the Firm questioned "Why did no one mention the excessive mold around the ceiling lights!"

Communications became more adversarial and in February 2016 the Buyers obtained and forwarded to the Firm a proposal from a restoration company to remediate mold growth in the home for \$6961.

Sometime in March 2016, the Buyers filed a complaint with the Firm's Board of REALTORS®. Soon thereafter, the Firm, through their attorney, proposed a settlement agreement to the Buyers in which the Buyers would agree to forever release the BIC & Firm from any liability, not file any more complaints and remove any negative online comments in exchange for a \$25K payment. The Buyers refused to sign the settlement as written, and no agreement was made.

July 2016 mold testing revealed unusually high levels of common household molds which the technician believed were likely growing in the HVAC system related to a condensation issue, commenting that he had "seldom recovered such high numbers" of mold spores. Although the Buyers replaced the HVAC system at a cost of \$13K, they vacated the home September 2016 in anticipation of an offer from the Respondents to purchase the property. Email evidence reflects that the Respondents did make an offer on October 18, 2016, through their attorney to purchase the property for \$410K, which was \$20K more than what the Buyers purchased the property for in 2014. However, these negotiations failed, and in November 2016 the Buyers filed their complaint a NCREC. The complaint focused on the Respondents' alleged failure to report a mold problem in the home both before the Buyer's purchase and during the BIC's tenancy.

Additionally, the Buyers declared that they never signed the management agreement and never agreed to pay the 11% management fee but that the BIC insisted that the Property Management Agreement was a non-negotiable part of the purchase. Included in their documentation was a copy of the Firm's maintenance ledger. In the ledger, an entry dated October 28, 2013, noted mold on the living room ceiling, kitchen cabinets, and master bath, and states that the recently vacated tenant informed the Firm of an "ongoing moisture issue...that has led to mold". An entry on October 31, 2013, stated that "owner will be handling" these issues.

The response from the Firm's attorney alleged that neither the Firm nor the BIC was aware of any mold problem either before the Buyer's purchase or during the tenancy. The response noted that the Buyers were aware from the home inspection report that the inspector was unable to access the air handler unit, but that the Buyers did not request any follow up on the matter. Further, as the tenant of the property, the response stipulated that the BIC would have wanted a mold problem to be remediated if he had been aware of one. The response briefly addressed the October 28, 2013, maintenance log which noted mold, stating that the BIC was not the tenant at the time and suggesting that the Buyers provided no evidence that there was a mold problem at the property. The response did not address or provide a Property Management Agreement signed by the Buyers.

Though the Commission Staff requested copies of the Firm's complete records for the property, the Respondents provided only one undated and unsigned "Move-In Inspection Form." Based upon the version date on the form, it appeared that it was supposed to be the move-out inspection connected with the end of the BIC's tenancy. While the form stipulated that everything was in "good" condition, there were two notes regarding "moisture around vents" and "burn marks (?) around outlet... [and] lights".

Commission Staff requested that the Respondents address the apparent lack of a Property Management Agreement, identify the purpose and author of the unsigned/undated move-in inspection form, provide complete maintenance records for the entirety of the Firm's management of the property, address the purpose of listing "Property Management Agreement" under "Other Provisions and Conditions" in the contract and requested any documentation as to how the mold/moisture issue noted in October 2013 was addressed. The Respondents' attorney's response suggested that the Buyers did not sign the May 2014 Property Management Agreement "because of the inclusion and reference to the management agreement on the executed Offer to Purchase" and stated that the purpose of the inclusion of the reference to "Property Management Agreement" under other conditions in the contract was because the Property Management Agreement between the Firm and former owner would "carry over to the [Buyers] at the time of closing which is why [the BIC] made reference to it on the contract." The response identified the undated/unsigned move-in inspection as a move-out inspection conducted by Firm staff on November 20, 2015, at the end of the BIC's tenancy. The response did not address further the October 2013 maintenance record regarding mold & moisture other than to refer to the record itself. Some additional maintenance records were provided which included two additional dated but unsigned move-in inspection forms from 2010 and 2013. Both forms noted everything as "good."

## Main Points - The BIC Who Wore Many Hats

Subject property was:

- managed by PM firm for several years; and
- listed for sale with another firm in 2013 but property did not sell and the listing expired.

Buyers inquired with tenant (who was also the BIC of the PM firm) about owner's interest in selling the property. The BIC offered to act as a Buyer's Agent and contacted the owner about a possible sale.

March 2014: Buyers signed contract paperwork that included

- a Buyer Agency Agreement with no mention of dual agency; and
- an OTP with PM Agreement and Residential Rental Agreement attached.

March 2014 home inspection did not include inspection of HVAC because the system was not accessible.

April 2014: Closing.

May 2014: Broker-associate with PM firm mailed PM agreement to buyers. Buyers did not sign the agreement, but the firm acted as Property Manager for the next 18 months.

Summer 2015: BIC-tenant notified Buyers (owners) of plans to vacate in October.

October 2015: BIC, PM firm, and Buyers signed lease termination with return of TSD and \$500 payment from BIC-tenant to Buyers.

December 2015: Buyers moved in and immediately began encountering mold.

March 2016:

- Buyers filed a complaint with Board of REALTORS®; and
- BIC and Firm offered \$25k settlement, which Buyers refused.

July 2016 mold test revealed high levels of mold. Buyers replaced HVAC system but moved out in September 2016.

October 2016: Respondents offered to purchase the property for \$410k, which Buyers refused.

October 2016: Buyers filed NCREC complaint, based on:

- Firm's and Brokers' failure to report mold during purchase and during BIC's tenancy; and
- Firm's management of property without a written agreement.

Firm's attorney stated:

- Firm and BIC were unaware of mold;
- Buyer did not request any further inspection of HVAC at time of purchase; and
- Inclusion of PM agreement in the sales contract was sufficient notice for management.

Firm did not provide property records to NCREC other than one move-in inspection report.

## Evaluation & Discussion - The BIC Who Wore Many Hats

Errors made by Buyer Agent/BIC (& tenant): \_\_\_\_\_  
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\_\_\_\_\_  
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Errors made by Broker Associate: \_\_\_\_\_  
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## Related Law and Rule Considerations - The BIC Who Wore Many Hats

### Undisclosed Dual Agency is Illegal

Commission Rule 58A .0104(d) states:

*A real estate broker representing one party in a transaction shall not undertake to represent another party in the transaction without the written authority of each party. The written authority shall 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 shall 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.*

Thus, brokers are prohibited from acting for more than one party in a transaction without the knowledge and consent of all parties.

### Listing and Property Management Agreements must be in Writing from the Onset

Commission Rule 58A .0104(a) states, in part:

*A broker representing a property owner in any capacity, whether in a sales or lease transaction, must have a written agency agreement with the property owner before providing any brokerage services on behalf of the property owner.*

### Brokers must Discover and Disclose Material Facts

NCGS 93A-6(a)(1) states:

*The Commission has power to suspend or revoke at any time a license issued under the provisions of this Chapter, or to reprimand or censure any licensee, if, following a hearing, the Commission adjudges the licensee to be guilty of:*

*(1) Making any willful or negligent misrepresentation or any willful or negligent omission of material fact.*



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## CASE #D16-0156: THE REO (REAL ESTATE OWNED) LISTING



Read the following case summary.

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

### **PARTIES:**

The Complainant was the prospective Buyer of an REO four unit multifamily property. Respondents were the Listing Agent, the Co-Listing Agent, and the Listing Firm.

### **COMPLAINT AND FACTS:**

The Buyer owned property adjacent to the subject property and claimed that he had been waiting for the property to come on the market as he was aware that it had gone into foreclosure. According to both the Buyer and his Buyer's Agent, he alerted the Buyer's Agent to track the property in the MLS so that he could submit an offer when it was listed. The property went active in the MLS on July 31, 2015, for \$85,500, but to the surprise and dismay of the Buyer and Buyer's Agent, the property was already listed as "pending contract."

The Buyer and Buyer's Agent immediately prepared a \$100,000 cash offer with \$5000 EMD, no due diligence period, and closing in roughly 2 weeks. Buyer's Agent submitted the offer on August 1, 2015, to the Listing Agent (LA) and insisted that the LA submit it to the REO seller. After some discussion, the LA submitted the offer, which was accepted as a back-up by the REO seller. The Buyer's Agent questioned the Listing Agent as to the fact that the MLS noted the listing date for the property as July 2, 2015, despite the fact that the listing did not become active until July 31 with 1 day on the market (DOM) until contract.

The Buyer filed a complaint alleging that the Listing Agent held the property off the MLS and performed no marketing of the property of any kind until a Buyer that the Listing Firm represented as a dual agent completed his due diligence and put the property under contract.

In a joint response to the Commission's inquiry, the Listing Agents stated that the REO property had been in their portfolio since February 2015, but the Bank's Asset Manager was in the process of conducting a due diligence, including cleaning out the property and preparing it for market. The response referenced the fact that contact information for the Listing Agents was visible on the 4 exterior mailboxes and provided photos showing what appeared to be their business card taped to the mailboxes next to the front door of each unit. The response alleged that showings of the property had not been possible due to "infestation and safety;" however, five offers had been negotiated and one accepted by July 31, 2015.

Commission Staff requested copies of the Listing Firm's complete transaction files. The response included only a few handwritten notes and some emails with names and contact information redacted, and the Respondent claimed no more could be provided due to confidentiality.

Commission Staff again requested the transaction file including the 5 offers and contact information for the Asset Manager, citing relevant Commission rules.

In the second response, the LAs provided their listing file including a screen shot of the interface with the Asset Management Company showing 5 submitted offers beginning July 16 with the first 4 rejected and the 5th accepted on July 31. All five offers were from the same buyer whom the Listing Agent represented as a dual agent. The Listing Agent stated that the buyer was a rental property investor and a long-time client who kept in regular contact with the Listing Agent as she listed all of the Asset Manager (Asset Management Company Representative)/Seller's REO property in the area.

The Listing Agent alleged that there was no effort to prevent any other party from making an offer and that the reason that the listing was not active in the MLS was because they did not have access to the property as the cleanout company had changed the locks around the same time that the listing agreement was signed. The Listing Agent alleged that the Asset Management Company was aware of this and that the listing became active shortly after the Listing Agent gained access.

The Listing Agent referenced email correspondence with a representative of the Asset Management Company regarding the issue of access. On July 8, the Asset Management Company Representative reminded the Listing Agent that she was several days overdue in submitting documentation that the property was listed in the MLS. The Listing Agent responded on July 9, stating that she had "hesitated to put it in our MLS" because the cleanout crew changed the lockboxes and she was unable to access the property. On July 16, the Listing Agent emailed the Asset Management Company Representative responsible for the property and confirmed that she had access to the property and requested that the Buyer who submitted an offer earlier that day be allowed to conduct his inspections prior to contract acceptance. The Asset Management Company Representative responded that the Buyer could begin inspections.

A review of the transaction file revealed that the Listing Agent was the only signatory on any of the paperwork, including the listing agreement with the Asset Management Company. Included in the listing agreement is the clause “All Listings must be entered in the MLS within one (1) business days of the date of this listing addendum.” The Buyer’s \$82,000 cash offer, which was accepted on July 31, closed on September 28 with the Listing Firm receiving both sides of the transaction.

Commission Staff contacted the Asset Management Company Representative and asked if he was aware that the listing was not active in the MLS or otherwise marketed until July 31. The Asset Management Company Representative responded “No, the property should have been listed within 24 hours of the listing being assigned on July 2, 2015.”

Commission Staff called the Listing Agent to discuss the transaction timeline in greater detail and confirmed that the listing became active in the MLS and a yard sign was installed on the property on July 31. Commission Staff asked the Listing Agent what date she regained access to the property and she initially indicated that it was shortly before July 31. When Commission Staff reviewed her own email correspondence with her whereby she confirmed she had access on July 16 and requested permission for her buyer to begin inspections, she conceded that she had access by this date. Commission Staff asked if she was required to have the listing active in the MLS within 1 day of the listing date and she acknowledged that she was. Commission Staff asked who would have had to authorize any delay in placing the property in the MLS and she named the Asset Management Company Representative. Commission Staff asked if the Asset Management Company Representative authorized the nearly 30-day delay, and she stated that he did not.

## Main Points - The REO Listing

Buyer owned property adjacent to subject property.

July 31: Property appeared in MLS but was already “pending contract.” Listing date was later discovered to be July 2.

August 21: Buyer submitted offer that was accepted as a back-up contract.

Listing Agent claimed showings had not been possible before July 31.

Listing file contained 5 submitted offers beginning July 16, and all the offers were from the same client of the Listing Agent.

The Listing agreement specified that the property should have been listed in MLS within 24 hours of effective date.

## Evaluation & Discussion - The REO Listing

Errors made by Listing Agent: \_\_\_\_\_  
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\_\_\_\_\_  
\_\_\_\_\_

Errors made by Co-Listing Agent: \_\_\_\_\_  
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\_\_\_\_\_  
\_\_\_\_\_

## Related Law and Rule Considerations - The REO Listing

### Agency Agreements

A listing contract expressly creates an agency relationship between the property owner and the broker/firm and specifies the duties and services the listing firm owes the seller-client.

### A Broker must place a Client’s Interests before any Self-Interest

A “fiduciary” is a person who acts for another in a relationship of trust and who is obligated to act in the other’s best interests, **placing the other’s interests before any self-interest.** Under the common law of agency, an agent owes certain fiduciary duties to the principal, including obligations to be loyal to the principal and preserve personal, confidential information about the principal, to operate in good faith to promote the principal’s interests, and to disclose all facts to the principal that may influence the principal’s decision. An agent’s fiduciary obligations to the principal preclude the agent from taking advantage of the principal in any manner during the course of the agency relationship.

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## CASE #D15-0881: THE MISSING HUD-1



Read the following case summary.

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

### **PARTIES:**

The Complainants were a husband and wife who were selling a home and purchasing a new-construction home using the same firm. Respondents were the 1) Broker who acted both as the Listing Agent for the sale of the couple's property and the Buyer's Agent for their purchase of a new home, 2) Broker's BIC, and 3) Broker's Firm.

### **COMPLAINT AND FACTS:**

The Complainants filed a complaint against their Listing Agent shortly after the May 28, 2015, closing of the sale of their home. The Complainants were unable to attend the closing and had signed a Power of Attorney so that the Listing Agent could attend and sign on their behalf. The Complainants were unhappy that the proceeds from the sale were lower than they expected and complained that the Listing Agent had failed to provide them with a draft of the HUD-1 prior to closing and that he did not contest the Buyer receiving cash back at closing.

In their complaint, the Complainants criticized all aspects of the Listing Agent's representation of them in the sale of their home and bemoaned the fact that the Listing Agent refused to release them from a Buyer's Agency Agreement for their purchase. The Complainants stated that the Buyer's Agency Agreement had no expiration date and was signed 2 weeks after they had entered into a purchase agreement for their new-construction home. They stated that the broker had represented them as their agent during the signing of the purchase agreement, but that they had no Buyer Agency Agreement at the time.

In their response to the inquiry, the Broker, BIC, and Firm conceded that the Buyer's Agency Agreement had no expiration and that it was signed 2 weeks after the Complainants signed a contract for their new home. The Broker alleged that at his initial meeting with the Complainants on March 5, 2015, they discussed that the Broker would represent them in their purchase of a new home and sale of their existing home, and the Broker reviewed and provided a copy of the WWREA brochure. The response noted that the Complainants signed a WWREA brochure presented to them by the new-home sales agent at the March 20, 2015, contract signing, and that the Complainants willingly signed the acknowledgement in the purchase contract that the Broker was their buyer's agent and would receive a commission as such.

The Complainants stated the first time they saw the WWREA disclosure was when the new-home sales agent presented it to them at contract signing.

As to the Buyer's Agent Agreement, the Respondent contended that the failure to include an expiration date was an oversight. Regarding the timing of reducing the agreement to writing, the Respondent alleged that he was unaware that the Complainants would sign a purchase contract on March 20 and therefore he did not have a Buyer's Agency Agreement prepared.

A review of the email correspondence between the Complainants and Respondent reveal that on March 19, the Complainants emailed the Respondent stating "we chose the lot...we are meeting...Friday at 12...to sign the contract...I would like you to be there before we sign the contract to look over it." The Respondent confirmed in his response emails that the subject lot was a good choice and at what time he would attend the meeting. The Respondent's response did not address why it took over 2 weeks to remedy the lack of a written Buyer's Agency Agreement once it was required; however, a March 24 email from the Respondent to the Complainants stated "we need to get together to go over and sign some Buyer stuff." There was no evidence that the Respondent attempted to present a Buyer's Agency Agreement to the Complainants until they met again on April 5, 2015, when they signed the Buyer's Agency Agreement and a Listing Agreement for the Complainants' current home.

The Complainants criticized all aspects of the Respondent's handling of the sale of their home from the contract negotiation to confusion over the date of the closing to the fact that the Buyer received a check at closing. The Complainants received proceeds from the sale of approximately \$1900, and the Respondent alleged that this was in line with their stated goal to break-even on the sale, but the Complainants denied that they stated their goal was to break-even. The Respondent did not prepare a seller-net sheet or provide any evidence that he reviewed potential proceeds of a sale with the Complainants.

Of primary concern to the Complainants was the idea that they did not have the opportunity to review the HUD-1 settlement statement prior to the May 28, 2015, closing. It appeared that the Power of Attorney signed by the Complainants afforded the Respondent the authority to sign any documents necessary to effect the closing, and there is no evidence that the Respondent was directed to allow the Complainants to review the HUD-1 before the Respondent signed the closing documents. Nonetheless, the Respondent alleged that he provided the Complainants with a draft of the HUD-1 the day prior to closing.

In his response to the Commission's inquiry, the Respondent provided an email that he had forwarded to the Complainants from the closing attorney's office that included a draft HUD-1. The time stamp indicated the Respondent forwarded the email on May 27, 2015, at 3:40 pm. In the email, he wrote, "Preliminary. Not the one I will sign. But we should have a copy this afternoon and your side won't change by much. thanks!" Of note is the similarity between this email and one that the Respondent sent to the Complainants on May 28, 2015, at 12:12 pm, just after the closing, in which he stated "Preliminary. Not the one I signed. But we should have a copy this afternoon and your side won't change by much. thanks!" Both of the emails appeared to have been forwarded copies of the same email from the closing attorney's office, which was sent to the Respondent on May 27 at 6:47 pm, approximately 3 hours after the Respondent allegedly forwarded the email to the Complainants on the same date.

## Main Points - The Missing HUD-1

May 2015:

- Closing for the Sellers' home.
- Listing Agent was given POA by Sellers and attended closing on their behalf.
- Sellers were not given a HUD-1 prior to closing and were unhappy with the proceeds.

After representing the Sellers in the sale of their home, the Listing Agent was to act as a Buyer's Agent for their purchase of a new home. The Listing Agent did not accompany the Sellers when they signed the contract for their purchase. Seller's complaint alleged that Agent/Firm would not release them from a Buyer Agency Agreement that was:

- signed two weeks after purchase agreement, and
- had no expiration date.

Respondent provided (to Commission investigators) copies of email messages he claimed to have sent to the Sellers, but time stamps indicated the emails may have been falsified.

## Evaluation & Discussion - The Missing HUD-1

Errors made by Broker: \_\_\_\_\_

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\_\_\_\_\_

Errors made by BIC &/or Firm: \_\_\_\_\_

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\_\_\_\_\_

## Related Law and Rule Considerations - The Missing HUD-1

### Agency Agreements must be in Writing

Commission Rule 58A 0104(a) states, in part:

*Every agreement for brokerage services between a broker and a Buyer or tenant shall be express and shall be in writing and signed by the parties thereto not later than the time one of the parties makes an offer to purchase, sell, rent, lease, or exchange real estate to another.*

Thus, a Buyer Agency Agreement must be in writing before any party in the transaction seeks to extend any offer to any other party.

### Brokers should Review the Settlement Statement with the Client in Advance of the Settlement Conference

As noted in the *North Carolina Real Estate Manual*, it is important that the parties and the real estate brokers agree on the accuracy of the settlement statement before proceeding with the closing. Brokers involved in the transaction should obtain a copy of the settlement statement as soon as possible and review it with each party with whom they are working.

Note: Case #D15-0881 involved a closing that occurred on May 28, 2015, which predated the TRID rule. The TRID (Tila-RESPA Integrated Disclosures) rule became effective October 3, 2015, and applied to loan applications received on or after October 3, 2015. The TRID rule replaced the HUD-1 settlement statement (RESPA) and final Truth-in-Lending statement (TILA) with two Closing Disclosure (CD) documents, one for the borrower and a separate one for the seller.

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## OTHER AGENCY CONSIDERATIONS: ATTEMPTS TO LIMIT A LISTING AGENT'S DUTIES & LIABILITY

### Limited Service Listing Contract

As noted in the *North Carolina Real Estate Manual*, some brokers specialize in providing “limited listing services” to sellers who primarily want the benefit of MLS advertising and who are willing to show their own properties, negotiate their own sales contracts, and handle their own preparations for closing.

Limited service brokers typically offer to provide only certain services to a seller, such as to place a “for sale” sign on the seller’s property and list the property in the MLS and perhaps on Internet sites. The seller is usually responsible for fielding inquiries, scheduling and conducting showings, negotiating a contract, and other tasks associated with selling the property.

A limited service broker should carefully specify in the written agency agreement those services that will be provided and clearly indicate that the broker’s services are limited to those described in the contract.

### Limitations Apply Primarily to Services, Not Duties

It is very important to note that limiting a listing broker’s services by contract generally does not limit the broker’s legal duties.

- A broker *MAY* lawfully limit by contract the services he will provide to a client.
- A broker may *NOT* contractually limit or waive the duties imposed by statute and Real Estate Commission Rules.

Thus, even though a limited listing agreement may only require a broker to list an owner’s property in a cooperative listing service, the broker still owes the owner-principal all the traditional agency fiduciary duties (loyalty, obedience, disclosure of information, accounting, and skill, care, and diligence) to the extent necessary to properly provide the contracted service.



*In a MLS listing, the following statement is included in the broker comments section: “Owner and Listing Agent make no representations or disclosures as to condition of the property. Buyer is encouraged to perform all inspections.” Does this language release the Listing Agent/Firm from liability for material fact disclosure?*

**Answer:** No. A broker may not limit his/her duties under License Law and Commission Rules, including the duty to discover and disclose material facts to clients and customers.



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## ANSWERS TO DISCUSSION QUESTIONS

### For Discussion on page 53

Larry, a NC broker, is hosting an open house for another broker in his firm. When individuals arrive, he hands them a property brochure and tells them he isn't the Listing Agent but that he is available if they have questions. Shirley, a prospective buyer, tells Larry she is very interested in the property and wants to make an offer. Larry tells Shirley he has offer paperwork with him and will be happy to represent her and write up the offer. They sit down at the kitchen table, and Larry produces the WWREA brochure. He tells Shirley that the brochure explains all of his duties as a buyer's agent and then asks her to sign it. Then, he begins going through the offer paperwork with her.

Has Larry fulfilled his duties under the Commission's agency rule (58A .0104)? Why or why not?

*Answer: No. Larry has not fulfilled his duties under the Commission's agency rule.*

*First, Larry should introduce himself as a listing agent or representative of the seller to all open house guests, since he works for the listing firm.*

*Next, he should provide a more thorough explanation of the WWREA brochure, including a full explanation of options for representation, and allow Shirley the chance to ask questions.*

*Finally, because Larry is an agent at the listing firm, he cannot represent Shirley as a buyer's agent. Assuming his firm practices dual agency, and assuming the seller has authorized dual agency in the Listing Agreement, Larry may offer Shirley representation as a dual agent, but he should explain the difference between dual agency and exclusive representation, so Shirley can make an informed choice between the two.*

## Case Outcome - The BIC who wore many Hats

### Errors identified during the Commission's Investigation

- Undisclosed Dual Agency: The BIC/Firm was acting as Property Manager on behalf of the owner and as Buyer's Agent for the same property; however, no discussion regarding dual agency took place, nor was a dual agency agreement signed by either party.
- Conflict of Interest: The BIC was a tenant in the property while his firm was employed by the owner as a Property Manager and while his firm was representing the Buyer in the purchase of the property.
- Lack of Written Agency Agreement: The Firm provided property management services and charged management fees for a year and a half, even though there was no Property Management Agreement.
- Failure to Disclose Material Facts: The BIC of the Property Management firm did not disclose known mold and moisture issues.

### Law & Rule Violations identified during the Commission's Investigation

- N.C.G.S. § 93A-6(a)(1) - Making any willful or negligent misrepresentation or any willful or negligent omission of material fact.
- N.C.G.S. § 93A-6(a) (4) - Acting for more than one party in a transaction without the knowledge of all parties for whom he or she acts.
- 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) - Any other conduct which constitutes improper, fraudulent or dishonest dealing.
- N.C.G.S. § 93A-6(a)(15) - Violating any rule adopted by the Commission.
- Commission Rule 58A .0104 - Agency Agreements and Disclosure.

### Sanctions Imposed by Commission

- BA/BIC (tenant): Reprimand -- reduced to Dismissal because BIC timely completed one course each in agency and property management
- Broker-Associate: Close and Warn
- Firm: Reprimand -- reduced to Dismissal because BIC timely completed one course each in agency and property management

## Case Outcome - The REO Listing

### Errors identified during the Commission's Investigation

- Listing Agent did not uphold the terms set forth in the Listing Contract (by not listing within one day of execution).
- Listing Agent put her interests before the interests and instructions of her client (by holding the seller's property off the market to allow a buyer-client time to finalize an offer - likely so she could earn higher compensation as a dual agent).

## Law & Rule Violations identified during the Commission's Investigation

- 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) - Any other conduct which constitutes improper, fraudulent or dishonest dealing.

## Sanctions Imposed by Commission

- Listing Agent: 12-month Active Suspension -- reduced to 1 month active suspension and 11 months stayed suspension because LA timely completed Commission's *Issues and Answers Course*.
- Co-Listing Agent: Close and Warn
- Listing Firm: Close (no action)

## Case Outcome - The Missing HUD-1

### Errors identified during the Commission's Investigation

- The Respondent Broker failed to reduce his Buyer Agency Agreement to writing until weeks after he represented the Buyers in submitting an offer for their new home.
- Broker did not provide a copy of the settlement statement to the client in advance of the settlement conference.
- Broker may have falsified documentation provided to the Commission during the inquiry (based on the suspicious nature of the emails he claimed to have sent to the Buyers on the day before and day of the closing).

## Law & Rule Violations identified during the Commission's Investigation

- N.C.G.S. § 93A-6(a)(1) - Making any willful or negligent misrepresentation or any willful or negligent omission of material fact.
- 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) - Any other conduct which constitutes improper, fraudulent or dishonest dealing.
- N.C.G.S. § 93A-6(a)(15) - Violating any rule adopted by the Commission.
- Commission Rule 58A .0104(a) and (c) - Agency Agreements and Disclosure.

## Sanctions Imposed by Commission

- Respondent Broker: 6-month stayed Suspension -- reduced to Reprimand because he timely completed Commission's *Issues and Answers Course*.
- Firm: Close (no action)
- BIC: Close (no action)

# Bonus Case!

The following case incorporates many of the concepts discussed in previous cases.

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## CASE #D17-0077: CONDO LISTING



Read the following case summary.

Determine what errors were made by the broker(s) and which License Laws and/or Commission Rules were violated.

### **PARTIES:**

The Complainant was the Seller of a condo. Respondents were the Listing Agent who was a Provisional Broker at the time of the transaction and his BIC who operated as a Sole Proprietor.

### **COMPLAINT:**

In August 2016, the Seller filed a complaint alleging that the Provisional Broker used inflated and/or improper comparable sales to convince him to list his property with the Provisional Broker, that the Provisional Broker could not produce the relevant comps when the Buyer's appraisal came in low, that the Provisional Broker improperly advised the Buyer's Agent that the Buyer should sue the Seller, and that the Provisional Broker purposely delayed returning the Seller's keys to him.

### **FACTS:**

The case evidence revealed that in the spring of 2016, the recently-licensed Provisional Broker solicited the Seller to list his FSBO condo. Text and email correspondence reflected that the Seller was skeptical that the Provisional Broker would be able to sell the condo at a high enough price to pay off his existing mortgage obligation plus a listing commission. The Provisional Broker offered to list the condo for a 4% total brokerage fee, including a 3% brokerage fee for a Buyer's Agent, and stated that he was "confident" that the property would be under contract within a week if listed at \$229,000, as condos in the building were appraising near \$230/SF and a condo nearby sold for \$250/SF.

On or about May 15, 2016, the Provisional Broker listed the condo for \$229,000 and advertised it as 1014 SF.

On June 5, the condo went under contract for \$222,500 with a Buyer represented by a Buyer's Agent. Per the Provisional Broker's promise made to the Seller just prior to listing the property, the Provisional Broker confirmed to the Seller on June 28 that he provided three comps to the Buyer's Appraiser to support the sale price. However, on July 13, the Buyer's appraisal came back at \$210K or \$217/SF based upon the Appraiser's measurement of 969 SF, 4.6% less than the 1014 SF advertised by the Provisional Broker and \$12,500 under the contract price. The Seller asked the Provisional Broker to send him the comps he claimed to have furnished to the Appraiser; the comps the Provisional Broker provided were for \$216, \$217 and \$228/SF, with the \$228 comp in a different building.

The case evidence reflected that the transaction soon fell apart, as did the relationship between the Seller & Provisional Broker.

On July 22, the final day of the Due Diligence Period (DDP), the Provisional Broker forwarded the Buyer's termination notice to the Seller along with the request to sign the notice acknowledging that the Earnest Money Deposit (EMD) would be released to the Buyer.

According to the Seller, he was on the road and did not immediately respond to the Provisional Broker's email; however, there is no dispute that the Seller and Provisional Broker had no discussion regarding the Seller's intent to sign the notice and otherwise agree to the Buyer's right to the EMD. Nonetheless, at 6 pm that same day, the Provisional Broker cc'd the Seller on an email to the Buyer's Agent where he advised the Buyer's Agent that the Seller had refused to agree to the release of the EMD and that the Buyer would have to "sue" the Seller for the same. Subsequently, the Seller appeared to have clarified that evening directly to the Buyer's Agent that he intended to sign the form.

The Provisional Broker's listing had since expired, and on July 26 the Seller contacted the Provisional Broker to make arrangements to get the keys to a friend so that the friend could show the condo to a prospective buyer or tenant that weekend. The Provisional Broker responded that he was out of town until August 1 and that he would return the keys at that time. The Seller persisted, demanding that either the Provisional Broker or someone else in his firm deliver the keys immediately, to which the Provisional Broker responded that both sets of keys were at his apartment and that they could not be provided until August 1. The Provisional Broker informed the Seller that he was blocking his number and would not respond to him any further.

In his response to the Commission's inquiry, the Provisional Broker argued that, although he cited a condo that sold for \$250/SF to the Seller prior to listing the property, he did not represent that this was a good comp for the Seller's condo as it included a 2-car garage and that he only used this sale as an example of rising prices. The Provisional Broker bemoaned the Appraiser's use of only comps that were in the same building, one of which was a one bedroom unit while the subject was two bedrooms. As to the square footage advertised by the Provisional Broker, he stated that he used the number from the Seller's original appraisal when he purchased the property.

Regarding his email to the Buyer's Agent advising that the Seller had refused to sign the termination notice and that the Buyer would need to sue the Seller, the Provisional Broker alleged that he was under the impression that the Seller was required to sign the form prior to the 5 pm expiration of the DDP and that when the Seller "ignored" his requests, he notified the Buyer's Agent that legal action would be necessary. The Provisional Broker conceded that this "might have been a little unprofessional" but that the Seller was "extremely unprofessional." Finally, regarding the Provisional Broker's alleged failure to timely deliver the Seller's keys, the Provisional Broker opined that he was out of town and the delay was unavoidable. Also included with his response was a copy of the MLS sheet for the Seller's recent listing with a new Listing Agent evidencing that the Seller had re-listed the property for \$229K.

In his response to the Commission's inquiry, the Provisional Broker's BIC claimed that the Provisional Broker believed that the comps supported a \$230/SF price for the subject listing. The BIC confirmed that the Provisional Broker relied upon an old appraisal for the square footage measurement, and that BIC twice measured the condo after the Buyer's appraisal stated the unit was 969 SF and confirmed that the lower number was correct.

The BIC reiterated the Provisional Broker's misunderstanding that the Seller had to sign the Buyer's termination notice prior to the DDP expiration. He alleged that he counseled the Provisional Broker that the timing of the Seller's signing the form was of no consequence, that it was inappropriate to inform the Buyer's Agent that the Seller refused to sign the form when the Seller made no such representation, and that the Provisional Broker had a fiduciary responsibility to his client and should not have advised legal action against him. The BIC echoed the Provisional Broker's claim that the Provisional Broker was out of town when the Seller insisted upon the immediate delivery of his keys.

The Commission requested that the Provisional Broker submit copies of his listing and transaction files. The Provisional Broker provided only copies of the two appraisal square footage measurements and the new MLS listing of the condo at the same list price of \$229K. In late September, Commission Staff once again requested the Provisional Broker's complete file. Although the Provisional Broker claimed to have used an online valuation tool to perform a CMA, he could not produce documentation for a CMA.

At the time of the complaint in August 2016, the BIC, acting as a Sole Proprietorship, had 46 brokers under his supervision, including 14 PBs. The brokerage appeared to operate primarily as a "virtual office." Commission records revealed that in an earlier case involving possible unlicensed activity by a SC broker, in its December 2015 closing letter, the Commission cautioned this same BIC regarding his responsibility to supervise agents, especially PBs.

In his response to the Commission's inquiry, the Seller stated that the BIC was professional and helpful, but reiterated his allegations regarding the Provisional Broker's improper conduct and maintained that the Provisional Broker misrepresented the condo which sold for \$250/SF as a comp and that the Provisional Broker did so in order to convince the Seller to list with him.

The Seller further alleged that the Provisional Broker contacted his new Listing Agent in August 2016 and warned her to be wary of doing business with the Seller.

In addition, the Seller provided a copy of a social media post he alleged the Provisional Broker sent to all 509 of the Seller's social media friends over the holidays.

The 1400-word post provided a highly detailed narrative of the listing transaction from the Provisional Broker's point of view, lamenting all of the Provisional Broker's hard work and his unfair treatment at the hands of the Seller. The post declared that the Seller was an untrustworthy and unscrupulous bully and made claims regarding the Seller's civil suit against the Provisional Broker being quickly thrown out of court. Additionally, the post included the statement: "Similar to the small claims court judge the NC real estate commission quickly decided that there was no wrong doing on my part and dismissed his whiny complaint."

A review of Commission records indicated that the Provisional Broker's license had been placed on inactive status on February 1, 2017, for his failure to complete at least one postlicensing course by the one-year anniversary (December 21, 2016) of the Provisional Broker's licensure. An October 2016 reminder notice was mailed to the Provisional Broker at the BIC's address regarding the Provisional Broker's need to complete a postlicensing course and a February 1, 2017, notice was sent to the Provisional Broker's home address notifying him that his license was now inactive due to his failure to complete postlicensing. On February 15, 2017, Commission Staff wrote to both the Provisional Broker and the BIC by email. Commission Staff provided a copy of the alleged social media post to the Provisional Broker in that email and asked if he published the post to the Seller's social media account. Also, Staff asked both the Provisional Broker and the BIC whether the Provisional Broker was currently practicing brokerage.

The BIC responded that he just consulted the Commission's records and he was previously unaware that the Provisional Broker was no longer active and affiliated with him. He further stated that he received no notice from the Commission of the Provisional Broker's change in status. Commission Staff provided copies of the notices sent by the Commission and reminded the BIC that he accepted responsibility to ensure that PBs under his supervision completed postlicensing and CE in a timely manner. Commission Staff mentioned that Commission records during the previous year indicated that the BIC had 14 PBs under his supervision and that he may wish to immediately review their compliance regarding postlicensing course completion. The BIC responded that he was doing so and that he had directed the Provisional Broker to immediately cease all brokerage activities.

Regarding the alleged social media post, the Provisional Broker responded that it was “100% my right as a US citizen to use my first amendment right of free speech. I have written a very factual account of [the Seller’s] actions and have shared this information with his friends and family.”

The Provisional Broker stated that he was told by a real estate school that he had until June 1 to “complete continuing education to maintain my real estate license” but that his BIC had just informed him that his license was inactive. Commission Staff asked the Provisional Broker about the statement that the Commission quickly dismissed the Seller’s complaint; Staff clarified that his license was inactive for his failure to complete at least one of the 30-hour postlicensing classes. The Provisional Broker initially responded confirming his understanding regarding his education requirements. Some hours later, he sent an additional email opining that the social media post was hearsay and that his attorney advised him there was no need to respond to alleged quotes.

Commission Staff contacted the Seller’s 2nd Listing Agent and confirmed that the Provisional Broker contacted her in August 2016 and warned her to “watch your back” regarding the Seller. The Listing Agent also confirmed that the Seller’s condo sold in September 2016 for \$224K cash, which is approx. \$231/SF based upon 969 SF.



## Case D17-0077: Main Points

Seller alleged that the PB:

- used inflated and/or improper comps;
- could not produce relevant comps when the Buyer's appraisal came in low;
- improperly advised the Buyer's Agent that the Buyer should sue the Seller; and
- purposely delayed returning the Seller's keys to him.

May 2016: PB listed condo for \$229,000.

June 5: Seller accepted offer for \$222,500.

July 13: Buyer's appraisal is for \$210,000.

- PB claimed to have provided comps to support \$229,000. Those comps were later discovered to be for \$216,000, \$217,000, and \$228,000 (with the \$228,000 comp being from a different building.)

July 22:

- Buyer's Agent sent notice of termination with request for release of EMD.
- Without direction from Seller, PB advised Buyer's Agent that Seller had refused release of EMD and that Buyer would have to sue Seller for EMD.
- Seller told the Buyer directly that he intended to sign the termination.

July 26:

- Listing had expired.
- Seller contacted PB to request keys.
- PB refused to provide the keys until August 1 because he was out of town; and he blocked the Seller's number.

PB's response:

- He claimed he did not represent (to the Seller) that all of the comps he provided to be "good" comps, and he criticized the appraiser's comps.
- His square footage measurement was based on an appraisal from a previous sale.
- He thought that the Seller was required to sign the termination by 5pm on the DDP, so he advised the Buyer that legal action would be necessary.
- He could not deliver keys when Seller requested them.

BIC's response:

- PB believed his comps were correct.
- PB had relied on an old appraisal, but when the BIC measured the unit, it was discovered the old appraisal was wrong.
- He had counseled the PB regarding the termination document and his comments regarding legal action.
- PB was out of town when the Seller requested keys.

PB:

- could not produce a CMA;
- advised Seller's new listing agent to "watch your back;" and
- posted a 1400-word narrative of events, claiming that NCREC had dismissed the complaint.

PB's license was placed on inactive status in February 2017 for failure to complete postlicensing. Both PB and BIC claimed they had not been properly notified of the postlicensing requirement and deadline.

## Case D17-0077: Condo Listing - Evaluation and Discussion

Errors made by PB: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Errors made by BIC: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

## Case D17-0077: Condo Listing - Related Law and Rule Considerations

### Duties of a Listing Agent

A “fiduciary” is a person who acts for another in a relationship of trust and who is obligated to act in the other’s best interests, placing the other’s interests before any self-interest.

Under the common law of agency, an agent owes certain fiduciary duties to the principal, including obligations to be loyal to the principal and preserve personal, confidential information about the principal, to operate in good faith to promote the principal’s interests, and to disclose all facts to the principal that may influence the principal’s decision.

An agent’s fiduciary obligations to the principal preclude the agent from taking advantage of the principal in any manner during the course of the agency relationship.

Agency law also requires that a real estate broker, like any other agent, exercise a high degree of skill, care, and diligence in the conduct of the agent’s duties.

A broker’s fiduciary responsibilities to sellers are explained in the *Working with Real Estate Agents* brochure as follows:

*Duties to Seller: The listing firm and its agents must • promote your best interests • be loyal to you • follow your lawful instructions • provide you with all material facts that could influence your decisions • use reasonable skill, care and diligence, and • account for all monies they handle for you...*

*Services and Compensation: To help you sell your property, the listing firm and its agents will offer to perform a number of services for you. These may include • helping you price your property • advertising and marketing your property • giving you all required property disclosure forms for you to complete • negotiating for you the best possible price and terms • reviewing all written offers with you and • otherwise promoting your interests.*

## Following Lawful Instructions

A listing agent has an affirmative duty to promote a seller's best interests and follow his/her lawful instructions.

## Helping to Price the Property

A listing agent has an affirmative duty to provide his or her seller-client with competent advice as to an appropriate listing price for the seller's property, based on the broker's knowledge of the seller's property, the local real estate market for such properties, and other relevant factors.

As a best practice, every listing agent, regardless of experience level, should perform a full comparative market analysis (CMA) for the seller prior to advising the seller on an appropriate listing price. It is not a specific legal requirement under the Real Estate License Law or Commission rules or under the common law agency for every listing broker to perform a comparative market analysis (CMA) on every property the broker lists. However, it is a broker's obligation to derive in some manner a reasonably accurate estimate of the probable selling price of the seller-principal's property.

## Square Footage Disclosure Requirements



***Does the Real Estate Commission require brokers to include square footage in their advertising and property descriptions?***

**Answer:** No. The Commission does not require a listing agent to report square footage. What statements or descriptions a broker chooses to make when marketing or showing property are up to the broker, but all such statements or representations must be accurate.

The Commission's *Residential Square Footage Guidelines* state:

*Although real estate agents are not required by the Real Estate License Law or Real Estate Commission rules to report the square footage of properties offered for sale (or rent), when they do report square footage, it is essential that the information they give prospective purchasers (or tenants) be accurate....*



### ***Should a broker personally measure a structure?***

**Answer:** The *Guidelines* state that brokers “... are expected to be able to accurately calculate the square footage of most [residential] dwellings ...compiled using these Guidelines or comparable standards.” (p. 5)

The *Guidelines* recommend that listing brokers personally measure dwellings to obtain accurate data, particularly if the dwelling is not complex or unusual. Alternatively, an agent may rely upon measurements and calculations made by someone “...with greater expertise in determining square footage ...” such as a state-licensed appraiser or a more experienced broker, as long as the calculations are made in connection with the current transaction.

#### **Unreliable Square Footage Sources**

- the property owner
- tax records
- listing, appraisal or survey information from a prior transaction
- blueprints or building plans\*

\* If the structure is not yet built, a broker who provides information as to projected square footage should disclose that the estimate is based on building plans, and must measure the structure upon completion and report the actual square footage.



### ***May a broker working with a buyer or tenant rely on the square footage as reported by the listing agent/company in its marketing of the property?***

**Answer:** Generally, yes, unless there is an error so significant that it should be obvious to a reasonably prudent broker.

What is sufficiently significant that a reasonably prudent broker would notice? The *Guidelines* suggest that a broker working with a buyer may not be expected to notice that a dwelling listed as 2200SF is actually 2000SF, whereas the same broker should recognize a problem when viewing a dwelling listed as 3200SF that actually is 2300SF. Thus, absent a red flag, a broker representing a buyer or tenant generally is not required to discover and disclose square footage.

## BIC Liability/Responsibility for Provisional Brokers

Rule 58A .0110(g)(6) holds the BIC responsible for “the supervision of provisional brokers associated with or engaged on behalf of the firm at such office in accordance with the requirements of Rule [58A] .0506....”

KEY POINTS of Rule 58A .0506 include:

- A PB may engage in activities requiring a real estate license only when:
  - his or her license is on active status  
and
  - s/he is supervised by a BIC at the office where the PB is associated.
- A BIC must ACTIVELY AND DIRECTLY supervise the PB in a manner that reasonably assures the PB performs all acts for which a real estate license is required in accordance with the Real Estate License Law and Commission rules.
- A PB may be supervised by only one BIC at a time.

## Postlicensing Education Requirement

Commission Rule 58A .1902 states, in relevant part:

- (a) The 90 classroom hour postlicensing education program shall consist of three 30 classroom hour courses prescribed by the Commission which may be taken in any sequence. A provisional broker as described in G.S. 93A-4(a1) or G.S. 93A-4.3(d) must satisfactorily complete at least one of the 30-hour courses during each of the first three years following the date of his or her initial licensure as a broker in order to retain his or her eligibility to actively engage in real estate brokerage...*
- (b) If a provisional broker as described in G.S. 93A-4(a1) or G.S. 93A-4.3(d) fails to complete the required postlicensing education described in Paragraph (a) of this Rule by the end of either the first or second year following the date of his or her initial licensure as a broker, his or her license shall be placed on inactive status...*
- (c) If a provisional broker as described in G.S. 93A-4(a1) or G.S. 93A-4.3(d) fails to complete all three postlicensing courses within three years following the date of his or her initial licensure, his or her license shall be placed on inactive status...*

NOTE: Refer to *Section 6-Licensing and Education*, for a full explanation of the Postlicensing education program.

## Requirement for Active Licensure to Engage in Brokerage

Commission Rule 58A .0504(a) states:

*Except for licenses that have expired or that have been revoked, suspended or surrendered, all licenses issued by the Commission shall be designated as being either on active status or inactive status. Subject to compliance with Rule .0110 of this Subchapter, the holder of a license on active status may engage in any activity requiring a real estate license and may be compensated for the provision of any lawful real estate brokerage service. The holder of a license on inactive status shall not engage in any activity requiring a real estate license, including the referral for compensation of a prospective seller, buyer, landlord or tenant to another real estate broker or any other party. A broker holding a license on inactive status must renew the license and pay the prescribed license renewal fee in order to continue to hold the license. The Commission may take disciplinary action against a broker holding a license on inactive status for any violation of G.S. 93A or any rule adopted by the Commission, including the offense of engaging in an activity for which a license is required.*

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## CASE OUTCOME - CONDO LISTING

### Errors identified during the Commission's Investigation

- The PB did not use adequate/appropriate comps for the comparative market analysis.
- The PB used the Seller's (old) original appraisal for square footage calculations.
- The PB claimed that the Seller was refusing termination and release of earnest money, though the Seller had made no such statement.
- Lack of professional conduct by PB.
- Lack of appropriate supervision of PB by BIC.
- Failure to adhere to postlicensing education requirements.
- Failure to discontinue brokerage practice while license was on inactive status.

### Law & Rule Violations identified during the Commission's Investigation

- N.C.G.S. § 93A-6(a)(1) - Making any willful or negligent misrepresentation or any willful or negligent omission of material fact.
- 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) - Any other conduct which constitutes improper, fraudulent or dishonest dealing.
- N.C.G.S. § 93A-6(a)(15) - Violating any rule adopted by the Commission.
- Commission Rule 21 NCAC 58A .0110 - Broker-in-Charge
- Commission Rule 21 NCAC 58A .0506 - Provisional Broker to be Supervised by Broker

### Sanctions Imposed by Commission

- BIC: 6-month Suspension, stayed - reduced to Reprimand because he timely completed the Commission's *12-hour Broker-in-Charge Course*
- PB: Reprimand - reduced to Dismissal because he timely completed the Commission's *Issues and Answers Course* and a course on ethics.