

2022-2023 General Update Course

Section 2

Dual Agency: Who Do You Represent?



“The Undisclosed Pitfall”

Sam and Melissa are affiliated brokers with ABC Homes. Sam meets with Lucas, a prospective seller, and Lucas enters into a listing agreement with ABC Homes. He does not agree to dual agency. Lacy, a buyer-client, enters into a written buyer agency agreement with Melissa, but dual agency is not discussed.

Lacy views the property owned by Lucas and is interested in making an immediate offer on the property.

- **Can Sam and Melissa legally practice dual agency in this transaction? YES/NO Why or why not?**
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LEARNING OBJECTIVES

After completing this section, you should be able to:

- explain the basic requirements of Commission Rule 58A .0104;
- define dual agency;
- describe how to legally practice dual agency;
- explain designated dual agency;
- list an advantage of designated dual agency; and
- identify some policies a BIC should consider before allowing the practice of designated dual agency in the firm/company.

TERMINOLOGY

Agency Concepts

- **Agency:** The relationship that exists when one person or entity is authorized to act for and on behalf of another.
- **Agent:** The person or entity acting for and on behalf of the principal within the bounds of the authority granted and who owes fiduciary (legal) duties to the principal.
- **Principal / Client:** The party who authorizes another (the agent) to act on the principal's behalf within specified parameters and to whom the agent owes certain legal duties.
- **Dual Agency:** The practice of one firm/sole proprietorship representing both the buyer and the seller in the same real estate sales transaction.
- **Designated Dual Agency:** The practice of one brokerage company representing both the buyer and the seller but designating individual brokers to exclusively represent either the buyer's or seller's interest.

NOTE: Commission rules commonly use the term firm. However, these rules apply to firms AND sole proprietorships. According to the BIC Best Practices Guide, a firm may be a corporation, partnership, limited liability company, or any other type of business entity. Also, prior to a firm conducting brokerage activity, a firm license is required. A sole proprietorship is a business that is owned and managed by one individual who is solely responsible for its debts and obligations. A sole proprietorship may have more than one broker associated with their company as well.

AGENT'S FIDUCIARY DUTIES

It is important for brokers to remember that an agency relationship is created when the principal authorizes the agent to act on their behalf. Therefore, we need to review the fiduciary duties that an agent owes a principal before we begin the discussion on dual and designated dual agency.

A *fiduciary* is a person who acts for another in a relationship of trust and who is obligated to act in the other's best interests, including placing the other's interests before their own. Brokers must act as fiduciaries for their principals while conducting brokerage activities.



What are the fiduciary duties owed to a principal?

A fiduciary must:

- be **obedient** to the principal (e.g., follow all lawful directives);
- be **loyal** to the principal;
- **disclose** all facts to the principal that may influence the principal's decision;
- **preserve** all personal, confidential information about the principal that is not a material fact;
- **account** for the funds of the principal; and
- **exercise** skill, care, and diligence in the performance of their duties; and

in addition, all brokers must operate in **good faith** to promote the principal's interests.

In plain words, when a principal employs a real estate broker as an agent, that principal is entitled to receive absolute loyalty and obedience from the agent. This means that the broker cannot advance their own personal, business, or family interests above their principal's interests. The principal's interests must be the top priority of the agent.

Also, the agent may not participate in conduct that will compromise or divide the loyalty they owe to the principal. Basically, the agent cannot participate in activities that will be adverse to the interests of the principal. Also, the agent must comply with all lawful instructions of the principal and ensure they are fulfilling the terms of the agency agreement.

Agency Agreements and Disclosures

Prior to establishing an agency relationship with a principal, a broker must adhere to the requirements set forth in Commission Rule 58A .0104(c). This rule states:

In every real estate sales transaction, a broker shall, at *first substantial contact* with a prospective buyer or seller, **provide** the prospective buyer or seller with a copy of the publication "Working with Real Estate Agents,"... **review** the publication with the buyer or seller, and determine whether the agent will act as the agent of the buyer or seller in the transaction.

It is imperative that the broker *provide and review* the WWREA Disclosure form to the prospective buyer or seller at first substantial contact in all sales transactions (i.e. residential and commercial). The WWREA Disclosure form informs the prospective buyer or seller not to share confidential information before an agency relationship is created. It further educates the consumer on the type of agency options that a firm/company may provide during representation.

After the WWREA Disclosure is provided and reviewed, the consumer has the ability to make an informed decision regarding the type of agency relationship, if any, they would like to enter into with the firm/company.

If the prospective buyer or seller decides against entering into an agency relationship with the broker, the broker does not owe any fiduciary duties to the individual under agency law. For example, if the broker receives any personal, information from the consumer, the information is *not* considered confidential and can be shared with others.



Are agency agreements required to be in writing?

Yes. An agency agreement must:

- be in writing;
 - listing agreements must be in writing before brokerage services are provided
 - buyer agency agreements must be in writing no later than the time one of the parties makes an offer to purchase, sell, rent, lease, or exchange real estate to another
- identify and be signed by all parties and include the broker's license number;
- have a definite termination date on which it automatically expires; and
- contain the fair housing non-discrimination language as stated in Rule 58A .0104(b).

Also, all agency agreements must be *expressed* from the beginning before any brokerage services can be conducted. An *express* agreement means that the agreement, even if oral, includes all of the contractual terms between the parties.



When must an agency agreement with sellers or lessors be in writing?

Rule 58A .0104(a) indicates that brokers may not provide any sales, leasing, or management services for any property owner without having a written agency agreement from the onset of the brokerage relationship.

What if a broker is only providing limited brokerage services? Is an agency agreement required for the limited brokerage services? Yes. It does not matter if the broker is providing full or limited services, the agency agreement must still be executed in writing before the agreed upon services are provided. If the broker does not have a written agency agreement, they may be forfeiting any right to receive compensation.

Also, Rule 58A .0104(a) states that every agency agreement must specify a definite termination date on which the agency agreement will automatically expire. However, an agency agreement (e.g. property management) between a landlord and broker to procure tenants or receive rents for the landlord's property may allow for an automatic renewal so long as the landlord may terminate without notice at the end of the contract period and any subsequent renewals.



When must an agency agreement with buyers and tenants be in writing?

A buyer agency agreement with a buyer/tenant *must* be reduced to writing and signed no later than the time one of the parties makes an offer to purchase, sell, rent, lease, or exchange real estate to another. However, if the policies of a firm/company permit a broker to enter into an oral buyer agency agreement, then the broker may do this initially.

However, oral buyer agency agreements must be express and permit the buyer/tenant to work with other agents for an undetermined time period. In other words, the oral agreement *may not* be exclusive and obligate the buyer/tenant to work only with the firm/company for any period of time. The moment the buyer agency relationship is restricted to a specific time period or to only one brokerage company, the agency agreement must immediately be reduced to writing and signed by all parties.

DUAL AGENCY



“But Everyone Agreed”

Alice, a broker with 123 Realty, enters into an oral buyer agency agreement with Bernice, a buyer-client. Bernice is interested in purchasing two parcels of land listed by 123 Realty. Alice tells Bernice that the seller has provided the firm with written authorization to practice dual agency. She also tells Bernice while reviewing the WWREA Disclosure, that the firm can represent her as a dual agent as well if she agrees to this type of agency representation.

Before agreeing to representation, Bernice asks Alice to explain the concept of dual agency. Alice uses the WWREA Disclosure and *Questions and Answers: on Working with Real Estate Agents* brochure to assist her with answering questions

about dual agency. Bernice verbally agrees to dual agency representation. After the verbal agreement, Alice submits an offer to the sellers on behalf of Bernice.

Did Alice violate License Law and Commission rules? YES/NO?

If so, how? _____



What is dual agency?

Dual agency exists when a firm/company or sole practitioner represents both the interests of the prospective buyer and prospective seller in the same real estate transaction.



Does dual agency always involve only one individual broker representing both buyer and seller in a transaction?

No. There continues to be confusion about how many affiliated brokers of a real estate brokerage company can be actively involved in a dual agency transaction.

Perhaps the clearest illustration of dual agency is a sole practitioner who is responsible for securing a seller-client and then a buyer-client interested in that seller-client's listed property. Most people can quickly appreciate the challenge that a single broker (individual dual agent) would encounter while balancing fair and equal (neutral) representation of both sides without sharing protected confidential client information.

But, recall that dual agency can also be practiced by a single entity. Therefore, a real estate firm can have the listing of a seller-client and also have a buyer agency agreement with a buyer who is interested in that particular listing. If both the buyer and the seller clients authorize dual agency, the firm and ALL of its affiliated brokers are in dual agency with both the seller-client and the buyer-client for this property. The situation could mirror the sole practitioner example above, in that, a single affiliated broker signed up both the seller and buyer clients with each authorizing the broker to serve as the dual agent. It is more likely that one affiliated broker secured the listing of the seller-client and a different affiliated broker created agency with the buyer-client who is interested in the firm's listing.

The fiduciary duties owed in dual agency are not affected whether one or multiple affiliated brokers are involved. Involving a second affiliated broker, does not automatically change the dual agency relationship to designated dual agency. Additional authorization is required from both clients to practice designated dual agency. This will be discussed further in the section.



Is dual agency legal in North Carolina?

Yes. Dual agency is legal in North Carolina as long as both parties (e.g. seller and buyer) have provided written authorization for the agent to represent both parties in the transaction.



“Did I Say Too Much or Too Little?”

Nelson, an agent with See Homes, represents Renee, a seller-client. In the listing agreement, Renee provides written authority for See Homes to practice dual agency. She also tells Nelson that he is not to share any of her confidential information during the transaction. Renee informs Nelson that she has noticed a weird smell coming from the right side of her house. Nelson walks outside to the right of the house and notices puddles of water in the yard. Nelson tells Nancy that it is normal for puddles of water to accumulate during heavy rainfall and the new buyers can easily fix the issue. Nelson lists Renee’s property later that evening and does not include any information about the water puddles in the yard.

Donna, an unrepresented buyer, contacts Nelson and inquires about Renee’s property. During the conversation, Nelson reviews the property details with Donna and the WWREA Disclosure form. Nelson informs Donna that he can represent her in the transaction if she would agree to dual agency representation. Donna agrees to dual agency representation in the written buyer agency agreement. Nelson communicates to Renee that he is now acting as a dual agent in the transaction.

Nelson discloses the material facts to Donna. He further tells her that Renee will accept \$10K less than the list price of the home because she knows the property needs some repairs. A couple of hours later, Donna submits an offer on Renee’s property for \$10K less than the listing price. Nelson reviews the offer with Renee; she accepts the terms of the offer and enters into a contract with Donna.

Did Nelson violate Commission rules? If so, how?



Does a dual agent owe fiduciary duties to both the buyer and the seller clients?

Yes. A dual agent owes the same fiduciary duties to both principals in a transaction. Therefore, a dual agent must ensure that their clients are aware of the responsibilities and fiduciary duties owed by a dual agent and provide their consent for representation.

What if the dual agent is aware of material facts regarding a property? Must the dual agent disclose the material facts? Yes. An agent, whether acting for one client side or both in a transaction, must disclose all facts to their principal that may influence their decision about a property, including material facts. Therefore, a dual agent (just like in any transaction) must disclose material facts to all parties in the transaction, which happens to include both principals. Although material facts must be disclosed to both principals, the dual agent must not disclose confidential information of either client, or advocate for one client over the other during the transaction.

According to the Bulletin article, [Dual Agency: When Is It Appropriate?](#), practicing dual agency lawfully is challenging because the buyer and seller must agree to be represented in an adversarial relationship by the same agent/firm. Therefore, a dual agent must act with a combination of discretion and fairness that can often times be difficult to balance.

Note: Brokers can potentially have more exposure to claims of conflicts of interest when practicing dual agency. The article, [Dual Agency: When Is It Appropriate?](#) is reprinted at the end of this section.



Is it mandatory for sole proprietorships or firms to practice dual agency?

No. A sole proprietorship or firm has the authority to determine the type(s) of agency representation it will offer potential clients.



What is unauthorized dual agency?

Unauthorized dual agency occurs when a broker or brokerage company has an agency agreement to represent one party in a transaction, but also represents another party in the same transaction without the express **written** authority (i.e., authorized dual agency) of each party. Unauthorized dual agency is illegal in North Carolina.



What is required for an agent to legally practice dual agency?

According to N.C. Gen. Stat. § 93A-(6)(a)(4), a licensee violates Real Estate License Law if they act for more than one party in a transaction without the knowledge of all parties for whom they act. Therefore, in order for a broker to legally practice dual agency they are required to obtain **written** authorization at the beginning of the agency relationship. The only *exception* for obtaining written authorization at the start of the relationship is when a buyer or tenant is represented by a broker in an oral agreement in adherence to Rule 58A .0104(a).

Also, as noted before, express **written** authority for dual agency shall be reduced to writing **not later** than the time that one of the parties represented by the broker makes an offer to purchase, sell, rent, lease, or exchange real estate to another party.

What if a broker does not receive written authority to practice dual agency? If a broker represents more than one party in a transaction without the written authority of each party, the broker may be in violation of Commission Rule 58A .0104(d) which specifies:

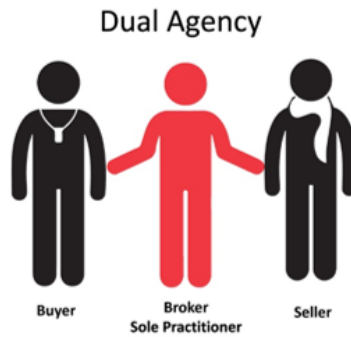
A real estate broker representing one party in a transaction shall not undertake to represent another party in the transaction without the written authority of each party.

Such a violation by a broker may require a forfeiture of any commission or other compensation for participation in the transaction.



Can one agent practice dual agency?

Yes. A sole practitioner or affiliated agent of a firm may practice dual agency and represent both parties in the transaction as long as it is permitted in the office policies.



Note: This diagram shows one broker and/or sole practitioner who works for both the buyer and seller in the same transaction. Both the prospective buyer and prospective seller must consent and provide written authority to the broker and/or sole practitioner to engage in dual agency.



Can different agents within the same firm practice dual agency?

Yes. A firm is practicing dual agency when it represents more than one party in the same transaction. In order for dual agency to be practiced legally, the prospective buyer and seller must both provide written authority for the firm to practice dual agency. Therefore, a broker affiliated with the firm may work directly with the prospective buyer-client and another affiliated broker with the same firm may work directly with the prospective seller-client; both affiliated brokers remain in dual agency with both clients, just like all of the brokers affiliated with the firm.

If one broker in the firm assists the prospective buyer and another broker in the firm assists the prospective seller, isn't it automatically considered designated dual agency? No. If there are two agents affiliated with the same firm representing the buyer and the seller in the transaction, this is considered dual agency. Although the brokers work for the same firm, they have not been designated to represent only the interest of the buyer and/or seller. Designated dual agency does not exist automatically. It is created when the parties provide written authority and the firm's policies permit it.



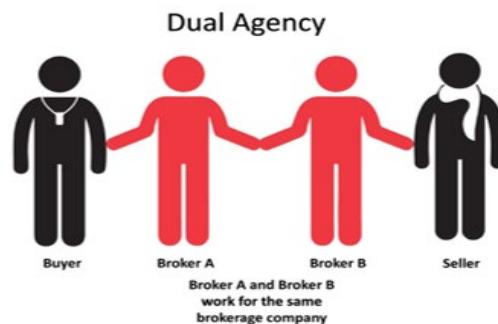
“The Dual Agency Firm”

John and Tasha are brokers affiliated with XYZ Homes. John represents Tim, a seller-client, and Tasha represents, Sara, a buyer-client. Tim and Sara have provided authorization for XYZ Homes and their agents to practice dual agency in the agency agreements.

Sara is interested in purchasing Tim’s property. Tasha informs Sara that she will provide her with all of the seller disclosures, CMA’s, and property information to assist her with making an offer on Tim’s property. Tasha further proceeds to tell Sara that she can not advise her on what offer to submit on the property.

XYZ Homes only practices dual agency. It does not allow the practice of designated dual agency.

Are John and Tasha designated dual agents for Tim and Sara, respectively? YES/NO



NOTE: This diagram is an example of the most common form of dual agency. This example displays two brokers who are both affiliated with the same firm and/or company. Broker A is working directly with the buyer and Broker B is working directly with the seller. The firm and/or company and all of its brokers represent both the buyer and the seller. The brokers have divided loyalty between the buyer and seller. Both the prospective buyer and seller must consent and provide written authority for the firm and/or company to engage in dual agency.



Can dual agents share confidential information with either principal?

No. A dual agent must treat buyers and sellers fairly and equally and cannot help one party gain an advantage over the other party. Dual agents owe both their clients the same fiduciary duties and must not divulge confidential information about either party to the other without prior permission.



Can a dual agent reduce potential conflicts of interest by fully explaining their duties and obligations owed to each client?

Yes. A dual agent can reduce potential conflicts of interest by explaining the fiduciary duties they owe to each principal while practicing dual agency. Additionally, if a client is not comfortable with the firm representing both parties from the neutral dual position, the firm can offer designated dual agency representation as an option if it is offered by the firm. Both principals would have to approve designated dual agency representation.

NOTE: Designated dual agency cannot be practiced by a sole practitioner.



“The Errors of Latrice’s Ways”

Latrice, a broker with A+ Realty, lists her residential property with her firm. Latrice completes all seller disclosures and marks *“No Representation”* on the *Residential Property and Owners’ Association Disclosure Statement*.

Sarah, an unrepresented buyer, is interested in Latrice’s property. Latrice informs Sarah that she owns the property but can still represent her during the transaction if she provides Latrice with her written, informed consent. Sarah signs the written buyer agency agreement and provides written authority for A+ Realty to practice dual agency.

Latrice and Sarah view the property. During the walk through, Latrice provides Sarah with information regarding the property such as the seller disclosures she completed and a Comparative Market Analysis for the area. Latrice also makes Sarah aware that she cannot advise her on what price to offer because she is acting as a dual agent.

Sarah tells Latrice that her pre-approval amount is \$417,000, and states that this is also the price she wants to offer for the property. Latrice completes the **Standard Form 2-T, Offer to Purchase and Contract** using the information provided by Sarah. Upon completing the offer, Latrice signs it and enters into a contract with Sarah.

Sarah closes on the property within 30 days.

What errors, if any, did Latrice make during this transaction?



Can a broker selling their own residential property act as a dual agent and represent a buyer in the transaction?

No. According to Rule 58A .0104(o), a broker who is selling property in which the broker has an ownership interest shall not undertake to represent a buyer of that property. Reality check: how can the seller-broker not share the buyer-client's confidential information with themselves?!



Can a broker selling their own commercial property act as a dual agent and represent a buyer in the transaction?

It depends. A broker who is selling commercial real estate as defined in Rule 58A .1802, in which the broker has *less* than 25% ownership interest, may represent a buyer of that property if the buyer consents to the representation after full written disclosure of the broker's ownership interest. If the broker has *more* than a 25% ownership interest in the property, then they cannot represent a buyer in the transaction.



Can a firm/company act as a dual agent for a property listed by an affiliated broker-owner?

Yes. A firm/company may act as a dual agent for a property listed by an affiliated broker as long as the broker representing the buyer on behalf of the firm does not have an ownership interest in the property. The buyer must also consent to the representation after full written disclosure of the affiliated broker's ownership interest in the listed property.

DESIGNATED DUAL AGENCY

Designated agency is a subcategory of dual agency. Subsections (j)-(m) of Rule 58A .0104 authorizes real estate firms to engage in an optional form of dual agency known as designated agency, in certain sales transactions involving in-house dual agency.

Designated dual agency involves appointing or “*designating*” individual broker(s) in a firm to represent only the interests of a seller and other individual broker(s) in the same firm to represent only the interests of a buyer in a transaction.



“How Many Wrongs Make a Right?”

Stephanie, the BIC of XYZ Homes, designates Frank to represent Stacey, the seller-client and Donnell to represent Chris, the buyer-client, after both principals provide written authorization for designated dual agency. Prior to being designated dual agents, neither Frank nor Donnell have prior confidential information about the principals. Further, Stephanie reminds Frank and Donnell not to share any confidential information about their clients without the clients’ permission.

The next day, Frank and Donnell are having a conversation. Frank tells Donnell that his client, Stacey, will accept any amount over the asking price because she has to catch up on her past due alimony payments.

Did Frank violate Commission rules? YES/NO If so, how?

Should Donnell inform Chris of the information he learned from Frank? YES/NO

Why or why not?

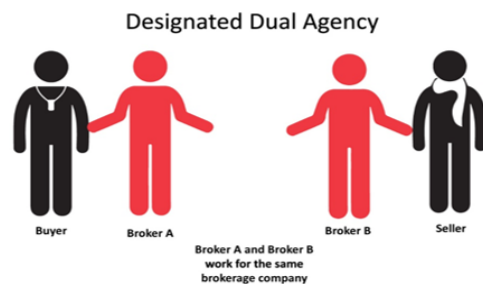


What is designated dual agency?

Designated dual agency exists when both the buyer and seller clients provide written authorization for the firm/company that represents them both to designate one or more individual brokers to represent only their interests during the transaction. In other

words, one or more brokers represent only the interests of the seller-client, and one or more brokers represent only the interests of the buyer client.

Although the buyer and seller are both clients of the same firm/company, the buyer has a designated agent and the seller has a designated agent. Therefore, the designated agents represent **only** the interests of their respective clients. Be aware that an individual broker cannot be designated and represent only the interests of one party if the broker has received prior confidential information concerning the other party in the transaction.



NOTE: This diagram displays a space between Broker A and Broker B. Broker A and Broker B work for the same firm and/or company and the firm/company represents both the buyer and seller in the same transaction. However, Broker A has loyalty only to the buyer and Broker B has loyalty only to the seller.



When is authorization required for designated dual agency?

Pursuant to Rule 58A .0104(d), the written authority for designated dual agency shall be reduced to writing not later than the time the parties are required to reduce their dual agency agreement to writing.

Remember, the written authority for dual agency must be obtained at the formation of the relationship except when a buyer or tenant is represented by a broker without a written agency agreement. Under such circumstances, the written authority for dual agency shall be reduced to writing not later than the time that one of the parties represented by the broker makes an offer to purchase, sell, rent, lease, or exchange real estate to another party.

Note: If the buyer agency agreement is in writing from the outset of the agency relationship, then both the listing agreement and buyer agency agreement need to include written authorization for dual and/or designated dual agency before any in-house listings can be shown.

NOTE: Both parties **must** request designated dual agency in the written agreements before it can be practiced.



What is an advantage of designated dual agency?

The advantage of designated dual agency over standard dual agency is that each of the firm's clients (seller and buyer) receive representation more like single agency than dual agency.

In the typical dual agency situation, client advocacy is lost because the dual agent may not advocate for one client to the detriment of the other client.

This leads to the dual agent remaining impartial at all times. However, designated dual agency allows agents to fully represent the interests of their respective clients, allowing agents to advise their clients during the transaction.



Can a sole practitioner practice designated dual agency?

No. A sole practitioner is one broker; therefore, one broker cannot practice designated dual agency. Designated dual agency requires one or more brokers to be designated to represent only the interests of the seller and one or more other brokers to be designated to represent only the interests of the buyer.



Must a firm/company practice designated dual agency?

No. A firm/company has the ability to determine what type(s) of agency representation they will offer to prospective clients.



What is required for a firm/company to practice designated dual agency?

In order for a firm/company and its affiliated brokers to legally engage in designated dual agency, the designated brokers must NOT know confidential information about the opposing parties prior to designation. In other words, the agent being designated for the buyer must not have/know confidential information about the seller, and vice versa.

If a brokerage company would like to have affiliated brokers eligible to offer designated dual agency, it would be in the company's best interest to publish policies that support the confidentiality of information about the company's clients. For example, a company policy might limit the sharing of any client's confidential information to only affiliated brokers that legally need to know the information. This policy would minimize the

possibility of a broker not being eligible for designation because they already possess confidential information about one of the sides of the transaction.

NOTE: According to Rule 58A .0104(m), a broker designated to represent a buyer or seller shall disclose the identity of all of the brokers so designated to both the buyer and the seller. The disclosure shall take place no later than the presentation of the first offer to purchase or sell.



Is designated dual agency automatic when two brokers from the same firm each represent the buyer-client and seller-client?

No. If there are two agents affiliated with the same firm representing the buyer and seller in the transaction, this is considered dual agency. Although the two agents work for the same firm/company, they have not been *designated* to represent only the interests of the buyer or seller. Designated dual agency does not exist *automatically* unless it is stated in the written office policies *and* written authority is provided by the client.



“Here We Go Again”

Lisa and Stan are brokers with ABC Realty. Tom and Mary are clients of the firm and have authorized ABC Realty to practice dual agency and requested the firm to designate brokers to represent each of their respective interests. The BIC of ABC Realty has designated Lisa to represent Tom, the seller-client, and Stan to represent Mary, the buyer-client.

Lisa lists Tom’s property for \$875,000. Mary is interested in purchasing Tom’s property and Stan submits an offer on Mary’s behalf.

While advocating for their respective clients, Stan informs Lisa that Mary needs to purchase a property quickly because she needs to start a new job. Therefore, she is willing to offer more to entice Tom to accept her offer if necessary. Lisa is shocked by Stan’s comment and begins to walk towards the BICs office.

Has Stan violated Commission rules? YES/NO _____

Why or why not? _____



Can a broker practicing designated dual agency share confidential information about their client?

No. A designated dual agent is required to act only in the best interests of their client and this includes ensuring confidential information is not shared with anyone, including the opposing designated party, without permission.

Pursuant to Rule 58A .0104 subsections (k) and (l), the broker so designated shall not, without their client's permission, disclose to the other party or the broker designated to represent the other party:

- (1) that a party may agree to a price, terms, or any conditions of sale other than those offered;
- (2) the motivation of a party for engaging in the transaction, unless disclosure is otherwise required by statute or rule; and
- (3) any information about a party that the party has identified as confidential, unless disclosure is otherwise required by statute or rule.

What if a designated dual agent acquires confidential information about the firm's other principal (e.g., the opposing party) after being designated? Should the designated dual agent disclose this information to their principal? Yes. Designated dual agency allows a broker to exclusively represent a designated principal's interests including advocating on their behalf and advising them during the transaction. If a broker learns confidential information post-designation about the designated principal's opponent, who is also the firm's principal, the broker would need to share this information with their designated principal.

Although, the designated agent must inform their principal of the information they have acquired post-designation, the brokerage company may incur civil liability and/or be subject to disciplinary action due to the poor handling of confidential information of their other principal.

NOTE: Rule 58A .0104(k) and (l) prohibits a designated dual agent from disclosing information about their designated principal which does not rise to the level of material facts to the company's opposing principal (or designating agent for the opposing principal) without the consent of the broker's own designated principal.

In order to prevent improper disclosure of confidential information in designated dual agency transactions, a BIC should have office procedures and policies in place to maintain the confidentiality of client information.



Can designated dual agents be full or provisional brokers?

Yes. Designated dual agents may be full or provisional brokers pursuant to Commission rules. However, a BIC cannot act as the designated agent for a party in a real estate sales transaction when a provisional broker under their supervision acts as a designated agent for another party. A firm/company may have a policy that prohibits the practice of designated dual agency by specific agents.



“The BIC & the PB”

Mary, a consumer, contacts ABC Homes to inquire about a property listed by the firm. Victoria, a provisional broker, answers the call. After Victoria provides and reviews the *Working with Real Estate Agents Disclosure*, Mary decides that she wants Victoria to represent her in the transaction and enters into a written buyer agency agreement authorizing designated dual agency.

Before showing the property to Mary, Victoria speaks to Jamie, the BIC, about Mary’s interest and desire for designated dual agency. Since there are only the two of them in the firm, Jamie tells Victoria that she will be the designated agent for Mary and he will be the designated agent for Alan, the seller-client. Jamie also assures Victoria that any information she submits in the transaction file will not be disclosed to Alan although Jamie still has to review it.

Did Victoria violate Commission rules? YES/NO Why or why not?

Did Jamie violate Commission rules? YES/NO Why or why not?



Can a BIC practice designated dual agency?

Yes. A BIC can be a designated broker for a party in a real estate sale transaction. However, a BIC cannot act as the designated agent for a party in a real estate sales transaction when a provisional broker under their supervision acts as a designated agent for another party with a competing interest according to Rule 58A .0104(j).

In the Commission article, [BICs and Designated Dual Agency Transactions - Room for Conflicts!](#), the Commission states a best practice for BICs is to not represent a party in

a designated dual agency situation. Basically, if BICs adopt this practice it can reduce the chance that a BIC may violate Commission rules for either:

- failing to maintain and review transaction records, or
- learning confidential information about the other party and using or (failing to use) that confidential information to the advantage of their client in a designated dual agency situation.

If a BIC decides to represent a party in a designated dual agency transaction, the BIC must establish policies and procedures to ensure compliance with the Commission's rules. The BIC should also designate another broker in the office to collect and review records from the transaction. This will prevent the BIC who is a designated dual agent from having access to confidential information about the other party in the transaction.

It may also provide comfort to the other designated dual agents that they can provide records in compliance with Rule 58A .0108(d) and not have their client's confidential information inappropriately shared with the other party in a designated dual agency transaction.



“There is a Difference”

West is a broker affiliated with 123 Homes. West is contacted by Joe, a prospective seller, because he is interested in listing his property. Joe enters into a listing agreement with West at the conclusion of the listing presentation. In the listing agreement, Joe authorizes 123 Homes to practice dual agency and requests specifically designated dual agency.

West has been working with Fran, a buyer-client. Fran previously provided 123 Homes authorization to practice dual agency in the buyer agency agreement. However, West does not discuss designated dual agency as an option with Fran. West informs Fran that the firm just acquired a new listing and that she may be interested in purchasing this type of property. Fran views the property with West and decides to submit an offer.

West submits and reviews the offer with Joe. Joe agrees with the terms of the offer and enters into a contract with Fran. Prior to settlement, Joe reviews the contract again and realizes that West acted as a dual agent for both parties. Joe calls West and indicates his anger and dissatisfaction with West also representing Fran in the transaction.

Did West violate Commission rules? YES/NO Why or why not?



What should a BIC consider before allowing the practice of designated dual agency in their firm/company?

A BIC should consider developing written office policies to determine how:

- information will be shared,
- files will be managed, and
- confidential information will be protected and not distributed to designated agents of opposing parties.

For example, the BIC should determine how much information, if any, would be shared about a property at an office meeting. If the BIC allows information to be shared that relates to the property only, then the likelihood of an agent extracting personal, financial, or confidential information about a client during the meeting may be substantially reduced.

SUMMARY OF IMPORTANT POINTS

- Brokers must act as fiduciaries for their principals while conducting real estate transactions.
- A fiduciary must:
 - be obedient to the principal (e.g., follow all lawful directives);
 - be loyal to the principal;
 - disclose all facts to the principal that may influence the principal’s decision;
 - preserve all personal, confidential information about the principal that is not a material fact;
 - account for the funds of the principal; and
 - exercise skill, care, and diligence in the performance of their duties; and
 - operate in good faith to promote the principal’s interests
- An agent cannot advance their own personal, business, or family interests above their principal’s interests.
- An agent must comply with all lawful instructions of the principal that are consistent with the terms of the agency agreement.
- In every real estate sales transaction, a broker shall, at *first substantial contact* with a prospective buyer or seller, *provide* the prospective buyer or seller with a copy of the publication “Working with Real Estate Agents,”... *review* the publication with the buyer or seller, and determine whether the broker will act as the agent of the buyer or seller in the transaction.
- An agency agreement must:
 - be in writing;
 - listing agreements must be in writing before brokerage services are provided
 - buyer agency agreements must be in writing no later than the time one of the parties makes an offer to purchase, sell, rent, lease, or exchange real estate to another
 - identify and be signed by all parties and include the broker’s license number;
 - have a definite termination date on which it automatically expires; and
 - contain the fair housing non-discrimination language as stated in Rule 58A .0104(b).
- All agency agreements must be *express* from the beginning before any brokerage services can be conducted.
- An express agreement means that the agreement includes all of the terms of the agreement between the parties.
- Oral buyer agency agreements must be express and permit the buyer/tenant to work with other agents for an undetermined time period.
- A buyer agency agreement with a buyer/tenant *must* be reduced to writing before the presentation of any offer being made or received by the buyer/tenant.

- If a firm/company or sole practitioner represents more than one party in the same real estate transaction, this is considered dual agency.
- Dual agency is legal in North Carolina as long as both parties (e.g., seller and buyer) have provided written authority for the agent to represent both parties in the transaction.
- A dual agent owes the same fiduciary duties to both the principals in the transaction.
- The dual agent must disclose material facts, but must not disclose confidential information, or advocate for one client over the other.
- It is not mandatory that a firm/company or sole practitioner practice dual agency.
- Unauthorized dual agency occurs when a broker or brokerage firm has an agency agreement to represent one party in a transaction but also represents another party in the same transaction without the express *written* authority (i.e., authorized dual agency) of each party.
- Express authority for dual agency shall be reduced to writing not later than the time that one of the parties represented by the broker makes an offer to purchase, sell, rent, lease, or exchange real estate to another party.
- A sole practitioner or affiliated agent of a firm/company may practice dual agency as long as it is permitted by the office policies.
- A dual agent must treat buyers and sellers fairly and equally and cannot help one party gain an advantage over the other party.
- A dual agent can reduce potential conflicts of interest by explaining their fiduciary duties while practicing dual agency with both their buyer and seller clients.
- According to Rule 58A .0104(o), a broker who is selling property in which the broker has an ownership interest shall not represent a buyer of that property.
- Designated agency is a subcategory of dual agency. It involves appointing or “*designating*” individual agent(s) in a firm or sole proprietorship to represent only the interests of the seller and other individual agent(s) to represent only the interests of the buyer in the same transaction.
- Express written authorization for designated dual agency must be obtained from both parties by the time any oral buyer agency agreement is reduced to writing, which is required prior to any offers being made or received.
- The principal advantage of designated dual agency is that each of the firm’s clients (seller and buyer) receive representation that is more like single agency than dual agency.
- Rule 58A .0104(k) and (l) prohibits a designated dual agent from disclosing information about their designated principal which does not rise to the level of material facts to the company’s opposing principal, or designating agent for the opposing principal, without the consent of the broker’s own designated principal.
- Designated agents may be full or provisional brokers pursuant to Commission rules.

- A BIC can be a designated agent for a party in a real estate sale transaction as long as the designated agent for the opposing party is not a provisional broker under that BIC's supervision.

ANSWERS TO DISCUSSION QUESTIONS

For Discussion on Page 55

“The Undisclosed Pitfall”

Sam and Melissa are affiliated brokers with ABC Homes. Sam meets with Lucas, a prospective seller, and Lucas enters into a listing agreement with ABC Homes. He does not agree to dual agency. Lacy, a buyer-client, enters into a written buyer agency agreement with Melissa, but dual agency is not discussed.

Lacy views the property owned by Lucas and is interested in making an immediate offer on the property.

Can Sam and Melissa legally practice dual agency in this transaction? YES/NO Why or why not?

Answer: No. Sam and Melissa cannot legally practice dual agency. Dual agency is legal in North Carolina as long as both parties (e.g. Lucas and Lacy) have provided written authorization for the agents to represent both parties in the transaction. Lucas did not provide written authorization for dual agency and Melissa did not even discuss dual agency with Lacy. Therefore, if Sam and Melissa proceed to represent Lucas and Lacy in this transaction, they are participating in unauthorized dual agency. Unauthorized dual agency occurs when a broker or brokerage company has an agency agreement to represent one party in a transaction but also represents another party in the same transaction without the express written authority (i.e., authorized dual agency) of each party. Unauthorized dual agency is illegal in North Carolina.

For Discussion on Page 59

“But Everyone Agreed”

Alice, a broker with 123 Realty, enters into an oral buyer agency agreement with Bernice, a buyer-client. Bernice is interested in purchasing two parcels of land listed by 123 Realty. Alice tells Bernice that the seller has provided the firm with written authorization to practice dual agency. She also tells Bernice while reviewing the WWREA Disclosure, that the firm can represent her as a dual agent as well if she agrees to this type of agency representation.

Before agreeing to representation, Bernice asks Alice to explain the concept of dual agency. Alice uses the WWREA Disclosure and *Questions and Answers: on Working with Real Estate Agents* brochure to assist her with answering questions

about dual agency. Bernice verbally agrees to dual agency representation. After the verbal agreement, Alice submits an offer to the sellers on behalf of Bernice.

Did Alice violate License Law and Commission rules? YES/NO? If so, how?

Answer: Yes. According to Rule 58A .0104(a) and (d), Alice needed to ensure that the buyer agency agreement authorizing dual agency was reduced to writing prior to Bernice's submission of an offer on the property. It is not sufficient that Bernice initially entered into an oral buyer agency agreement and provided verbal authorization for dual agency. Because Alice did not reduce the buyer agency agreement and dual agency authorization to writing prior to the submission of an offer by Bernice, Alice may be in violation of Commission rules and may forfeit her rights to any compensation.

For Discussion on Page 61

“Did I Say Too Much or Too Little?”

Nelson, an agent with See Homes, represents Renee, a seller-client. In the listing agreement, Renee provides written authority for See Homes to practice dual agency. She also tells Nelson that he is not to share any of her confidential information during the transaction. Renee informs Nelson that she has noticed a weird smell coming from the right side of her house. Nelson walks outside to the right of the house and notices puddles of water in the yard. Nelson tells Nancy that it is normal for puddles of water to accumulate during heavy rainfall and the new buyers can easily fix the issue. Nelson lists Renee's property later that evening and does not include any information about the water puddles in the yard.

Donna, an unrepresented buyer, contacts Nelson and inquires about Renee's property. During the conversation, Nelson reviews the property details with Donna and the WWREA Disclosure form. Nelson informs Donna that he can represent her in the transaction if she would agree to dual agency representation. Donna agrees to dual agency representation in the written buyer agency agreement. Nelson communicates to Renee that he is now acting as a dual agent in the transaction.

Nelson discloses the material facts to Donna. He further tells her that Renee will accept \$10K less than the list price of the home because she knows the property needs some repairs. A couple of hours later, Donna submits an offer on Renee's property for \$10K less than the listing price. Nelson reviews the offer with Renee; she accepts the terms of the offer and enters into a contract with Donna.

Did Nelson violate Commission rules? If so, how?

Answer: Yes. As a dual agent, Nelson owes both principals, Renee and Donna, fiduciary duties. Nelson must also disclose material facts to all

parties in the transaction. In addition, he must disclose all non-confidential information to both principals to ensure they are able to make an informed decision about how they would like to proceed in the transaction.

However, during this transaction, Nelson informed Donna that Renee would accept \$10K less than the list price due to the material facts. As a dual agent, Nelson cannot disclose confidential information (e.g., price, conditions of sale, etc.) for either principal according to Rule 58A .0104(n). Further, Renee advised Nelson not to share any confidential information. Nelson was required to treat Renee and Donna fairly and equally and should not have helped Donna gain an advantage over Renee.

For Discussion on Page 65

“The Dual Agency Firm”

John and Tasha are brokers affiliated with XYZ Homes. John represents Tim, a seller-client, and Tasha represents, Sara, a buyer-client. Tim and Sara have provided authorization for XYZ Homes and their agents to practice dual agency in the agency agreements.

Sara is interested in purchasing Tim’s property. Tasha informs Sara that she will provide her with all of the seller disclosures, CMA’s, and property information to assist her with making an offer on Tim’s property. Tasha further proceeds to tell Sara that she can not advise her on what offer to submit on the property.

XYZ Homes only practices dual agency. It does not allow the practice of designated dual agency.

Are John and Tasha designated dual agents for Tim and Sara, respectively? YES/NO

Answer: No. John and Tasha are two agents affiliated with XYZ Homes. Although John represents Tim and Tasha represents Sara, this is considered dual agency. John and Tasha have not been designated by their BIC to represent only the interests of Tim and Sara, respectively. Designated dual agency does not exist automatically unless it is stated in the written office policies.

For Discussion on Page 66

“The Errors of Latrice’s Ways”

Latrice, a broker with A+ Realty, lists her residential property with her firm. Latrice completes all seller disclosures and marks “No Representation” on the *Residential Property and Owners’ Association Disclosure Statement*.

Sarah, an unrepresented buyer, is interested in Latrice's property. Latrice informs Sarah that she owns the property but can still represent her during the transaction if she provides Latrice with her written, informed consent. Sarah signs the written buyer agency agreement and provides written authority for A+ Realty to practice dual agency.

Latrice and Sarah view the property. During the walk through, Latrice provides Sarah with information regarding the property such as the seller disclosures she completed and a Comparative Market Analysis for the area. Latrice also makes Sarah aware that she cannot advise her on what price to offer because she is acting as a dual agent.

Sarah tells Latrice that her pre-approval amount is \$417,000, and states that this is also the price she wants to offer for the property. Latrice completes the **Standard Form 2-T, Offer to Purchase and Contract** using the information provided by Sarah. Upon completing the offer, Latrice signs it and enters into a contract with Sarah.

Sarah closes on the property within 30 days.

What errors, if any, did Latrice make during this transaction?

Answer: According to Rule 58A .0104(o), Latrice violated Commission rules when she represented Sara as a buyer agent in the transaction. Under Commission Rule 58A .0104(o), Latrice cannot represent Sara due to having ownership interest in the property. Although Latrice and Sara provided A+ Realty authorization to practice dual agency; another broker affiliated with A+ Realty without an ownership interest in the property would have to represent Sara with the purchase of Latrice's property. Also, Sara must be given a full written disclosure of Latrice's ownership interest in the property and consent to the representation by the affiliated broker of A+ Realty.

For Discussion on Page 68

"How Many Wrongs Make a Right?"

Stephanie, the BIC of XYZ Homes, designates Frank to represent Stacey, the seller-client and Donnell to represent Chris, the buyer-client, after both principals provide written authorization for designated dual agency. Prior to being designated dual agents, neither Frank nor Donnell have prior confidential information about the principals. Further, Stephanie reminds Frank and Donnell not to share any confidential information about their clients without the clients' permission.

The next day, Frank and Donnell are having a conversation. Frank tells Donnell that his client, Stacey, will accept any amount over the asking price because she has to catch up on her past due alimony payments.

Did Frank violate Commission rules? YES/NO If so, how?

Answer: Yes. Frank is designated to represent the exclusive interest of Stacey, and should not have disclosed any confidential information to Donnell without Stacey's permission pursuant to Rule 58A .0104(k). Frank may have violated the Commission rule on two points when he informed Donnell that Stacey would agree to any price over asking and that she is past due on her alimony payments.

Should Donnell inform Chris of the information he learned from Frank? YES/NO

Why or why not?

Answer: Yes. Donnell should inform Chris of the information that he has learned from Frank. Designated dual agency allows agents to fully represent the interests of their respective clients, including advising and advocating on their behalf. If a designated agent learns confidential information after becoming designated, they have an obligation to represent their clients' interest to the best of their ability and disclose.

The listing broker and firm may be liable due to the disclosure of confidential information by Frank; however, Donnell has an obligation to inform Chris of this information.

For Discussion on Page 71

“Here We Go Again”

Lisa and Stan are brokers with ABC Realty. Tom and Mary are clients of the firm and have authorized ABC Realty to practice dual agency and requested the firm to designate brokers to represent each of their respective interests. The BIC of ABC Realty has designated Lisa to represent Tom, the seller-client, and Stan to represent Mary, the buyer-client.

Lisa lists Tom's property for \$875,000. Mary is interested in purchasing Tom's property and Stan submits an offer on Mary's behalf.

While advocating for their respective clients, Stan informs Lisa that Mary needs to purchase a property quickly because she needs to start a new job. Therefore, Mary is willing to offer more to entice Tom to accept her offer if necessary. Lisa is shocked by Stan's comment and begins to walk towards the BICs office.

Has Stan violated Commission rules? YES/NO Why or why not?

Answer: Yes. Stan may have violated Commission rules if he disclosed Mary's confidential information without her permission to Lisa. As a designated dual agent, Stan is not allowed to share any confidential information regarding Mary (e.g., willingness to pay more for the property or her starting a new job) to Lisa without Mary's permission under Rule 58A .0104(l).

For Discussion on Page 73

“The BIC & the PB”

Mary, a consumer, contacts ABC Homes to inquire about a property listed by the firm. Victoria, a provisional broker, answers the call. After Victoria provides and reviews the *Working with Real Estate Agents Disclosure*, Mary decides that she wants Victoria to represent her in the transaction and enters into a written buyer agency agreement authorizing designated dual agency.

Before showing the property to Mary, Victoria speaks to Jamie, the BIC, about Mary’s interest and desire for designated dual agency. Since there are only the two of them in the firm, Jamie tells Victoria that she will be the designated agent for Mary and he will be the designated agent for Alan, the seller-client. Jamie also assures Victoria that any information she submits in the transaction file will not be disclosed to Alan although Jamie still has to review it.

Did Victoria violate Commission rules? YES/NO Why or why not?

Answer: Yes. Victoria may be in violation of Commission Rule 58A .0104(j) if she acted as a designated dual agent for Mary, a buyer-client while her BIC Jamie acted as a designated dual agent for Alan, the seller-client. According to Commission Rule 58A .0104(j), a BIC cannot be the designated dual agent in a transaction where a provisional broker under their supervision represents a competing party as a designated dual agent.

Did Jamie violate Commission rules? YES/NO Why or why not?

Answer: Yes. As a BIC, Jamie cannot be a designated dual agent in a transaction where a provisional broker under his supervision is representing a competing party in the same transaction as a designated dual agent. Jamie is responsible for supervising Victoria’s transactions. Therefore, Jamie would be able to see confidential information regarding Victoria’s designated principal when he reviews the transaction file. Furthermore, since the firm is a two-person firm, with only a BIC and a provisional broker, designated dual agency should not be practiced due to the likelihood that Commission Rule 58A .0104(j) may be violated.

Also, if Jamie is considering practicing designated dual agency, he should ensure that he creates office policies regarding file maintenance, preservation of confidential information, and have additional brokers affiliated with the firm.

For Discussion on Page 74

“There is a Difference”

West is a broker affiliated with 123 Homes. West is contacted by Joe, a prospective seller, because he is interested in listing his property. Joe enters into a listing agreement with West at the conclusion of the listing presentation. In the listing agreement, Joe authorizes 123 Homes to practice dual agency and requests specifically designated dual agency.

West has been working with Fran, a buyer-client. Fran previously provided 123 Homes authorization to practice dual agency in the buyer agency agreement. However, West does not discuss designated dual agency as an option with Fran. West informs Fran that the firm just acquired a new listing and that she may be interested in purchasing this type of property. Fran views the property with West and decides to submit an offer.

West submits and reviews the offer with Joe. Joe agrees with the terms of the offer and enters into a contract with Fran. Prior to settlement, Joe reviews the contract again and realizes that West acted as a dual agent for both parties. Joe calls West and indicates his anger and dissatisfaction with West also representing Fran in the transaction.

Did West violate Commission rules? YES/NO Why or why not?

Answer: Yes. West may be in violation of Commission rules when he did not adhere to the type of agency representation that Joe had authorized in the listing agreement. Joe authorized West and 123 Homes to practice designated dual agency. However, West practiced dual agency by representing buyer-client, Fran, with the purchase of Joe’s property.

West failed to adhere to his fiduciary duties and follow the seller’s lawful instructions to only practice designated dual agency. Therefore, West may be subject to disciplinary action by the Commission, be liable for breach of contract, and/or forfeit claims to compensation.

Dual Agency: When Is It Appropriate?

In brief, dual agency is appropriate in a sales transaction only when it is agreed to - in writing - by fully informed sellers and buyers.

One of three types of agency representation (see box), dual agency arises when a firm is representing both the sellers and buyers in an in-house sale situation.

Practicing dual agency lawfully is challenging because the sellers and buyers must agree to be represented in an adversarial relationship by the same agent. A dual agent who must act with a combination of discretion and fairness that can be difficult to balance.

Although the laws and rules by which dual agency is practiced have not been reviewed to any significant extent by the courts, theoretically a dual agent owes the full range of agency duties to both principals. This creates practical problems for the dual agent regarding such matters as disclosure of material facts (especially confidential information about a client) and advocating for clients.

Thus, a broker's ability to provide full representation of the client may be compromised to some extent. By entering into dual agency without the full understanding and consent of both clients, a broker may unfairly deprive those clients of the level of service they expect to receive. Additionally, brokers can potentially have more exposure to claims of conflicts of interest when practicing dual agency.

To alleviate the conflicting responsibilities of dual agency, the North Carolina Association of REALTORS® has developed agency contract forms which place limits on the disclosure by a dual agent of information relating to any party's motivation, possible agreement to price, terms or other conditions, or any information identified as confidential. The contract forms also include an acknowledgment by the client that the agent will not act as an advocate for or exclusive representative of the client. Whether this form or another is used, all brokers are required by the Commission's rules to reduce their dual agency agreements to writing with the seller from the outset and with the buyer before one of the parties makes an offer.

Designated agency (a modified form of dual agency), is defined in rules adopted by the Real Estate Commission. It gives each client exclusive representation from an individual broker, while still allowing the firm to represent all of its clients. Remember, a broker-in-charge should never act as a designated agent in a situation where the other designated agent is a provisional broker under his or her supervision. The broker-in-charge loses his or her ability to supervise or assist a provisional broker in such a situation.

An agent who lists his or her own property, or property belonging to the firm, should refrain from acting as a dual agent when selling that property, as there are inherent conflicts of interest in offering one's own personal property for sale and then attempting to represent a buyer in the transaction as well.

What about the case of an unrepresented buyer or seller - can a broker work with him or her while solely representing another party? Yes, so long as the broker reviews and has the unrepresented party sign the *Working With Real Estate Agents* brochure, disclosing in writing that the broker will represent only his or her client (buyer or seller) in the transaction. Remember, there is no requirement that both the buyer and seller have broker representation

in a transaction. An agent can work with an unrepresented buyer or seller as a customer, and still fully represent his or her client.

What if a previously unrepresented buyer or seller tells the listing broker that he or she would now like representation in an ongoing transaction where the listing broker has already disclosed that he or she represents only the interests of the seller? The broker's client may object, considering the information that the client has previously given the broker about his personal situation and/or desire for exclusive representation. If the parties do not consent to Dual Agency at that point, the listing broker should refer the unrepresented party to an outside broker/firm for buyer representation.

All parties in the transaction deserve the best representation possible. Agents should remember to consider the interests of their clients first and determine which form of agency best suits their needs.

Agency Refresher

Clients may choose:

- Exclusive Representation - both the broker and the firm represent only one client in the transaction, to the exclusion of all others;
- Dual Agency - the firm and its agents may represent both the buyer and seller in a transaction; and
- Designated Dual Agency - the firm represents both the seller and buyer via one agent designated exclusively as the seller's agent, and another agent designated exclusively as the buyer's agent, with each agent representing only the interests of their designated client.

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21 NCAC 58A .0104 AGENCY AGREEMENTS AND DISCLOSURE

(a) Every agreement for brokerage services in a real estate transaction and every agreement for services connected with the management of a property owners association shall be in writing and signed by the parties thereto. Every agreement for brokerage services between a broker and an owner of the property to be the subject of a transaction shall be in writing and signed by the parties at the time of its formation. Every agreement for brokerage services between a broker and a buyer or tenant shall be express and shall be in writing and signed by the parties thereto not later than the time one of the parties makes an offer to purchase, sell, rent, lease, or exchange real estate to another. However, every agreement between a broker and a buyer or tenant that seeks to bind the buyer or tenant for a period of time or to restrict the buyer's or tenant's right to work with other agents or without an agent shall be in writing and signed by the parties thereto from its formation. A broker shall not continue to represent a buyer or tenant without a written, signed agreement when such agreement is required by this Rule. Every written agreement for brokerage services of any kind in a real estate transaction shall be for a definite period of time, shall include the broker's license number, and shall provide for its termination without prior notice at the expiration of that period, except that an agency agreement between a landlord and broker to procure tenants or receive rents 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 period and any subsequent renewals. Every written agreement for brokerage services that includes a penalty for early termination shall set forth such a provision in a clear and conspicuous manner that shall distinguish it from other provisions of the agreement. For the purposes of this Rule, an agreement between brokers to cooperate or share compensation shall not be considered an agreement for brokerage services and, except as required by Rule .1807 of this Subchapter, need not be memorialized in writing.

(b) Every listing agreement, written buyer agency agreement, or other written agreement for brokerage services in a real estate transaction shall contain the following provision: "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." The provision shall be set forth in a clear and conspicuous manner that shall distinguish it from other provisions of the agreement. For the purposes of this Rule, the term, "familial status" shall be defined as it is in G.S. 41A-3(1b).

(c) In every real estate sales transaction, a broker shall, at first substantial contact with a prospective buyer or seller, provide the prospective buyer or seller with a copy of the publication "Working with Real Estate Agents," set forth the broker's name and license number thereon, review the publication with the buyer or seller, and determine whether the agent will act as the agent of the buyer or seller in the transaction. If the first substantial contact with a prospective buyer or seller occurs by telephone or other electronic means of communication where it is not practical to provide the "Working with Real Estate Agents" publication, the broker shall at the earliest opportunity thereafter, but in no event later than three days from the date of first substantial contact, mail or otherwise transmit a copy of the publication to the prospective buyer or seller and review it with him or her at the earliest practicable opportunity thereafter. For the purposes of this Rule, "first substantial contact" shall include contacts between a broker and a consumer where the consumer or broker begins to act as though an agency relationship exists and the consumer begins to disclose to the broker personal or confidential information. The "Working with Real Estate Agents" publication may be obtained on the Commission's website at www.ncrec.gov or upon request to the Commission.

(d) A real estate broker representing one party in a transaction shall not undertake to represent another party in the transaction without the written authority of each party. The written authority shall be obtained upon the formation of the relationship except when a buyer or tenant is represented by a broker without a written agreement in conformity with the requirements of Paragraph (a) of this Rule. Under such circumstances, the written authority for dual agency shall be reduced to writing not later than the

time that one of the parties represented by the broker makes an offer to purchase, sell, rent, lease, or exchange real estate to another party.

(e) In every real estate sales transaction, a broker working directly with a prospective buyer as a seller's agent or subagent shall disclose in writing to the prospective buyer at the first substantial contact with the prospective buyer that the broker represents the interests of the seller. The written disclosure shall include the broker's license number. If the first substantial contact occurs by telephone or by means of other electronic communication where it is not practical to provide written disclosure, the broker shall immediately disclose by similar means whom he or she represents and shall immediately mail or otherwise transmit a copy of the written disclosure to the buyer. In no event shall the broker mail or transmit a copy of the written disclosure to the buyer later than three days from the date of first substantial contact with the buyer.

(f) In every real estate sales transaction, a broker representing a buyer shall, at the initial contact with the seller or seller's agent, disclose to the seller or seller's agent that the broker represents the buyer's interests. In addition, in every real estate sales transaction other than auctions, the broker shall, no later than the time of delivery of an offer to the seller or seller's agent, provide the seller or seller's agent with a written confirmation disclosing that he or she represents the interests of the buyer. The written confirmation may be made in the buyer's offer to purchase and shall include the broker's license number.

(g) The provisions of Paragraphs (c), (d) and (e) of this Rule do not apply to real estate brokers representing sellers in auction sales transactions.

(h) A broker representing a buyer in an auction sale transaction 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 disclosing that he or she represents the interests of the buyer. The written confirmation may be made in the written agreement.

(i) A firm that represents more than one party in the same real estate transaction is a dual agent and, through the brokers associated with the firm, shall disclose its dual agency to the parties.

(j) When a firm represents both the buyer and seller in the same real estate transaction, the firm may, with the prior express approval of its buyer and seller clients, designate one or more individual brokers associated with the firm to represent only the interests of the seller and one or more other individual brokers associated with the firm to represent only the interests of the buyer in the transaction. The authority for designated agency shall be reduced to writing not later than the time that the parties are required to reduce their dual agency agreement to writing in accordance with Paragraph (d) of this Rule. An individual broker shall not be so designated and shall not undertake to represent only the interests of one party if the broker has actually received confidential information concerning the other party in connection with the transaction. A broker-in-charge shall not act as a designated broker for a party in a real estate sales transaction when a provisional broker under his or her supervision will act as a designated broker for another party with a competing interest.

(k) When a firm acting as a dual agent designates an individual broker to represent the seller, the broker so designated shall represent only the interest of the seller and shall not, without the seller's permission, disclose to the buyer or a broker designated to represent the buyer:

- (1) that the seller may agree to a price, terms, or any conditions of sale other than those established by the seller;
- (2) the seller's motivation for engaging in the transaction unless disclosure is otherwise required by statute or rule; and
- (3) any information about the seller that the seller has identified as confidential unless disclosure of the information is otherwise required by statute or rule.

(l) When a firm acting as a dual agent designates an individual broker to represent the buyer, the broker so designated shall represent only the interest of the buyer and shall not, without the buyer's permission, disclose to the seller or a broker designated to represent the seller:

- (1) that the buyer may agree to a price, terms, or any conditions of sale other than those established by the seller;
- (2) the buyer's motivation for engaging in the transaction unless disclosure is otherwise required by statute or rule; and
- (3) any information about the buyer that the buyer has identified as confidential unless disclosure of the information is otherwise required by statute or rule.

(m) A broker designated to represent a buyer or seller in accordance with Paragraph (j) of this Rule shall disclose the identity of all of the brokers so designated to both the buyer and the seller. The disclosure shall take place no later than the presentation of the first offer to purchase or sell.

(n) When an individual broker represents both the buyer and seller in the same real estate sales transaction pursuant to a written agreement authorizing dual agency, the parties may provide in the written agreement that the broker shall not disclose the following information about one party to the other without permission from the party about whom the information pertains:

- (1) that a party may agree to a price, terms, or any conditions of sale other than those offered;
- (2) the motivation of a party for engaging in the transaction, unless disclosure is otherwise required by statute or rule; and
- (3) any information about a party that the party has identified as confidential, unless disclosure is otherwise required by statute or rule.

(o) A broker who is selling property in which the broker has an ownership interest shall not undertake to represent a buyer of that property except that a broker who is selling commercial real estate as defined in Rule .1802 of this Subchapter in which the broker has less than 25 percent ownership interest may represent a buyer of that property if the buyer consents to the representation after full written disclosure of the broker's ownership interest. A firm listing a property owned by a broker affiliated with the firm may represent a buyer of that property so long as any individual broker representing the buyer on behalf of the firm does not have an ownership interest in the property and the buyer consents to the representation after full written disclosure of the broker's ownership interest. (p) A broker or firm with an existing listing agreement for a property shall not enter into a contract to purchase that property unless, prior to entering into the contract, the listing broker or firm first discloses in writing to their seller client that the listing broker or firm may have a conflict of interest in the transaction and that the seller-client may want to seek independent counsel of an attorney or another licensed broker. Prior to the listing broker entering into a contract to purchase the listed property, the listing broker and firm shall either terminate the listing agreement or transfer the listing to another broker affiliated with the firm. Prior to the listing firm entering into a contract to purchase the listed property, the listing broker and firm shall disclose to the seller-client in writing that the seller client has the right to terminate the listing and the listing broker and firm shall terminate the listing upon the request of the seller-client.

History Note:

*Authority G.S. 41A-3(1b); 41A-4(a); 93A-3(c); 93A-6(a);
Eff. February 1, 1976; Readopted Eff. September 30, 1977;
Amended Eff. July 1, 2015; July 1, 2014; July 1, 2009; July 1, 2008; April 1,
2006; July 1, 2005; July 1, 2004; April 1, 2004; September 1, 2002; July 1, 2001;
October 1, 2000; August 1, 1998; July 1, 1997; August 1, 1996; July 1, 1995;
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public
interest Eff. May 1, 2018.*