



NORTH CAROLINA REAL ESTATE COMMISSION

Real Estate Bulletin

Volume 24

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Number 4

Commission Staff Update



The Real Estate Commission announces the addition of a new member to its staff, due to a vacancy created in the Audits and Investigations Division

by the retirement of Investigator James K. Clinard.

James E. Hash has been employed as an auditor/investigator to audit trust accounts and investigate complaints against licensees in the eastern and coastal sections of the state. A native of West Virginia, Jim moved to Fayetteville, N.C., in 1973. He is a graduate of Fayetteville State where he earned a degree in business administration; he also has a real estate license. Jim is a retired postal inspector with the U.S. Postal Service. He and his wife Mary Ann reside in New Bern.



The following Commission staff members have made appearances before various real estate industry and related groups since the last issue of the *Bulletin*. Commission Executive Director **Phillip T. Fisher** attended a meeting of the N.C. Association of REALTORS® Board Officers Leadership Conference in Greensboro and updated the officers on various Commission activities...Special Deputy Attorney General **Thomas R. Miller**, the Commission's Legal Counsel,

(continued on page 2)

Commission proposes to adopt and amend rules

The North Carolina Real Estate Commission, pursuant to authority vested in it by the General Statutes of North Carolina, proposes to adopt and amend certain rules contained in Title 21, Chapter 58 of the North Carolina Administrative Code.

In general, the adopted and amended rules would require real estate brokers and salesmen to disclose their agency relationships to parties to real estate sales transactions on a form prescribed by the Commission, and to establish a program of continuing education for persons with **active real estate licenses** as mandated by the North Carolina General Assembly.

Anyone interested in the Commission's proposals may present oral or written comments at a public rule-making hearing to be held at 9:00 a.m. on April 14, 1994, at the Jane S. McKimmon Center, corner of Gorman Street and Western Boulevard, Raleigh, North Carolina. For planning purposes, please notify the Commission at 919/733-9580 prior to the hearing if you plan to attend.

Written comments not presented at the hearing should be delivered by the hearing date to the North Carolina Real Estate Commission, P.O. Box 17100, Raleigh, NC 27619-7100.

This 15th day of March, 1994.

AGENCY CONTRACTS AND DISCLOSURE

Background

In recent years, buyer brokerage has become increasingly popular in the real estate industry and marketplace. This increased popularity has focused more attention on the relationship of real estate brokers and salesmen to buyers and sellers, and whether these buyers and sellers at least generally understand the duties and responsibilities of brokers and salesmen to them.

To better define and explain these broker-client-customer relationships, many state real estate licensing agencies and trade associations have developed disclosure forms for use by real estate agents. The North Carolina Real Estate Commission studied this issue and formed a task force of prominent real estate practitioners and consumers to advise it.

After careful consideration, the task force recommended to the Commission that it adopt rules requiring real estate brokers and salesmen to disclose their relationship to the parties in *residential and commercial sales transactions* on a form mandated by the Commission. The task force developed a model form and made recommendations on its use, emphasizing that the disclosure form and procedures should be meaningful without creating any unnecessary

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REAL ESTATE BULLETIN

Published quarterly as a service to real estate licensees to promote a better understanding of the Real Estate License Law and Rules, and proficiency in ethical real estate practice. The articles published herein shall not be reprinted or reproduced in any other publication without specific reference being made to their original publication in the North Carolina Real Estate Commission Real Estate Bulletin.

NORTH CAROLINA REAL ESTATE COMMISSION

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Editor

Carrie D. Worthington

EXAM RESULTS

| | Passed | Failed |
|---------------|--------|--------|
| October 1993 | | |
| Brokers | 53 | 65 |
| Salesmen | 194 | 215 |
| November 1993 | | |
| Brokers | 83 | 34 |
| Salesmen | 290 | 190 |
| December 1993 | | |
| Brokers | 133 | 87 |
| Salesmen | 491 | 245 |

Commission Staff Update

(Continued from page 1)

discussed agency disclosure, presentation of contracts and related subjects when he addressed the Jacksonville Board of REALTORS®...Deputy Legal Counsel **Miriam J. Baer** spoke on issues relating to real estate agency at the Iredell County Board of REALTORS® Continuing Education Seminar in Statesville and in Spruce Pine when she addressed the Yancey-Mitchell Board of REALTORS®...Associate Legal Counsel **Marilyn E. Tomei** was in Southern Pines for a meeting of the Pinehurst/Southern Pines Board of REALTORS®. She discussed "Do's and

Don'ts in Real Estate" and recent changes in real estate law. Marilyn explained issues involving unlicensed assistants when she spoke to the Hendersonville Board of REALTORS®...and Education and Examination Officer **Earl H. Grubbs** met with Johnston County appraisers at a meeting in Smithfield where he discussed future plans for appraiser licensing and regulation. (Individuals and groups requesting a speaker from the Real Estate Commission are reminded that a "Speaker Request Form" is available from the Commission Office.) □

PUBLICATIONS ORDER FORM

| Publication | No. Copies Requested |
|---|----------------------|
| "Questions and Answers on: Tenant Security Deposits" (Free Brochure) Also available in bulk to property managers to distribute to tenants and landlords. (Orders of more than 100 copies require special consideration.) | |
| "Questions and Answers on: Fair Housing" (Free Brochure) (Orders of more than 100 copies require special consideration.) | |
| "Questions & Answers on: Condos and Townhouses" (Free Brochure) (Orders of more than 100 copies require special consideration.) | |
| "A Buyer's Guide to Vacation Real Estate in N.C." (Free 28-page Booklet) Also available in bulk to coastal and western N.C. real estate firms to distribute to clients and customers. (Orders of more than 50 copies require special consideration.) | |

Firm Name

Phone

Street Address (NOT P.O. BOX)

Send to N.C. Real Estate Commission, P.O. Box 17100, Raleigh, N.C. 27619-7100.

MONTHLY TRUST ACCOUNT SHORT COURSE IN RALEIGH DATES

April 12
June 7

May 10*
July 12

All Raleigh courses start at 1:00 p.m. and end at approximately 4:30 p.m. To register for the course, telephone the Real Estate Commission Office (919-733-9580) at least 10 days prior to the course and ask for the Education Division. Please have your real estate license number (if any) handy! Registrations will be confirmed in writing, giving registrants more detailed information concerning the location of the course.

*Resort Property Management Recordkeeping Course is scheduled for this date. The regular Trust Account Short Course will not be held in May. [Please see the Caravan Registration Form on page 3 of this Bulletin for dates the courses will be held in other cities.]

When does a contract become enforceable?

By: *Miriam J. Baer, Deputy Legal Counsel*

Have you ever been involved in a real estate transaction in which you were not certain whether the parties had a binding contract? Perhaps the buyer and seller had reached an oral agreement when another buyer made an offer on the property. Maybe one of the parties got "cold feet" and wanted to back out of the deal even after signing the contract.

To determine whether parties have an enforceable contract, you must be familiar with two basic concepts of contract law: the Statute of Frauds and the concept of acceptance.

The Statute of Frauds

Every state has a law known as the "Statute of Frauds," which requires certain contracts to be in writing in order to be enforceable. Included in the North Carolina Statute of Frauds are certain long-term leases and *all* contracts for the *sale of land* or any interest in land. To be enforceable, these leases and contracts must also be "signed by the party to be charged"; *i.e.*, the person against whom you want to enforce the contract.

So, if one party has not signed a purchase contract, and has only *orally* agreed to its terms, he or she may not be held to the agreement. This means that if a buyer makes a written, signed offer to which a seller has only *orally* agreed, the agreement is not enforceable. If the seller receives a second offer, he is free to accept it.

The Concept of Acceptance

The second important concept in determining whether you have an enforceable contract is that of "acceptance." Along with "offer" and "consideration," "acceptance" is required in every contract between two or more parties in order for the contract to be legally valid.

Generally, it is easy to determine when you have an "offer" in a real estate transaction. In North Carolina, a buyer usually makes the initial offer in writing, (often on the standard

Offer to Purchase and Contract form), signs the offer and presents it to the seller or the seller's agent.

Likewise, "consideration" - something of value given to induce the other party to enter the contract - is usually not an issue in real estate contracts. Typically, the buyer promises to give money or property to induce a seller to convey real property. (This does not mean that earnest money is required to form an enforceable contract; the parties can form an enforceable contract without the buyer giving earnest money provided the other requirements are met.)

The remaining issue in real estate contracts, then, is the question of whether "acceptance" has occurred.

Only when a contract has been properly accepted does it become enforceable. To achieve a valid acceptance, a contract for the sale of real estate must meet two elements: "signature" and "communication of acceptance."

1. Signature

While a full signature is preferred, any mark will suffice - including initials or even an "x" (for instance, when one of the parties is unable to write) - as long as it is made with the intent of the signer to be bound to the contract. There have even been cases in which a letterhead was considered a sufficient signature for a party.

Similarly, the signature does not

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Caravan Registration Form

Trust Account Short Course and

Resort Property Management Recordkeeping Course

1. These courses are FREE and involve approximately 3½ hours of instruction.
2. Participation is limited to real estate licensees and trust account bookkeepers. (No unlicensed prelicensing students, please.)
3. Registration forms must be received in the Commission Office at least 10 days prior to the course. Registrations will be confirmed in writing giving registrants more detailed information concerning the location of the course.
4. All Caravan Courses start at 9 a.m.

I wish to attend the following Trust Account Short Course:

- | | |
|--|--|
| <input type="checkbox"/> Wilmington (April 20) | <input type="checkbox"/> Charlotte (April 28) |
| <input type="checkbox"/> New Bern (April 21) | <input type="checkbox"/> Greensboro (April 29) |
| <input type="checkbox"/> Asheville (April 27) | <input type="checkbox"/> Nags Head (May 4) |

I wish to attend the following Resort Property Management Trust Account Course:

- | | |
|---|--|
| <input type="checkbox"/> Asheville (April 26) | <input type="checkbox"/> Wilmington (April 19) |
| | <input type="checkbox"/> Nags Head (May 3) |

Name: _____

Address: _____

City _____ Zip _____ Bus. Phone _____

I am a: ☐ real estate licensee ☐ trust account bookkeeper

☐ other _____ Mail to: N.C. Real Estate Commission
P.O. Box 17100, Raleigh, NC 27619-7100

Rules

(Continued from page 1)

burdens on brokers and salesmen.

Concurring with the recommendations of the task force, the Commission has developed a "Disclosure to Buyer from Seller's Agent or Subagent" form for use by real estate agents when working with buyers as agents (or subagents) of the seller; and "Description of Agent Duties and Relationships" language which must be incorporated into all listing contracts, buyer agency contracts or other contracts for real estate brokerage services. The Commission has also proposed to amend its rules to establish requirements and procedures for using the form and making disclosures.

If adopted, the effective date of these amendments will be delayed until January 1, 1995, to give licensees adequate time to become familiar with the new requirements and to make the necessary changes to offer to purchase and agency contract forms.

Proposed Amendments

The Commission proposes to amend its Rule A .0104 to require that every listing contract, buyer agency contract or other contract for real estate brokerage services be **in writing** and include the "Description of Agent Duties" shown on page 8 of this *Bulletin*. The contract also must contain a statement, prescribed by the Commission and immediately following the Description, which alerts the parties to any potential for a dual agency relationship. The rule would prohibit brokers and brokerage firms from representing more than one party in a transaction without the express, written authority of each party.

Also under the proposed amendment, when you are acting as agent or subagent of the **seller**, you must disclose to potential buyers that you are representing the interests of the seller. This disclosure must be made at your *first substantial contact* with the buyer, using the Commission-

prescribed "Disclosure to Buyer from Seller's Agent or Subagent" form shown on page 7 of this *Bulletin*.

Conversely, when you are acting as agent of the **buyer**, you must disclose (at least verbally) to the seller or seller's agent at the time of your *initial contact* with them that you are representing the interests of the buyer, and you must disclose that fact in writing no later than the time of delivery of an offer. This written disclosure may be made in the offer to purchase.

The Commission also proposes to amend Rule A .0112 to require that every preprinted offer or sales contract form used by a broker or salesman include a provision identifying each real estate agent and firm involved in the transaction and disclosing whom each represents.

CONTINUING EDUCATION

Basic Requirements

Beginning with license renewals in **June 1995**, you must complete **eight (8) classroom hours of continuing education each year** in order to renew your license on **active** status. The education must be completed during the twelve-month period preceding the expiration date of your license.

Under rules proposed by the Commission, you must obtain four of the eight hours by completing a four-hour *Update* course to be developed by the Commission. You may obtain the remaining four hours by completing one or more *elective* courses approved by the Commission. (*NOTE: Nonresident licensees will not be required to take the Update course; however, they must complete either eight hours in approved elective courses or eight hours of continuing education approved by the real estate licensing agency in their resident state.*)

To renew your license on active status in June 1995, you must have completed all approved continuing education courses between July 1, 1994 and June 10, 1995. *No courses will be allowed to be offered between*

June 11 and June 30 in order to afford the Commission adequate time to renew the many licenses.

Active vs. Inactive

Beginning next year, you must designate whether you are renewing your license on active status or inactive status. **Active** status is required if you wish to engage in (and receive compensation for) any activity requiring a license. You must satisfy the continuing education requirement in

To renew your license on inactive status, you do not have to satisfy the continuing education requirement, but before you can change your license to active status, you must show that you have obtained continuing education specified by the Commission.

order to renew your license on **active** status.

If your license is on **inactive** status, you may retain your license but not engage in (and be compensated for) any activity requiring a real estate license, including referrals. **To renew your license on inactive status, you do not have to satisfy the continuing education requirement**, but before you can change your license to active status, you must show that you have obtained continuing education specified by the Commission. This could range from 0 to 20 hours, depending on the length of time your license has been inactive, any continuing education you may have completed since the beginning of the preceding license period, and whether such education is creditable toward the continuing education requirement for the current license period.

Update Course

The proposed *Update* course, to be developed by the Commission, will be the principal component of the new continuing education program. This four-hour course will address recent changes in real estate laws and practices, as well as topics determined by the Commission to be special problem areas. The Commission will introduce new subject matter each year, and will make every effort to choose subjects which will be of interest to the vast majority of licensees.

Update courses will be offered by sponsors approved by the Commission. Instructors must meet stringent qualification requirements regarding their real estate background and must demonstrate their teaching skills through submission of a videotape showing them teaching a real estate topic.

Elective Courses

Elective courses will be available through sponsors whose courses and instructors have been approved by the Commission. Required to be at least two hours in length, courses must directly contribute to the goal of ensuring that licensees possess the knowledge, skill and competence necessary to function in the real estate business in a manner that protects and serves the public interest. Acceptable topics would include real estate law, agency law, real estate contracts, land use controls, environmental hazards and protection, real estate economics and markets, real estate finance, investment or appraisal, property management, construction, commercial brokerage, and similar topics. Unacceptable topics would include those not directly related to real estate practice (e.g., general business administration or management, personal skills training) and those whose primary focus is on improving the licensee's ability to be financially successful (e.g., sales, motivational or success training, brokerage management).

Earning Credits

As a general rule, you may earn the required eight hours of continuing

education credit only by taking courses approved by the Commission. You will receive four hours of credit for completing the *Update* course, and a maximum of four hours of credit for any single *elective* course. You will not receive any credit for taking a prelicensing course.

You will not be required to pass an examination to receive credit for a continuing education course; however, you must attend 90% of the course. Attendance will be strictly monitored by course sponsors and instructors.

If you take more elective courses than are necessary to satisfy your continuing education requirement for the year, you may "carry over" those courses to satisfy your elective requirement for the following year. However, only entire two-hour and four-hour courses may be carried over - not extra hours in a course.

You may request the Commission to evaluate and award continuing education credit for a course **not** approved by the Commission or for some other real estate education activity (e.g., teaching or developing an approved continuing education course, writing a text or published scholarly article). Unapproved courses and education activities must be found to be equivalent to an approved course. A \$50 nonrefundable fee will be required for each request, but instructors of continuing education courses will be exempt from the fee.

Extensions of Time

In cases of extreme hardship, the Commission may grant additional time for you to complete your continuing education. But to receive this additional time, you must show that you were unable to obtain the required continuing education due to an incapacitating illness or other circumstance which existed for a substantial portion of the license year. You must show that satisfying the continuing education requirement prior to license renewal would therefore have caused you severe and verifiable hardship. Business or personal inconvenience and your procrastination in taking courses are not grounds for an exten-

sion. The fact that you may be forced to go on inactive status until you have obtained your continuing education will not be considered a hardship.

Sponsor Approval and Fees

Courses and sponsors will be approved annually, with approval expiring on June 30. The Commission proposes to charge sponsors an application fee of \$100 for approval to conduct the *Update* course and each *elective* course, and \$50 to renew the approval. However, no fees of any type will be charged to accredited North Carolina community colleges, junior colleges, colleges and universities which sponsor courses. And no fee will be charged for approval to instruct the *Update* course. Once approval has been granted, the sponsor may conduct the course as frequently and at as many locations as desired *between July 1 and June 10 of the approval period*.

Sponsors must remit to the Commission a \$5 fee for each person completing the course to offset the Commission's costs in administering the continuing education program.

All approved continuing education courses must be open to all licensees on a first-come/first-served basis. Sponsors must afford all licensees an equal opportunity to enroll in their courses and may not promote or conduct courses in a manner that would effectively exclude licensees who are not affiliated with the sponsor.

Other

The proposed rules also address other topics such as sponsor eligibility, requirement for advance approval, course administration, reports to the Commission, and denial or withdrawal of approval of a course or sponsor, as well as numerous matters relating to the operation of courses by sponsors and instructors; e.g., scheduling, advertising, classroom facilities, instructor performance, student evaluation of courses, monitoring attendance, student participation standards, solicitation of students by instructors, and cancellation and refund policies. □

Contracts

(Continued from page 3)

have to appear at the bottom of the document. Although it is preferable for the signature to be at the bottom, the contract will still be valid if the signature appears elsewhere. A party can therefore initial a contract at the side (as when rewriting a counteroffer) and be bound to the contract.

2. Communication of Acceptance

Signature alone is not sufficient to constitute a valid acceptance: the accepting party must also *communicate* acceptance to the party who made the last offer or counteroffer.

Assume, for example, that a buyer makes a written, signed offer which is delivered to the listing agent and then to the seller. The seller likes the offer exactly as written and signs it. Has a binding contract been created? No! The seller has not communicated acceptance back to the buyer. The contract will not be binding until the buyer (or the *buyer's agent*) learns of the seller's acceptance.

Unless the parties have agreed to a particular method of communication, communication of acceptance can be made in any manner that is convenient for the parties, and can even occur accidentally. Therefore, in a typical residential sales transaction, communication of acceptance can be made orally, e.g., by calling and advising the buyer of acceptance. This oral acceptance does not violate the Statute of Frauds because the contract itself has been written and signed. It is only the *communication* of acceptance that is oral.

(Note that *delivery* of the contract document is not required to make a contract enforceable. The contract is formed at the time of communication. The real estate agent does, of course, have a duty to provide copies of the contract to the parties under the Real Estate License Law.)

Because communication must be made to the other party in the transaction or to the other party's agent, it is important to know whether the real estate agents involved represent the buyer or the seller.

a. Communicating acceptance of a buyer's offer or counteroffer

Suppose that a seller signs a buyer's written offer and then tells the listing agent that he has accepted the offer. Is the seller's statement to the listing agent sufficient to create a binding contract? No. The seller has communicated acceptance only to his own agent, not to the buyer or to the buyer's agent. So, the contract is not yet enforceable.

Assume then that the listing agent tells the selling agent that the seller has signed and accepted the buyer's offer. Has communication of acceptance been accomplished? The answer depends upon which party the selling agent represents. If the selling agent is a subagent of the seller, communication to the selling agent does not create a binding contract. However, if the selling agent is a buyer's agent, communication to him is as good as communication to the buyer herself: the contract is enforceable once the buyer or the buyer's agent learns that the seller has signed the buyer's written, signed offer.

b. Communicating acceptance of a seller's counteroffer

Now suppose that the seller *rejects* the buyer's offer but makes a written, signed counteroffer. To accept the seller's counteroffer, the buyer must do two things: (1) sign the counteroffer, and (2) communicate acceptance

back to the seller or to the seller's agent. A signature, without communication, does not create a contract. Conversely, communication of acceptance, without a signature, does not create a contract.

Remember that communication of the buyer's acceptance must be made to the *seller* or to the *seller's agent* or *subagent*. If a buyer communicates acceptance to his own agent, i.e., a buyer's agent, no binding contract has been created.

c. Oral negotiations

Often after the buyer makes an initial written offer, all subsequent negotiations are communicated orally through the real estate agents involved in the transaction. This practice is acceptable, but may delay reaching a *binding* agreement. A "gentlemen's agreement" is unenforceable; to be binding, the terms must be put in writing and signed by the parties.

In a "nutshell"

A contract for the sale of land is enforceable only if (1) it is in writing and signed; and (2) an offer has been made, is supported by consideration and is properly accepted. Acceptance requires not only the *written signatures* of the parties, but also *communication of acceptance* from the party accepting the last offer/counteroffer to the party (or party's agent) who made it. □

Disciplinary action

Penalties for violations of the Real Estate License Law and Commission Rules vary depending upon the particular facts and circumstances present in each case. Due to space limitations in the Bulletin, a complete description of such facts cannot be reported in the following Disciplinary Action summaries.

ACTION ASSOCIATES, INC. (New Bern) - By Consent, the Commission reprimanded Action Associates, Inc. The Commission found that the corporation had failed to oversee the proper deposit of cash receipts into a

rental trust account, had failed to oversee the maintenance of the trust account including failure to perform monthly reconciliations of ledgers and journals with bank records, and had therefore failed to detect that a shareholder of the corporation had converted trust monies to his personal use, which resulted in a shortage in the trust account. The Commission noted that the shareholder was removed from the corporation and that the corporation and another shareholder had fully reimbursed the rental trust account.

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DRAFT

DISCLOSURE TO BUYER FROM SELLER'S AGENT OR SUBAGENT

(This form must be used by real estate agents working with buyers as agents or subagents of the seller.)

Firm Name: _____ Agent Name: _____

AGENCY DISCLOSURE

When showing you property and assisting you in the purchase of a property, the above-referenced agent and firm will be representing the interests of the SELLER. As such, the firm and its agents must work to obtain for the seller the best bargain possible. The firm and its agents must also furnish the seller any information obtained from you or any other source which is material to the transaction or which might influence the seller's decision to sell. Therefore, as a buyer, you should not give the seller's agent any information that you do not want the seller to know.

ACKNOWLEDGEMENT

(DO NOT SIGN THIS FORM UNTIL YOU HAVE READ BOTH SIDES.)

By signing below, I acknowledge that I have received a completed copy of this form.

Buyer's Name (Print or type)

Buyer's Signature

Date

Buyer's Name (Print or type)

Buyer's Signature

Date

INSTRUCTIONS TO AGENTS WORKING WITH BUYERS AS AGENTS OR SUBAGENTS OF THE SELLER

1. Review the "Description of Agent Duties and Relationships" on the reverse side of this form with the buyer(s) at the time of your first substantial contact with the buyer(s).
2. Explain the type(s) of agency (seller agency, buyer agency, dual agency) your firm offers.
3. Enter your name and the firm name at the top of this form and review the Agency Disclosure with the buyer(s).
4. Have the buyer(s) complete the ACKNOWLEDGEMENT above.
5. Give the buyer(s) a copy of this form, and retain the signed original for your files.
6. Disclose to the seller's agent or firm the fact that you are representing the seller at the time you make an appointment to show the seller's property.

NOTE: If your firm will act as a buyer's agent, do not use this form: enter into a buyer agency contract with the buyer.

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DESCRIPTION OF AGENT DUTIES AND RELATIONSHIPS

Every listing contract, buyer agency contract or other contract for brokerage services in a real estate sales transaction in North Carolina must contain this "Description of Agent Duties and Relationships." Real estate agents should carefully review this information with you prior to entering into any agency contract. Before you begin working with any real estate agent, you should know who the agent represents in the transaction.

AGENTS' DUTIES

Whether you are the buyer or seller, when you contract with a real estate firm to act as your agent in a real estate transaction, the agent must try to obtain for you the best bargain possible. The agent also owes you the duty to:

- Act with reasonable skill, care and diligence
- Safeguard and account for any money handled for you
- Disclose to you any information which might influence your decision to buy or sell
- Be loyal and obedient to you

Even if the agent does not represent you, the agent must still be fair and honest and disclose to you all "material facts" which the agent knows or reasonably should know. (Typically, a fact is "material" if it relates to defects or other conditions affecting the property, or if it may influence your decision to buy or sell.)

AGENTS WORKING WITH SELLERS

A seller can enter into a "listing contract" with a real estate firm authorizing the firm and its agent(s) to represent the seller in finding a buyer for his property. The listing contract should state what the seller will pay the listing firm for its services, and it may require the seller to pay the firm no matter who finds the buyer.

The listing firm may belong to a Multiple Listing Service (MLS). The MLS provides a means of exposing the seller's property to other agents who are members of the service. Some of those agents may be working with buyers as buyers' agents; others will be working with buyers but still representing the sellers' interests as a "subagent." Both buyer's agents and seller's subagents may desire to share in the commission the seller pays to the listing firm; the listing agent may share the commission with the seller's permission.

AGENTS WORKING WITH BUYERS

A buyer may contract with an agent or firm to represent him (a **buyer's agent**), or may work with an agent or firm that represents the seller (a **seller's agent or subagent**). All parties in the transaction should find out at the beginning who the agent working with the buyer represents.

If a buyer wants a buyer's agent to represent him in purchasing a property, the buyer should enter into a "buyer agency contract" with the agent. The buyer agency contract should state how the buyer's agent will be paid. **Unless some other arrangement is made which is satisfactory to the parties, the buyer's agent will be paid by the buyer.** Many buyer agency contracts will also obligate the buyer to pay the buyer's agent no matter who finds the property that the buyer purchases.

A buyer may decide to work with a firm that is acting as agent for the seller (a **seller's agent or subagent**). If a buyer does not enter into a buyer agency contract with the firm that shows him properties, that firm and its agents will show the buyer properties as an agent or subagent working on the seller's behalf. Such a firm represents the seller, and **not** the buyer.

A seller's agent or subagent must still treat the buyer fairly and honestly and disclose to the buyer all material facts which the agent knows or reasonably should know. The seller's agent typically will be paid by the seller. **If the agent is acting as agent for the seller, the buyer should be careful not to give the agent any information that the buyer does not want the seller to know.**

DUAL AGENTS

A real estate agent or firm may represent more than one party in the same transaction only with the knowledge and consent of all parties for whom the agent acts. "Dual Agency" is most likely to occur when a buyer represented by a buyer's agent wants to purchase a property listed by that agent's firm. A dual agent must carefully explain to each party that the agent and the agent's firm are also acting for the other party.

A dual agent owes both parties the full range of duties listed above, including the duty to disclose to both parties any material facts. Therefore, both the seller and the buyer should be careful not to disclose to a dual agent any information that he does not want the other party in the transaction to know; for example, a seller's willingness to accept less than the asking price, or a buyer's willingness to pay more than offered.

In any dual agency situation, the agent must obtain a written agreement from the parties which fully describes the obligations of the agent and the agent's firm to each of them.

Disciplinary action

(Continued from page 6)

ALTA C. BIGGERS (Charlotte) - By Consent, the Commission suspended Ms. Biggers' broker license for two years effective December 1, 1993. The Commission found that Ms. Biggers, as custodian of the trust account for tenant security deposits held by a real estate firm, had expended tenant security deposits for improper purposes, which led to a shortage in the firm's trust account. The Commission noted that Ms. Biggers subsequently replaced the missing funds.

ERIC L. BIGGERS (Charlotte) - By Consent, the Commission suspended Mr. Biggers' broker license for two years effective December 1, 1993. The Commission then stayed its Order for a probationary term of two years. The Commission found that Mr. Biggers, as broker-in-charge of his own real estate firm, had failed to maintain proper trust or escrow account records. The Commission further found that Mr. Biggers had allowed tenant security deposits to be expended for improper purposes, which led to a shortage in the firm's trust account. The Commission noted that Mr. Biggers subsequently replaced the missing funds.

ALAN J. BLAKE (Hope Mills) - By Consent, the Commission suspended Mr. Blake's broker license for two years effective December 1, 1993. One year of the suspension is to be active and the remaining period stayed for a probationary term of one year. The Commission found that Mr. Blake, while licensed as both an attorney and a real estate broker, had been disciplined by the North Carolina State Bar for offenses which could reasonably affect his performance in the real estate business; namely, converting interest on trust monies to his personal use and failing to give truthful information to certain clients of his law practice.

RONALD A. BROWN (Charlotte) - By Consent, the Commission suspended Mr. Brown's broker license for one year effective November 3, 1993. One month of the suspension is to be active and the remaining period stayed for a probationary term of one

year upon condition that Mr. Brown complete the Commission's Trust Account Short Course before January 30, 1994. Following an audit of Mr. Brown's trust account prompted by a complaint concerning an earnest money deposit, the Commission found that on occasion, Mr. Brown had failed to deposit trust monies into a trust account in a timely manner and on other occasions, had failed to obtain copies of contracts. The Commission further found that Mr. Brown had failed to perform monthly trust account reconciliations and trial balances. The Commission noted that Mr. Brown had refunded an earnest money deposit in response to the complaint.

MALEENE R. CAVINESS (Greensboro) - The Commission revoked Ms. Caviness' salesman license effective November 15, 1993. The Commission found that Ms. Caviness had failed to disclose to successive brokers-in-charge and to her property owner-client the fact that she was acting as a rental property manager outside the supervision of a broker-in-charge and had failed to properly account for or remit to successive brokers-in-charge or to the property owner rental proceeds she received from a tenant. The Commission also found that Ms. Caviness had misrepresented the disposition of rent monies she had collected and kept by fabricating cancelled checks. The Commission further found that she had accepted compensation directly from the property owner rather than from her employing broker or broker-in-charge. The Commission also found that Ms. Caviness had commingled trust monies with her own funds and had converted trust monies to her own use.

WILLIAM E. COUTOUZIS (Fayetteville) - By Consent, the Commission suspended Mr. Coutouzis' broker license for two years effective December 15, 1993. The Commission then stayed its Order for a probationary term of two years upon condition that Mr. Coutouzis successfully complete the Commission's Trust Account Short Course prior to March 15,

1994. The Commission found that Mr. Coutouzis, as principal broker and broker-in-charge of a licensed real estate corporation, had failed to oversee the proper deposit and maintenance of trust monies in the rental trust account. The Commission further found that Mr. Coutouzis had failed to maintain certain ledger cards or to perform monthly reconciliations and had failed to retain adequate records in such a manner as to create a clear audit trail. The Commission also found that Mr. Coutouzis had allowed a shortage to occur in the corporation's rental trust account.

NANCY S. DEANS (New Bern) - By Consent, the Commission reprimanded Ms. Deans effective November 10, 1993. The Commission found that Ms. Deans, as principal broker and broker-in-charge of a licensed real estate corporation, had failed to oversee the proper deposit of cash receipts into a rental trust account. The Commission further found that Ms. Deans had failed to oversee the maintenance of the trust account including failure to perform monthly reconciliations of ledgers and journals with bank records, and had therefore failed to promptly detect that another shareholder of the corporation had converted trust monies to his personal use, which resulted in a shortage in the trust account. The Commission noted that the shareholder was removed from the corporation and that Ms. Deans and the corporation had fully reimbursed the rental trust account.

RICHARD L. JAMES (Southern Pines) - By Consent, the Commission suspended Mr. James' broker license for six months effective October 15, 1993. The Commission then stayed its Order for a probationary term of 12 months. The Commission found that Mr. James had misrepresented the receipt of earnest money from a purchaser on an offer to purchase and contract form, had drafted an extensive addendum to the contract which characterized the transaction as a "lease to own," and had assisted parties in structuring a sale of property over a due-on-sale clause in the

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Disciplinary action

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seller's deed of trust without advising the seller's lender of the transaction.

GARY C. KEEVER (Charlotte) - The Commission accepted the permanent voluntary surrender of Mr. Keever's salesman effective November 4, 1993. The Commission dismissed without prejudice charges that Mr. Keever had violated the provisions of the Real Estate License Law based upon his alleged criminal offenses. Mr. Keever neither admitted nor denied any misconduct.

KENNEDY & COMPANY, INC. (Southern Pines) - By Consent, the Commission suspended the corporate real estate broker license of Kennedy & Company, Inc. for six months effective October 15, 1993. The Commission then stayed its Order for a probationary term of 12 months. The Commission found that the principal broker and broker-in-charge of the corporation had misrepresented the receipt of earnest money on an offer to purchase and contract form, had drafted an extensive addendum to the contract which characterized the transaction as a "lease to own," and had assisted parties in structuring a sale of property over a due-on-sale clause in the seller's deed of trust without advising the seller's lender of the transaction.

ALFRED S. KILPATRICK (Rocky Mount) - By Consent, the Commission revoked Mr. Kilpatrick's broker license effective November 15, 1993. The Commission found that Mr. Kilpatrick had listed property for sale on a listing agreement form which did not contain a properly-worded nondiscrimination provision. The Commission further found that Mr. Kilpatrick had failed to deposit or maintain an earnest money deposit in a trust or escrow account and had instead converted the money to his own use, and had failed to properly account for the earnest money when the transaction did not close.

JOHN E. LIGHT (Kitty Hawk) - By Consent, the Commission revoked Mr. Light's broker license effective December 1, 1993. The Commission then issued Mr. Light a salesman license. After February 1, 1994, Mr.

Light may apply for reinstatement of his broker license upon his fulfillment of various conditions. The Commission found that Mr. Light, as broker-in-charge of an office of a licensed real estate corporation which managed residential rental units, had failed to ensure the deposit and maintenance of rental funds and security deposits in a North Carolina trust or escrow account and had failed to create and maintain records of such funds as required by Commission rule. The Commission noted that Mr. Light had not converted trust monies to his personal use.

LEONZA LOFTIN (Fayetteville) - The Commission accepted the voluntary surrender of Mr. Loftin's broker license for three years effective November 3, 1993. The Commission dismissed without prejudice charges that Mr. Loftin had violated the provisions of the Real Estate License Law and Commission rules based upon his handling of certain trust monies.

SHIRLEY F. MORRISON (Greenville) - By Consent, the Commission reprimanded Ms. Morrison effective September 9, 1993. The Commission found that Ms. Morrison, as broker-in-charge of a licensed real estate corporation, had allowed a broker associated with the corporation to engage in real estate brokerage for a fourteen-month period after the broker's license had expired.

JAMES G. READ (Charlotte) - The Commission revoked Mr. Read's salesman license effective October 1, 1993. The Commission found that Mr. Read had made a false statement on his application for real estate licensure; namely, Mr. Read answered "no" to the application question regarding criminal convictions when, in fact, he had been convicted of the crimes of conversion of the property of others, false reporting of odometer mileage to law enforcement officials, and possession of a motor vehicle without a vehicle identification number. The Commission further found that Mr. Read had made misrepresentations and false promises concerning obtaining new financing

which he had promised to parties in a real estate transaction, had made false representations to the parties concerning the nature of certain documents he had asked the parties to sign, and had failed to disclose his business and personal connections in the transaction.

BRIAN L. SOUTH (Durham) - By Consent, the Commission suspended Mr. South's broker license for six months effective November 1, 1993. The Commission then stayed its Order for a probationary term of one year. The Commission found that Mr. South, as an officer of a licensed real estate corporation selling its own property, had caused brokerage commissions in nine real estate transactions to be paid to an unlicensed corporation under his control. The Commission noted that it did not find evidence of any other Real Estate License Law violations. Mr. South neither admitted nor denied any misconduct.

AARON L. SPAIN (Greenville) - By Consent, the Commission reprimanded Mr. Spain effective September 9, 1993. The Commission found that Mr. Spain had continued to engage in real estate brokerage for a fourteen-month period after his license had expired.

EDWARD L. STINSON (Nags Head) - By Consent, the Commission suspended Mr. Stinson's broker license for 12 months effective October 10, 1993. The Commission then stayed its Order for a probationary term of 12 months. The Commission found that Mr. Stinson had written checks for real estate license renewal and the late renewal fee which were returned by the bank for insufficient funds. The Commission further found that Mr. Stinson had continued to engage in real estate brokerage for 14 months after his license had expired.

JOHN C. TAYLOE, III (New Bern) - By Consent, the Commission suspended Mr. Tayloe's broker license for four years effective November 10, 1993. The Commission found that Mr. Tayloe, as a shareholder in a licensed real estate corporation, had

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Verifying property information

By: Marilyn E. Tomei, Assistant Legal Counsel

When you are listing property for sale or for rent, you should verify certain information through a reliable source before you pass it on to parties in the transaction and thereby avoid possible allegations of misrepresentation. Examples of information which should be verified include lot acreage and frontage, land-use restrictions and square footage.

Verifying lot acreage and frontage

If you decide to advertise physical features of land - such as lot acreage and frontage - you should take steps to ensure that your representations are accurate. Physical features should be verified through public records such as tax maps and recorded plats, or alternatively through unrecorded surveys.

A tax map is **not** intended to be used for legal description and should not be relied on exclusively, but it can be a good starting point. If the property is in a subdivision, a plat of the entire subdivision is probably recorded, and can be obtained from the county register of deeds.

If a previous purchase of the property was financed by a commercial lender, the lender probably required a survey. In the event that the survey was not recorded, you may be able to obtain a copy of it from the surveyor at a nominal cost. Other possible sources are the lender, closing attorney or seller.

When you have a deed, you may generate the information on your own by computer. Programs are available which print a sketch of the property and give you its area in square feet or acres, when you input the metes and bounds description.

Verifying land use restrictions

In addition to physical features, other representations which can and should be verified include zoning/subdivision ordinances and restrictive covenants or deed restrictions and how they may affect the use or development potential of the property, and sewage disposal regulations and per-

mit information.

Consult public agencies and public records concerning restrictions on the use of property imposed by *zoning and subdivision ordinances*, which are under the jurisdiction of the city and/or county planning department. Zoning maps (often collectively called the zoning "atlas") are available for public inspection, usually in the planning department, which also maintains records of subdivision approval applications.

You should also be aware that privately-imposed land use regulations such as *restrictive covenants* may affect the use of the property. They generally impose even stricter limitations than do zoning and subdivision ordinances and often apply in single-family subdivisions and condominium and townhouse developments. Examples of restrictive covenants are the prohibition of commercial uses of a residential property, the requirement that original buildings or later additions conform to a general plan and be reviewed by a committee, and the requirement that property owners pay for maintenance of common areas and private roads.

Private land use restrictions can also be found in individual deeds. An example of such a restriction is the stipulation by a donor that property is given to a church, but only so long as it is used for church purposes. Otherwise, the property will revert to the original owner or his successors. Such a restriction runs with the land and applies to every owner of the property in the chain of title after the deed containing the restriction has been recorded. It is therefore important for all agents in the transaction to have this information. Deeds and restrictive covenants are recorded in the county register of deeds office.

The Commission does not expect licensees to search titles or to find and be familiar with all deed restrictions or restrictive covenants. However, you do have a duty to alert parties in the transaction that they

may exist. If a buyer alerts you of a need to use the property in a special way, advise the buyer to investigate possible restrictions on the use of the property before becoming obligated to purchase it.

For example, you should be aware that the operation of a professional office at a residential property might be prohibited or severely restricted by zoning or restrictive covenants or both. Therefore, if you represent a buyer who wishes to operate an accounting business at home, you should caution the accountant-buyer about the possible public and private land use restrictions, and advise him or her to thoroughly research such restrictions before selecting and contracting to buy a home. Refer the party to a private attorney for further information.

Other common commercial enterprises operated at home which should alert licensees to public or private land use restrictions are day-care centers (which are regulated at the state level as well), businesses which sell craft or hobby items, and catering services (which may also be regulated by the health department).

Concerning restrictions on land use imposed by *sewage disposal regulations* administered by local health departments, see *Real Estate Bulletin*, Vol. 24, Nos. 1 and 3 (Spring and Fall 1993).

Verifying square footage

Negligent misrepresentation of building square footage is among the most common misrepresentation complaints the Commission investigates. When listing property, you should personally measure the square footage of buildings. Never rely on the seller's representation of square footage, or on a previous listing agent's figures. That agent may not have measured accurately - or at all!

Alternatively, you can usually rely on an appraiser's report as to square footage. But, review it carefully to

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Verifying property information

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confirm that no additions or other modifications affecting square footage have been made to the structure since the appraisal. If you find any, you must make additional calculations.

An appraisal report is usually available, especially if the property has been recently purchased or refinanced, because a commercial lender generally requires an appraisal. Even though the appraiser's client is usually the lender, you can obtain a copy of the report from the borrower (who is now the seller or landlord), since he or she is entitled to one.

Don't rely on house plan drawings, however, because the finished product sometimes differs from the plans. Also, do not rely on tax records. Although the tax office appraises property, it does so on a mass scale; therefore, its calculations may not be exact and are not a reliable source of square footage information for real estate transaction purposes.

Disciplinary action

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converted certain cash receipts to his own use, had altered corporation books and records to falsely indicate that the receipts had been deposited into the corporation's rental trust account, and had thereby caused a shortage in the account.

VAUGHN REALTY, INC. (Fayetteville) - By Consent, the Commission suspended the corporate real estate broker license of Vaughn Realty, Inc. for two years effective December 15, 1993. The Commission then stayed its Order for a probationary term of two years. The Commission found that Vaughn Realty, Inc. had failed to oversee the proper deposit and maintenance of trust monies in its rental trust account. The Commission further found that the corporation had failed to maintain certain ledger cards or to perform monthly reconciliations and had failed to retain adequate records in such a manner as to create a clear audit trail. The Commission also found that the corporation had allowed a shortage to occur in the corporation's rental trust account. □

Representing the square footage of properties accurately is an important component of keeping your clients and customers satisfied. The typical home buyer has both a financial and psychological interest in the square footage of the property. If a purchaser discovers after closing that the property has less living space than was originally represented, that purchaser will certainly be disappointed. This may cause him to demand a reduction in the purchase price, which may in turn result in complaints to the Real Estate Commission from both the purchaser and seller.

Whether the buyer is entitled to a reduction in the purchase price is a question for a civil court, but you will better serve your clients, your customers and yourself if you provide them with correct information from the beginning of the transaction.

Accurate square footage information is also important in commercial lease transactions where rents are often based on a set price per square foot. Many licensees feel safe by underestimating square footage. However, if you underestimate square footage, your landlord client will not get the full benefit of the lease contract. To avoid any misunderstanding, be sure that both the landlord and the client understand how the square footage is measured and calculated.

You as the selling agent

When you are the selling agent in a transaction, you should exercise caution when using property information provided by the listing agent. The selling agent may not rely on a listing agent's representation and repeat it to others when the agent knows or should know that the representation is wrong. A selling agent who passes along inaccurate information may be guilty of negligent misrepresentation.

Consequently, if you suspect inaccuracies in any representations made by the listing agent, you should verify the information by one of the methods already discussed. Or, you can alert the parties to the fact that the listing agent's representation is probably incorrect, and advise them how to confirm the information. You may want to put this alert in writing, so there can be no doubt that you have discharged your duty.

In summary

Be conscious of possible errors in property information provided by anyone else in a real estate transaction. And, be sure of the accuracy of such information before you repeat it to other parties. By doing so, you may be saving yourself the inconvenience and anguish of a complaint, and you will most certainly be serving your clients and customers more effectively. □

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