SELECTED TOPICS FOR BROKERS-IN-CHARGE

2014-2015 BROKER-IN-CHARGE UPDATE

Outline:

✦What is an "Office?"
✦Office Policies & Listing Practices
✦ Periodic Renewal & Reporting Requirements

Learning Objective: This Section will address issues primarily relevant to brokers-in-charge. This year's special BIC section will discuss the following topics:

1) what is an "office" or "branch office," and what does it matter?
2) what information should associated brokers be required to obtain and have in the transaction file before the office begins marketing the property? and
3) what compliance issues must be satisfied every year to stay in business?

WHAT IS AN OFFICE?

Change is the primary constant in today's real estate brokerage world. Brokers are constantly assessing their options and deciding whether to change offices (affiliate with a different company), or start their own company and open an office, or if they even need a public office space. Given these considerations, brokers should know what an office or branch office is and when a location where a broker conducts business crosses the line and becomes an office. *Does it really matter*? Yes, because if a location is an "office," then it must have a broker-in-charge to comply with Rule A.0110(b), which states:

> ...every real estate firm, including a sole proprietorship, shall have a broker designated by the Commission ...to serve as the broker-in-charge at its principal office and a broker to serve as broker-in-charge at any branch office.

The rule also states that a broker may only be broker-in-charge of one office, subject to a limited exception in Rule A.0110(c), i.e., two separate companies that share the same physical office space. In this latter case, one person may serve as broker-in-charge for both companies at that location, or each company could have its own broker-in-charge.

Practical Application

A provisional broker must be associated with a broker-in-charge (and thus an office) or his/her license will be on inactive status and s/he can't engage in any brokerage activity. Further, a provisional broker can only be affiliated with one office of one company at a time. The four things a provisional broker must do to keep his/her license on active status are:

1) timely pay the $45 renewal fee;
2) complete the General Update and one elective each year after first license renewal;
3) complete at least one 30-hour postlicensing course in each of the first three years; and
4) have a broker-in-charge.

In contrast, a broker *not on provisional status* only needs to do ***two things each year to keep his/her license active***:

1) pay the $45 license renewal fee by June 30
and
2) complete the General Update course and one elective by June 10 each year.

Eight hours of continuing education (four hours being the Update) and $45 per year allows a broker to remain on active status and thus be eligible to engage in brokerage activity.

Any broker whose license is on active status should fall into one of the following categories. *According to Commission records*, that broker either should:

1) be associated with an office where there is a broker-in-charge;
or
2) be broker-in-charge of his/her own company (including sole proprietorships);
or
3) not represent consumers in any real estate transactions or engage in brokerage activity.

The primary *very limited* exception to the above three categories is a broker on active status acting as a *sole proprietor* who has no associates, never handles trust monies and doesn't advertise or promote his/her services as a broker in any manner. Such a broker may refer consumers who come to him/her unsolicited to other brokers and receive a referral fee or may occasionally act as a buyer agent so long as the broker didn't solicit the buyer-client, without being a broker-in-charge. Any *compensation earned must be payable directly to the broker* (not to any entity) because the exception is limited to sole proprietors. [See Rule A.0110(e) regarding this limited exception.]

Definition of Office - Rule A.0110(a)

What is the legal definition of an "office" for brokerage purposes? When the broker-in-charge rule was revised effective May 1, 2013, it created three separate definitions: 1) office; 2) principal office; and 3) branch office. Subparagraph (a) presently defines each as follows:

> 1) "**Office**" means any place of business where acts are performed for which a real estate license is required *or* where monies received by a broker acting in a fiduciary capacity are handled or records for such trust monies are maintained.

2) "**Principal Office**" means the office so designated in the Commission's records by the qualifying broker of a licensed firm or the broker-in-charge of a sole proprietorship; and

3) "**Branch Office**" means any office in addition to the principal office of a broker which is operated in connection with the broker's real estate business.

The fundamental question is: what makes a location an "office?" Whether it is a principal or branch office is secondary, as ***ALL offices must have a broker-in-charge***. According to the above definition, an ***office*** is a place of business where *either*:

1) acts occur that require a real estate license,
OR
2) trust monies are handled or the trust account records are maintained.

1) Location Where "Acts Are Performed that Require a License"

The test most commonly applied is the first prong — what activity is occurring at a location and who is providing it? To the extent that acts requiring a real estate license (i.e., brokerage) are performed at a location, it may be construed to be an office. *What acts require a real estate license?* What constitutes "brokerage" is found within the law's definition of a broker. Paraphrased, G.S. 93A-2(a) defines a "**broker**" as:

1) any person, partnership, corporation, limited liability company, association, or other business entity who
2) for compensation or valuable consideration or promise thereof
3) does any of the following related to any real estate or the improvements thereon
   - lists or offers to list,
   - sells or offers to sell,
   - buys or offers to buy,
   - auctions or offers to auction (excluding a "mere crier of sales"),
   - leases or offers to lease,
   - sells or offers to sell leases of whatever character,
   - rents or offers to rent, or
   - negotiates the purchase or sale or exchange of real estate
4) ***for others***.

The simple test to determine whether a license is required in any given transaction is: does the transaction involve:

1) the temporary or permanent transfer of an interest in real property,
2) for others,
3) for compensation, consideration or the promise thereof.

If the answer to all three questions is "yes," then an active North Carolina real estate license is required as the conduct constitutes real estate brokerage activity. If the answer to any one of the three questions is "no," then the activity may not require a license as it wouldn't be real estate brokerage. While the statute lists eight situations that are exempt from licensure requirements, the one brokers most commonly will encounter relates to property management and will be discussed shortly.

2) Where Trust Monies are Handled or Records Maintained

The second prong of the definition was added to address the situation where a very large company has multiple office locations, each with its own broker-in-charge. Consider, for example, a real estate company with ten offices where real estate brokerage activities are performed. Additionally, the company has an administrative center at an eleventh location where there are no affiliated brokers, because the company doesn't represent the public or engage in "acts that require a license" at that location. However, all the trust monies and trust account-related records for all ten office locations are funneled through the administrative center, since all book-keeping is done at this location, i.e., paying the operating expenses for each office, issuing commission checks, paying salaried employees, etc.. *Even though no brokerage activity occurs at this administrative center, the company still must designate a broker-in-charge for that location because trust monies are handled and trust records maintained at this one central location, rather than each office managing funds it receives.* ***The BIC's primary, if not sole, responsibility at this administrative center will be to supervise all employees handling trust monies and maintain the trust account records.*** [The ten other offices must each have a broker-in-charge because agents at those locations are actively engaged in real estate brokerage, i.e., meeting the public and discussing available properties for lease, sale, purchase or exchange.]

Factors in Determining if a Location is an Office

The Commission has identified the following factors as criteria it would consider in determining whether a licensee has an office.

(1) Does the location's address appear in advertising, on business cards or letterhead, or in the Commission's records?

(2) Do licensees use the location on an ongoing basis to meet the public to perform some aspect of customary brokerage service?

(3) Does the location operate on a permanent, or at least indefinite, basis with regular hours?

(4) Is the location regularly staffed by licensees?

(5) Are files and records, such as trust account records and transaction files, maintained there?

(6) Is the location designed and furnished to facilitate the regular conduct of brokerage business, e.g., desks, computers, copy machines, telephones, conference rooms, etc.?

NOTE: *Not all of these factors must be present before a location will be deemed an office* and some factors may be given greater weight than others. For example, the following factors generally demonstrate that a location is an "office" under Commission rules:

- if a physical address is printed on the company's letterhead, its agents' business cards and appears in the company's advertising,

  and
- when the public goes to that address, one or more licensees are available to discuss current properties for lease or sale,

and

- the company's transaction files and, if applicable, trust account records are maintained at that address/location.

Must a company, whether an entity with a firm license or a sole proprietorship, have a brick-and-mortar storefront office?

Regardless of whether the broker chooses to create an entity and obtain a firm license, or operate as a sole proprietorship, *if that company is offering to represent others in real estate brokerage transactions, then it* ***must have an office somewhere****, even if it's in the broker-owner's home.* This ***does not mean*** that the office must be a public meeting space. The Commission has never required a licensee to have a public meeting space. Within the bounds established by License Law, Commission rules, and other applicable law, how a broker chooses to engage in brokerage is up to the broker. The majority of offices currently designated with the Real Estate Commission (i.e., having a BIC) are the only office that the company maintains, and most of those companies only have 1-3 licensees affiliated with the company.

While a broker is *not required to publish any physical office address* in advertisements or on business cards or letterhead, the broker nonetheless will have an office somewhere — a base of operations where s/he keeps transaction files, does research, contacts clients, updates websites, etc., and the Commission needs to know where that space is if it wishes to visit. ***Understand that you cannot have an "office" without having an officially designated BIC of that office on Commission records!*** A licensee creates an office by sending a BIC Declaration form (REC 2.04) to the Commission designating a broker as BIC for that location.

Know too that a *broker who chooses to have his/her office in the home* and not publicize that address, *must still request designation as a broker-in-charge at the home address* on Commission records, but may now provide the Real Estate Commission with an additional "***delivery address***" that is a post office box and instruct the Real Estate Commission to publish only the delivery address on the Commission's website, rather than the physical address.

"Virtual" Offices (VO)

Understand that *an independent broker who offers to provide real estate brokerage services to consumers must be a broker-in-charge of him or herself, if s/he is not affiliated with a company where there is a broker-in-charge*. A sole practitioner may very well have his/her office in the home, since so much of real estate brokerage is meeting consumers at their locations or public places. Nonetheless, there are times when a conference room or office may be needed to meet clients or customers, but not on a full-time office lease basis. One option might be to have a "virtual office." This term refers to an arrangement where the broker leases conference or meeting room space on an occasional or as-needed basis in a furnished office environment where the broker may meet clients or customers when not meeting them in their homes or other public place.

If a broker works primarily from home, but also occasionally leases conference room/office space, where is his/her office? A virtual office *is* a brick-and-mortar physical space. The broker can't declare him/herself broker-in-charge at both locations, as one broker may only

be a broker-in-charge at one location. Each case is reviewed on its own facts, but *generally, the broker's true office is his/her home*. Factors that might influence the analysis include:

- How frequently does the broker use the meeting/office space?
- Is the meeting space used as the address on business cards and in advertising?
- If the public visits that location are they greeted by a receptionist who may take messages?
- Where does the broker receive postal mail?
- Does a telephone number provided on business cards or advertising (in addition to the broker's cell phone) ring into the meeting space location?
- Where does the broker maintain his/her transaction files and trust account records ?

The more these factors are present, the more it would appear that the broker is attempting to hold out to the public that the meeting space is his/her office.

Virtual Office *Websites*

Unlike a virtual office which is a physical place, a virtual office *website* is a presence on the internet that may or may not allow interaction with consumers. Whether the site is an Internet Data Exchange (IDX) website or a virtual office website (VOW), both are ethereal — there is no physical brick-and-mortar location to visit. In such a case, ***the independent broker who is actively representing consumers will have his/her office in his/her home*** *unless s/he leases office space elsewhere.*

The following excerpt from an article titled "Agency Disclosure & Agreement Requirements" in the Commission's *2009-2010 Real Estate Update* course materials briefly recaps the distinction between an IDX and VOW according to the National Association of REALTORS®. The entire article may be found on the Commission's website under "Publications" and then "Update/BICAR."

Internet Sites and Virtual Office Website (VOWs)

With the advent of modern technology, many licensees now display listings on an internet website or **virtual office website** (VOW), so long as they have the requisite consent. Websites that allow a consumer to view available properties for lease or sale (generally the latter), but do not require any registration or the "capturing" of any information about the consumer are considered brokerage advertising forums and may be referred to as **Internet Data Exchanges** (IDXs). The only activity occurring at such sites is the sharing of information (data) about various properties. According to the "Frequently Asked Questions on the VOW Policy and the Model VOW Rules" published by the National Association of REALTORS®, the ***distinction between an IDX and a VOW is as follows***:

> Q.9.1: *An IDX site is considered advertising* — and listing brokers' consent is required before another broker may advertise the other brokers' listings. *A VOW is considered online brokerage*. Listing brokers' consent is not required to display on a VOW any listing otherwise available to MLS participants and subscribers for Internet display.... A website that offers online MLS listing searching capability that does not comply with the detailed requirements of the VOW policy is, by definition, an IDX site. [Emphasis added.]

"Virtual Office Website" Operated by REALTOR® Members

While many websites may be IDXs, some IDXs may also have a feature that allows a consumer to cross-over and visit a broker at his/her "virtual office" to gain even more information about a property. What then makes a website a "virtual office website" as opposed to an IDX? **NAR's VOW Policy** (the "Policy") defines a **virtual office website** in Section I.1 as follows.

> For purposes of this Policy, the term Virtual Office Website ("VOW") refers to a Participant's Internet website, *or a feature of a Participant's Internet website,* through which the Participant is capable of providing real estate brokerage services to consumers ***with whom the Participant has first established a broker-consumer relationship (as defined by state law)*** where the consumer has the opportunity to search MLS data, subject to the Participant's oversight, supervision, and accountability. [Emphasis added.]

> The policy continues in Section II.1 to require:
> A Participant may provide brokerage services via a VOW that include making MLS active listing data available, *but only to consumers with whom the Participant has first established a lawful consumer-broker relationship,* including completion of all actions required by state law in connection with providing real estate brokerage services to clients and customers (hereinafter "Registrants"). *Such actions shall include, but are not limited to, satisfying all applicable agency, non-agency, and other disclosure obligations, and execution of any required agreement(s).* [Emphasis added.]

The primary distinctions between an IDX and a VOW thus seem to be: 1) the attempt to provide brokerage services via the website, versus merely displaying information, and 2) the level or depth of the information provided. What information may be displayed on an IDX versus a VOW often is governed by the rules of the applicable MLS. Generally, feeds for IDX purposes have fewer fields or screens and may only display information found on the property data listing sheet. Many more informational fields and/or property statuses may be shown on a VOW, including information such as days on market, and closed, pending, contingent, expired, and withdrawn listings. Whatever MLS information could be shared with a consumer in a brick-and-mortar office may be communicated via a VOW (but *not* an IDX).

The point for this discussion is that while an independent broker may conduct the majority of his/her real estate brokerage online, interacting with consumers and providing all required disclosures and agreements electronically, that ***broker must declare him/herself a BIC at his/her home***, unless s/he has a brick-and-mortar office elsewhere.

Other Scenarios

A mall kiosk?

A real estate company rents a small kiosk in the main aisle of a shopping mall where the company displays photos of its listings and other available properties. The company's name appears at the top of the kiosk and its affiliated brokers share rotating shifts at the kiosk that is

staffed most afternoons and some weekends for a few hours each day at different times, depending on the agents' availability. During these shifts, the licensees are handing out their business cards, greeting the public, answering questions and promoting their and the company's listings and services. The kiosk is minimally furnished and has no private meeting rooms. Would this "space" rise to the level of an office and require a broker-in-charge?

A model home?

#1: A real estate company is hired by a builder/developer to market a subdivision twenty miles away from the company's office on Fourth Street. There is a model home at the subdivision that is used principally to display floor plans and quality of construction, but generally is not staffed by agents. The advertising for the subdivision gives the company's address and telephone number at Fourth Street and all files relating to the subdivision lots are kept at the Fourth Street location.

Under this scenario, would the model home be an "office" under Commission rules that needs a broker-in-charge?

#2: What if:

- the advertising for the subdivision gives the company's name and phone number for the Fourth Street office, but the address of the model home, and
- agents from the Fourth Street office staff the model home from 10am-7:00pm daily, and
- copies of information regarding available lots and homes and working files are kept at the model home, but the original files are at the Fourth Street office and are regularly updated by agents after each shift at the model home?

Under this scenario, would the model home be an "office" under Commission rules that should have a broker-in-charge?

#3: What if:

- the advertising for the subdivision has the company's name, but the address of the model home and the advertised telephone number rings directly into the model home, and
- the model home is always staffed by agents whenever it is open, and
- all the original records and files related to properties in that subdivision are kept at the model home, rather than Fourth Street, and
- in addition to the model home being furnished, the company, for agents' convenience, installs a dedicated secure wireless modem, a desk, and a combined printer/copier/scanner.

Under this scenario, would the model home be an "office" under Commission rules that should have a broker-in-charge?

Mall kiosk: Hopefully it is apparent that the mall kiosk is not an office as defined in Rule A.0110(a). The company is promoting its services and its agents at that location and inviting the public to visit them at the office address on the business cards. There are no transaction files maintained at the kiosk nor is there a physical address or telephone number for the kiosk.

Model Home #1: In the first example, the model home has not become a branch office that requires a broker-in-charge. The public is being directed to the office on Fourth Street, all files ad records are at the Fourth Street office, the model home is not regularly staffed by agents and is not furnished with office-type equipment.

Model Home #2 & #3: In the second and third examples, the model home comes increasingly closer to being a branch office as defined in Rule A.0110(a). In both cases, the company in its advertising is directing the public to the model home address, rather than the office on Fourth Street, and when the public visits the model home there is always a broker onsite to discuss various lots for sale and building options. However, in the second example, the public is calling the Fourth Street office for information, the files and information at the model home are duplicate files with the originals regularly updated at the Fourth Street office, and the model home has not been furnished with a wireless modem or other equipment to facilitate brokerage activity. Nonetheless, it is a close call.

In the third example, the model home has crossed most of the lines. The advertising is directing the public to the model home exclusively with no mention of the Fourth Street office, there are agents onsite whenever the model home is open, the records and files for the properties are kept in the model home, and the model home has been equipped to facilitate brokerage activities. In this instance, the model home most likely is a branch office for which a broker-in-charge should be designated. Each situation is evaluated on a case by case basis.

The need to have a broker-in-charge for the model home increases if the model home is staffed primarily by provisional brokers. Why? Because provisional brokers won't be on active status and can't engage in brokerage activity unless they have a broker-in-charge and the ***broker-in-charge is responsible for directly and actively supervising provisional brokers in all brokerage activity***. (See Rule A.0506.) Thus, provisional brokers have considerably less autonomy and ability to work independently than brokers not on provisional status (sometimes referred to as "full" brokers). While full brokers may be allowed more latitude, the *broker-in-charge still must supervise non-provisional brokers in five areas*: 1) active license; 2) agency disclosure and agreements; 3) advertising; 4) transaction files; and 5) trust monies.

How can a broker-in-charge effectively supervise his/her provisional brokers and full brokers when they operate at a location more than twenty miles from the broker's main office? If full brokers are staffing the model home, why not ask one of them to become broker-in-charge at that location until the subdivision is sold, and then the company could close that branch location and all agents could return to the Fourth Street office? *While the company would remain civilly liable for the acts of all of its associated agents at any location, the broker-in-charge at the Fourth Street office would not have to answer to the Commission concerning conduct at the model home,* ***so long as*** *a broker-in-charge was designated at the model home/branch office*.

If no broker-in-charge is required/designated at the model home/branch office, then the broker-in-charge of any licensees rotating through or staffing the remote location will remain responsible for supervising all affiliated agents in all brokerage activity wherever conducted.

Rental Office in an Apartment Complex

What about a broker who has been hired to manage an apartment complex? *License Law provides a limited exception for brokers who are managing property for others*; the broker (or brokerage company) may hire unlicensed *salaried* (W-2) employees to assist the broker in leasing and managing that property (commercial or residential) so long as the employee stays within the parameters of G.S.93A-2(c)(6): they may show units, accept rental applications, complete and sign preprinted form leases *without* negotiating lease terms or amounts of deposits, accept security deposits or monthly rent payments, etc. This is ***legal unlicensed activity***. While the broker must be a BIC at some location, the broker-employer is *not* required to have a broker-in-charge physically at the apartment complex (or office building or retail center) because *no acts are being performed there that require a real estate license*. (**NOTE:** the major question and liability is how does the BIC-broker-employer ensure that all monies received by his/her onsite unlicensed W-2 employees make it into the trust account?)

Condominium/Association Leasing or Sales

What if a broker has been hired to lease property for multiple owners or engage in sales for more than one owner-client, such as in a condominium complex or an association? The broker must have an office somewhere as negotiating lease terms and selling real estate do require a real estate license. For example, an owners' association enters into a written agency agreement with a broker to collect the periodic dues and assessments and pay certain expenses on behalf of the association. Additionally, various owners enter into written agency agreements with the broker to either lease or sell their units. While association management is still an unregulated activity, the Commission has long required brokers who are handling association funds to treat those monies as trust monies and if a broker must have a trust account, s/he must also be a BIC or must be affiliated with an office where there is a BIC who would be responsible for overseeing the trust account. Further, managing property for others and helping others buy, sell or exchange property requires an active real estate license and thus is brokerage. If this broker is working independently, unaffiliated with any other real estate company, then s/he must declare him/herself as a BIC, whether as a sole proprietor or as a licensed entity. The broker's office may be either: 1) in his/her home ***or*** 2) at a work space in the Association complex, if provided, ***or*** 3) in a leased brick-and-mortar space, but *the broker may only be BIC at one location* and should apply the factors discussed above in making that decision.

RECOMMENDED LISTING PRACTICES

As noted earlier, the majority of real estate companies, whether licensed entities or sole proprietorships, are relatively small operations. Approximately two-thirds only have one office and over half of those have only one broker who also is the BIC and, if an entity, the qualifying broker. In these companies, the broker-in-charge/qualifying broker/owner are all one and that person dictates office policy. A broker who serves as broker-in-charge for a larger company with multiple offices may *not* be the person who creates company policy, but must know and understand office policies and procedures in order to enforce them at his/her location. Whether the BIC is permitted to supplement or require his/her associated agents to do more than official office policy depends on the company.

That said, one of the many issues that should be addressed in any office policy is: ***what constitutes a complete listing file prior to marketing any property?*** In other words, what information and documents does the company/BIC require a broker to gather *before* the property may be advertised in any forum? The Commission ***strongly recommends*** that companies require agents to **get a copy of the current Deed to the property** in addition to whatever other documents and information a broker must gather, such as the Residential Property and Owner Association Disclosure Statement and the broker's square footage calculations if stating square footage in any advertising or information about the property. The reason should be apparent — to confirm who holds title to the property and thus has the authority to sell. This also should be the person or entity named as the owner/seller in any listing agreement entered into between the consumer and the real estate company.

It is surprising the number of people who think they own the property, when either they don't, or there are additional owners, or they own it as an entity, rather than in their individual names. *Having a copy of the most recent deed in the transaction file prior to marketing the property usually confirms the owner's identity and both the owner's ability to enter into a listing agreement and to sell the property*. The current owner should have at least a copy, if not the original, deed. If not, most North Carolina Register of Deeds now have both deeds and deeds of trust available online that usually aren't difficult to find with a little training.

> *Example:* Broker entered into a listing agreement with the apparent owner who was the only named person on both the promissory note and Deed of Trust and listed the property in the MLS. Offers were received and the property went under contract. When performing the title search, the buyer's closing attorney learned that the property was actually titled in the name of two persons, one of whom had not signed the offer to purchase and contract. The attorney notified the listing agent, who then inquired of his client, who acknowledged that she had in fact transferred title to herself and her former partner, who had no liability on the mortgage. The former partner was incarcerated and the two were no longer speaking.
>
> The broker wanted to know what he should do? The broker ultimately had to withdraw the listing, because his client didn't have the ability to convey marketable and insurable title to any buyer. Until the client either gained the incarcerated co-owner's cooperation, whether by a power of attorney, or a quitclaim deed or some other mechanism or legal proceeding, she could not sell the property.

Red Flags

Brokers should be aware of at least three situations that should raise red flags and give the broker pause when undertaking to list a property. These situations include:

1) property coming out of an estate;
2) property owned by separating or divorcing spouses; and
3) property owned by a trust.

1) Property Coming out of an Estate

Recall that not all property passes through an estate upon the death of one owner: title to property that is owned by spouses as *tenants by the entirety* and property owned as *joint tenants with right of survivorship* will automatically vest in the surviving owners. Absent a survivorship feature, when an owner dies, whether one of several tenants in common or the last sole owner, then his/her ownership interest is part of his/her estate and must go through probate. Someone must petition the Court to initiate probate proceedings; if the decedent died testate, then the person named as executor or executrix will be appointed by the Court to oversee probate of the estate; if the decedent died without a will (intestate), then a person must be appointed as administrator by the Court to oversee the disposition of the estate.

Don't assume that the executor or administrator has the authority to sell any real property. *Title to real property vests automatically by operation of law in the heirs at the decedent's death*, even though there is no written evidence of the heirs' ownership at that point. ***The heirs are the "owners" of the property and are the persons who should sign a listing agreement***. Once filed, a Last Will and Testament is public record. If the Will gives the Executor the right to liquidate/sell any real property without the heirs' consent, then the listing agreement would be with the estate and executor. Administrators may not have such authority under state law. Reviewing the probate court file should reveal who the heirs are. Understand further the following:

- If any heirs are married, the signature of each spouse will be required to transfer marketable title to a buyer; accordingly, a prudent broker would include both the heir and his/her spouse as owners in the listing agreement and obtain the signatures of both on the listing agreement.

- If any heirs are *minors* (less than 18 years of age), then a guardian must be appointed for them (generally a parent, if living) who is authorized to consent to a conveyance, since the minor lacks legal capacity to enter into a contract to sell.

A broker who is uncertain about who has what legal rights to sell or lease inherited property and receive the proceeds therefrom, should seek legal advice from a competent attorney. Preferably, the *attorney's advice should be in writing and the broker should retain a copy of the lawyer's opinion in the transaction file*.

2) Property Owned by Separating/Divorcing Spouses

A company that is approached to market a property where the owners are going through a separation and/or divorce might want to ask a few questions before deciding whether to take the listing where title is still in both names or the marital interest of the non-titled spouse has not been released. Why? Because the consent and signatures of both the husband and the wife will likely be required on any deed of conveyance and preferably on the listing agreement as well. Suggested inquiries include:

1) Are the parties speaking to and cooperating with each other or are they hostile and adversarial?

2) Do both spouses support and voluntarily agree to sell the property?

3) Is there a court order or have the parties entered into a written agreement pertaining to the listing and sale of the property including: a) the choice of broker, b) the list price, c) the listing period, d) any obligation to accept an offer that is within a stated range of the list price, and e) adjustments to the list price during the listing period?

   Example: A broker was contacted about a potential listing where the parties had recently separated after nearly thirty years of marriage. The alleged cause was the husband's philandering with the wife's (former) best friend who worked with the husband. The parties had resolved their various marital issues in a written agreement that gave the wife the right to live in the property for three years with the husband paying the monthly mortgage as alimony, but also allowed the parties to agree to sell the property anytime during that three year period. The parties' written agreement failed to establish any parameters for the sale, leaving it to the parties to agree. The broker interviewed the husband and wife separately as to the potential listing, since they weren't speaking to each other and couldn't be in the same room.

How likely is it that the wife would cooperate and accept any offer to purchase when she has the right to live in the property for three years? Does a company want to invest the time, energy and resources to market a property under these circumstances or is it an exercise in futility, particularly since the parties' separation agreement/property settlement didn't establish any guidelines for the sale?

3) <u>Property Owned by a Trust</u>

Sometimes owners, in doing estate planning, decide to convey property titled in their individual name into a trust, whether revocable or irrevocable. Alternatively, an owner may provide in his/her Last Will and Testament that real property be held in trust for the benefit of a named person or persons. The terms of the trust instrument will disclose how much authority and discretion the trustee has to manage and/or sell trust assets. Thus, *when property is held by a trust*, whether by deed, Will, or other written trust instrument, ***a broker should request a copy of the trust instrument to discover the scope of the trustee's authority and who has the authority to sell the property***.

<u>Disciplinary Case:</u>

This was one of several issues in a recent disciplinary case in which a broker, who was the broker-in-charge and qualifying broker for her company, entered into a listing agreement in December 2010 for property that had been deeded to the "Smith Family Trust" by the financially-distressed owners in September 2010. The *trustee* named in the trust instrument *was an individual* ("Harry"). Harry also owned a South Carolina entity ("XYZ") that had no interest in the property. *The broker never requested a copy of the trust instrument*, relying instead on the attorney's oral assurance that the trustee (Harry) had the authority to sell the property.

The broker never met nor had any conversations with Harry or the original owners who had created the Smith Family Trust. Her dealings were with a person affiliated with a loss mitigation company (a totally separate company from Harry's company, XYZ). The broker

entered into a listing agreement with XYZ as owner/seller to market the property, rather than with Harry as trustee of the Smith Family Trust, and the listing agreement with XYZ was signed by an individual who worked with the loss mitigation company, rather than someone affiliated with XYZ. Thus, the alleged listing agreement was invalid because the named "seller," XYZ, had no ownership interest in the property nor was it the named trustee of the Smith Family Trust, and the person signing the listing agreement was not affiliated with XYZ in any way. The broker also used a mix of residential and commercial agency forms, even though it was a residential transaction.

While the broker secured potential buyers who entered into a lease with option to purchase agreement prepared by the attorney who handled XYZ's closings, they ultimately lost the property two years later when they stopped paying the agreed rental and a latent foreclosure action that had been pending for seven years was revived. No one had mentioned the foreclosure action to the buyers at any time. The buyer-optionees filed a complaint against the broker with the NCREC as well as a complaint with the NC State Bar against the attorney. The Commission's investigation revealed several mitigating factors, including that the broker would not have been able to discover the dormant, but pending, foreclosure and the attorney had told her it had been dismissed. However, for her utter failure to speak personally with either the owners or the trustee or to request a copy of the trust document and some verification as to who had the authority to list and sell the property, (in addition to using the wrong agency forms), the broker entered into a Consent Order under which she would be reprimanded unless she completed specified education before a stated date, in which event the case would be dismissed..

Moral of the story: when property is titled in the name of a trust, prudent brokers will request a copy of the trust instrument to confirm who has the authority to do what. If the broker either can't obtain a copy of the trust instrument, or can't understand what they receive, *the broker should confer with an* ***attorney of the broker's choice*** *for an opinion regarding who has the legal authority to enter into agreements concerning the property and under what conditions, if any.* It is not recommended that a broker rely solely on an oral statement, whether by an attorney or another, that someone has the authority to sell a property without seeing the underlying documents to confirm that authority.

PERIODIC RENEWAL & REPORTING REQUIREMENTS

There are several matters that a BIC must attend to under federal and/or state law and Commission rules. The following list is provided as a *starting point* of various matters BICs should periodically check, but ***it is neither comprehensive nor exhaustive***. Brokers-in-charge are urged to obtain advice from attorneys and other professionals about their legal obligations and to supplement this list as suits their needs.

Trust Account Oversight

- Perform or review the monthly trust account reconciliation and confirm that:
  the reconciled bank statement equals the journal balance that equals the trial balance.

- Periodically check to assure that the bank continues to print "Trust Account" or "Escrow Account" on all *checks, deposit tickets and bank statements* for any and all trust accounts, particularly after re-ordering more checks or deposit tickets.

Sales and Use Taxes

- If applicable, ensure that quarterly sales and use tax has been paid to the NC Department of Revenue, if the broker is managing or leasing either vacation rentals, long-term residential properties or commercial properties.

Employer/Employee Issues

- If the broker has any hourly or salaried employees, the broker must be familiar with the North Carolina Wage and Hour Act administered by the Wage and Hour Bureau of the NC Department of Labor. Information and fact sheets may be found at http://www.nclabor.com/wh/wh.htm.

  The company must withhold federal and state income tax and FICA from their employees' earnings and forward it quarterly to the IRS and NC Department of Revenue. The company will also be required to contribute to both the worker's compensation fund and unemployment compensation fund for all salaried or hourly employees. If a company doesn't want to handle all of the legal and reporting aspects related to salaried or hourly employees, the company could consider hiring a payroll service company to perform the record-keeping and reporting functions or use employees provided by a personnel staffing agency. [**NOTE:** Unlicensed employees supplied by a staffing agency could **not** engage in onsite leasing on behalf of the broker, as *only the salaried (W-2) employees **of a broker** are eligible for the G.S. 93A-2(c)(6) exception*.]

- Pursuant to federal tax regulations, companies must have *written independent contractor agreements* with all associated licensees and that *agreement must clearly state that "**the individual will not be treated as an employee with respect to such services for Federal tax purposes***." Although the company is not required to withhold and remit taxes or FICA for any of its independent contractors, it still ***must document all compensation paid to any broker and timely file Form 1099-MISC with both the IRS and NC Department of Revenue annually***. More information on this topic may be found in the article "Employment Issues" from the *2012-2013 BICAR* Course available on the Commission's website under "Publications" and "Update/BICAR Topics."
  See www.ncrec.gov/Pdfs/bicar/EmploymentIssues.pdf .

Annual Renewals

The broker-in-charge is responsible for assuring that any licensees under his/her supervision:

- timely complete the correct Update course and a REC approved elective by June 10;
- timely complete any required postlicensing each year, if a provisional broker (in addition to required CE);
- pay the $45 license renewal fee by June 30;

If an affiliated licensee fails to maintain an active license for any reason, the broker-in-charge may not allow that licensee to engage in any brokerage activity until the license is back on active status.

While the broker-in-charge is not responsible by rule for the renewals below, s/he should check these matters as well to assure that the company is operating in compliance with other applicable laws or rules. The BIC should:

- remind all licensees to pay the privilege license fee (currently $50) to the NC Dept of Revenue;
- confirm that the qualifying broker timely pays the $45 renewal fee for the firm's license;
- file a business personal property tax listing by January 31 if required by a governmental unit.
- check the Secretary of State's website, Corporations Division, to confirm that the entity has filed an Annual Report and remains in good standing. [**Note:** failure to file an Annual Report for two or more years may result in the entity being administratively dissolved by the Secretary of State. This means *the entity no longer is authorized to do business in NC*. The Commission will cancel an entity's firm license if it learns that the entity is not in good standing with the NC Secretary of State Corporations Division.]