SECTION FOUR

UPDATES, REMINDERS & RESOURCES

LEARNING OBJECTIVES

Upon completing this Section, you should be able to:

- identify changes in Commission Rules that are effective July 1, 2016;
- explain basic requirements of the Commission's agency disclosure and agreements rule;
- explain the commission payment chain;
- determine whether a property owner may use video and audio equipment to record others in the owner's home during showings; and
- identify resources available on the Commission's website.

COMMISSION RULE UPDATES

Only seven Commission rules changed as of July 1, 2016, four of which were clerical/ technical corrections. The remaining three rule revisions are summarized below.

Rule 58A .0103 – Broker Name and Address

- At initial licensure, every Broker must provide the Commission with
  - current personal name,
  - firm name,
  - trade name, if any,
  - residence address,
  - firm address,
  - **telephone number, and**
  - **email address.**

Telephone number and email address were added as of July 1, 2016. All brokers must notify the Commission in writing within 10 days, if any information changes.

- Before an entity or sole proprietorship does business under an assumed name (dba, trade name), it must register that assumed name with the Register of Deeds in every county where the company maintains an office or its agents do business.

What is an assumed name ("DBA")?

Entities

Generally, the legal name of an entity is the name it registered with the NC Secretary of State, Corporations Division. An assumed name (doing business as) is any name other than the entity's legal name as registered with the NC Secretary of State.

> *Example:* XYZ Realty, LLC is properly registered with the NC Secretary of State. If it wants to do business as *XYZ Realty*, no additional registration is needed because it is using its legal name. If XYZ Realty LLC wants to do business as *Star Quality Properties*, then that name must be registered with the Register of Deeds in every county where the company has an office or its agents do business.

NOTE: Commission rules prohibit a company from including the name of an unlicensed person or provisional broker in the company's name, unless the company is a corporation or limited liability company.

Sole Proprietorships

A sole proprietorship is a company owned by only one person who is personally liable for the debts and obligations of the company. A sole proprietorship does not register with the Secretary of State because there is no entity.

Under Commission rules, if the name of a sole proprietorship does not or cannot include the owner/sole proprietor's surname, then the company's business name must be registered with the Register of Deeds in every county in which the sole proprietorship has an office or its agents do business.

> *Example:* Sam MacDonald is a broker/ sole proprietor. If Sam wants to do business as "MacDonald's Realty Services," no additional registration is needed because he is using his surname (last name) in the business name.
>
> But if Sam wants to do business as "Sam's Super Realty," then he must register his company's name so the public knows who "Sam" is.

1. Julie Johnson has an active broker license and engages in brokerage as a sole proprietor under the name "Johnson Realty" with 5 affiliated brokers.

a. Must she register her company's name? _____

b. Why or why not? _____

2. Julie Johnson has an active broker license and engages in brokerage as a sole proprietor under the name "Julie's Realty Stars" with 5 affiliated brokers.

a. Must she register her company's name? _____

b. Why or why not? _____

c. If yes, where must she register the name? _____

NOTE: Understand that Julie is not required to register her company's name in #1 because her company's name includes her surname. However, if she wants to prevent any other broker named Johnson from using "Johnson Realty" as the name for his/her sole proprietorship, and then she should register her company's name with the Register of Deeds in any county where she or her affiliated agents intend to do business. Once registered, no other Johnson could use the identical name in those counties, unless s/he create an entity (LLC, corporation, partnership, etc.) named Johnson Realty and register it with the Secretary of State. In #2, Julie must register her company's business name because it does not include her surname.

Individuals: An individual broker (as opposed to an entity or sole proprietorship) may not use an assumed name and must accurately disclose the identity of any company with which s/he is affiliated.

Rule 58A .0108 – Retention of Records

In addition to the 13 documents previously required by this rule, as of July 1, 2016, brokers are expressly required to retain copies of:

- sketches, calculations, photos, and other documentation used or relied upon to determine square footage;
  and
- advertising used to market a property.

Retaining documents related to square footage calculations echoes the advice contained in the *Residential Square Footage Guidelines* since 2006, namely:

> Brokers must retain for at least three years all sketches, calculations, photos and other documentation used and/or relied upon to determine square footage.

The requirement to retain copies of *all advertising used to market a property* applies to **any** forum or media the company authorizes its brokers to use and to which they **directly** submit advertising content. If a broker submits the same ad to four different advertisers, the broker may retain one copy of the ad, but should indicate all the publication sources/media to which it was sent for dissemination.

NOTE: The rule still concludes with the catch-all "any other records pertaining to real estate transactions" which is construed very broadly and previously was interpreted to include the two categories of documents expressly added.

Rule 58A .0113 – Reporting Criminal Convictions and Disciplinary Actions

For two decades, the rule has required licensees to report criminal convictions and any disciplinary action by an occupational licensing agency to the Commission within 60 days of the conviction or disciplinary action. Disciplinary action has now been clarified to include any conciliation agreement or consent order entered against a licensee by any governmental agency related to an occupational license. Brokers should report criminal convictions and disciplinary actions using the Commission's "Criminal Conviction Disciplinary Action Reporting Form" (REC 2.09) available on the Commission's website.

REMINDERS IN 3 TOPIC AREAS

1) AGENCY

1. The Commission's *Working with Real Estate Agents* brochure must be provided to whom, when? _____
2. In sales transactions, when must agency agreements with property owners be in writing? _____

   When in lease/property management transactions? _____
3. A broker working with a buyer or tenant must have an express agency agreement with the consumer when? _____

   When must it be in writing? _____
4. Who are the parties to an agency agreement? _____
5. Must a brokerage company allow oral buyer agency or practice dual agency? _____

Because of the number of brokers who fail to disclose agency or have written agreements, the Commission has directed staff in the Regulatory Affairs Division to routinely request copies of brokers' transaction files in most investigations to discover whether brokers are conducting their brokerage activities in compliance with Real Estate License Law and Commission Rules. A broker who does not have a written agency agreement with the property owner prior to listing or managing the owner's property or with the buyer/tenant-client prior to presenting an offer, or does not have a *Working with Real Estate Agents (WWREA)* disclosure panel in a sales file violates Commission rules.

Does this really happen? The Commission had several cases within the past two (2) years in which brokers were managing property for others with no written property management agreement (and some with no trust account). Brokers in at least 2 of the 10 disciplinary cases in Section One did not provide the *WWREA* brochure to the consumer; one did not have any written agency agreement with his buyer-client; and another had a non-compliant listing agreement as it omitted the required non-discrimination language. *The Commission instructed Staff to include a brief review of a broker's obligations under Rule 58A .0104.*

Timeline of Rule 58A .0104

The Commission's agency rule began 40 years ago with only listing agreements mentioned, but with only small changes, the rule has been in its present form for more than 20 years. Hence, all licensees should be intimately familiar with its requirements.
Below is a brief synopsis of Rule 58A .0104's evolution.

- **1976:** written listing agreement must have an expiration date.

- **1989:** non-discrimination language first required.

- **1995: January 1** - Substantial revisions**,** including
    a) the requirement that all 1) buyer agency agreements, 2) listing agreements, or 3) "any other contract for brokerage services in a real estate sales transaction" must be in writing from the outset of the relationship.
    b) the introduction of an agency disclosure requirement that brokers must provide consumers to explain principal/agent relationships and fiduciary duties; (it was replaced by the *Working with Real Estate Agents* disclosure in 2001.)
    c) an acknowledgement of the possibility of dual agency and what that means.

- **2001:** introduced oral non-exclusive buyer/tenant agency and the mandated *Working with Real Estate Agents* brochure.

Since **April 1, 2006**, the rule has required ***every*** *brokerage services agreement* ***in any real estate transaction*** *and every agreement for services connected with the management of a property owners' association to be in writing* (generally sooner, rather than later). Thus, whether the transaction involves sales, leasing, property management, or owner association management, the broker and principal must have a written agency agreement. The question is: when?

The Commission has published many educational materials over the past 20 years concerning agency requirements and principles. Brokers who are confused or unclear as to their agency obligations should study these materials. As the maxim counsels: "Ignorance of the law (rules) is no defense."

Rule 58A .0104 – Agency Agreements and Disclosure

 **BIC ALERT!** Every broker is responsible for his/her actions, but brokers-in-charge must understand that they are [and have been since July 1, 2001] responsible for supervising ***all brokers*** at their office as to adherence to and compliance with the agency rule requirements. The broker-in-charge should assure that all licensees affiliated with his/her office are fully informed of and comply with the firm's agency policies, which should be in writing. Office policies should clearly address issues such as the types of agency relationships practiced by the firm, whether the firm allows oral buyer agency agreements and under what conditions, etc.

Brokers-in-charge should regularly provide training to their affiliated licensees concerning Rule 58A .0104 agency disclosures and agreements. It's difficult to be proficient at most undertakings without training or practice. Role playing various "first substantial contact" scenarios in sales transactions helps brokers practice how to competently provide the *WWREA* brochure and explain the agency options a consumer has.

Agency in a Nutshell

Agency generally is not as difficult or complex as many brokers think. *The agency agreement is the employment contract between the company/agent and the consumer*. It should address what services the consumer-principal authorizes the agent to provide and what the principal's obligations are to the agent.

The ***parties*** to the agency agreement are the consumer(s) and the brokerage company, **not** the affiliated individual broker-agent who completes and signs the agency agreement on behalf of his/her principal, the company. This is why when an individual agent leaves a company, s/he is not entitled to take the company's clients with whom s/he has been working, unless s/he has the company's consent to take them.

> **NOTE:** To properly transfer a company's client to a departing broker's new company, the existing agency agreement with the company either must be:
>
> 1) terminated by mutual agreement of the company and the consumer and a new agency agreement created between the consumer and the departing broker's new company, or
>
> 2) assigned (with the consumer's written consent) to the departing broker/new company.

The *Working with Real Estate Agents* brochure informs the consumer of the available agency options and the consequences of each (e.g., exclusive agency versus traditional dual agency versus designated dual agency). *A principal-agent relationship is neither automatic nor presumed in North Carolina real estate brokerage practices*. There must be an agency discussion between the broker and the consumer that leads to a meeting of the minds that must be reduced to writing and signed by both parties before the broker may provide any brokerage services, subject to one exception for oral buyer/tenant agency.

The basic requirements of Rule 58A .0104 are summarized below.

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

- A broker who represents a *property owner* in *any* capacity, whether in a sales or a lease transaction, must have a ***written agency agreement*** *with the property owner from the inception of the relationship* ***before providing any brokerage services on behalf of the property owner***. The written agency agreement may be referred to as a right to sell listing agreement (exclusive or not) in a sales transaction, or a right to lease agreement or a property management agreement in lease transactions.

- A broker who provides services to an owners' association for a fee must have a written agency agreement with the association defining each party's obligations **before** the broker may provide any services.

- A broker may work with a buyer or tenant under an *express oral agency agreement* ***so long as*** the agreement is *non-exclusive* and does not 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.

- Oral agency agreements should address the same issues as written agency agreements, i.e.,
  - the services the broker will provide,
  - the broker's compensation,
  - whether the buyer/tenant authorizes dual agency if the situation arises, and
  - how long the broker will work with the buyer/tenant before requiring a written buyer/tenant agency agreement.

It is wise to confirm the terms of this oral understanding in a written letter or email from the broker to the buyer/tenant. **NOTE:** If dual agency is not discussed and consent obtained as part of the oral buyer agency agreement, *then the buyer agent cannot show his/her buyer-client any of his/her company's listings*. The buyer has only authorized the broker to act as a buyer-agent because the broker failed to explain dual agency and obtain the buyer's oral permission to act as a dual agent, if the situation arises.

- Any oral buyer/tenant agency agreement ***must be reduced to writing prior to the presentation of any offer by any party***. The buyer/tenant should be advised of this requirement/expectation at the outset of the relationship. A broker-buyer agent may not present an offer, if s/he does not have a written buyer agency agreement.

Recommendation: Does not prepare any offer until **after** the client has signed a written buyer/tenant agency agreement and/or dual agency agreement. Why expend the time and energy preparing an offer that you will not be able to present if your oral buyer/tenant-client refuses to sign a written buyer/tenant agency agreement?

Purpose of WWREA Disclosure

The required agency disclosures are designed to protect not only the public, ***but brokers as well***. Engaging in unauthorized or undisclosed agency, particularly dual agency, may not only lead to disciplinary action against the broker, the broker-in-charge and the broker's company, but may also result in civil liability and monetary damages against the company. Undisclosed dual agency still ranks in the top 10 issues nationally that errors and omission carriers cover on behalf of real estate brokerage companies.

What is first substantial contact? First substantial contact (FSC) occurs when either the broker or the consumer begins to act as if an agency relationship exists or the consumer begins to share confidential or personal information that could be used against them in negotiations. *The WWREA brochure must be provided and reviewed* ***before*** *confidential information is disclosed*. First substantial contact may occur in person, by telephone, by electronic communications, or through an agent's website. Numerous examples of FSC via various contact modes are described in the educational materials on the Commission's website. See the links at the end of this subsection.

> ***What is the basic agency message consumers need to hear?***
> "Mr./Ms. Consumer, nothing you tell me is confidential until you decide whether you want to hire my company as your agent, so please does not tell me anything you would not want the other side in a transaction to know until you decide what company to hire as your agent-advocate."

View agency disclosure (the WWREA brochure) as a type of real estate ***Miranda warning***. The intent is not only to inform consumers of their choices, but to alert them that "anything you say may be used against you later" until such time as the consumer decides whether and how to work with a broker. Until the consumer chooses an agent, a broker owes few duties to the consumer other than those due third parties (*i.e.*, honesty, fair dealing, and disclosure of all material facts).

The obligation to keep information confidential arises from the fiduciary duties inherent in any agency relationship, but they do not attach or become effective until the principal-agent relationship is created. The ***fiduciary duties*** an agent owes his/her principal under the common law of agency are:

1) loyalty and obedience;
2) accounting;
3) disclosure of information;
4) skill, care and diligence; and
5) confidentiality (which may be subsumed under "loyalty").

Brokers must understand that, **whenever they are acting as an agent,** ***by definition*** **they must have a principal somewhere**. If the consumer does not want to hire the broker as his/her agent, then the broker must be authorized to act as the agent for the other party to continue in the transaction. If the other party also refuses to hire the broker, then the broker cannot function as an agent in that transaction, because the broker has no principal and is therefore unemployed. The WWREA disclosure brochure attempts to make consumers aware of both their choices and the consequences of those choices.

Company Policy on Agency

Companies may establish whatever policies they wish so long as those policies are not contrary to/prohibited by law or rules. While License Law and Commission Rules permit oral buyer agency and dual agency, neither compels a company to practice either. A company may have more stringent policies than required by law or rule. For example, a company may require its affiliated agents to have a written buyer agency agreement from the outset of the relationship, or it may choose to offer buyer agency only and not take listings, thereby avoiding dual agency.

> **NOTE**: BICs or brokers who would like more information or training materials concerning compliance with Rule 58A .0104 requirements are referred to previous Update/BICAR articles available on the Commission's website. To access the articles, go to the Commission's homepage (www.ncrec.gov), click on the ***Publications*** menu, and select ***Update, BICAR Topics***. Relevant articles include *Agency Disclosure and Agreement Requirements* and *Dual and Designated Agency*.

2) BROKERAGE COMMISSIONS

1. Who is entitled to the listing commission? _____
2. Why are they/it entitled to the full listing commission? _____
3. Who else may have a claim to a portion of the listing fee and why? _____
4. Affiliated brokers should receive their brokerage compensation from whom? _____

It appears some brokers may be confused or have forgotten how the compensation entitlement chain works in a typical residential sales transaction. The listing commission belongs to the listing company because that is the only agent the consumer agreed to pay in the listing agreement.

Brokers should not <u>demand</u> that settlement agents pay the individual brokers their share of the listing or selling company's split of the commission. Payroll or accounts payable is not the settlement agent's job. The settlement agent is authorized to pay the listing commission from the seller's proceeds to the listing <u>company</u> pursuant to the listing agreement; typically, the listing company instructs or authorizes the closing attorney/settlement agent to pay the selling company's share of the full commission directly to the selling company. Thus, closing attorneys usually write one check to the listing company and another check to the selling company, if any. It is then up to each *company to pay its affiliated agents whatever split may be due the individual agent under the employment agreement with the company and to issue a Form 1099 to each agent*.

License Law expressly requires provisional brokers to receive **all** brokerage compensation only from their BIC or their employing company. A provisional broker may be disciplined if s/he accepts brokerage compensation from anyone other than his/her BIC or employing company. [G.S. 93A-6(a)(5).] Full brokers are prohibited from receiving any income from brokerage activity without the full knowledge and consent of their BIC. [G.S. 93A-6(a)(6).]

Paying commissions for brokerage services in violation of License Law constitutes a criminal misdemeanor. Brokers should not attempt to shift this burden to a closing attorney/ settlement agent, particularly under threat of referring the broker's clients elsewhere if the attorney refuses to disburse commissions to individual agents. More and more attorneys are complaining to the Commission about this issue. An attorney may agree to disburse compensation to affiliated full brokers upon proper certification by and instructions from the BIC, but there should not be any pressure or coercion by the brokerage company. Closing attorneys cannot pay a provisional broker because they may only be paid directly from their BIC or the employing brokerage company.

The listing company is entitled to the listing commission because it is the party to the listing agreement (not the individual brokers). The listing company may have an obligation to share compensation with a selling company if both companies are members of a cooperative listing service, or if requested by the selling company and agreed to by the listing company, as authorized by the seller in the listing agreement. A company's obligation to share with its affiliated brokers arises from the independent contractor/employment agreement with each licensee and is not addressed in the listing agreement or buyer agency agreement.

3) AUDIO-VIDEO RECORDING

1. May an owner legally use audio recording devices in his/her property for the purposes of monitoring conversations held during showings of the property?
2. May an owner legally use cameras or other video-recording devices in his/her property to record others during showings of the property?

Historically, showings of residential properties occur without the seller or listing agent present to allow buyers and their agents to view the property and *privately* discuss issues, including possible offers and other feedback. Technological advances are continuously impacting the rules of the game. The May 2014 edition of the *Real Estate Bulletin* included an article titled "The Use of Audio/Visual Equipment During Showings" by the Commission's Deputy Legal Counsel. [To access the article, go to www.ncrec.gov, click on the ***Publications*** menu, select ***Bulletins*** and ***May2014-Vol45-1*** and go to page 7.] The article discusses applicable federal and state laws, the primary being the federal Omnibus Crime Control and Safe Streets Act of 1968. This federal Act makes it illegal for anyone to "… intentionally intercept … any wire, oral or electronic communication."

NOTE: *it is the **interception** of the communication that is illegal, even if the oral communication is not recorded*. However, if state law allows a person to hear an oral communication when one party to the conversation has consented, then federal law is not violated. North Carolina's Electronic Surveillance Act is similar to the federal law, but it permits an individual to intercept others' oral communications if one party to the conversation consents. Thus, where you are a party to the conversation, you generally could record it, but you cannot record or intercept conversations between others, such as buyers and their agents, because you're not a party to that conversation.

Bottom line: you cannot legally intercept, monitor, or eavesdrop on conversations between others unless you have the consent of at least one of the participants, even if you are not recording the conversation. The referenced *Bulletin* article concludes with the following advice concerning others' oral communications.

> … The Commission recommends not using any device in the home as a means of trying to gain information on potential buyers or their agents. Such an attempt to gain potentially confidential information about a buyer would most likely be considered inappropriate at best, and has the potential to result in criminal or civil liability.

Interestingly, the laws pertain to oral and electronic communications, not necessarily video surveillance. The *Bulletin* article refers to a 2002 North Carolina case in which a separated spouse hid a video camera in the home in hopes of gaining evidence against her husband. The Court held that merely videotaping did not violate North Carolina law "… *unless* such videotaping also included an audio recording." [See *Kroh v. Kroh*, 152 N.C. App. 147 (2002).]

Thus, an owner could have cameras or other video-recording devices in his/her property to tape others while on the property, ***so long as***:

- the video recording equipment does not have any audio recording or listening features activated;
  and
- any video surveillance devices are not located where they might violate an individual's privacy (e.g., a bathroom).

A prudent buyer-agent should alert their buyer-clients that some or all of the houses viewed may have active video surveillance equipment in the property.

RESOURCES

The Commission's website, www.ncrec.gov, harbors a wealth of information and resources available for training, teaching, research, confirmation, breaking information, etc. All brokers should periodically visit and search the various offerings on the website.

Following is a brief overview of the information that is available to both brokers and the public.

Video Library

In the past 2-3 years the Commission has produced several videos on various topics as mini-training or "how to" clips. Most of these are only 2-4 minutes long. To access the videos, go to the Commission's homepage (www.ncrec.gov), click on the ***Resources*** menu, and select ***Video Library***.

Video titles/topics are as follows (in order of appearance):

1. Real Estate Licensing Requirements
2. Regaining Broker-in-Charge (BIC) Status
3. How to Become BIC or BIC-Eligible
4. Private School Director
5. TRID Webinar for Pre/Post Licensing Instructors
6. Real Estate Safety
7. Complaints
8. Licensing Requirement - High School
9. Trust Account Reconciliation
10. Broker-in-Charge Statement of Eligibility
11. Broker-in-Charge Update Course
12. Time Shares
13. Education and Recovery Fund
14. What Brokers, Buyers, Sellers Must Know About "Fracking"
15. Security Deposit
16. Spot Audits
17. Difference Between NC Real Estate Commission and NC Association of Realtors
18. Accounting for the Deposit of Earnest Money
19. Buyers Working with Real Estate Agents
20. Sellers Working with Real Estate Agents
21. Firm Licensing
22. Continuing Education Requirements
23. How to File a Complaint
24. License Reinstatement
25. License Renewal

Also under the ***Resources*** menu is a "Trust Account Tutorial" which illustrates the:

1) Deposit Cycle,
2) Disbursement Cycle, and
3) Monthly Reconciliation Cycle for a rental trust account.

Publications

The Publications menu on the Commission's website provides access to:

1. All Bulletin articles published since 2007.
   - Select *Publications\Bulletins 2007-2016* to view Bulletins since 2006.
2. All brochures and books (some free, others for a nominal fee) published by the Commission.
   - Select *Publications\Order Free Publications* to view and order free brochures.
   - Select *Publications\Publications* to view a comprehensive list of publications.
3. Update/BICAR course materials since 2006.
   - Select *Publications\Update, BICAR Topics* to view all topics.

Following is a comprehensive listing of all Update/BICAR topics available on the Commission's website. Most of the information is still valid, but in the event of a conflict, licensees should follow the advice and information in the article most recently published.

> ***NOTE:*** BICs and brokers may print any of the copyrighted articles below and use them for **training or educational/informational purposes so long as no fee is charged** without violating the Commission's copyright. Any reprints for training or educational purposes must also include © NCREC and the date. Any other reproduction or use requires the Commission's written permission.

General Topics

Title	Covered in…
Advertising Issues	2013-2014 Broker-in-Charge Annual Review (*hereafter referred to as BICAR)*
Advertising and Syndication	2013-2014 Update
Agency Disclosure and Agreement Requirements	2009-2010 Update, 2007-2008 BICAR
Alternate Financing	2011-2012 BICAR
Broker-in-Charge Requirements	2015-2016 Broker-in-Charge Update Course (*hereafter referred to as BICUP)*
Broker Price Opinions	2011-2012 Update
Compensation Disclosures to Buyer from Dual Agent	2011-2012 BICAR
Compensation Issues	2009-2010 BICAR
Commission Rules and Laws	2013-2014 Update
Contract Formation and Negotiation	2013-2014 Update
Court Cases	2013-2014 BICAR
Disciplinary Cases	2012-2013 BICAR
Disciplinary Procedures	2010-2011 BICAR
Dual and Designated Agency	2009-2010 BICAR
Due Diligence in Residential Sales	2009-2010 Update
Electronic Signatures and Documents	2014-2015 General Update
Employment Issues	2012-2013 BICAR
Fair Housing	2013-2014 BICAR
Green Building	2012-2013 Update

General Topics

Title	Covered in…
Handling Complaints	2015-2016 BICUP
Handling Trust Monies	2015-2016 BICUP
Lead-Based Paint Renovation Requirements	2011-2012 BICAR
Lending Laws and Loan Fraud	2008-2009 BICAR
License Law 2012	2012-2013 Update
License Law 2011	2011-2012 Update
Licensing and Education	2015-2016 General Update/BICUP
Material Facts	2008-2009 Update
Mortgage Acts & Practices (MAP Rule)	2011-2012 BICAR
Permits	2012-2013 Update
Radon	2005-2006 Update
Record Retention Requirements	2012-2013 BICAR
Rules Revised	2014-2015 General Update
Safety	2015-2016 General Update/BICUP
Selected Broker-in-Charge Topics	2014-2015 BICUP
Short Sales	2011-2012 Update
Subdivision Street Disclosure	2014-2015 General Update
Summary Ejectment	2012-2013 Update
Surveys and Confidentiality	2013-2014 Update
Transactions Foreclosed Properties	2008 -2009 BICAR
TRID	2015-2016 General Update/BICUP
Trust Account Management	2010-2011 BICAR
Vacation Rental Sales	2015-2016 General Update/BICUP

Offer to Purchase and Contract

Title	Covered in…
Offer to Purchase and Contract Revised	2010-2011 Update
Offer to Purchase Sample Form	2010-2011 Update
OTP Practical Exercise	2010-2011 Update
OTP Practice Contract	2010-2011 Update
Selected Residential Contract Forms	2011-2012 Update

Property Management

Title	Covered in…
Selected Property Management Issues	2009-2010 Update (Licensing Requirements; Trust Money Issues)
Selected Property Management Issues	2011-2012 Update (Property Management Agreements; Disposal of Tenant's Personal Property)
Selected Property Management Issues	2014-2015 General Update

RESPA Reform (See also TRID article in 2015-2016 Update above)

Title	Covered in…
Good Faith Estimate (GFE) Example	2010-2011 Update
HUD-1 Settlement Statement Example	2010-2011 Update
RESPA Reform 2010	2010-2011 Update

SUMMARY OF NCAR/NCBA JOINT FORMS' CHANGES

The following Summary of changes to a few of the Joint Forms created by the Joint Forms Task Force is reprinted with the kind permission of the North Carolina Association of Realtors® (now known as NC Realtors®). The following Summary is copyrighted by NCAR and may not be reproduced without NCAR's express permission. This Summary is included to alert licensees to form changes effective July 1, 2016, but no additional explanation is included in these materials.

NCAR'S Summary of Joint Form Changes © NCAR 2016

The NCAR/NC Bar Association Joint Forms Task Force recommends that the residential forms listed below be revised or created effective July 1, 2016. A summary of the significant changes to each form follows the list. A marked-up copy of each form that shows the exact changes can be accessed by clicking on the name of the form.

Jointly-Approved Forms (approved by NCAR and NC Bar Association)

(1) Offer to Purchase and Contract (form 2-T)
(2) Offer to Purchase and Contract—Vacant Lot/Land (form 12-T)
(3) Offer to Purchase and Contract—New Construction (form 800-T)
(4) Contingent Sale Addendum (form 2A2-T)
(5) Possession Before Closing Agreement (form 2A7-T)
(6) Possession After Closing Agreement (form 2A8-T)

(1) Offer to Purchase and Contract (form 2-T)

- Paragraph 1(d)—new wording adds "electronic transfer" as permissible method for paying initial EMD and additional EMD
- Paragraph 1(e)—new wording added to clarify that definition of "Earnest Money Deposit" includes not only earnest money actually paid but earnest money required to be paid, in order to avoid possible argument that according to a literal reading of the existing definition, the seller is only entitled to receive earnest money that's actually been paid in the event of a breach by buyer
- Paragraph 2(b)
    - Whether or not a hot tub transfers with the property has been an occasional source of controversy between the parties. Therefore, hot tub and related equipment has been added to the list of fixtures that are included in the purchase unless the parties agree that it will not convey by identifying it in paragraph 2(d)
    - Another occasional source of disagreement has been whether bathroom mirrors are a part of the purchase price. Currently, "attached" wall and door mirrors are considered fixtures. Suggested new wording provides that **all** bathroom mirrors are considered fixtures, whether they are "attached" or not, subject to the parties agreeing otherwise.
- Paragraph 4(b)
    - Subparagraph 4(b)(ii)—the wording pertaining to owners' association charges has been modified slightly to track suggested changes to paragraph 6(b) pertaining to the buyer's responsibility for payment of certain owners' association charges. See explanation below.

- Paragraph 5—in subparagraphs (d) and (e), 2 references to "date the Contract was made" have been changed to "Effective Date." This is a technical change that does not affect the timeframe for terminating a contract if either of the Real Estate Commission's Disclosure Statements are not timely provided.
- Paragraph 6—the Contract was modified last year regarding responsibility for payment of fees charged by an owners' association or management company in connection with the sale of a property. Before last year, the buyer was responsible for paying all owner association fees and charges except any fee incurred by the seller in completing the Disclosure Statement. Last year's changes attempted to allocate responsibility for the payment of the various fees that may be charged by an owners' association or management company in a more balanced way, making the seller responsible for paying any "transfer or similar fee." That phrase was intended to cover any charge related to transferring or changing ownership records to a new owner, whether it was called a "transfer fee" or something else.

  Based on questions and input from members and a number of real estate attorneys, the Joint Forms Task Force decided to revisit the issue to further clarify responsibility for payment of fees charged by owners' associations and their management companies. Subparagraphs (a) and (c) of existing paragraph 6 have been combined, reformatted and revised in a new proposed subparagraph (b). Under new subparagraph (b), the buyer will be responsible for payment of the following association/management company fees: (i) charges for providing information required by buyer's lender, (ii) charges relating to buyer's "future use and enjoyment of the property," and (iii) charges for determining restrictive covenant compliance. Other association/management company fees will be the responsibility of the seller. See discussion of changes to paragraph 8(j) below.
- Paragraph 7(d)—blank spaces have been added for the name(s) of any associations and the amount and frequency of payment of the association's regular dues
- Paragraph 8
  - Paragraph 8(j)—the reference to "transfer or similar fees" has been eliminated. Instead, the seller will be responsible for paying any fees imposed by an association/management company in connection with the transaction other than the fees that the buyer is responsible for paying (see discussion of paragraph 6 above).
- Paragraph 14— "Security codes" and "electronic devices" have been added to the list of means of access to the property that are deliverable together with possession of the property.
- Paragraph 15— The wording of this paragraph has been modified to clarify that the blank space is intended only to identify addenda to the Contract that have been drafted by an attorney or a party to the transaction. In addition, the wording of the "Note" regarding the limitation on drafting by a real estate broker has been modified slightly and repositioned below the blank space in an effort to make it more prominent.
- NOTICE INFORMATION Section—Blank spaces for the license numbers of the selling agent firm and listing agent firm have been added under the firms' names.
- ESCROW AGENT ACKNOWLEGMENT OF RECEIPT OF (ADDITIONAL) EARNEST MONEY DEPOSIT—Since time is "of the essence" regarding delivery of any Additional Earnest Money Deposit, a blank space for the time of day has been added in order to memorialize the time of day the escrow agent receives the Additional EMD. This could be important to prove timely delivery of the Additional EMD if a Contract requires its delivery by a specified date and time.

(2) Offer to Purchase and Contract—Vacant Lot/Land (form 12-T)

- Paragraph 1(d)—changes correspond to suggested changes to paragraph 1(d) of form 2-T. See above.
- Paragraph 1(e)—changes correspond to suggested changes to paragraph 1(e) of form 2-T. See above.
- Paragraph 2(b)(iv)—changes correspond to suggested changes to paragraph 4(b)(ii) of form 2-T. See above.
- Paragraph 3—subparagraph 3(d), Authorization to Disclose Information, has been moved from paragraph 3 to subparagraph 4(c) of the "Buyer Obligations" section of the form in order to be consistent with the format of form 2-T.
- Paragraph 4—changes correspond to suggested changes to paragraph 6 of form 2-T. See above.
- Paragraph 6
    - Subparagraph 6(d)—the existing wording has been modified to specifically contemplate that the parties may agree that the seller will <u>not</u> be responsible for removing garbage and/or debris from the property. For example, this might be desirable in the sale of a large tract with significant highway frontage where the seller is concerned that such language might obligate the seller to remove all trash from the highway right-of-way.
    - Subparagraph 6(j)—changes correspond to suggested changes to paragraph 8(j) of form 2-T. See above.
- Paragraph 11—wording added to correspond to "means of access" language in paragraph 14 of form 2-T. See above.
- Paragraph 12— changes correspond to suggested changes to paragraph 15 of form 2-T. See above.
- NOTICE INFORMATION Section—changes correspond to suggested changes to "Notice Information" section of form 2-T. See above.
- ESCROW AGENT ACKNOWLEGMENT OF RECEIPT OF (ADDITIONAL) EARNEST MONEY DEPOSIT— changes correspond to suggested changes to same section of form 2-T. See above.

(3) Offer to Purchase and Contract—New Construction (form 800-T)

- Paragraph 1(d)—changes correspond to suggested changes to paragraph 1(d) of form 2-T. See above.
- Paragraph 1(c)—changes correspond to suggested changes to paragraph 5(e) of form 2-T. See above.
- Paragraph 7(c)—changes correspond to suggested changes to paragraph 5 of form 2-T. See above.
- Paragraph 8—change corresponds to suggested changes made to paragraph 6 of form 2-T. See above.
- Paragraph 10(j)—changes correspond to suggested changes to paragraph 8(j) of form 2-T. See above.
- Paragraph 14—changes correspond to suggested changes made to paragraph 14 of form 2-T. See above.
- Paragraph 15—changes correspond to suggested changes made to paragraph 15 of form 2-T. See above.

- NOTICE INFORMATION Section—changes correspond to suggested changes to "Notice Information" section of form 2-T. See above.
- ESCROW AGENT ACKNOWLEGMENT OF RECEIPT OF (ADDITIONAL) EARNEST MONEY DEPOSIT— changes correspond to suggested changes to same section of form 2-T. See above.

(4) Contingent Sale Addendum (form 2A2-T)

- Paragraph 1(a)—technical change to clarify that the contingency that buyer must be able to close on the sale of the buyer's existing property is subject to the terms and conditions of the Addendum.
- Paragraph 2
    - Existing Addendum requires buyer to notify seller "promptly" if a contract on the buyer's property falls through. New suggested wording has been added that requires any such notification to be within 3 days of any such termination.
    - Additional wording has been added to clarify that the buyer's right to terminate the contract with the seller if the contract on the buyer's property falls through would not in any event extend beyond the 3-day period that the buyer may terminate if the closing on buyer's property has not taken place as set forth in paragraph 1(b) of the Addendum.
- Paragraph 3—The Exclusive Right to Sell Listing Agreement permits a firm to take a listing on property but not market it until a later date. Wording has been added to the first two menu items under paragraph 3 to clarify that the buyer's property is or will be actively marketed by the date set forth in the blank.

(5) Possession Before Closing Agreement (form 2A7-T)

- The Warning against using the form for occupancy of more than 14 days has been removed.
    - There is nothing "magic" about the 14-day timeframe, and the limitation can have unintended consequences. For example, under the current version of the form, if the buyer takes possession 14 days before the Settlement Date and the Settlement Date is delayed through no fault of the buyer, the buyer's right of possession technically terminates before Settlement, and the buyer is arguably holding over and subject to payment of a per-diem hold-over fee if they do not move out.
    - Elimination of the 14-day maximum occupancy does NOT eliminate the legal issues that can arise when the buyer takes possession before Closing, and the form still should be used only for short-term occupancy.
- Paragraph 1—instead of a maximum occupancy period, the Agreement now provides that it will terminate at Closing or the termination of the Contract.
- Paragraph 2—new wording clarifies that by taking possession, the buyer is waiving the Contract condition that the property must be in the same condition at Closing as on the date of offer. Thus, for example, if the HVAC system breaks down after the buyer has taken possession, the buyer would not have a right to terminate the Contract. New wording makes it clear that this waiver does not affect the validity of any repair agreement that the parties may have entered into before the buyer takes possession.

- Paragraph 3—new wording clarifies that possession by the buyer does not modify the "Risk of Loss" condition in the Contract, which provides that the risk of loss in the event of a fire or other casualty loss remains with the seller until Closing and gives the buyer the right to terminate in the event of any such loss.
- Paragraph 4—new wording establishes that if the buyer delays the Settlement, the buyer is required to pay additional rent in an agreed-on per-diem amount.
- Paragraph headings have been added and the time-is-of-the-essence provision moved from the end of the Agreement to the first paragraph where the term of the Agreement is stated.

(6) Possession After Closing Agreement (form 2A8-T)

- The Warning against using the form for occupancy of more than 14 days has been removed from this form as well. The limitation occasionally causes unnecessary issues in connection with seller occupancy after closing. For example, a buyer recently caused a delay in settlement and closing and argued that the seller was still required to pay the full amount of the lump sum rent notwithstanding the fact that the seller's permitted occupancy had been reduced to 2 days as a result of the buyer's delay in closing.
- Paragraph 1—Instead of being tied to a specific date, the seller's occupancy period is tied to the date of closing, which will provide flexibility in the event that closing is delayed.
- Paragraph 2—new wording clarifies that although the seller is obligated to pay the cost of damage done to the property during the seller's post-closing occupancy, the risk of loss due to fire or other casualty loss passes to the buyer at closing.
- Paragraph headings have been added and the time-is-of-the-essence provision moved from the end of the Agreement to the first paragraph where the term of the Agreement is stated.

Permitted users of NCAR's forms have 60 days following their effective date to transition to the revised forms. Therefore, old versions should not be used on transactions taking place after the end of August 2016.

ANSWERS TO DISCUSSION QUESTIONS

Page 72

1. Julie Johnson has an active broker license and engages in brokerage as a sole proprietor under the name "Johnson Realty" with 5 affiliated brokers.
   a. Must she register her company's name? *No.*
   b. Why or why not? *Because her surname is part of the business name.*
2. Julie Johnson has an active broker license and engages in brokerage as a sole proprietor under the name "Julie's Realty Stars" with 5 affiliated brokers.
   a. Must she register her company's name? *Yes.*
   b. Why or why not? *Because her surname is not part of the business name.*
   c. If yes, where must she register the name? *In every county in which she has an office and/or will be engaging in brokerage activities.*

Page 74

1. The Commission's Working with Real Estate Agents brochure must be provided to whom, when? *All customers / clients in sales transactions at first substantial contact*
2. In sales transactions, when must agency agreements with property owners be in writing? *From the outset (before any brokerage services are provided)*
   When in lease/property management transactions? *From the outset (before any brokerage services are provided)*
3. A broker working with a buyer or tenant must have an express agency agreement with the consumer when? *From the outset (before any brokerage services are provided)*
   When must it be in writing? *prior to the presentation of any offer by any party*
4. Who are the parties to an agency agreement? *Broker (company/firm) and client*
5. Must a brokerage company allow oral buyer agency or practice dual agency? *No.*

Page 79

1. Who is entitled to the listing commission? *Listing Firm*
2. Why are they/it entitled to the full listing commission? *Firm is entitled to compensation under the listing agreement (full amount of commission to be paid by seller).*
3. Who else may have a claim to a portion of the listing fee and why? *Buyer's (cooperating) Firm based on due to terms of listing agreement.*
4. Affiliated brokers should receive their brokerage compensation from whom? *From their firms / BICs.*

Page 80

1. May an owner legally use audio recording devices in his/her property for the purposes of monitoring conversations held during showings of the property? *No*.
2. May an owner legally use cameras or other video-recording devices in his/her property to record others during showings of the property? *Yes*.