

# LICENSE LAW AND RULE COMMENTS

## Comments on Selected Provisions of the North Carolina Real Estate License Law and Real Estate Commission Rules

### INTRODUCTION

These comments on selected North Carolina Real Estate License Law and Real Estate Commission Rules provisions are intended to assist real estate licensees, prelicensing course students and others in understanding the License Law and Commission rules. The comments are organized in a topic format that often differs from the sequence in which the topics are addressed in the License Law and Commission rules. The topics selected for comment here are of particular importance and/or are likely to be frequently encountered in the usual course of real estate practice. The appropriate references to the License Law and Commission rules are provided beside each listed topic.

### LICENSE REQUIREMENT

#### General [G.S. 93A-1 and 93A-2]

Anyone who for compensation transacts real estate business in this state as an agent for another must have a North Carolina real estate broker license. This requirement applies to any person or entity who directly or indirectly engages in the business of a real estate broker while physically in the state of North Carolina. A real estate licensee is commonly referred to as a real estate “agent,” although the latter does not actually appear in the License Law.

Most individual broker licenses are issued on “provisional” status. The primary difference between a provisional broker and a broker not on provisional status is that the latter may operate as an unsupervised independent agent while a provisional broker must work under the supervision of a broker who has been designated with the Real Estate Commission as “broker-in-charge” of a real estate office.

A broker-in-charge is a broker who has been designated with the Commission as the broker having responsibility for the supervision of provisional brokers engaged in real estate brokerage at a particular real estate office and for other administrative and supervisory duties prescribed by Commission rule.

Note that a real estate “licensee” is NOT automatically a “REALTOR®.” A licensed real estate agent is a REALTOR® only if he/she belongs to the National Association of REALTORS®, a private trade association.

#### Licensing of Business Entities [G.S. 93A-1 and 93A-4; Rule A.0502]

In addition to individuals (persons), “business entities” also must be licensed in order to engage in the real estate business. Any corporation, partnership, limited liability

company, association or other business entity (other than a sole proprietorship) must obtain a separate real estate firm broker license.

#### Activities Requiring a License [G.S. 93A-2]

Persons and business entities who for compensation perform the activities listed below as an agent for others are considered to be performing brokerage activities and must have a North Carolina real estate license. There is no exemption for engaging in a limited number of transactions. A person or entity who performs a brokerage service in even one transaction must be licensed. Similarly, no fee or other compensation is so small as to exempt one from the application of the statute when acting for another in a real estate transaction. Brokerage activities include:

1. Listing (or offering to list) real estate for sale or rent, including any act performed by a real estate licensee in connection with obtaining and servicing a listing agreement. Examples of such acts include, but are not limited to, soliciting listings, providing information to the property owner, and preparing listing agreements or property management agreements.
2. Selling or buying (or offering to sell or buy) real estate, including any act performed by a real estate licensee in connection with assisting others in selling or buying real estate. Examples of such acts include, but are not limited to, advertising listed property for sale, “showing” listed property to prospective buyers, providing information about listed property to prospective buyers, negotiating a sale or purchase of real estate, and assisting with the completion of contract offers and counteroffers using preprinted forms and communication of offers and acceptances.
3. Leasing or renting (or offering to lease or rent) real estate, including any act performed by real estate licensees in connection with assisting others in leasing or renting real estate. Examples of such acts include, but are not limited to, advertising listed property for rent, “showing” listed rental property to prospective tenants, providing information about listed rental property to prospective tenants, negotiating lease terms, and assisting with the completion of lease offers and counteroffers using preprinted forms and communication of offers and acceptances.
4. Conducting (or offering to conduct) a real estate auction. (Mere criers of sale are excluded.) NOTE: An auctioneer’s license is also required to auction real estate.
5. Selling, buying, leasing, assigning or exchanging any

interest in real estate, including a leasehold interest, in connection with the sale or purchase of a business.

6. Referring a party to a real estate licensee, if done for compensation. Any arrangement or agreement between a licensee and an unlicensed person that calls for the licensee to compensate the unlicensed person in any way for finding, introducing or referring a party to the licensee has been determined by North Carolina's courts to be prohibited under the License Law. Therefore, no licensee may pay a finder's fee, referral fee, "bird dog" fee or similar compensation to an unlicensed person.

### Unlicensed Employees — Permitted Activities

The use of unlicensed assistants and other unlicensed office personnel in the real estate industry is very widespread and the Commission is frequently asked by licensees what acts such persons may lawfully perform. To provide guidance to licensees regarding this matter, the Commission has prepared the following list of acts that an unlicensed assistant or employee may lawfully perform so long as the assistant or employee is salaried or hourly paid and is not paid on a per-transaction basis.

An unlicensed, salaried (i.e., W-2) employee MAY:

1. Receive and forward phone calls and electronic messages to licensees.
2. Submit listings and changes to a multiple listing service, but only if the listing data or changes are compiled and provided by a licensee.
3. Secure copies of public records from public repositories (i.e., register of deeds office, county tax office, etc.).
4. Place "for sale" or "for rent" signs and lock boxes on property at the direction of a licensee.
5. Order and supervise routine and minor repairs to listed property at the direction of a licensee.
6. Act as a courier to deliver or pick up documents.
7. Schedule appointments for showing property listed for sale or rent.
8. Communicate with licensees, property owners, prospects, inspectors, etc. to coordinate or confirm appointments.
9. Show rental properties managed by the employee's employing broker to prospective tenants and complete and execute preprinted form leases for the rental of such properties.
10. Type offers, contracts and leases from drafts of preprinted forms completed by a licensee.
11. Record and deposit earnest money deposits, tenant security deposits and other trust monies, and otherwise maintain records of trust account receipts and disbursements, under the close supervision of the office broker-in-charge, who is legally responsible for handling trust funds and maintaining trust accounts.
12. Assist a licensee in assembling documents for closing.
13. Compute commission checks for licensees affiliated with a broker or firm and act as bookkeeper for the firm's bank operating accounts.

### Exemptions [G.S. 93A-2]

The following persons and organizations are specifically exempted from the requirement for real estate licensure:

1. **Property owners** when selling or leasing their own property. This includes both individual property owners personally selling or leasing their property and business entities selling or leasing real estate owned by the business entity. To qualify under this exemption, the person or entity must be the actual title holder or share title with an undivided interest.

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[Note: The Commission takes the position that the *bona fide* officers and employees of a **corporation** need not be licensed to sell or lease real estate belonging to the corporation. This is because corporations have a separate legal identity and can only function through its officers and employees, thus such officers and employees must be exempt when selling or leasing the corporation's property in order to give effect to the corporation exemption. However, the officers and employees of other business entities are considered to be exempt only if they personally are title owners of the property to be sold or leased. Thus, a partner in a general partnership is exempt as an owner when selling or leasing partnership-owned real estate, but an officer or employee of the partnership who is not also a partner is not exempt.]

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2. Persons acting as **attorneys-in-fact** under a power of attorney in *consummating performance* under a contract for the sale, lease or exchange of real estate. (Note: This limited exemption applies only to the final completion of a transaction already commenced. The licensing requirement may not be circumvented by obtaining a power of attorney.)
3. **Attorneys-at-law** when performing real estate activities in the normal course of providing legal services to their clients, such as when administering an estate or trust. Attorneys may NOT otherwise engage in real estate brokerage practice without a real estate license.
4. **Persons acting under court order** (e.g., receivers, trustees in bankruptcy, guardians or personal representatives)
5. **Trustees** acting under a trust agreement, deed of trust or will.
6. Certain **salaried employees of broker-property managers**. (See G.S. 93A-2(c)(6) for details.)

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**NOTE:** Although there is no specific statutory exemption for real estate **appraisers**, persons who appraise real estate for compensation are not required to have a real estate license to conduct such appraisals. However, such persons are required to be licensed or certified as a real estate appraiser by the North Carolina Appraisal Board.

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## THE REAL ESTATE COMMISSION

### Composition [G.S. 93A-3(a)]

The Real Estate Commission consists of nine (9) members who serve three-year terms. Seven members are appointed by the Governor and two are appointed by the General Assembly upon the recommendations of the Speaker of the House of Representatives and the President Pro Tempore of the Senate. At least three (3) members must be licensed brokers. At least two (2) members must be “public members” who are NOT involved directly or indirectly in the real estate brokerage or appraisal businesses.

### Purpose and Powers [G.S. 93A-3(a), (c) and (f); G.S. 93A-6(a) and (b); G.S. 93A-4(d) and 93A-4A]

The principal purpose of the Real Estate Commission is to protect the interests of members of the general public in their dealings with real estate brokers. This is accomplished through the exercise of the following statutory powers granted to the Commission:

1. Licensing real estate brokers and brokerage firms, and registering time share projects.
2. Establishing and administering a preclicensing and postlicensing education program for prospective licensees as well as a continuing education program for licensees.
3. Providing education and information relating to the real estate brokerage business for licensees and the general public.
4. Regulating the business activities of brokers and brokerage firms, including disciplining licensees who violate the License Law or Commission rules.

It should be noted that the Commission is specifically prohibited, however, from regulating commissions, salaries or fees charged by real estate licensees and from arbitrating disputes between parties regarding matters of contract such as the rate and/or division of commissions, pay of agents or similar matters. [See G.S. 93A-3(c) and Rule A.0109.]

### Disciplinary Authority [G.S. 93A-6(a)-(c)]

The Real Estate Commission is authorized to take a variety of disciplinary actions against licensees who the Commission finds guilty of violating the License Law or Commission rules while acting as real estate licensees. These are: reprimand, censure, license suspension and license revocation. The License Law also permits a licensee under certain circumstances to surrender his/her license with the consent of the Commission. Disciplinary actions taken against licensees are regularly reported in the Commission’s newsletter which is distributed to all licensees and also may be reported in local and regional newspapers.

It should be noted that licensees may be disciplined by the Commission for committing acts prohibited by the License Law when selling, leasing, or buying real estate for themselves, as well as for committing such acts in transactions handled as agents for others. [G.S. 93A-6(b)(3)]

The Commission also has the power to seek in its own name injunctive relief in superior court to prevent any person (licensees and others) from violating the License Law or Commission rules. A typical example of where the Commission might pursue injunctive relief in the courts is where a person engages in real estate activity without a license or during a period when the person’s license is suspended, revoked or expired. [G.S. 93A-6(c)]

Any violation of the License Law or Commission rules is a criminal offense (misdemeanor) and may be prosecuted in a court of law. However, a finding by the Commission that a licensee has violated the License Law or Commission rules does not constitute a criminal conviction. [G.S. 93-8]

## PROHIBITED ACTS BY LICENSEES

G.S. 93A-6 provides a list of prohibited acts which may result in disciplinary action against licensees. Discussed below are the various prohibited acts, except for those related to handling and accounting for trust funds, which are discussed in the Commission’s “Trust Account Guidelines,” and the failure to deliver certain instruments to parties in a transaction, which is discussed in the subsequent section on “General Brokerage Provisions.”

### Important Note

The provisions of the License Law relating to misrepresentation or omission of a material fact, conflict of interest, licensee competence, handling of trust funds, and improper, fraudulent or dishonest dealing generally apply independently of other statutory law or case law such as the law of agency. Nevertheless, another law may have an effect on the application of a License Law provision. For example, the requirements of the N.C. Tenant Security Deposit Act relating to the accounting to a tenant for a residential security deposit within 30 days after termination of a tenancy amplify the general License Law provisions (and Commission rules) requiring licensees to account for such funds within a reasonable time. Thus, in this instance, a violation of the Tenant Security Deposit Act’s provisions would also be considered by the Commission to be a violation of the License Law.

Similarly, the law of agency and the law of contracts, which are derived from case law, may be taken into consideration when applying the provisions of the License Law. Thus, a licensee’s agency status and role in a transaction might affect the licensee’s duties under the license law. Examples of how an agent’s duties under the License Law may be affected by the application of other laws are included at various points in this section on “Prohibited Acts by Licensees.”

### Misrepresentation or Omission [G.S. 93A-6(a)(1)]

Misrepresentation or omission of a material fact by brokers is prohibited, and this prohibition includes both “willful” and “negligent” acts. A “willful” act is one that is done

intentionally and deliberately, while a “negligent” act is one that is done unintentionally. A “misrepresentation” is communicating false information, while an “omission” is failing to provide or disclose information where there is a duty to provide or disclose such information.

For purposes of applying G.S. 93A-6(a)(1), whether a fact is “material” depends on the facts and circumstances of a particular transaction and the application of statutory and/or case law. The Commission has historically interpreted “material facts” under the Real Estate License Law to at least include:

**Facts about the property itself** (such as a structural defect or defective mechanical systems);

**Facts relating directly to the property** (such as a pending zoning change or planned highway construction in the immediate vicinity); and

**Facts relating directly to the ability of the agent’s principal to complete the transaction** (such as a pending foreclosure sale).

Regardless of whom the agent represents, these “material” facts must be disclosed to both the agent’s principal and to third parties the agent deals with on the principal’s behalf. In addition, an agent has a duty to disclose to his principal any information that may affect the principal’s rights and interests or influence the principal’s decision in the transaction.

Note, however, that G.S. 39-50 and 42-14.2 specifically provide that the fact that a property was occupied by a person who died or had a serious illness while occupying the property is NOT a material fact. Thus, agents do not need to voluntarily disclose such a fact. If a prospective buyer or tenant specifically asks about such a matter, the agent may either decline to answer or respond honestly. If, however, a prospective buyer or tenant inquires as to whether a previous owner or occupant had AIDS, the agent is prohibited by fair housing laws from answering such an inquiry because persons with AIDS are considered to be “handicapped” under such laws.

This introductory information should assist in understanding G.S. 93A-6(a)(1), which establishes four separate (although closely related) categories of conduct which are prohibited. These are discussed below, and a few examples of prohibited conduct are provided for each category.

**Willful Misrepresentation** — Where an agent who has “actual knowledge” of a material fact deliberately misinforms a buyer, seller, tenant or landlord concerning such fact. Also, where an agent who does NOT have actual knowledge of a matter material to the transaction provides incorrect information concerning such matter to a buyer, seller, tenant or landlord without regard for the actual truth of the matter (i.e., where an agent intentionally provides information without knowing whether it is true and the information provided is in fact not true).

**Note:** The following examples of willful misrepresentation apply regardless of the agent’s status (seller’s agent or buyer’s agent) or role (listing agent or selling agent).

**Example:** An agent knows that a listed house has a severe flooding problem during heavy rains. In response to a question from a prospective buyer who is being shown the house during dry weather, the agent states that there is no flooding problem.

**Example:** An agent knows that the heat pump at a listed house is inoperative, but tells a prospective buyer that all mechanical systems and appliances are in good condition.

**Example:** An agent knows that the approximate market value of a house is \$80,000, but tells the property owner that the house is worth \$90,000 in order to obtain a listing.

**Example:** An agent is completely unfamiliar with the features or condition of a listed property; however, the agent informs a prospective buyer that the plumbing is in good working order without first checking with the owner. (The agent in such instance is acting without regard for the truth of the matter being represented. If the plumbing in fact needs significant repair, then the agent may be guilty of willful misrepresentation.)

**Example:** Without checking with the owner, an agent tells a prospective buyer of a listed house that heating and cooling costs are “very reasonable.” (Because the agent acted without regard for the truth of the matter, he may be guilty of willful misrepresentation if heating and cooling costs are in fact extraordinarily high.)

**Negligent Misrepresentation** — Where an agent unintentionally misinforms a buyer, seller, tenant or landlord concerning a material fact either because he does not have actual knowledge of the fact, because he has incorrect information, or because of a mistake by the agent. If the agent “should reasonably have known” the truth of the matter that was misrepresented, then the agent may be guilty of “negligent misrepresentation” even though he was acting in good faith.

Negligent misrepresentation by real estate agents occurs frequently in real estate transactions. The most common situation results from the recording of incorrect information in an MLS® computer or book due to the negligence of the listing agent. When a prospective buyer is subsequently provided the incorrect information from the MLS® by the agent working with the buyer, a negligent misrepresentation occurs.

A listing agent is generally held to a higher standard with regard to negligent misrepresentation of material facts about a listed property to a buyer than is a selling agent who is acting as a seller’s subagent. This is because (1) The listing agent is in the best position to ascertain facts about the property, (2) the listing agent is expected to take reasonable steps to

assure that property data included with the listing is correct and (3) it is considered reasonable for a selling agent to rely on the accuracy of the listing data in most instances. However, a buyer's agent may in some cases be held to a higher standard than a seller's subagent because of the buyer's agent's duties to the buyer under the law of agency and the buyer's agent's special knowledge of the buyer's particular situation and needs.

**Example:** An agent has previously sold several lots in a subdivision under development and all those lots passed a soil suitability test for an on-site septic system. The agent then sells Lot 35 without checking as to whether this lot satisfies the soil test; however, the agent informs the buyer that Lot 35 will support an on-site septic system when in fact the contrary is true. (The agent was at least negligent in not checking the soil test result on Lot 35 and guilty of negligent misrepresentation. This result is not affected by the agent's agency status or role in the transaction.)

**Example:** An owner tells a listing agent with ABC Realty that his house has 1850 heated square feet. Without personally verifying the square footage, the agent records 1850 square feet on the listing form. The listing is placed in the local MLS and the MLS book is distributed showing the house as having 1850 square feet. The house is subsequently sold by a sales agent with XYZ Realty who tells the buyer that according to the MLS data, the house has 1850 square feet. The buyer later discovers that the house actually has only 1750 square feet. (In this situation, the listing agent did not make a direct misrepresentation to the buyer; however, he initiated the chain of communication which led to the buyer being misinformed, and thus indirectly misrepresented a material fact. Further, his failure to verify the square footage constituted negligence. Therefore, the listing agent is guilty of a negligent misrepresentation. Although the selling agent directly communicated the incorrect information to the buyer, he probably acted reasonably in relying on the data in the MLS book. In this case, if the selling agent had no reason to doubt the MLS data, the selling agent is not guilty of a negligent misrepresentation. Note, however, that if the square footage discrepancy had been sufficiently large that a reasonably prudent selling agent should have known the listed data was incorrect, then the selling agent would also have been guilty of negligent misrepresentation. The result in this particular example is not affected by the selling agent's agency status (seller's subagent or buyer's agent), although this might be a factor in other situations.

**Willful Omission** — Where the agent has “actual knowledge” of a material fact and a duty to disclose such fact to a buyer, seller, tenant, or landlord, but he deliberately fails to disclose such fact.

**Example:** An agent knows that a zoning change is pending which would adversely affect the value of a listed property, but fails to disclose such information to a prospective buyer. The agent has committed a willful omission and this result is not affected by the agent's agency status or role in the transaction.

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**[Note:** Information about a pending zoning change (or planned highway) that would enhance the value of a seller's property must also be disclosed to the seller, even if the agent is a buyer's agent.]

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**Example:** An agent knows that the city has just decided to extend water and sewer lines to a subdivision that has been plagued for years by serious water quality and sewage disposal problems. This will result in a substantial increase in the value of homes in the subdivision. The agent, who is working with a buyer to purchase a house in the subdivision, does not inform the seller of the city's recent decision. The agent has committed a willful omission and this result is not affected by the agent's agency status or role in the transaction.

**Example:** An agent knows that a listed house has a major defect (e.g., crumbling foundation, no insulation, malfunctioning septic tank, leaking roof, termite infestation, etc.) but fails to disclose such information to a prospective buyer. The agent has committed a willful omission and this result is not affected by the agent's agency status or role in the transaction.

**Example:** A selling agent working with a buyer as a subagent of the seller learns that the buyer is willing to pay more than the price in the buyer's offer, but fails to disclose this information to the seller (or listing agent) when presenting the offer. The selling agent has committed a willful omission. If, however, the selling agent were acting as a buyer's agent, then the result would be different because the agent does not represent the seller.

**Example:** A buyer's agent becomes aware that the seller with whom his buyer is negotiating is under pressure to sell quickly and may accept much less than the listing price. Believing such information should always be kept confidential, the buyer's agent does not provide the buyer with this information. The buyer's agent is guilty of a willful omission. An agent must disclose to his principal any information that might affect the principal's decision in the transaction.

**Example:** Suppose in the immediately preceding example that the seller's property is listed with the firm of the buyer's agent and the firm's policy is to practice dual agency in in-house sales situations where it represents both the seller and the buyer. In this situation, the buy-

er's agent would not be considered to have committed a willful omission under the License Law by not disclosing the information about the seller's personal situation to the buyer. Note: This assumes however that the buyer's agent properly disclosed his status as a buyer's agent to the seller or seller's agent upon "initial contact," that dual agency was properly authorized in writing by both the seller and buyer preferably prior to showing the seller's property to the buyer, but no later than presentation of any offer, and that the dual agency agreement provided for this limitation on disclosure. This position on the application of the License Law has been adopted by the Real Estate Commission to promote fairness and equity in transactions involving dual agency.

**Negligent Omission** — Where an agent does NOT have actual knowledge of a material fact, but he "should reasonably have known" of such fact, then he may be guilty of "negligent omission" if he fails to disclose this fact to a buyer, seller, tenant or landlord, even though he acted in good faith in the transaction.

The prohibition against negligent omission creates a "duty to discover and disclose" material facts which a reasonably prudent agent would typically have discovered in the course of the transaction. A listing agent is typically in a much better position than a selling agent to discover material facts relating to a listed property and thus, will be held to a higher standard than will a selling agent acting as a seller's subagent. On the other hand, a buyer's agent in some circumstances may be held to a higher standard than a seller's subagent because of the buyer's agent's duties to the buyer under the law of agency, particularly if the buyer's agent is aware of a buyer's special needs with regard to a property. Again we see how the agency relationships between agents and principals to a transaction and the agent's role in the transaction can affect a licensee's duties and responsibilities under the License Law.

Instances of negligent omission occur much less frequently than instances of negligent misrepresentation. This is because most facts about a listed property are recorded on a detailed property data sheet from which information is taken for inclusion in MLS computers/books. If incorrect information taken from an MLS computer/book is passed on to a prospective purchaser, then a "misrepresentation," rather than an "omission," has occurred. Nevertheless, there are examples of negligent omission which can be cited.

**Example:** A listing agent lists for sale a house located adjacent to a street that is about to be widened into a major thoroughfare. The thoroughfare project has been very controversial and highly publicized. The city recently finalized its decision to proceed with the project and the plans for the street widening are recorded in the city planner's office. A buyer, working with a selling agent, makes an offer to buy the house. The listing agent does

not disclose the street widening plans to the buyer or selling agent and claims later that he was not aware of the plans. In this situation, both the listing and selling agents are probably guilty of a negligent omission because each "should reasonably have known" of the street widening plans, clearly a material fact, and should have disclosed this fact to the buyer. This result is not affected by whether the selling agent is a buyer agent or seller's subagent.

**Example:** A seller has a 30,000 square foot commercial property for sale which cannot be expanded under local zoning laws. The buyer is looking for property in the 25,000 - 30,000 square foot range, but has told his buyer's agent that he needs a property where he can expand to 50,000 square feet or more in the future. The seller does not think to advise the buyer's agent that the property cannot be expanded, and the buyer's agent makes no inquiry about it although he is aware of the buyer's special needs. The buyer's agent is guilty of a negligent omission for failing to discover and disclose a special circumstance that he knew was important to his client.

**Example:** When listing a house, a listing agent is told by the seller that one area of the roof leaks badly when it rains, but the moisture so far is being contained in the attic. The listing agent forgets to note this on the MLS data sheet and forgets to disclose the leaking roof problem to prospective buyers and selling agents. The listing agent is guilty of a negligent omission. Because his failure to disclose the leaking roof problem was unintentional, the listing agent is not guilty of a willful omission; however, his forgetfulness resulting in his failure to disclose the defect constitutes a negligent omission.

### **Making False Promises [G.S. 93A-6(a)(2)]**

Real estate brokers are prohibited from "making any false promises of a character likely to influence, persuade or induce." It is unimportant whether the broker originally intended to honor his promise; failure to honor a promise is sufficient to constitute a violation of this provision. The promise may relate to any matter which might influence, persuade or induce a person to perform some act which he might not otherwise perform.

**Example:** An agent promises a prospective apartment tenant that the apartment he is considering renting will be repainted before the tenant moves in. The agent then fails to have the work done after the lease is signed.

**Example:** An agent promises a property owner that if he lists his house for sale with the agent's firm, then the firm will steam-clean all the carpets and wash all the windows. The firm then fails to have the work done after the listing contract is signed.

### **Other Misrepresentations [G.S. 93A-6(a)(3)]**

Real estate brokers are prohibited from pursuing a course of misrepresentation (or making of false promises) through other agents or through advertising or other means.

**Example:** In marketing subdivision lots for a developer, a broker regularly advertises that the lots for sale are suitable for residential use when in fact the lots will not pass a soil suitability test for on-site sewage systems.

**Example:** A broker is marketing a new condominium complex which is under construction. Acting with the full knowledge and consent of the broker, the broker's agents regularly inform prospective buyers that units will be available for occupancy on June 1, when in fact the units won't be available until at least September 1.

### **Conflict of Interest [G.S. 93A-6(a)(4) and (6); Rule A.0104(d)]**

G.S. 93A-6(a)(4) prohibits a real estate agent from "acting for more than one party in a transaction without the knowledge of all parties for whom he or she acts." Commission Rule A.0104(d) takes this a step further by providing that a broker or brokerage firm representing one party in a transaction shall not undertake to represent another party in the transaction without the express written authority (i.e., authorization of dual agency) of each party (subject to one exception, explained in the dual agency section). A typical violation of this provision occurs when the agent has only one principal in a transaction but acts in a manner which benefits another party without the principal's knowledge. In such a situation, the agent violates the duty of loyalty and consent owed to his principal.

**Example:** A house is listed with Firm X. When showing the house to a prospective buyer not represented by Firm X, an agent of Firm X advises the buyer to offer substantially less than the listing price because the seller must move soon and is very anxious to sell the property fast. The agent and Firm X are contractually obligated to represent only the seller. By advising the prospective buyer as indicated in this example, the agent is acting to benefit the buyer without the seller's knowledge and consent. This act violates both the License Law and the Law of Agency.

**Example:** An agent with Firm Y assists her sister in purchasing a house listed with Firm X without advising Firm X or the seller of her relationship with the buyer. The agent is "officially" acting as a subagent of the seller in the transaction. In this situation, there is an inherent conflict of interest on the part of the agent. If the agent does not disclose her relationships to both parties,

then the agent violates both the License Law and Law of Agency. In fact, since her allegiance lies with her sister, the agent should instead act as a buyer's agent from the outset. The same would be true if the buyer were a close friend or business associate of the agent, or in any way enjoyed a special relationship to the agent which would clearly influence the agent to act in behalf of the buyer rather than the seller.

G.S. 93A-6(a)(4) also prohibits any "self-dealing" on the part of an agent. For example, if an agent attempts to make a secret profit in a transaction where he is supposed to be representing a principal, then the agent violates this "conflict of interest" provision.

**Example:** An agent lists a parcel of undeveloped property which is zoned for single-family residential use. The agent knows that this property is about to be rezoned for multi-family residential use, which will greatly increase the property's value. Rather than informing the seller of this fact, the agent offers to buy the property at the listed price, telling the seller that he wants to acquire the property as a long-term investment. The deal closes. Several months later, after the rezoning has been accomplished, the agent sells the property at a substantial profit.

G.S. 93A-6(a)(6) prohibits a licensee from "representing or attempting to represent a real estate broker other than the broker by whom he or she is engaged or associated, without the express knowledge and consent of the broker with whom he or she is associated." Brokers may work for or be associated with more than one real estate company, so long as they have the express consent of all brokers-in-charge. Provisional brokers may never engage in brokerage activities for more than one company at a time.

### **Improper Brokerage Commission [G.S. 93A-6(a)(5) and (9)]**

No person may pay a commission or valuable consideration to any other person for acts or services performed in violation of the License Law. [G.S. 93A-6(a)(9)] This provision flatly prohibits anyone from paying an unlicensed person for acts which require a real estate license. Following are examples of prohibited payments:

**Example:** The payment by brokers of commissions to previously licensed sales associates who failed to properly renew their licenses (for any acts performed after their licenses had expired). [Note that payment *could* properly be made for commissions earned while the license was on active status, even if the license is inactive or expired at time of payment. The key is, was the license on active status at the time all services were rendered which generated the commission?]

**Example:** The payment of a commission, salary or fee by brokers to unlicensed employees or independent contractors (e.g., secretaries, “trainees” who haven’t passed the license examination, etc.) for performing acts or services requiring a real estate license.

**Example:** The payment by brokers of a “finder’s fee,” “referral fee,” “bird dog fee,” or any other valuable consideration to unlicensed persons who find, introduce, or bring together parties to a real estate transaction. This is true even if the ultimate consummation of the transaction is accomplished by a licensed broker and even if the act is performed without expectation of compensation. Thus, a broker may NOT compensate a friend, relative, former client or any other unlicensed person for “referring” a prospective buyer, seller, landlord or tenant to such broker. This prohibition extends to “owner referral” programs at condominium or time share complexes and “tenant referral” programs at apartment complexes.

In addition, a licensed “provisional” broker may NOT accept any compensation for brokerage services from anyone other than his employing broker or brokerage firm. Consequently, a broker may not pay a commission or fee directly to a provisional broker of another broker or firm. Any such payment, as well as bonuses, must be made through the provisional broker’s employing broker or firm. [G.S. 93A-6(a)(5)]

### **Unworthiness and Incompetence [G.S. 93A-6(a)(8)]**

This broad provision authorizes the Real Estate Commission to discipline any broker who, based on the agent’s conduct and consideration of the public interest, is found to be unworthy or incompetent to work in the real estate business. A wide range of conduct may serve as the basis for a finding of unworthiness or incompetence, including conduct which violates other specific provisions of the License Law or Commission rules. Here are a few examples of improper conduct which do not specifically violate another License Law provision but which might support a finding of unworthiness or incompetence.

1. Failure to properly complete (fill in) real estate contracts or to use contract forms which are legally adequate.
2. Failure to diligently perform the services required under listing contracts or property management contracts.
3. Failure to provide accurate closing statements to sellers and buyers or accurate income/expense reports to property owners.

### **Improper Dealing [G.S. 93A-6(a)(10)]**

This broad provision prohibits a real estate agent from engaging in “any other conduct [not specifically prohibited elsewhere in the License Law] which constitutes improper, fraudulent or dishonest dealing.” The determination as to whether particular conduct constitutes “improper, fraudulent or dishonest dealing” is made by the Real Estate Com-

mission on a case-by-case basis. Therefore, a broad range of conduct might be found objectionable under this provision, depending on the facts in a case.

One category of conduct which violates this provision is any breach of the duty to exercise skill, care, and diligence in behalf of a client under the Law of Agency. (Note that other breaches of Agency Law duties constituting either a “misrepresentation or omission,” a “conflict of interest” or a “failure to properly account for trust funds” are covered by other specific statutory provisions.)

Another category of conduct which violates this provision is any violation of the State Fair Housing Act. This is mentioned separately under the “Discriminatory Practices” heading.

**Example:** A broker is personally conducting the closing of a real estate sale he has negotiated. The seller does not show up for the closing. In order to avoid a delay in closing the transaction, the broker forges the seller’s signature on a deed to the property and proceeds with the closing in the seller’s absence.

**Example:** An agent assists a prospective buyer in perpetrating a fraud in connection with a mortgage loan application by preparing two contracts — one with false information for submission to the lending institution, and another which represents the actual agreement between seller and buyer. (This practice is commonly referred to as “dual contracting” or “contract kiting.”)

**Example:** A broker lists a property for sale and agrees in the listing contract to place the listing in the local MLS, to advertise the property for sale, and to use his best efforts in good faith to find a buyer. The broker places a “For Sale” sign on the property, but fails to place the property in the MLS for more than 30 days and fails to otherwise advertise the property during the listing period. (The broker has failed to exercise reasonable skill, care and diligence in behalf of his client as required by the listing contract and the Law of Agency.)

**Example:** An agent is aware that the owners of a house listed with his company are out of town for the weekend, yet the agent gives a prospective buyer the house keys and allows such prospect to look at the listed house without accompanying the prospect. (The agent has failed to exercise reasonable skill, care and diligence in behalf of his client.)

### **Discriminatory Practices [G.S. 93A-6(a)(10); Rule A.1601]**

Any conduct by a broker which violates the provisions of the State Fair Housing Act is considered by the Commission to constitute “improper conduct” and to be a violation of the License Law.

## **Practice of Law [G.S. 93A-4(e); G.S. 93A-6(a)(11); Rule A.0111]**

Brokers may not perform for others any legal service described in G.S. 84-2.1 or any other legal service. Following are several examples of real estate-related legal services which brokers may NOT provide.

1. Drafting legal documents such as deeds, deeds of trust, leases and real estate sales contracts for others. Although brokers may “fill in” or “complete” preprinted real estate contract forms which have been drafted by an attorney, they may NOT under any circumstances complete or fill in deed or deed of trust forms.
2. Abstracting or rendering an opinion on legal title to real property.
3. Providing “legal advice” of any nature to clients and customers, including advice concerning the nature of any interest in real estate or the means of holding title to real estate. (Note: Although providing advice concerning the legal ramifications of a real estate sales contract is prohibited, merely “explaining” the provisions of such a contract is not only acceptable, but highly recommended.)

## **Other Prohibited Acts [G.S. 93A-6(b)]**

In addition to those prohibited acts previously discussed, G.S. 93A-6(b) prescribes several other specific grounds for disciplinary action by the Commission, including:

1. Where a licensee has obtained a license by false or fraudulent representation (e.g., falsifying documentation of prelicensing education, failing to disclose prior criminal convictions, etc.).
2. Where a licensee has been convicted of, or pled guilty or no contest to, certain types of criminal offenses.
3. Where a broker’s unlicensed employee, who is exempt from licensing under G.S. 93A-2(c)(6) (property management exception), has committed an act which, if committed by the broker, would have constituted a violation of the License Law.
4. Where a licensee who is also a State-licensed or State-certified real estate appraiser has violated any of the provisions of the North Carolina Real Estate Appraisers Act and been disciplined by the N.C. Appraisal Board.

Lastly, be aware that under (b)(3), licensees may be disciplined for violating any of the 15 provisions under subsection (a) when selling, buying, or leasing their own property.

## **GENERAL BROKERAGE PROVISIONS**

**D**iscussed below are selected Commission rules related to general brokerage.

### **Agency Agreements and Disclosure [Rule A.0104]**

Provided below is a brief summary of the various provisions of the Commission’s rule regarding agency agreements and disclosure. For a much more in-depth discussion of this

rule and its application, the reader is referred to the Commission’s *North Carolina Real Estate Manual*.

**Agency Agreements:** Rule A.0104(a) requires all agency agreements for brokerage services (in both sales and lease transactions) to be in writing. Paragraph (a):

- Requires written agreements with property owners (whether sellers or lessors, commercial or residential) from the inception of the relationship;
- Allows express **oral** buyer/tenant agency agreement from the outset of the relationship which must be reduced to *writing no later than the time any party to the transaction wants to extend an offer*. As a practical matter, this oral agreement needs to address all key aspects of the relationship, including agent compensation, authorization for dual agency, etc.

(**Note:** Agreement must be in writing from the outset if it seeks to limit the buyer/tenant’s right to work with other agents or binds the client to the agent for any definite time period. In other words, an oral buyer/tenant agency agreement is non-exclusive and must be terminable by the client at any time.)

Further, every written agency agreement of any kind must also:

- Provide for its existence for a definite period of time and terminate without prior notice at the expiration of that period. [Exception: an agency agreement between a broker and a landlord to procure tenants for the landlord’s property may allow for automatic renewal so long as the landlord may terminate with notice at the end of any contract or renewal period.]
- Contain the Rule A.0104(b) non-discrimination (fair housing) provision, namely: “The broker shall conduct all brokerage activities in regard to this agreement without respect to the race, color, religion, sex, national origin, handicap or familial status of any party or prospective party to the agreement.” This provision must be set forth in a clear and conspicuous manner which shall distinguish it from other provisions of the agency agreement.
- Include the license number of the individual licensee who signs the agreement.

Allowing an agent to work with a buyer under an express oral buyer agency agreement is intended to address the problem of buyers being reluctant to sign a written buyer agency agreement at the outset of their relationship with a buyer agent. The idea underlying this approach is to allow an agent to work *temporarily* with a prospective buyer as a buyer’s agent under an *oral agreement* while the agent establishes a rapport with the buyer that makes the buyer feel more comfortable with signing a written buyer agency agreement.

Although the rule allows oral buyer/tenant agency agreements until the point in time when any party is ready to present an offer, it nevertheless is highly advisable that agents have such agreements reduced to writing and signed by the buyer/tenant at the earliest possible time in order to avoid misunderstanding and conflict between the buyer/tenant and agent. Recall also that the agent must obtain a written buyer/ten-

ant agency agreement from the buyer/tenant not later than the time any party to the transaction extends an offer to any other. If the buyer/tenant will not sign a written buyer/tenant agency agreement prior to an offer being presented, then the agent may not continue to work with the buyer/tenant as a buyer/tenant's agent. Moreover, the agent may not begin at this point to work with the buyer/tenant as a seller's subagent unless the agent (1) fully advises the buyer/tenant of the consequences of the agent switching from buyer/tenant's agent to seller's agent (including the fact that the agent would have to disclose to the seller/lessor any information, including "confidential" information about the buyer/tenant, that might influence the property owner's decision in the transaction), (2) obtains the buyer/tenant's consent, and (3) obtains the consent of the property owner and listing firm, which is the property owner's agent.

**Agency Disclosure Requirement:** While Rule A.0104(a) now requires all agency agreements, whether for lease or sales transactions or association management, to be in writing, the Rule A.0104(c) *disclosure* requirement still applies only to sales transactions. It requires licensees to provide prospective buyers and sellers, at first substantial contact, with a copy of the *Working with Real Estate Agents* brochure, to review the brochure with them and then reach an agreement regarding their agency relationship. The licensee providing the brochure should also include his/her name and license number on the brochure. Note that the obligation under this rule is not satisfied merely by handing the prospective seller or buyer the brochure to read. The agent is required to review the contents of the brochure with the prospective buyer or seller and then reach agreement with the prospective buyer or seller as to whether the agent will work with the buyer or seller as his/her agent or as the agent of the other party. In the case of a prospective **seller**, the agent may either (1) act as the seller's agent, which is the typical situation and which requires a written agreement from the outset of their relationship, or (2) work with the seller as a buyer's agent if the agent already represents a prospective buyer. In the case of a prospective **buyer**, the agent may either (1) act as the buyer's agent under either an oral or written agreement as addressed in Rule A.0104(a), or (2) work with the buyer as a seller's agent, disclosure of which must be in writing from the outset.

**Disclosure of Agency Status by Sellers' Agents and Subagents to Prospective Buyers:** Paragraph (e) of Rule A.0104, like (c), requires a seller's agent or subagent in sales transactions to disclose his/her agency status in writing to a prospective buyer at the "first substantial contact" with the buyer. It is recommended that sellers' agents make this required written disclosure using the form provided for this purpose in the *Working with Real Estate Agents* brochure that must be provided to buyers (as well as to sellers) at first substantial contact. This form has a place for the buyer to acknowledge receipt of the brochure and disclosure of agency status, thereby providing the agent with written evidence of having provided the brochure and disclosure. The disclosure may, however, be made using a different form — the

most important point is that the disclosure of seller agency be made in writing in a timely manner. The reason for this requirement is that buyers tend to assume that an agent they contact to work with them in locating a property to purchase is "their" agent and is working primarily in their interest. This may or may not be the case in reality. The purpose of the disclosure requirement is to place prospective buyers on notice that the agent they are dealing with is NOT "their" agent before the prospective buyer discloses to the agent information which the buyer would not want a seller to know because it might compromise the buyer's bargaining position.

Most frequently, "**first substantial contact**" will occur at the first "face-to-face" meeting with a prospective buyer. However, the point in time that "first substantial contact" with a prospective buyer occurs will vary depending on the particular situation and may or may not be at the time of the first or initial contact with the prospective buyer. Many first contacts are by telephone and do not involve discussions which reach the level that would require disclosure, although some initial phone contacts, especially those with out-of-town buyers, could reach this level. "*First substantial contact*" occurs at the point in time when a discussion with a prospective buyer begins to focus on the buyer's specific property needs and desires or on the buyer's financial situation. Typically, that point in time is reached when the agent is ready to solicit information from the prospective buyer that is needed to identify prospective properties to show the buyer. Therefore, *an agent planning to work with a prospective buyer as a seller's agent or subagent should assure that disclosure of his/her agency status is made in writing to the prospective buyer prior to obtaining from the prospective buyer any personal or confidential information* that the buyer would not want a seller to know. A few examples of such personal or confidential information include: The maximum price a buyer is willing to pay for a property; the buyer's ability to pay more than the price offered by the buyer; or the fact that a buyer has a special interest in purchasing the seller's property rather than some other similar property. In any event, the disclosure must be made prior to discussing with the prospective buyer his/her specific needs or desires regarding the purchase of a property. As a practical matter, this means the *disclosure will always need to be made prior to showing a property to a prospective buyer*. The best policy is to simply make the disclosure at the earliest possible time.

If first substantial contact occurs by telephone or by means of other electronic communication where it is not practical to provide written disclosure, the agent shall immediately disclose by similar means whom he/she represents and shall immediately, but in no event later than three days from the date of first substantial contact, mail or otherwise transmit a copy of the written disclosure to the buyer.

**Disclosure of Agency Status by Buyers' Agents to Sellers or Sellers' Agents:** Paragraph (f) of Rule A.0104 requires a buyer's agent to disclose his/her agency status to a

seller or seller's agent at the "initial contact" with the seller or seller's agent. "Initial contact" will typically occur when a buyer's agent telephones or otherwise contacts the listing firm to schedule a showing. The initial disclosure may be oral, but a written confirmation of the previous oral disclosure must be made (except in auction sale transactions) no later than the time of delivery of an offer to purchase. The written confirmation may be (and usually is) included in the offer to purchase. In fact, Commission Rule A.0112(a)(19) requires that any preprinted offer to purchase and contract form used by an agent include a provision providing for confirmation of agency status by each real estate agent (and firm) involved in the transaction.

**Consent to Dual Agency:** Paragraph (d) of Rule A.0104 requires generally that an agent must obtain the written authority of all parties prior to undertaking to represent those parties as a dual agent. It is important to note that this requirement applies to *all real estate transactions* (sales and lease/rentals), not just to sales transactions. [In sales transactions, this written authority to act as a dual agent is usually limited to "in-house" sales transactions and is usually included in the listing and buyer agency contracts. If those contracts do not grant such authority, then the agent must have both the seller and buyer consent to the dual agency prior to beginning to act as a dual agent for both parties.]

Paragraph (d) of Rule A.0104 currently requires written authority for dual agency from the formation of the relationship except situations where a buyer/tenant is represented by an agent working under an oral agency agreement as permitted by A.0104(a), in which case written authority for dual agency must be obtained no later than the time one of the parties represented by the agent working as a dual agent makes an offer to purchase, sell, rent, lease, or exchange real estate to the other party. Thus, it is permissible for the agent to operate for a limited period of time under an oral dual agency agreement. It is very important to remember that G.S. 93A-6(a)(4) still requires agents to obtain the consent of all parties prior to beginning to act as a dual agent for those parties. Therefore, it is essential that agents electing to operate as a dual agent for a limited period of time without obtaining this authority in writing still explain fully the consequences of their acting as a dual agent and obtain the parties' oral consent.

As a practical matter in sales transactions, agents will frequently have already obtained written authority to act as a dual agent for in-house sales transactions at the time the initial written listing or buyer agency agreement is executed. However, under Paragraph (a) of Rule A.0104, many buyer's agents may elect to work with their buyer clients for a period of time under an oral buyer agency agreement. Paragraph (d) permits such buyer's agents to also operate for a limited period of time as a dual agent in order to deal with situations where a buyer client is interested in a property listed with the agent's firm. Note that, although an oral dual agency agreement for a limited period of time is permitted by

Commission rules, it is strongly recommended that agents have any dual agency agreement in writing from the outset of the dual agency arrangement. This will provide the agent with some evidence that the matter of dual agency was discussed with the parties and that they consented to it. Such evidence could prove quite useful if a party later asserts that the agent did not obtain their consent for dual agency in a timely manner.

**Auction Sales:** Paragraph (g) of Rule A.0104 provides that the provisions of Paragraphs (c), (d) and (e) of the Rule shall not apply to real estate licensees representing sellers in auction sales transactions. Note that in auction sales, the real estate agents involved almost invariably work only as seller's agents and this fact is considered to be self-evident. Thus, there is no need for agents to distribute and review the *Working with Real Estate Agents* brochure, no need for disclosure of agency status by the seller's agents, and no dual agency. For the unusual situation where a buyer may be represented by an agent in an auction sale transaction, Paragraph (h) of Rule A.0104 provides that such a buyer's agent shall, no later than the time of execution of a written agreement memorializing the buyer's contract to purchase, provide the seller or seller's agent with a written confirmation that he/she represents the buyer.

**Dual Agency Status of Firm:** Paragraph (i) of Rule A.0104 codifies in the Commission's rules the common law rule that a firm which represents more than one party in the same real estate transaction is a dual agent, and further states that the firm, through the brokers affiliated with the firm, shall disclose its dual agency to the parties. This rule provision does not establish any additional requirement for licensees and is intended merely to clarify that the Commission follows the common law rule. In other words, dual agency is not limited to those situations where an individual agent is working with both a buyer client and seller client (or lessor and commercial tenant) in the same transaction. If one agent of a firm is working with a buyer client of the firm and another agent of the same firm is working with a seller client of the firm in a transaction involving the sale of the seller client's property to the buyer client, then the firm is a dual agent (as it also holds both agency agreements). However, a firm functions through its employees, namely, its associated agents; thus, under the common law, whenever the firm is a dual agent of certain parties in a transaction, all licensees affiliated with that firm are also dual agents of those parties in that transaction.

**Designated Agency:** Paragraphs (j) - (m) of Rule A.0104 authorize real estate firms to engage in a form of dual agency practice referred to in the rule as "designated agency" in certain sales transactions involving in-house dual agency. "Designated agency" is an optional method of practicing dual agency that may be adopted by a real estate firm if the firm establishes a policy consistent with the Commission's designated agency rules. Designated agency involves appointing or "designating" an individual agent(s) in a firm to rep-

resent only the interests of the seller and another individual agent(s) to represent only the interests of the buyer when a firm has an in-house dual agency situation.

The principal advantage of the designated agency approach over the “standard” dual agency approach is that each of a firm’s clients (seller and buyer) receive fuller representation by their designated agent. In the typical dual agency situation, client advocacy is essentially lost because the dual agent may not seek an advantage for (i.e., “advocate” for) one client to the detriment of the other client. The dual agent must remain completely neutral and impartial at all times. Designated agency returns “advocacy” to the services provided by the respective designated agents and allows them to more fully represent their respective clients.

Authority to practice designated agency must be in writing no later than the time a written dual agency agreement is required under A.0104(d). Additional required procedures for practicing designated agency are clearly spelled out in Paragraphs (j) - (m) and are not discussed further here. For more detailed coverage of dual and designated agency, the reader is once again referred to the Commission’s *North Carolina Real Estate Manual*.

**Dual Agency by Individual Agent:** Paragraph (n) of Rule A.0104 authorizes individual brokers representing both the buyer and seller in the same real estate transaction pursuant to a written dual agency agreement to include in the agreement a provision authorizing the broker not to disclose certain “confidential” information about one party to the other party without permission from the party about whom the information pertains. This provision is intended to allow individual dual agents to treat confidential information about their clients in a manner similar to that allowed for firms practicing designated agency.

### **Advertising [Rule A.0105]**

The rule prohibits “blind ads;” rather, all advertising must indicate that it is the advertisement of a broker or brokerage firm. Be aware that A.0105(c)(1) prohibits “provisional” brokers from advertising “without his or her broker’s consent” and must include the broker’s name in the advertising. Lastly, licensees may not advertise under an assumed name without registering the assumed name with the applicable County Register of Deeds office and no business entity (other than a corporation) may include in its name the name of an unlicensed person or salesperson. [See A.0105(b) and (d)]. [See also 2005-2006 Real Estate Update materials, Advertising.]

### **Delivery of Instruments [G.S. 93A-6(a)(13) and (14); Rules A.0106 and A.0107(c)]**

Among other things, Rule A.0106 requires agents to “immediately, but in no event later than five days from the date of execution, deliver to the parties thereto copies of any ... offer...” This does NOT mean that agents may in every case wait up to five days to present an offer to a seller. Rather, it means that an agent must immediately, as soon as pos-

sible, present to the seller any offer received by the agent. If the agent is the “selling agent,” then the offer should be immediately presented to the “listing agent” who should, in turn, immediately present the offer to the seller. The “five day” provision is included only to allow for situations where the seller is not immediately available (e.g., seller is out of town), and represents an outside time limit within which offers must always be presented. In all cases where the seller is available, the offer should be presented as soon as possible.

The same rule also means that a prospective buyer who signs an offer must immediately be provided a copy of such offer. (A photocopy is acceptable for this purpose.) Do NOT wait until after the offer is accepted (or rejected) by the seller.

In addition, this rule means that an offer must be immediately presented to a seller *even if there is a contract pending on the property*. Of course, in this instance, it is essential that the agent also advise the seller that serious legal problems could result from the seller’s acceptance of such offer and that the seller should contact an attorney if he is interested in treating the offer as a “back-up” offer or in attempting to be released from the previously signed contract.

### **Retention of Records [Rule A.0108]**

Note that as of September 1, 2002, licensees are required to maintain and retain various documents pertaining to their brokerage transactions for three years from the successful or unsuccessful conclusion of the transaction or the disbursement of all trust monies pertaining to that transaction, whichever occurs later. Thus, a licensee holding a disputed earnest money deposit which isn’t finally disbursed until July, 2004 from a transaction that terminated without closing in September, 2002, would be required to retain the A.0108 transaction file documents until July, 2007.

### **Brokerage Fees and Compensation [Rule A.0109]**

This rule prohibits a broker from receiving any form of valuable consideration from a vendor or supplier of goods or services in connection with an expenditure made on behalf of his principal in a real estate transaction without first obtaining the written consent of the principal.

**Example:** A broker manages several rental units for various owners and routinely employs Ajax Cleaning Service to clean the units after the tenants leave. The broker pays Ajax a \$50 per unit fee for its services out of rental proceeds received and deposited in his trust account. Ajax then “refunds” to the broker \$10 for each \$50 fee it receives, but the property owners are not aware that the broker receives this payment from Ajax in addition to his regular brokerage fee. The broker in this situation is making a secret profit without the property owners’ knowledge and is violating the rule.

This rule also prohibits a broker from receiving any form of valuable consideration for recommending, procuring, or

arranging services for a party to a real estate transaction without full disclosure to such party. The party for whom the services are recommended, procured, or arranged does not have to be the agent's principal.

**Example:** An agent sells a listed lot to a buyer who wants to build a house on the lot. Without the buyer's knowledge, the agent arranges with ABC Homebuilders for ABC to pay the agent a 3% referral fee if the agent recommends ABC to the buyer and the buyer employs ABC to build his house. The agent then recommends ABC to the buyer, ABC builds the buyer's house for \$100,000 and ABC secretly pays the agent \$3,000 for his referral of the buyer. The agent has violated this rule. (Note that the buyer in this situation likely paid \$3,000 more for his house than was necessary because it is very likely the builder added the agent's referral fee to the price he charged the buyer for building the house. The main point here is that the buyer had the right to know that the agent was not providing disinterested advice when recommending the builder.)

**Example:** A selling agent in a real estate transaction, while acting as a subagent of the seller, recommends to a buyer who has submitted an offer that the buyer apply to Ready Cash Mortgage Company for his mortgage loan. The agent knows that Ready Cash will pay him a "referral fee" of \$100 for sending him the buyer's business if the loan is made to the buyer, but the agent does not disclose this fact to the buyer. If the agent subsequently accepts the referral fee from the lender, he will have violated this rule. (The buyer has the right to know that the agent's recommendation is not a disinterested one.)

While A.0109(d) continues to absolutely prohibit licensees from sharing compensation with any unlicensed person for acts which require a real estate license, paragraph (e), which was added to Rule A.0109 effective September 1, 2002, allows one narrow, limited exception, namely: licensees may pay referral fees to travel agents who contact them to book *vacation rentals only*, so long as well-defined procedures are followed.

### **Broker-in-Charge [Rule A.0110]**

Every firm is required to designate a broker to serve as broker-in-charge at each office. The broker-in-charge is the person the Commission will hold responsible for the supervision and management of an office. The seven specific responsibilities of a broker-in-charge are enumerated in Paragraph (a). Brokers designated as a broker-in-charge on or after April 1, 2006 must have the equivalent of two years full-time brokerage experience within the preceding five years and must take the Commission's broker-in-charge course within 120 days of being designated, unless they already have taken the 12-hour course within the preceding three years.

The only people who might be designated broker-in-charge after April 1, 2006 who may not be required to take the 12-hour broker-in-charge course are those who already are designated as brokers-in-charge before March 31, 2006, who are transferring from office A to office B *with no lapse in their status as a broker-in-charge*. To remain a broker-in-charge, all brokers-in-charge will be required to take special annual broker-in-charge electives written by the Commission but taught by approved Update instructors as part of the broker's 8-hours of continuing education each year. Any broker-in-charge who suffers any break or lapse in their status as broker-in-charge for any reason will be required to satisfy the two-year experience requirement and take the 12-hour broker-in-charge course to be redesignated as a broker-in-charge after April 1, 2006, unless they have had the 12-hour course within the preceding three years.

### **Drafting Legal Instruments [Rule A.0111]**

This rule prohibits licensees from drafting legal instruments, e.g., contracts, deeds, deeds of trust, etc., but does allow them to fill in the blanks on preprinted sales contract and lease forms, which is not construed to be the unauthorized practice of law.

### **Offers and Sales Contracts [Rule A.0112]**

This rule specifies what minimum terms must be contained in any preprinted offer or sales contract form a licensee, acting as an agent, proposes for use by a party in a real estate transaction.

### **Reporting Criminal Convictions [Rule A.0113]**

Licensees are required to report to the Commission any criminal convictions or any disciplinary action taken against them by any other professional board within sixty (60) days of the final judgment or order in the case. This reporting requirement is ongoing in nature.

### **Residential Property Disclosure Statement [Rule A.0114]**

State law requires that most residential property owners complete a disclosure form to give to prospective purchasers. The form seeks to elicit information about the condition of the property by asking various questions, to which owners may answer "yes," "no," or "no representation." Failure to provide a buyer with this form may allow the buyer to cancel the contract by notifying the seller in writing within three calendar days of contract acceptance.

## **HANDLING TRUST FUNDS**

See the "Trust Account Guidelines" contained in this booklet for complete coverage of this important topic. Licensees and applicants should have a thorough knowledge and understanding of the "Trust Account Guidelines."