

2021-2022 General Update Course

Section Three

Broker Fiduciary Duties



Lisa, a broker with ABC Realty, represents Alicia. Lisa enters into a listing agreement with Alicia to sell her multi-family unit. Lisa lists the dwelling for \$786,000. Lisa and her husband, Sean, own an investment firm. Sean informs Lisa that he is interested in purchasing Alicia's multi-family unit and submits an offer for \$736,000 to Lisa on behalf of their investment firm.

Must Lisa disclose to Alicia that the offer was submitted by her husband, Sean, on behalf of the investment firm they own together?

LEARNING OBJECTIVES

After completing this section, you should be able to:

- define key terms related to agency and fiduciary duties;
- explain the broker's fiduciary responsibilities to clients;
- identify current examples of brokers who may be at risk of violating their fiduciary duties; and
- describe the concept of skill, care, and diligence.

TERMINOLOGY

Agency Concepts

- **Agency:** The relationship that exists when one person is authorized to act for and on behalf of another.
- **Principal / Client:** The person who authorizes another (the agent) to act on the principal's behalf within specified parameters and to whom the agent owes certain legal duties.
- **Agent:** The person acting for and on behalf of the principal within the bounds of the authority granted and who owes fiduciary (legal) duties to the principal.

AGENT'S FIDUCIARY DUTIES

Brokers must act as fiduciaries for their principals while conducting real estate transactions. 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, placing the other’s interests before any self-interest.

A fiduciary must:

- be **loyal** to the principal and preserve personal, confidential information about the principal;
- operate in **good faith** to promote the principal’s interests; and
- **disclose** all facts to the principal that may influence the principal’s decision.



Take a look at the following examples, and answer this question: What questions might the Commission ask if a complaint is filed?

1. A listing broker encourages a seller to delay showings by cooperating brokers / firms so that the property can be shown first to clients of the listing firm.
2. Due to the hot market, a listing broker encourages a seller to set short deadlines for the submission of offers.

Loyalty and Obedience

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 because the principal’s interests are the agent’s top priority. 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 that are consistent with the terms of the agency agreement. However, the Commission does not permit an agent to obey a principal’s instructions to perform an unlawful act.



A licensed broker and his unlicensed brother have started a renovation company called We Flip ‘Em, LLC. The broker asks a seller, whose home is listed with We Flip ‘Em, if the seller would like a quick cash sale. He tells the seller that We Flip ‘Em is interested in buying the home.

What are the broker’s obligations to the seller?

Self-Dealing

The agent’s duty to represent the principal’s best interests is paramount to the interests of all others, including the agents own interests. The appearance of and/or participation in “self-dealing” which is the agent putting their business interests above the principal, must be avoided.

If an agent has a personal interest in a transaction and such interest might affect the agent’s loyalty or obedience to the principal, the agent must either:

- withdraw as an agent in the transaction, or
- disclose the personal interests to the principal and proceed with the transaction only with the principals informed consent

The agent must avoid all conflicts of interest with their principals. If the agent has an interest in the transaction, it is imperative that they disclose this information immediately to allow the principal to make an informed decision regarding how to proceed with the transaction.

An example of self-dealing is also the utilization of a “straw-man” by an agent. This straw man participates in the real estate transaction by purchasing the property from the principal on behalf of the agent. After the sale is consummated, the property is sold at higher price and the agent realizes a profit. The realization of a profit without your principals’ knowledge is a violation of agency law and a breach of fiduciary duty.

Agent Representing Adverse Interests

As mentioned previously, an agent must not place their interests above their principal by participating in self-dealing and they must not represent any interest that is adverse to the principal without the full knowledge and informed consent of the principal.

If an agent represents an adverse interest without full disclosure, the agent will:

- breach the agency duties owed to the principal and may be liable for damages;
- likely make the contract negotiated by the agent voidable;

- not be entitled to a commission or any form of compensation for the transaction; and
- have violated G.S. §93A-6(a)(4) that prohibits brokers from acting for more than one party in a transaction without the knowledge of all parties for whom he or she acts.



Joe, a listing agent, is trying to help his brother find a home. He writes an offer for his brother and submits it to the seller who he is also representing.

May Joe's actions be considered a conflict of interest? _____

Can Joe help his brother write an offer? _____

Does Joe need a written buyer agency agreement for his brother? _____

Did Joe comply with Commission Rule 58A .0104(d) regarding dual agency? _____

Is it a good idea for Joe to assist his brother with purchasing this property from the seller? _____

Skill, Care, and Diligence

Agency law requires that a real estate broker, like any other agent, exercise a high degree of skill, care, and diligence in the conduct of the agent's duties.

The level of skill, care, and diligence required of a real estate broker is determined by:

- North Carolina General Statutes,
- North Carolina Real Estate Commission Rules,
- court decisions, and
- professional standards within the community.

An agent must exert reasonable diligence on the principal's behalf and strive to obtain the most advantageous bargain possible under the circumstances. Agents who do not perform with the required degree of skill, care, and diligence are:

- guilty of negligence or misconduct,
- liable to the principal for any damages the principal may sustain,
- may forfeit any claim to compensation, and/or
- may also violate License Law and Commission rules.

The broker-agent will be liable to the principal for all damages that are a direct or “proximate” consequence of the negligence.

Further, an agent utilizes skill, care, and diligence in their representation of the principal when they:

- Provide reliable information on matters relevant to the transaction
 - A broker should be knowledgeable about the real estate industry based on the licensing and continuing education courses they have taken. In addition, a broker should conduct research regarding matters that affect buyers and sellers in the real estate industry so they can provide valuable information to their principal.
- Provide competent advice on a property’s probable selling price
 - In an effort to provide competent advice on the probable selling price of a property, a broker should possess the requisite skill and knowledge of the industry to complete a comparative market analysis for their principal. A broker should never try to estimate the probable selling price of a property without completing a thorough analysis and researching the subject property.

Additionally, the broker should be able to answer general questions for the principal regarding the probable selling price of the property; however, if a broker receives inquiries regarding:

- sale leasebacks;
- tax consequences;
- evictions issues; and/or
- capital gains tax

they should refrain from giving tax and/or legal advice. The principal should be encouraged to consult with a CPA or attorney.

- Discover pertinent facts related to a property
 - Brokers should utilize their due diligence skills to research property-specific information to give to their principals.
- Effectively advertise a listed property
 - A broker should be knowledgeable about the area in which the property is located in an effort to advertise it effectively and not violate state and federal fair housing laws.

- Advise about offers
 - A broker who has knowledge of the market and effectively analyzes the probable selling prices of homes can efficiently assist their principals in determining the best offer to accept or submit for a transaction.
- Assist with contract preparation
 - A broker should be proficient in understanding the terms, clauses, and language in contract forms to adequately assist their buyers and sellers in completing and reviewing forms in a transaction.

A broker who fails to exercise skill, care, and diligence while representing a principal is in breach of their fiduciary duties under agency law and License Law and Commission rules.

For more information regarding the competency of licensees, review the 2019-2020 Update Course section, Competence of Licensees [here](#).



In the following examples, state whether or not the brokers are displaying the fiduciary duties of skill, care, and diligence. Explain your answers.

1. Stan, a buyer agent, wants to show Mary a property that is 100 miles outside of the geographic area he normally services. Also, Stan does not have access to the area's MLS. _____
2. Kim, a buyer agent, posts in the "The Brokers of NC" private Facebook group that she has a buyer interested in vacant land. However, this is her first transaction assisting someone with vacant land. Therefore, she is requesting brokers to provide her with a list of vacant lots she can show her client. _____

Disclosure of Information

An agent is obligated to act in good faith and fully disclose to the principal any and all information that might influence the principal's decision while also protecting the principal's personal information. An agent has an affirmative duty to discover and disclose to the principal "material facts" and all facts that may affect the principal's:

- rights or interests, or
- influence the principal's decision in the transaction.

An agent has an affirmative duty to disclose all material facts and relevant information in the transaction to the principal. Further, an agent also has a fiduciary duty of loyalty and obedience that imposes an obligation on the agent NOT to disclose certain personal information about the client-principal to third parties without the principal's consent. Also, a real estate broker must divulge information about other parties to the transaction to their principal to assist the principal in their decision-making process.

It is important for brokers to distinguish the difference between protecting a principal's interest and not disclosing their confidential information and the mandatory requirement to disclose material facts regarding a property to all parties in the transaction. A material fact is any fact that could affect a reasonable person's decision to buy, sell, or lease.

A broker has a duty to treat all persons in a real estate transaction with honesty and fairness and disclose material facts to parties and interested third parties in the transaction. Therefore, the disclosure of material facts is not contingent upon whether or not an agency relationship exists with a party to the transaction.



Sara, a listing agent, is performing a listing presentation for Mark. During Sara's walk through of the property, she notices a stain on the ceiling. She asks Mark about the stain and he mentions that the roof has a leak and has been repaired three times, but now needs to be replaced. Mark further stated that this was one of the reasons he wanted to sell the property. He directs Sara not to mention this information to prospective buyers because he will repaint the ceiling before the open house.

Must Sara disclose the leaking roof? Why or why not?

Accounting

A real estate broker in an agency relationship is obligated to account for all money and/or property that belongs to his principal. The real estate broker must also safeguard the property (e.g. money, deeds, documents, etc.) that relates to the clients transaction.

Furthermore, under the common law of agency, an agent is obligated to maintain accurate records of any transactions or dealings involving the principal.

An Agent Selling Their Own Home

Every real estate broker has to complete the Residential Property and Owners' Association Disclosure Statement if they are selling their home and it is a residential dwelling of four or fewer units. The real estate broker may check "Yes", "No", or "No Representation" to any or all of the questions on the disclosure. However, the broker must still discover and disclose all material facts regarding the property to all parties even if they checked "No Representation."

A broker selling his or her own home should not represent or offer to represent a buyer due to creating an obvious conflict of interest. If a buyer desires to be represented, then the seller/broker should advise the buyer to seek representation from another broker. Also, if the seller/broker listed their property with their own firm and the firm offers designated dual agency, another broker within the firm may represent the buyer. However, the best way to avoid a conflict of interest is to always encourage the buyer to seek representation from another firm.

A broker must follow all License Law and Commission rules, even when advertising their own property for sale. For example, a broker cannot advertise their property for sale as being listed by their firm without having a written listing agreement. It is important for brokers to know that the Commission has the authority to discipline a broker who fails to adhere to any License Law and Commission rule, even when selling their own property.

Best Practices for Brokers

As mentioned previously, brokers who act as agents for principals are considered fiduciaries. As a fiduciary, the broker owes specific duties, known as fiduciary duties, to the principal.

Below are best practices for brokers to implement to ensure they are providing fiduciary duties to their principal per agency law:

- the principal's interests are paramount;
- inform the principal of conflicts of interest as soon as they arise;
- timely provide the principal with relevant and material information so they can have time to make an educated, informed decision regarding the transaction;
- follow the lawful instructions of the principal;
- educate yourself on the geographic area and/or types of real estate transactions in which you will practice to obtain knowledge;
- and safeguard all money and/or property that belongs to the principal.

Brokers who ensure they are adhering to their fiduciary responsibilities have the greatest probability of compliance with License Law and Commission rules and meeting the needs of their principals.

CASE STUDIES

This section will utilize case studies to illustrate Commission rules regarding fiduciary duties and agency representation. The cases presented are actual Commission disciplinary cases, many of which resulted in disciplinary action being imposed against brokers and/or firms.

*To view NC License Law and Commission Rules, go to ncrec.gov, click on **Resources**, and select **License Law/Rules**.

When evaluating the case studies, it's important to differentiate between the "complaining witness" "complainants" and "respondents."

- **Complaining Witness:** The person(s) who submits a complaint to the Commission.
- **Complainant = Plaintiff:** Upon review of a submitted complaint, if the Commission opens an investigation against a respondent, the Commission (NOT the Complaining Witness) is the Complainant.
- **Respondent = Defendant:** The person against whom the complaint is made and who must reply to the complaint.

The outcomes of the cases, including Commission sanctions, are revealed at the end of the section. Possible sanctions include:

- **License Revocation** for a definite or indefinite period of time.
A broker whose license is revoked has no license.
- **License Suspension** for a stated period of time.
A broker whose license is suspended still has a license but is prohibited from using it for a specified period of time.
- **Reprimand**
This is a public statement of disapproval by the Commission. A broker who has been reprimanded continues to have an active license and may engage in real estate brokerage activities.
- **Close and Warn**
No disciplinary action is levied against the broker's license; however, the broker (respondent) is sent a letter of warning explaining a misstep or violation that was identified during the investigation.
- **Close**
No disciplinary action is levied against the broker's license.



The Commission's sanctions don't seem harsh enough in some cases. Why aren't the sanctions tougher?

Answer (as noted in the Commission's 2016-17 *Update* course materials):

The Commission frequently will impose a harsher sanction in a case, but allow the broker to reduce it to a lesser sanction or dismissal by completing some specified education by a certain date. This approach seeks to fulfill the Commission's purpose of protecting the public interest while educating brokers in hopes of improving their knowledge, competency, and skills.

CASE: WHAT ABOUT THE REPAIRS I REQUESTED?

Read the following case summary.

Determine what, if any, errors were made by the broker(s) and which License Laws or Commission Rules were violated.

PARTIES:

Complaining Witness (CW): Buyer.

Respondents: Listing Agent (RLA - Respondent Listing Agent) and Buyer Agent (RBA - Respondent Buyer Agent) in the subject transaction.

COMPLAINT FACTS:

In March 2018, RLA listed a residential property in MLS as being constructed of brick veneer. Later that month, the CW went under contract on the property and ordered a home inspection. The home inspection revealed potential moisture-related issues with the synthetic stucco on the home, among other things. RBA submitted the Due Diligence Request and Addendum (DDRA) to the RLA for the sellers' approval. CW requested a few repairs along with moisture readings of the stucco and roof certification.

The sellers signed the DDRA, but only after scratching through the moisture reading and roof certification language. RLA emailed RBA that day, that the sellers were "making all repairs, but moisture testing and roof certificate is a buyer inspection. If [the buyer] wants to get further inspections, seller will look at any additional repairs that are requested ..." RBA never provided this information to the CW or gave her a copy of the DDRA. Instead, when she texted RBA for an update on the repair request, RBA responded, "They agreed to all repairs and moving forward."

During the final walkthrough, CW says she asked RBA about the roof to which he replied that the roof had been inspected but he was still waiting on the certification from the company. The next day, the transaction closed. CW reached out to both RBA and RLA for the roof certification. RLA provided Buyer with the DDRA and advised that her seller clients had rejected the offer to provide a roof certification or moisture testing. RBA obtained a roof certification for the property after the complaint was filed.

RLA admitted that she failed to disclose the synthetic stucco. She did not disclose on the MLS since the home was predominately comprised of brick and that there is not an option in MLS to list both brick and stucco. The CW home inspection revealed the presence of synthetic stucco.

Main Points - What About The Repairs I Requested?

- In 2018, RLA listed a residential property in MLS as being constructed of brick veneer
- CW went under contract and ordered a home inspection
- Home inspection report revealed moisture-related issues with the synthetic stucco and other things
- RBA submitted a DDRA which requested a few repairs, moisture readings of the stucco, and roof certification to RLA for sellers approval
- Sellers scratched out moisture reading and roof certification and then signed it
- RLA emailed RBA stating the seller was making all repairs except moisture testing and roof certification
- RLA stated if CW wants to get further inspections, seller will review additional repairs that CW requests
- RBA did not provide information to CW or a copy of the DDRA
- RBA told CW seller agreed to all repairs via text message
- RBA stated roof was inspected but they were waiting on the roof certification and would provide it to CW at the final walkthrough
- Transaction closed without CW receiving roof certification
- RBA obtained roof certification after complaint was filed
- RLA admitted to failing to disclose synthetic stucco
- CW home inspection report did reveal presence of synthetic stucco

Evaluation and Discussion - What About The Repairs I Requested?

Errors made by RLA-Respondent Listing Agent:

Errors made by RBA-Respondent Buyer Agent:

Related law and Rule Considerations - What About the Repairs I Requested?

Competency

N.C.G.S. § 93A-6(a)(1) states:

The Commission has the power to suspend, revoke, reprimand, or censure any licensee for making any willful or negligent misrepresentation or any willful or negligent omission of material fact.

N.C.G.S. § 93A-6(a)(2) states:

The Commission has the power to suspend, revoke, reprimand, or censure any licensee if they make false promises of character likely to influence, persuade, or induce.

N.C.G.S. § 93A-6(a)(10) states:

The Commission has the power to suspend, revoke, reprimand, or censure any licensee if they engage in conduct which constitutes improper, fraudulent, or dishonest dealing.

N.C.G.S. § 93A-6(a)(15) states:

The Commission has power to suspend, revoke, reprimand, or censure any licensee if they violate any rule adopted by the Commission.

Delivery of Instruments

Commission Rule 58A .0106(a) dictates:

Every broker shall deliver a copy of any written agency agreement, contract, offer, lease, rental agreement, option, or other related transaction document to their customer or client within three days of the broker's receipt of the executed document.

Case: The Broker Who Disclosed My Offer

Read the following case summary.

Determine what, if any, errors were made by the broker(s) and which License Laws or Commission Rules were violated.

PARTIES:

Complaining Witness (CW): BIC of a Firm representing a Buyer.

Respondents: Listing Agent (RLA- Respondent Listing Agent) and Listing Firm (RLF- Respondent Listing Firm) for which the Listing Agent was QB/BIC.

COMPLAINT FACTS:

The BIC's complaint stated that an agent with his Firm, acting as a BA for a prospective Buyer, submitted a written offer to the RLA for the listed property. The property received multiple offers, according to the complaint, the RLA disclosed the amount of his Firm's Buyer's offer to competing BA's. The complaining Firm's BA stated that after she emailed to the RLA a copy of her Buyer's signed offer for \$176K, she received a VM from the RLA stating that there were multiple offers and per his Seller's request, he would inform all prospective buyers that the highest offer was \$176K and ask for H&B. CW supplied an audio copy of the VM.

RLA claimed that per his Seller, he asked for H&B from all prospective Buyers which resulted in a \$181K offer from a different Buyer that was accepted by the Seller. The RLA provided a copy of the accepted contract and copies of all four offers received. The RLA denied disclosing the price or terms of any offer to any other BA.

The BA whose Buyer-Client 2nd offer of \$181K was accepted by the Seller stated she had no written communications with the RLA regarding terms of other offers and that she could not recall the RLA disclosing the amount of any particular offer, only that the transaction was a multiple offer situation and the RLA had requested H&B. Another competing BA stated that shortly after he submitted an offer to the RLA, the RLA left a VM and sent an email to him giving notice of multiple offers and disclosing that the current highest offer was \$176K. This BA stated he no longer had a copy of the VM; however, he provided a copy of an email in which the RLA stated: "Did you get my message about the other offer that was \$176k in the initial offers before we called for highest and best?" The fourth and final BA responded similarly, and provided a copy of a text message from the RLA which stated: "Ok, did you hear my VM that we had at least a \$176k net to seller from initial offer? Just want to make sure".

Main Points - The Broker Who Disclosed My Offer

- The CW is a BIC of a firm representing a buyer
- Respondents are a listing agent (RLA) and a listing firm (RLF); the listing agent is also the QB/BIC
- BA with BIC's firm submitted offer to RLA for listed property for \$176K
- The property received multiple offers
- The RLA disclosed buyer's offer to a competing BA
- RLA left a VM stating that he is informing all prospective buyers that the highest offer the seller received was \$176K and to submit their H&B
- RLA received an offer for \$181K from a different buyer and seller accepted
- BA whose buyer-clients second offer of \$181K was accepted stated the RLA did not disclose the offer amount, only the existence of multiple offers and to submit your H&B offer
- A competing BA received a VM from the RLA disclosing the \$176,K and to submit your H&B offer
- Competing buyer provided NCREC with a copy of an email from the RLA asking if the BA received their voicemail message regarding the \$176K offer and the request for all buyers to submit their H&B offer
- A fourth BA provided NCREC with a copy of a text message from the RLA stating, "OK, did you hear my VM that we had at least a \$176K net to the seller from the initial offer? Just wanted to make sure."

Evaluation and Discussion - The Broker Who Disclosed My Offer

Errors made by RLA - Respondent Listing Agent:

Errors made by RLF- Respondent Listing Firm:

Related Law and Rule Considerations - The Broker Who Disclosed My Offer

Competency

N.C.G.S. § 93A-6(a)(10) states:

The Commission has the power to suspend, revoke, reprimand, or censure any licensee if they engage in conduct which constitutes improper, fraudulent, or dishonest dealing.

N.C.G.S. § 93A-6(a)(15) states:

The Commission has the power to suspend, revoke, reprimand, or censure any licensee if they violate any rule adopted by the Commission.

Disclosure of Offers Prohibited

Commission Rule 58A .0115 dictates:

A broker shall not disclose the price or other material terms contained in a party's offer to purchase, sell, lease, rent, or to option real property to a competing party without the express authority of the offering party.

Case: Whose Lot is It?

Read the following case summary.

Determine what, if any, errors were made by the broker(s) and which License Laws or Commission Rules were violated.

PARTIES:

Complaining Witness (CW): Owner of an unimproved residential lot.

Respondents: former Listing Agent (RLA - Respondent Listing Agent) for the lot and the listing firm (RLF- Respondent Listing Firm) for which she was QB.

COMPLAINT FACTS:

The RLA had 3 lots listed for sale that were owned by the CW's family members and were adjacent to the CW's lot. RLA solicited the CW to list her lot for sale, which she did for \$30K. The listing expired without an offer. The RLA later contacted the CW and told her that she had someone interested in the lot. The details of their discussion are disputed, but shortly thereafter, the CW received by mail a written offer for \$20K prepared by the RLA and disclosing her status as a dual agent. The mailing included an Agency Agreement Renewal signed by the RLA proposing to renew and extend the listing approximately three months. The CW signed neither of the agreements and the offer was withdrawn.

A month later, the CW received a notice of a lien filed against the lot. The lien was filed on behalf of a grading and landscaping company for \$7706 for clearing the CW's lot and applying for well & septic permits. The lien named the CW as the party who contracted for the services through the parties that were the proposed buyers on the rejected offer. The CW contacted the law office that filed the lien and received a copy of a form which purported to give the Buyers the authority to obtain well & septic permits for the CW's lot. The CW's name was listed on the form; however, it was not the CW's signature.

The CW contacted the RLA and thereafter, RLA sent the CW a written agreement signed by the RLA with a place for the CW to sign. The agreement stipulated that the RLA agreed to satisfy the subject lien in exchange for the CW waving any claims against the RLA and agreeing not to discuss or report the matter to the NCREC. The CW did not sign the agreement and retained an attorney who sent the RLA a demand letter for \$20K. RLA paid the lien Claimant \$7K in exchange for releasing and canceling the lien. The CW filed the NCREC complaint shortly thereafter.

In her response, the RLA alleged that upon discussing the \$20K offer with the CW in early Sept., the CW verbally accepted the offer and verbally authorized the RLA to sign the well & septic permit form on the CW's behalf because the CW lived out of the area, did not use email and it would take several days for the CW to receive the offer, review & sign it and return it to the RLA by mail. The RLA stated that the buyers were aware that the CW had not yet signed the offer and alleged that she had meant to sign the subject form as POA for the CW, but in haste signed the CW's name instead.

The owner of the grading & landscaping company who was both the lien claimant and the father of the proposed Buyer and her husband confirmed that the RLA told them that the CW had not yet signed the offer but had verbally accepted it. CW denied that she verbally accepted the \$20K offer or gave authorization to the RLA to sign anything on her behalf.

Main Points - Whose Lot Is It?

- In July, RLA listed 3 lots owned by CW family member
- The 3 lots were adjacent to the CW's lot
- CW listed her lot with RLA to sell for 30K
- The listing agreement expired
- In September, RLA sent CW an offer for 20K in the mail, and an Agency Agreement Renewal which extended the listing for 3 months, and a disclosure indicating she was acting as a dual agent
- CW did not sign any agreements and the offer was withdrawn
- A month later, CW received a notice that a lien had been filed on her property for \$7706

- The lien was filed by the grading and landscaping company for clearing the lot and applying for the well and septic permits
- The lien indicated that the CW contracted services through the party who proposed the offer
- CW contacted the law office who filed the lien to receive a copy of the form which gave the buyer authorization to obtain the well and septic permits for the CW's lot
- The CW was listed on the form but it was not her signature that provided the authorization
- RLA sent the CW the written agreement for the CW to sign indicating that if RLA satisfied the lien, the CW would not report the RLA to NCREC
- CW refused to sign the written agreement, hired an attorney, and sent a demand letter to the RLA requesting \$20K
- RLA paid CW \$7K for releasing and canceling the lien
- CW filed a complaint with NCREC
- RLA stated CW verbally accepted the \$20K offer and verbally authorized her to sign the well and septic permits
- RLA indicates she meant to sign POA document but signed CW name instead
- Owner of grading and landscaping company was the lien claimant and father of the prospective buyers
- CW denied verbally accepting a \$20K offer and giving RLA authorization to sign on her behalf

Evaluation and Discussion - Whose Lot Is It?

Errors made by RLA - Respondent Listing Agent:

Related law and Rule Considerations - Whose Lot Is It?

Competency

N.C.G.S. § 93A-6(a)(1) states:

- The Commission has the power to suspend, revoke, reprimand, or censure any licensee for making any willful or negligent misrepresentation or any willful or negligent omission of material fact.

N.C.G.S. § 93A-6(a)(2) states:

- The Commission has the power to suspend, revoke, reprimand, or censure any licensee if they make false promises of character likely to influence, persuade, or induce.

N.C.G.S. § 93A-6(a)(10) states:

- The Commission has the power to suspend, revoke, reprimand, or censure any licensee if they engage in conduct which constitutes improper, fraudulent, or dishonest dealing.

N.C.G.S. § 93A-6(a)(15) states:

- The Commission has power to suspend, revoke, reprimand, or censure any licensee if they violate any rule adopted by the Commission.

Agency Agreements and Disclosures

Commission Rule 58A .0104(a) requires:

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.

ANSWERS TO DISCUSSION QUESTIONS

For Discussion on Page 69

Lisa, a broker with ABC Realty, represents Alicia. Lisa enters into a listing agreement with Alicia to sell her multi-family unit. Lisa lists the dwelling for \$786,000. Lisa and her husband, Sean, own an investment firm. Sean informs Lisa that he is interested in purchasing Alicia's multi-family unit and submits an offer for \$736,000 to Lisa on behalf of their investment firm.

Must Lisa disclose to Alicia that the offer was submitted by her husband, Sean, on behalf of the investment firm they own together?

Answer: Yes. Since Lisa has the property listed, she owes fiduciary duties to Alicia. Now that Lisa and her husband are interested in purchasing the property, Lisa must follow the directives set forth in Commission rule 58A .0104, subsection (p) which dictate:

(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.

Before Lisa can enter into a contract to purchase with Alicia, Lisa must disclose in writing to Alicia that she may have a conflict of interest in the transaction due to owning the investment firm with Sean, her husband. Further, Lisa must inform Alicia to independently seek the advice of an attorney or another broker regarding the investment firm's inquiry to purchase the property. Additionally, prior to Lisa and Sean entering into a contract to purchase the property on behalf of their investment firm, Lisa MUST terminate the listing agreement with Alicia or transfer the listing to another broker affiliated with the firm.

For Discussion on Page 70

Take a look at the following examples, and answer this question: What questions might the Commission ask if a complaint is filed?

1. A listing broker encourages a seller to delay showings by cooperating brokers / firms so that the property can be shown first to clients of the listing firm.

Answer: Here are examples of the types of questions the Commission might ask:

- *Did the listing broker fully inform the seller of the advantages and disadvantages of delaying the showing of their property to cooperating brokers / firms?*
- *Did the seller make the decision to delay the showing of their property after receiving all of the information that explains the advantages and disadvantages of this decision?*
- *Did the listing broker independently make the decision to delay the showings of the seller's property?*

The listing broker must be able to show the Commission that the suggestion to delay the showing of the seller's property to cooperating brokers / firms was in the best interest of the seller. Additionally, it must be shown that the seller received competent advice and relevant, material information from the listing broker regarding why a seller would or would not delay showings of their property to cooperating brokers / firms.

It is important for the listing broker to be loyal and obedient to the seller, follow their lawful instructions, and put the seller's needs before their own. The listing broker must not make the decision(s) for the seller.

NOTE: A broker may be in compliance with the guidelines established by their local MLS, but may still be in violation of Commission rules if they are not acting in the best interests of their principal.

2. Due to the hot market, a listing broker encourages a seller to set short deadlines for the submission of offers.

Answer: Here are examples of the types of questions the Commission might ask:

- *Did the listing broker fully inform the seller of the advantages and disadvantages of setting a short deadline for the submission of offers?*
- *Did the seller make the decision to set a short deadline for the submission of offers after receiving all of the information that explains the advantages and disadvantages of this decision?*
- *Did the listing broker independently make the decision to set a short deadline for the submission of offers?*

The listing broker must be able to show the Commission that the suggestion to delay the showing of the seller's property to cooperating brokers / firms was in the best interest of the seller. Additionally, it must be shown that the seller received competent advice and relevant, material information from the listing broker regarding

why a seller would or would not shorten the deadline for the submission of offers in a hot real estate market.

It is important for the listing broker to be loyal and obedient to the seller, follow their lawful instructions, and put the seller's needs before their own. The listing broker must not make the decision(s) for the seller.

For Discussion on Page 71

A licensed broker and his unlicensed brother have started a renovation company called We Flip 'Em, LLC. The broker asks a seller, whose home is listed with We Flip 'Em, if the seller would like a quick cash sale. He tells the seller that We Flip 'Em is interested in buying the home.

What are the broker's obligations to the seller?

Answer: Since the broker has the property listed, the broker owes fiduciary duties to the seller-client. Now that the broker is interested in purchasing the property, the broker must follow the directives set forth in Commission rule 58A .0104, subsection (p) which dictate:

(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.

Before the broker can enter into a contract to purchase with the seller-client, the broker must disclose in writing to the seller-client that they may have a conflict of interest in the transaction due to owning the renovation company, "WE FLIP EM, LLC." Further, the broker must inform the seller-client to independently seek the advice of an attorney or another broker regarding their inquiry to purchase the property. Additionally, prior to the broker entering into a contract to purchase the property on behalf of "WE FLIP EM, LLC", the broker MUST terminate the listing agreement with the seller-client or transfer the listing to another broker affiliated with the firm.

For Discussion on Page 72

Joe, a listing agent, is trying to help his brother find a home. He writes an offer for his brother and submits it to the seller who he is also representing.

May Joe's actions be considered a conflict of interest?

Answer: Yes, Joe's actions may be considered a conflict of interest because he is representing a family member, his brother. Joe must avoid all conflicts of interest with the seller. Joe should have immediately disclosed to the seller that the offer was from his brother so that the seller could make an informed decision on how to proceed with the transaction.

Can Joe help his brother write an offer?

Answer: No. Under these facts, Joe does not have the written authority from the seller to practice dual agency. Joe also does not have a written buyer agency agreement authorizing dual agency with his brother. Joe should not assist his brother in writing an offer. If Joe assists his brother in writing an offer, he is representing an interest that is adverse to the sellers without their full knowledge and informed consent. Joe must either withdraw as an agent in the transaction or disclose the personal interests in the transaction to the seller and proceed with the transaction only with the seller's informed consent. Also, Joe may in violation of §93A-6(a)(4) that prohibits brokers from acting for more than one party in a transaction without the knowledge of all parties for whom he or she acts.

Does Joe need a written buyer agency agreement for his brother?

Answer: It depends. First, Joe must have the written authority from the seller to even practice dual agency. Joe must also inform the seller that he has a conflict of interest due to his brother wanting to make an offer on the property. If the seller has provided written authorization to practice dual agency, has full knowledge of Joe's representation of his brother and provides informed consent, Joe may represent the interest of his brother. Joe must enter into a written buyer agency agreement authorizing dual agency with his brother. If the seller does not provide their informed consent, Joe must withdraw from the transaction.

Did Joe comply with Commission Rule 58A .0104(d) regarding dual agency?

Answer: It depends. If Joe received written authority from the seller to practice dual agency and had a written buyer agency agreement with his brother authorizing dual agency, then yes. However, if Joe submitted an offer to the seller from his brother without the written authority of the seller to practice dual agency, he may be in violation of License Law and Commission rules and breached the fiduciary duties he owes to the seller. Although Joe may have the written authority to practice dual agency from the seller and his brother, Joe must still inform the seller immediately of the conflict of interest. Joe can only proceed in the transaction with the seller's informed consent or he must withdraw from the transaction.

Is it a good idea for Joe to assist his brother with purchasing this property from the seller?

Answer: No. It is probably not a good idea for Joe to assist his brother with purchasing the property. It is likely that Joe would have difficulty adhering to the fiduciary duties that he owes the seller when representing his brother.

For Discussion on Page 74

1. Stan, a buyer agent, wants to show Mary a property that is 100 miles outside of the geographic area he normally provides services. Also, Stan does not have access to the area's MLS.

Answer: Stan should be knowledgeable about the geographic area in which he wants to show Mary property. If Stan is considering property outside of the MLS, he should consult with his BIC to see if this is even permissible. Additionally, Stan would need to be knowledgeable about the area so that he could assist Mary with obtaining reliable information about the property, advising her about offers, discovering pertinent facts about the property, and assisting with contract preparation. If he is not knowledgeable about the area, Stan should refer Mary to another broker - or enlist the assistance of a broker who has knowledge of the area.

2. Kim, a buyer agent, posts in the "The Brokers of NC" private Facebook group that she has a buyer interested in vacant land. However, this is her first transaction assisting someone with vacant land. Therefore, she is requesting brokers to provide her with a list of vacant lots she can show her client.

Answer: Brokers are encouraged to ask for assistance and/or information from their network of real estate professionals. However, Kim may not be competent enough to represent this buyer with this vacant land purchase. Kim should consult with her BIC to determine if she can even assist this buyer, consider taking additional education before practicing brokerage in land transactions, and/or collaborate with an experienced broker to assist in this transaction with her BICs permission.

For Discussion on Page 75

Sara, a listing agent, is performing a listing presentation for Mark. During Sara's walk through of the property, she notices a stain on the ceiling. She asks Mark about the stain and he mentions that the roof has a leak and has been repaired three times, but needs to be replaced. Mark further stated that this was one of the reasons he wanted to sell the property. He directs Sara not to mention this information to prospective buyers because he will repaint the ceiling before the open house.

Must Sara disclose the leaking roof?

Answer: Yes. Sara discovered the leaking roof and now she must disclose it to all parties in the transaction per License Law and Commission rules because it is a material fact.

Case Outcome: What About The Repairs I Requested?

Errors identified during the Commission's Investigation

- RBA received a DDRA back from the RLA which marked through a requested roof certification.
- RBA did not provide the document to his client or inform them of the refusal and claimed a roof certification had been completed when it had not.

Law & Rule Violations identified during the Commission's Investigation

- N.C.G.S. § 93A-6(a)(1) - Making any willful or negligent misrepresentation or any willful or negligent omission of material fact.
- N.C.G.S. § 93A-6(a)(2) - Being unworthy or incompetent to act as a real estate broker in a manner as to endanger the interest of the public.
- N.C.G.S. § 93A-6(a)(10) - Any other conduct which constitutes improper, fraudulent or dishonest dealing.
- N.C.G.S. § 93A-6(a)(15) - Violating any rule adopted by the Commission.
- Commission Rule 21 NCAC 58A .0106 - Delivery of Instruments

Sanctions Imposed by Commission

- RBA: conditional reprimand with courses
- RLA: ***Closed*** with a warning

Case Outcome: The Broker Who Disclosed My Offer

Errors identified during the Commission's Investigation

- RLA, at his seller's request, disclosed the highest offer received to several BAs and requested them to submit their H&B offer.
- The RLA did not have the express authority of the buyer whose offer was disclosed to do so.

Law & Rule Violations identified during the Commission's Investigation

- N.C.G.S. § 93A-6(a)(10) - Any other conduct which constitutes improper, fraudulent or dishonest dealing.
- N.C.G.S. § 93A-6(a)(15) - Violating any rule adopted by the Commission.
- Commission Rule 21 NCAC 58A .0115 - Disclosure of Offers Prohibited

Sanctions Imposed by Commission

- For RLA and RLF: Conditional stayed 1 year suspension with courses

Case Outcome: Whose Lot Is It?

Errors identified during the Commission's Investigation

- RLA listed an unimproved lot and, after the listing expired, presented an agency renewal agreement and offer from a proposed buyer.
- RLA signed seller's name to a form authorizing the buyers to obtain a well and

septic permit and the buyers also did work to clear the lot.

- The buyers subsequently filed a lien for the work done when the seller refused to sell. (The RLA paid in order to have the lien released).

Law & Rule Violations identified during the Commission's Investigation

- N.C.G.S. § 93A-6(a)(1) - Making any willful or negligent misrepresentation or any willful or negligent omission of material fact.
- N.C.G.S. § 93A-6(a)(2) - Being unworthy or incompetent to act as a real estate broker in a manner as to endanger the interest of the public.
- N.C.G.S. § 93A-6(a)(10) - Any other conduct which constitutes improper, fraudulent or dishonest dealing.
- N.C.G.S. § 93A-6(a)(15) - Violating any rule adopted by the Commission.
- Commission Rule 21 NCAC 58A .0104(a) - Agency Agreement and Disclosure

Sanctions Imposed by Commission

- RLA: Conditional 18 month suspension with 2 months active with courses