2020 – 2021
Broker-in-Charge
Update Course

Student Manual

July 2020

INTRODUCTION

The 2020-2021 Broker-in-Charge Update (BICUP) Course is a four (4) hour course that must be completed by all brokers-in-charge and brokers who have BIC-Eligible status and who wish to renew their licenses on active status on July 1, 2021, for the 2021-2022 license year.

Brokers-in-charge and brokers with BIC-Eligible status must take the BICUP course each year to satisfy the Update course requirement and to maintain BIC-Eligible status, as prescribed by Commission Rules 58A .1702. and 58A .0110.

This four (4) hour course will include 210 minutes of classroom instruction and 30 minutes of breaks.

Comments and Complaints

This course, developed by the staff of the North Carolina Real Estate Commission, may be conducted only by Education Providers that are certified by and instructors who are approved by the Commission.

Comments and complaints about the course, Education Provider, or instructor may be directed in writing to:

North Carolina Real Estate Commission
Education and Licensing Division
P.O. Box 17100, Raleigh, NC 27619-7100
Email: educ@ncrec.gov

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Section 1

Fair Housing

1. Betty hires Ray, a broker, to assist her with locating a tenant for her basement apartment. Betty informs Ray that the tenant is not allowed to have a pet. Ray places an advertisement on social media and indicates that pets are not allowed for this rental. Ray receives an application from an individual with a service animal and reviews it with Betty. Even though the prospective tenant meets all the qualification requirements, Betty tells Ray she will not rent the apartment to the tenant because of the animal. Ray informs Betty that she is in violation of the Fair Housing Act and State fair housing laws.
   Is Ray correct? Why or why not? _____

2. John owns a residential house and decides to use it as a rental property. In his advertisement, John notes that "no pets" will be allowed in the property. He receives several applications and evaluates each based on employment, credit worthiness, and criminal history. He selects a tenant and notifies the individual that the application was approved. One week after signing the lease agreement, the new tenant emails John and asks for an accommodation for his assistance animal, a pig. John denies the request, stating that 1) the pig is not domesticated and may damage the property, and 2) the tenant did not request the accommodation prior to signing the lease.
   Can John legally deny the accommodation request because it was submitted after the application?
   _____

3. Explain the differences between service and assistance animals.
   _____
   _____

LEARNING OBJECTIVES

This section will review the basic requirements of the federal and state Fair Housing Acts and will delve into reasonable accommodations that must be made for service and assistance animals.

By the end of this section, you should be able to:

- explain the purpose of fair housing laws;
- list the seven protected classes in the federal Fair Housing Act;
- define handicapping condition;
- define reasonable accommodation;
- differentiate between service and assistance;
- explain the complaint process; and
- explain why automatic disqualifiers, such as housing vouchers, should not be used in tenant screening.

TERMINOLOGY

- **Assistance animal:** The *Fair Housing Act* provides guidelines for tenants to have assistance animals in order to use and occupy a dwelling. An assistance animal works, performs tasks, provides assistance, or provides emotional support for a person with a physical or mental impairment that substantially limits at least one major life activity or bodily function. An example of an assistance animal is a miniature horse, cat, monkey, etc.)
- **Disparate Impact:** A doctrine, policy or practice that seems neutral on its face, but has the effect of disproportionately harming people of a certain protected class.
- **Major life activity:** Seeing, hearing, walking, breathing, performing manual tasks, caring for one's self, learning, speaking, or working.
- **Reasonable accommodation:** A change, exception, or adjustment to a rule, policy, practice, or service that may be necessary for a person with a disability to have equal opportunity to use and enjoy a dwelling, including public and common use spaces.
- **Service animal:** The *American with Disabilities Act* provides guidelines for places of public accommodations to allow the admittance of a service animal for individuals with a disability. According to the *American with Disabilities Act*, a service animal is any **dog** that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or mental disability. A **miniature horse** is no longer considered a service animal.

PURPOSE & HISTORY OF THE FAIR HOUSING ACT

The purpose of the federal Fair Housing Act (hereafter known as FHA) is to ensure that members of protected classes have equal access to housing.

WHAT ARE PROTECTED CLASSES?

The first U.S. law enacted to provide citizens with equal access to housing was the Civil Rights Act of 1866. The Act dictated:

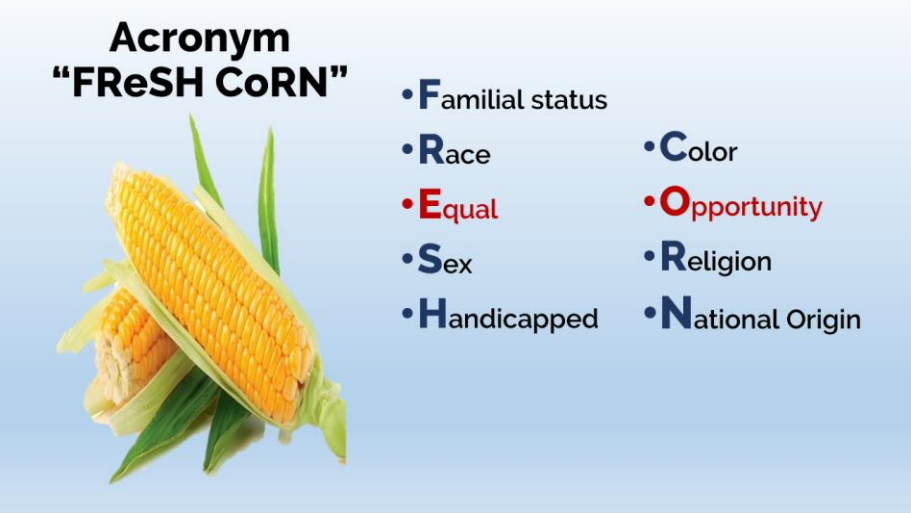
> *…citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude…shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence,* ***to inherit, purchase, lease, sell, hold, and convey real and personal property,*** *and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens….*

The Federal Civil Rights Act of 1866, which prevents racial discrimination in the sale of and rental of housing, is still in place today. However, additional laws have since been enacted, to expand the protections to other groups of individuals.

Title VIII of the Civil Rights Act of 1968, also known as the Fair Housing Act of 1968, prohibited discrimination in the sale, rental, and financing of housing based on race, religion, and national origin. In 1974, sex was added as a protected class, and familial status and disability were added in 1988.

Consequently, there are now seven protected classes expressly listed under the Fair Housing Act, as follows:

- race,
- color,
- religion,
- sex,
- handicapping conditions/disability,
- familial status, and
- national origin.



North Carolina General Statute § 41A (hereafter known as the State Fair Housing Act) includes protections for the same seven classes.

Also, brokers should be aware that five jurisdictions in NC have local fair housing ordinances certified by HUD as "substantially equivalent" to federal FHA. Those five jurisdictions are:

- the City of Durham;
- the City of Greensboro;
- the City of Winston-Salem;
- Orange County; and
- the City of Charlotte-Mecklenburg County.

These jurisdictions receive federal funding under the Fair Housing Assistance Program to investigate and attempt to resolve complaints within their area. However, only one of the substantially equivalent local ordinances includes additional protected classes. The Orange County, NC, local fair housing ordinance also makes it unlawful to discriminate in housing because of age and veteran status.

The most recent changes in FHA are related to sexual preference and orientation. Lesbian, gay, bisexual, or transgender (LGBT) persons are not expressly listed as protected classes under FHA or the State Fair Housing Act. However, the Department of Housing and Urban Development (hereafter known as HUD) has regulations that implement policies to "ensure that its core programs are open to all eligible individuals and families regardless of sexual orientation, gender identity, or marital status."

Persons who identify as LGBT and who believe they have experienced housing discrimination may be able to file a claim based on:

- the Fair Housing Act;
- HUD's equal access rule; or
- state and local anti-discrimination laws.

Due to HUD's expanding policy for fair housing to all eligible individuals and families regardless of sexual orientation, gender identity, or marital status, brokers should realize that discrimination in housing based upon LGBT considerations may violate FHA.

Protected Class: Handicapping Condition / Disability

60% (sixty percent) of all FHA complaints are related to the denial of reasonable accommodations and disability access. Also, most HUD charges of discrimination against a housing provider involve the denial of reasonable accommodations to a person who has a physical or mental disability that the housing provider cannot readily observe.

The State of Fair Housing in North Carolina (2019) report found that, in 2018, the most common complaint allegations filed were discrimination based upon a disability. Complaints alleging discrimination due to disability accounted for 59.7% (92 out of 154) of the total number of complaints filed. In addition, two-thirds of the complaints were filed in the following five counties:

- Durham;
- Forsyth;
- Guilford;
- Mecklenburg; and
- Wake.

Additionally, the FHA and State Fair Housing Act use different terminology to define a physical or mental impairment that substantially limits one or more of a person's major life activity. Regardless of the terminology used, the definition of the terms remain the same. The terminology and definitions provided by the FHA and the State Fair Housing Act are:

The Fair Housing Act defines DISABILITY as:

- …those individuals with mental or physical impairments that substantially limit one or more major life activities. The term mental or physical impairment may include conditions such as blindness, hearing impairment, mobility impairment, HIV infection, mental retardation, alcoholism, drug addiction, chronic fatigue, learning disability, head injury, or mental illness.

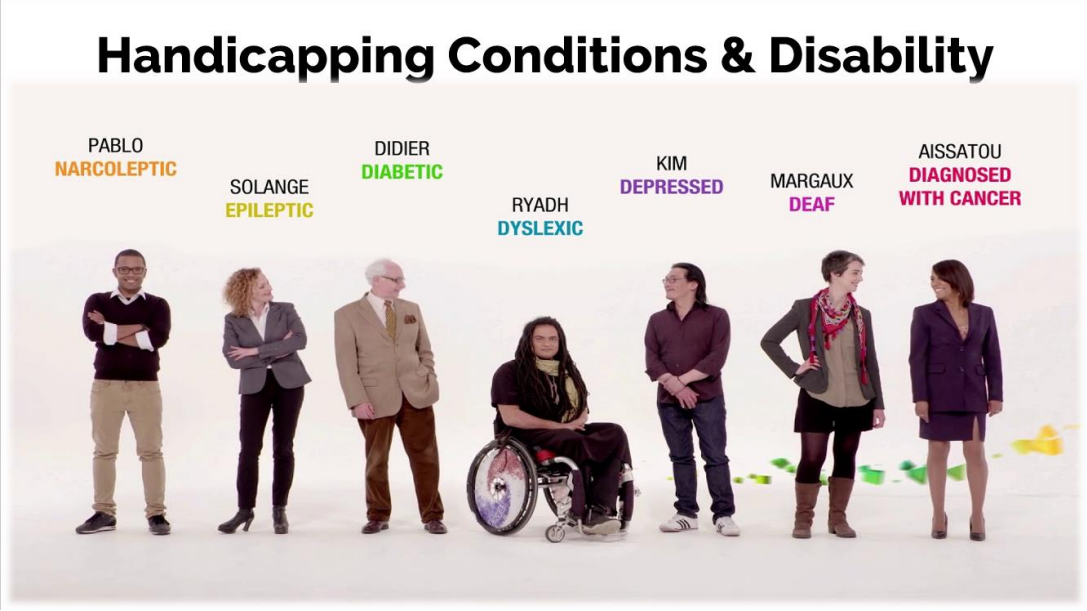
The State Fair Housing Act defines HANDICAPPING CONDITION as:

> (i) A physical or mental impairment which substantially limits one or more of a person's major life activities;
> (ii) A record of having such impairment;
> (iii) Being regarded as having such impairment.
>
> Handicapping condition does not include current, illegal use of or addiction to a controlled substance as defined in 21 U.S.C. § 802, the Controlled Substances Act. The protections against discrimination on the basis of handicapping condition shall apply to a buyer or renter of a dwelling, a person residing in or intending to reside in the dwelling after it is sold, rented, or made available, or any person associated with the buyer or renter.

Under Federal and State Fair Housing laws, if an individual has a disability/handicapping condition which substantially limits their major life activities, such as

- learning,
- walking,
- seeing, and
- breathing,

the individual may request a reasonable accommodation to occupy and use the dwelling.



WHAT IS A REASONABLE ACCOMMODATION?

A reasonable accommodation is a change, exception, or adjustment to a rule, policy, practice, or service that may be necessary for a person with a disability to have equal opportunity to use and enjoy a dwelling, including public and common use spaces.

It is not necessary for an individual to submit a written request or use the words "reasonable accommodation," "assistance animal", or any other special words to request a reasonable accommodation under FHA. However, the person making the request is encouraged to do so in order to avoid miscommunication.

The request for a reasonable accommodation for an assistance animal may be:

- oral or written; and
- requested by others on behalf of the individual, including a person legally residing in the unit with the requesting individual, a legal guardian, or an authorized representative.

In addition, an individual may also want to keep a copy of a reasonable accommodation request and supporting documentation in case there is a dispute regarding the validity of the request later.

An individual may request an accommodation in order to use or occupy a dwelling either before or after acquiring the assistance animal. Under FHA, a person with a disability may make a reasonable accommodation request at any time; the housing provider must consider the request even if the resident made the request after bringing the animal into the dwelling.

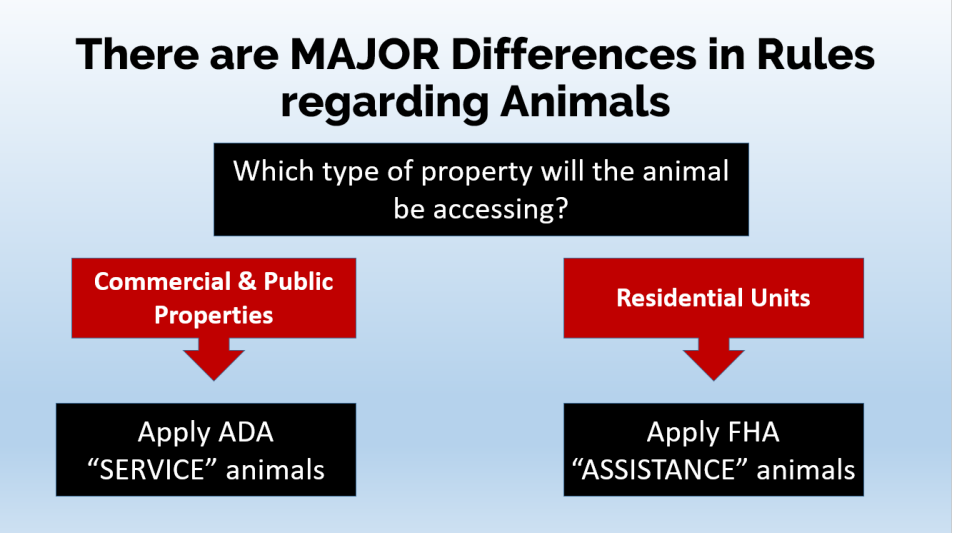
A housing provider's failure to provide a reasonable accommodation is a violation of FHA and State fair housing laws.

 BIC ALERT: Reasonable accommodation requests are considered records that must be retained in transaction files pursuant to Rule 58A .0108(b)(15).

WHAT IS THE DIFFERENCE BETWEEN A SERVICE AND ASSISTANCE ANIMAL?

There are major differences in rules regarding accommodation requests related to animals. To determine which rules apply, you must first determine the type of property for which the accommodation request is being made.

- The American with Disabilities Act (ADA) applies to commercial properties / places of public accommodation. The ADA defines criteria for SERVICE animals.
- The Fair Housing Act (FHA) applies to residential properties. The FHA defines criteria for ASSISTANCE animals.



Fair Housing Act (FHA): Assistance Animals

FHA makes it unlawful for a housing provider to refuse a reasonable accommodation for a person with a disability who needs it to use and enjoy the dwelling.

Therefore, housing providers are required to modify or make exceptions to policies when it may be necessary to permit persons with disabilities to have assistance animals.

On January 28, 2020, HUD issued FHEO (Fair Housing and Equal Opportunity) Notice FHEO-2020-01, which states, in relevant part:

> This notice explains certain obligations of housing providers under the Fair Housing Act (FHA) with respect to animals that individuals with disabilities may request as reasonable accommodations.

There are two types of assistance animals:
(1) service animals, and
(2) other trained or untrained animals that do work, perform tasks, provide assistance, and/or provide therapeutic emotional support for individuals with disabilities (referred to in this guidance as a "support animal").

Policies including pet deposits, fees, and/or breed restrictions do not apply to assistance or service animals because these animals are not considered pets. A housing provider may charge a fee or deposit for pets.

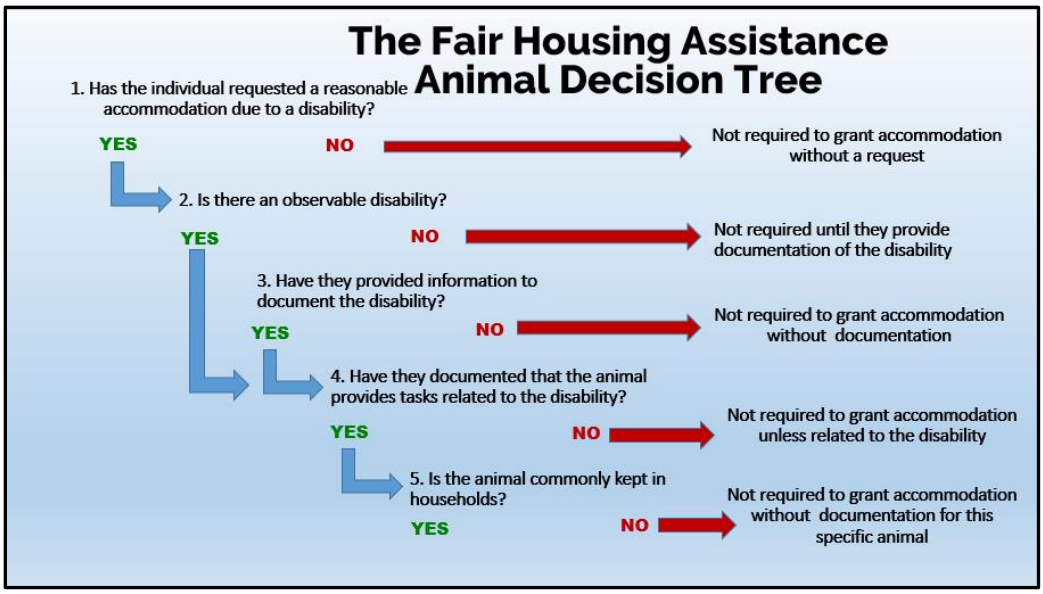
Here is a link to the entire FHEO Notice FHEO-2020-01 issued by HUD: https://www.hud.gov/sites/dfiles/PA/documents/HUDAsstAnimalNC1-28-2020.pdf

An animal that does not qualify as a service animal or other type of assistance animal is a pet for purposes of the FHA and may be treated as a pet for purposes of the lease and housing provider's rules and policies.

Definitions and Guidelines under Fair Housing Act (FHA)

Assistance animals (i.e. support animals) work, perform tasks, provide assistance, or provide emotional support for a person with a physical or mental impairment that substantially limits at least one major life activity or bodily function.

According to the FHEO Notice FHEO-2020-01, issued by HUD, housing providers may use the following questions as a guide to help them make a decision regarding a reasonable accommodation request:



1. Has the individual requested a reasonable accommodation to get or keep an animal in connection with a physical or mental impairment or disability?

   YES: Proceed to question 2.

   NO: The housing provider is not required to grant a reasonable accommodation if the purpose is not related to a handicapping condition or disability.

2. Does the individual have an observable disability or does the housing provider (or agent making the determination for the housing provider) already have information giving them reason to believe that the person has a disability?

   YES: Proceed to question 4.

   NO: Proceed to question 3.

   Note: Observable disabilities include blindness or low vision, deafness or being hard of hearing, mental illness, or mobility limitations. Some impairments may not be observable. In such case, the housing provider may request information regarding the disability and the disability-related need for the animal but is not entitled to know the individual's diagnosis.

3. Has the individual requesting the accommodation provided information that reasonably supports that the individual seeking the accommodation has a disability?

   YES: Proceed to question 4.

NO: The housing provider is not required to grant the accommodation unless this information is provided. Note that the housing provider must provide the individual with a reasonable opportunity to submit the information.

Information about the disability may include:

- a determination of a disability from a federal, state, or local government,
- a receipt of disability benefits, eligibility of a housing voucher due to disability, or
- information confirming a disability from a health care professional.

Before denying a reasonable accommodation request due to lack of information, the housing provider is encouraged to engage in a good-faith dialogue with the requesting party called the "interactive process."

The housing provider may not insist on specific types of evidence if the information which is provided or actually known to the housing provider meets the requirements. Also, a housing provider may not request the disclosure of the diagnosis, severity of the disability, or medical records/examination.

An attorney should be consulted before denying a reasonable accommodation request to prevent violations of the Fair Housing Act. Also, the NC Human Relations Commission is a resource for brokers and housing providers regarding fair housing questions and concerns. This agency can provide information regarding reasonable accommodation request and when they can be denied.

Also, it is recommended that individuals seeking reasonable accommodations for support animals ask health care professionals to provide the following statements /certifications:

- the patient has a physical or mental impairment;
- the patient's impairment(s) substantially limit(s) at least one major life activity or major bodily function; and
- the patient needs the animal(s) because it does work, provides assistance, performs at least one task that benefits the patient because of his or her disability, or because it provides therapeutic emotional support to alleviate a symptom or effect of the disability of the patient.

Some certificates and licensing documents can be obtained via the internet for a nominal fee. According to *FHEO Notice FHEO-2020-01,* documentation from the internet is not, by itself, sufficient to reliably establish an individual has a non-observable disability or disability related-need for the assistance animal.

4. Has the individual requesting the accommodation provided information which reasonably supports that the animal does work, performs tasks, provides assistance, and/or provides therapeutic emotional support with respect to the individual's disability?

   YES: Proceed to question 5.

   NO: The housing provider is not required to grant the accommodation unless this information is provided but may not deny the accommodation on the grounds that the individual has not provided the information until the housing provider has provided a reasonable opportunity to do so.

5. Is the animal commonly kept in households?

   YES: The reasonable accommodation should be provided.

   NO (animal is a reptile, barnyard animal, monkey, kangaroo, or other non-domesticated animal): A reasonable accommodation should not be provided unless the individual demonstrates a disability-related therapeutic need for the specific animal. The individual is encouraged to submit documentation from a health care professional confirming the need for the animal.

Unique animals may be a reasonable accommodation if the animal is trained to do work or perform tasks that a dog cannot perform and the information from the health care professional confirms:

- the individual has allergies that prevents using a dog; or
- without the animal, the symptoms or effects of the person's disability will be significantly increased.

It may be helpful for patients to ask health care professionals to provide the following additional information:

- the date of the last consultation with the patient;
- any unique circumstances justifying the patient's need for the particular animal (if already owned or identified by the individual); and

- whether the health care professional has reliable information about this specific animal or whether they specifically recommend this type of animal.

Example: A capuchin monkey is trained to assist a person with a spinal cord injury who has paralysis. The monkey, because it has hands, can retrieve a bottle of water from the refrigerator, unscrew a cap, insert a straw or place the bottle of water in a holder for the individual. A service dog is not able to perform these types of manual tasks.

Although domesticated, non-domesticated, and unique animals may be considered for reasonable accommodations, a housing provider may deny a reasonable accommodation request due to:

- a direct threat to the health and safety of others; or
- the potential of the animal to cause substantial physical damage to the property of others.

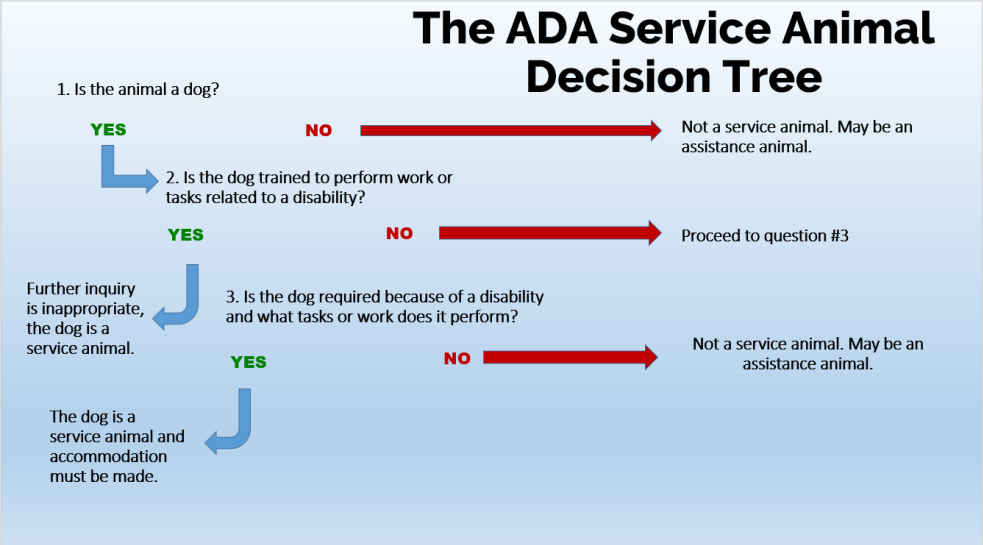
Reasonable accommodation requests must be analyzed using objective evidence about the particular conduct of the assistance animal, and not the conduct of similar animals.

Americans with Disabilities Act (FHA): Service Animals

The American with Disabilities Act (hereafter referred to as ADA) defines a "service animal" as any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or mental disability. The work or tasks performed by a service animal must be directly related to the individual's disability. Although a miniature horse is not considered a service animal under ADA, HUD and the Department of Justice (hereafter known as DOJ) issues guidance for animals that are not commonly kept in households or "unique animals." These types of animals are called assistance animals.

Miniature horses are considered assistance animals if they are animals they do work, perform tasks, and provide assistance, or emotional support for a person with a physical or mental impairment that substantially limits at least one major life activity or bodily function.

According to the FHEO Notice FHEO-2020-01, housing providers may use the following questions as a guide to help determine if the animal is a service animal under ADA.



1. Is the animal a dog?

   YES: Proceed to question 2.

   NO: The animal is not a service animal but may be another type of assistance animal for which a reasonable accommodation is needed under FHA. Proceed to question 1 under the questions for a reasonable accommodation under FHA.

2. Is it readily apparent that the dog is trained to do work or perform tasks for the benefit of an individual with a disability?

   YES: Additional inquiries are unnecessary and inappropriate because the animal is a service animal.

   NO: Proceed to question 3.

3. Is the animal required because of a disability and what work or task has the animal been trained to perform?

   YES: If the animal is required because of a disability and the work or task is identified, then the reasonable accommodation should be granted because the animal is a service animal.

   NO/NONE: If the animal is not required because of a disability, the animal does not qualify as a service animal under ADA but may be a support or other type of assistance animal that needs to be accommodated under FHA.

Performing a work or tasks means that the dog is trained to take a specific action when needed to assist the person with a disability. Some examples of the disability support functions service animals perform are:

- alerting a hearing-impaired person to sounds;
- guiding a visually-impaired person;
- pulling a wheelchair; or
- reminding a person to take their medication.

Moreover, policies including pet deposits, fees, and/or breed restrictions do not apply to service animals because they are not considered pets.

Questions for Discussion

I am a broker managing a property on behalf of an owner. My tenant has submitted an accommodation request. What is the correct process?

Brokers should educate their owners on fair housing laws and the differences between pets, service animals, and assistance animals before providing property management representation. If a tenant is requesting an accommodation for an assistance or service animal, brokers may request on behalf of their owner documentation to support the existence of a disability or need for that animal if not readily apparent. Lastly, brokers may provide a response to a tenant's accommodation request for an assistance or service animal after speaking with the owner.

If a broker receives a request for a reasonable modification to the property, the broker must communicate the request to the owner. The owner will then decide whether or not the request is reasonable. However, the broker may request on behalf of the owner documentation to support the request for the reasonable modification.

Additionally, brokers and owners must ensure that they are compiling with fair housing laws when responding to an accommodation request. Further, they have the burden of proof to demonstrate a legitimate basis for denying a reasonable accommodation request. Most importantly, a failure on the part of the broker or owner to respond is in itself a violation of FHA.

When can a request for a reasonable accommodation be legally denied?

A reasonable accommodation request may be legally denied when / if:

- the accommodation will cause an undue financial and administrative burden on the housing provider;
- accommodating the request will fundamentally alter the housing provider's services;

- the assistance animal poses a direct threat to the health and safety of others that cannot be reduced or eliminated by another reasonable accommodation; or
- an assistance animal causes substantial physical damage to the property of others that cannot be reduced or eliminated by another reasonable accommodation.

An attorney should be consulted before denying a reasonable accommodation request to prevent violations of the Fair Housing Act. Also, the NC Human Relations Commission is a resource for brokers and housing providers regarding fair housing questions and concerns. This agency can provide information regarding reasonable accommodation request and when they can be denied.

The North Carolina Real Estate Commission has published a brochure entitled "Fair Housing" to assist brokers and housing providers with the Fair Housing Act. It is available at: https://www.ncrec.gov/Brochures/Print/FairHousing.pdf

BIC ALERT: BICs should ensure affiliated brokers are educated about the Fair Housing Act. Consider implementing training programs and having clear firm policies.

Examples of Accommodations

Following are examples of accommodations a housing provider may provide an individual with a disability/handicapping condition:

- assigning a reserved parking space for one individual, even though no other individuals have assigned spaces;
- providing written material orally, in large print, or Braille;
- providing reminders for a developmentally challenged individual when lease payments are due;
- permitting a live-in aide with a disabled individual when it violates normal occupancy policies; and
- permitting service animals when the policies otherwise prohibits pets.

An example of failing to provide a reasonable accommodation occurred in Castillo Condo. Ass'n v. U.S. Dep't of Hous. & Urban Dev., 821 F.3d 92. In this case, Carlo Gimenez´Bianco, resided in a condo governed by the Castillo Condominium Association (hereafter known as the Association). The Association learned that Gimenz´ had a dog in his condo which was in violation of the "no pets" policy and sent him a letter.

Gimenz´ promptly responded with a letter from his treating psychiatrist asserting the disability-related need for his emotional support dog. The Association failed to provide the reasonable accommodation after the response and this lead Gimenz´ to sell his

condo that he occupied for 15 years. Gimenz´ filed a complaint with HUD and after a thorough investigation, HUD lodged a complaint against the Association. Initially, after a four-day evidentiary hearing, an Administrative Law Judge ruled that the Association did not violate the Fair Housing Act because Gimenz´ did not prove that he had a mental impairment. This decision was appealed to the Secretary of HUD and the Secretary found that the Association was in violation of the Fair Housing Act due to the following facts:

- Gimenz´ had a recognizable disability;
- Gimenz´ informed the Association of his need for the reasonable accommodation; and
- The Association denied the accommodation request and failed to engage with Gimenz´ in an interactive process.

The Secretary awarded Gimenz´ damages for emotional distress, assessed a civil penalty against the Association, and implemented mandatory training in fair housing for the officers of the Association.

The Association appealed to the Court. The Court upheld the findings of the Secretary of HUD and stated in it's ruling that the Association knew or should have known of the disability, and the emotional support dog was a reasonable accommodation that would have afforded Gimenz´ an opportunity to use and enjoy his dwelling. Further, the Court held that the actions of the condominium association violated FHA and affirmed that housing providers must modify or make exceptions to a "no pets" policy for persons with disabilities who require service or assistance animals.

The National Association of REALTORS® has provided a video, Window to the Law: Assistance Animals in Housing, indicating the criteria housing providers can use when considering a request for an accommodation under FHA. The video can be accessed at https://www.nar.realtor/videos/window-to-the-law/assistance-animals-in-housing.

Reasonable Accommodations Requests for Service Animals in Places of Public Accommodation

There are similarities and differences between the FHA and ADA. One similarity is that they both prohibit discrimination against a protected class of individuals. However, they are distinguished by the FHA prohibiting discrimination and providing equal access to housing for protected classes and the ADA prohibiting discrimination in the use and enjoyment of places of public accommodation for protected classes of individuals.

According to the ADA, Title III Regulations, a place of public accommodation means a facility operated by a private entity whose operations affect commerce and falls within at least one of the following categories:

- places of lodging;
- restaurant or bar;
- theatre;
- places of public gatherings;
- grocery (i.e. retail) stores;
- laundromats;
- public transportation;
- places of public recreation;
- places of education;
- social center establishments (i.e. daycare, senior centers, etc.); and
- places of exercise or recreation.

Under the ADA, if an individual is requesting an accommodation be made for a service animal in a place of public accommodation, the owner/manager may not ask questions about the existence or nature of the individual's disability.

However, the following questions may be asked to determine whether the animal is a service animal.

1. Is the service animal required because of a disability?
2. What work or tasks has the animal been trained to perform?

Questions for Discussion

 ***Can the owner require the individual to provide documentation regarding the service animal's certification or training?***

No. Asking the individual to provide proof of the animal's certification is not permitted. The owner/manager may only ask the two questions mentioned above, even if the disability is not known or the tasks and/or work performed by the animal is not readily apparent or known.

 ***What if the tasks or services provided by the animal are readily apparent? Can the owner ask for more information?***

No.

 ***Can a service animal be legally denied access?***

A service animal can be legally denied access to a place of public accommodation ONLY IF:

- the animal is out of control and the handler is not effective in controlling it;
- the animal is not housebroken; or
- admitting the service animal would fundamentally alter the nature of the goods, services, programs, or activities provided to the public (i.e. inability to go to certain areas within a zoo due to causing agitation of animals).

COMPLAINTS: HOW / WHERE ARE THEY FILED?

In North Carolina, complaints for alleged violations of fair housing laws must be filed within one year of the alleged violation with the North Carolina Human Relations Commission (NCHRC), 1711 New Hope Church Road, Raleigh, NC.

Once a complaint has been filed, the NCHRC will investigate to determine whether unlawful discrimination has occurred, and

- attempt to eliminate discriminatory practices by (1) having an informal conference, (2) persuasion, or (3) conciliation; or
- issue a right-to-sue letter if allegations of discrimination are not determined.

If a resolution cannot be achieved by NCHRC, an individual may:

- request a right-to-sue letter so that they may file a civil lawsuit;
- allow NCHRC to file a lawsuit for them; or
- have an administrative hearing to determine a final decision on the matter.

An individual may choose to file a civil lawsuit at their expense without filing a complaint with the NCHRC at any time. A civil lawsuit must be filed within one year of an alleged violation of the state fair housing laws and within two years of federal fair housing laws.

Additionally, a complaint can be filed with HUD's Fair Housing/Equal Opportunity Housing Office using the following options:

- in English or Spanish online at https://www.hud.gov.
- download a HUD complaint form in a variety of languages and email it to a local FHEO office
- call an FHEO Intake Specialist at 1-800.669.9777 or your local FHEO office.

Penalties

The U.S. Department of Housing and Urban Development (HUD) published adjusted civil penalty amounts on May 15, 2019, for individuals and entities that have been found in violation of housing-related laws after April 15, 2019.

The maximum civil penalty is $21,039 for the first violation of FHA. The civil penalty is $10,000 for the State Fair Housing Act. If an entity or individual has violated the act within the previous five years a maximum fine of $52,596 may be awarded under FHA and $25,000 under the state. Consequently, if a violation has occurred two or more times within the previous seven years, a maximum fine of $105,194 is awarded for FHA violations and $50,000 for state violations.

Civil penalty amounts are in addition to any award for actual damages, attorney fees, and/or cash due to housing discrimination.

CAN REAL ESTATE BROKERS BE HELD LIABLE FOR THEIR CLIENTS' OR EMPLOYEES' FAIR HOUSING VIOLATIONS?

YES! FHA pertains to all individuals who are engaging in residential real estate transactions, so brokers may be held liable for their clients' or employees' violations of FHA, even if the brokers did not directly discriminate.

In an effort to prevent fair housing violations, brokers should educate their clients on fair housing laws before providing brokerage services. Most importantly, in order for a broker to educate their clients/employees, they must first obtain knowledge by attending training and educational programs.

Questions for Discussion

I am a broker managing a property on behalf of an owner. My owner-client does not want me to rent the property to families with young children, because the back deck is very high off the ground. If I follow the owner's directive, can I get in trouble?

YES! FHA prohibits discrimination based on the protected class of familial status, which means families with children under the age of 18. A broker may not legally exclude a protected class member at the directive of an owner, regardless of the reasoning behind it.

Also, if the broker knows that an owner unlawfully discriminates against a tenant or applicant, then the broker, too, is in violation of the Fair Housing Act.

I am a broker managing a property on behalf of an owner. I have explained that service animals must be permitted under the law, but the owner refuses, saying no animals will be allowed. What can I do?

If you proceed with this client, you, too, can be held liable for violations of Fair Housing. Also, you will be in violation of License Law and Commission rules. If the client will not relent, you should terminate the agency agreement immediately in writing and explain the reasons for the termination.

 ***Will my firm be liable if one of the employees or affiliated brokers discriminates against a protected class member?***

Yes, the firm will be liable for the actions of affiliated brokers and employees if unlawful discrimination against a protected class member occurs. The firm will be liable due to vicarious liability. Vicarious liability is when an employer is held responsible for the negligence of an employee or affiliate while they are performing a work related task.

One such violation occurred in the case of Chicago v. Matchmaker Real Estate Sales Center, Inc., 982 F.2d 1086 (1992). In this case, the Leadership Council in Chicago suspected that the defendants (agents of Matchmaker Real Estate Sales Center, Inc.,) were engaging in the illegal practice of racial steering. Therefore, the Leadership Council conducted a series of five test intermittently from July of 1987 until June of 1988.

The "testers," black and white individuals, posed as homeseekers looking for properties on the southwest side of Chicago and nearby suburban areas. The Leadership Council ensured they met various financial qualifications (i.e. income and down payment availability) and had varying housing needs (i.e. family size and preference).During the test black testers were only showed homes in the black areas of town, Chicago Lawn and Gabe Park. The white testers received computer lists of the homes available in the suburban areas.

The CEO and sole shareholder of Matchmaker Real Estate Sales Center, Inc., Erwin Ernst, had written office polices ensuring that agents complied with all fair housing laws and attended additional training courses sponsored by the local real estate board.

However, during the bench trial, the magistrate judge held that Erwin Ernst and Matchmaker Real Estate Sales Center were vicariously liable for the actions of his agents even though he was unaware of any discriminatory conduct.

The judge relied on the following to support this finding:

> A principal cannot free itself of liability by delegating to an agent the duty not to discriminate. *Green v. Century 21, 740 F.2d 460, 465 (6th Cir. 1984)*

Ernst also argued that the agents were considered "independent contractors" via the employment agreement. The judge threw out the argument that agents were independent contractors because the agents worked in Matchmaker's office under Ernst's day-to-day control and supervision, and followed multiple office policies while conducting real estate transactions.

The magistrate judge held that the agents violated the Civil Rights Act of 1866 and the Fair Housing Act. Additionally, the judge agreed to hold Ernst and Matchmaker Real Estate Sales Center, vicariously liable for the unlawful behavior of its agents. In addition, the Court stated:

> As a matter of well-settled agency law, a principal may be held liable for the discriminatory acts of his agent if such acts are within the scope of the agent's apparent authority, even if the principal neither authorized nor ratified the acts. Coates v. Betchel, 811 F.2d 1045, 1051 (7th Cir. 1987).

Also, all defendants were jointly and severally liable for punitive and compensatory damages, and a monetary award for frustration of purpose.

The following cases also support the Court's opinion that an employer is vicarious liable for the acts of their agents or employees while they are acting within the course and scope of employment:

- *Walker v. Crigler, 976 F.2d 900* (CA4 1992) (owner of rental property liable for the discriminatory acts of the property manager)
- *Marr v. Rife, 503 F.2d 735 (CA6 1974)* (real estate agency's owner liable for the discriminatory acts of his agency's salespersons)

 BIC ALERT: BICs may be held liable for the actions of their affiliated brokers who unlawfully discriminate against a protected class.

If I violate fair housing laws, can I lose my broker license?

A violation of the fair housing law is also violation of the N.C. Gen. Stat. §93A-6(a)(10) and (15) and Commission rules 58A .1601.

HOUSING CHOICE VOUCHER PROGRAM

The federal government has a housing program titled *Housing Choice Voucher Program*. This program allows low-income families, disabled individuals, and the elderly to secure:

- decent,
- safe, and
- sanitary

housing within a private market.

The recipient of the voucher has the opportunity to choose housing that meets their needs as long as the housing provider participates in the program.

The *Housing Choice Voucher Program* is administered at the local level through public housing agencies in each state. According to HUD, a housing subsidy is paid to the housing provider directly by the public housing agency on behalf of the participating family. The family then pays the difference between the actual rent charged by the landlord and the amount subsidized by the program.

Unfortunately, some housing providers are now using housing vouchers as an automatic disqualifier for prospective tenants. This practice of automatic disqualification may be in violation of fair housing laws, as it could be an example of disparate impact.

Under FHA, *disparate impact* is defined as:

- a doctrine, policy or practice that is neutral on its face
- but disproportionately harms people of a protected class.

For instance, if a housing provider disqualifies a tenant based solely on the usage of a housing voucher and a majority of the prospective tenants who use them are within a certain protected class, disparate impact may occur.

To prevent the possibility of disparate impact, housing providers should avoid automatic disqualifiers, such as housing vouchers. Instead, they should employ tenant screening criteria that consider multiple factors and that can be applied fairly and equitably to everyone regardless of their race, sex, color, national origin, religion, familial status, or disability.

Disparate impact in housing and its discriminatory effects on protected classes will be explored in more detail in the *2021-2022 Update Course*.

ANSWERS TO DISCUSSION QUESTIONS

For Discussion on page 1

1. Betty hires Ray, a broker, to assist her with locating a tenant for her basement apartment. Betty informs Ray that the tenant is not allowed to have a pet. Ray places an advertisement on social media and indicates that pets are not allowed for this rental. Ray receives an application from an individual with a service animal and reviews it with Betty. Even though the prospective tenant meets all the qualification requirements, Betty tells Ray she will not rent the apartment to the tenant because of the animal. Ray informs Betty that she is in violation of the Fair Housing Act and State fair housing laws.

   Is Ray correct?
   Answer: Yes, Ray is correct. It is a violation of FHA, and State Fair Housing laws for the owner to fail to respond to a request for an accommodation. In addition, Ray may be in violation of FHA and the NCREC Laws and rules if he continues to represent Betty while she unlawfully discriminates against a protected class member.

2. John owns a residential house and decides to use it as a rental property. In his advertisement, John notes that "no pets" will be allowed in the property. He receives several applications and evaluates each based on employment, credit worthiness, and criminal history. He selects a tenant and notifies the individual that the application was approved. One week after signing the lease agreement, the new tenant emails John and asks for an accommodation for his assistance animal, a pig. John denies the request, stating that 1) the pig is not domesticated and may damage the property, and 2) the tenant did not request the accommodation prior to signing the lease.

   Can John legally deny the accommodation request because it was submitted after the application in this scenario?
   Answer: No. An individual may request an accommodation at any time. John must consider the request even though it was made after the application was approved.

3. Explain the difference between a service animal and an assistance animal.
   *Answer: The Americans with Disabilities Act defines a service animal as **any dog** that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or mental disability.*

*FHA defines an assistance animal as **animals (i.e. bird, cat, hamster, etc.)** that work, perform tasks, provide assistance, or provide emotional support for a person with a physical or mental impairment that substantially limits at least one major life activity or bodily function.*

Section 2

Contracts

1. Mark, a buyer's agent, submits an offer on behalf of his clients for $27,000. The listing agent reviews the offer with his seller. The seller marks out $27,000, writes in $37,000, initials the change, and signs all pages.
   Was a contract created? Why or why not? _____

2. Mae, a buyer's agent with ABC Realty, submits an offer on behalf of her buyer-client to Tammy, a seller's agent with XYZ Realty. The offer includes a $1000 due diligence fee (DDF) and a $2000 initial earnest money deposit (EMD). Tammy presents the offer to her seller-client, and the seller signs the offer as-is, without making any changes. Tammy calls Mae to let her know the seller has signed the contract. Tammy reminds Mae that the DDF and EMD checks must be delivered to Tammy's office by the end of the day.
   Are the parties under contract? Yes / No
   If YES, when was the contract formed? _____
   If NO, what is required for contract formation? _____

3. Sam, a buyer's agent, submits an offer on behalf of his buyer-client to Malik, the listing agent. Malik presents the offer to his seller-client. The seller agrees to all terms except the due diligence fee. The seller wants to increase the fee from $2500 to $5000. Malik calls Sam to discuss the DDF change, and Sam tells him the buyer will agree to the increase. Malik adjusts the amount of the DDF on the Offer to Purchase form, and the seller initials the change and signs all pages. Malik forwards the paperwork to Sam.
   A few hours later, Malik calls Sam again and tells him the seller is rescinding the offer, because the seller has accepted another offer.
   Did Malik's and Sam's clients form a contract? Why or why not?
   _____

LEARNING OBJECTIVES

By the end of this section, you should be able to:

- define offer and acceptance;
- list methods of communicating acceptance;
- explain the difference between a due diligence fee and earnest money deposit;
- explain whether a due diligence fee or earnest money deposit is required for a valid contract; and
- describe a broker's fiduciary duties related to multiple offers and contract preparation.

TERMINOLOGY

- **Offer:** A promise (that is definite in terms) by an offeror calling for a promise or an action by an offeree.
- **Offeree:** A party to whom an offer is made.
- **Offeror:** A party making an offer.
- **Acceptance:** A promise by offeree to be bound by the terms of an offer.
- **Contract:** A deliberate agreement between two or more competent parties supported by legal consideration to perform or abstain from some act.
- **Due Diligence Fee:** ***Standard Form 2-T*** defines due diligence fee as a negotiated amount, if any, paid by Buyer to Seller with the contract that gives the Buyer the right to terminate the contract for any reason or no reason during the Due Diligence Period.
- **Earnest Money Deposit:** An amount of money deposited by the Buyer to the Seller that is evidence of good faith.

CONTRACT BASICS

A contract is

- a deliberate agreement,
- between two or more competent parties,
- supported by legal consideration,
- to perform or abstain from performing some act.

Under contract law, any agreement between two or more parties must meet certain requirements to be legally valid. The essential elements of a contract are:

- **consideration**, meaning something of value passing between the parties that supports their agreement;
- **lawful objective** (purpose) and a means of accomplishing that objective;
- **mutual assent**, meaning a "meeting of the minds" where all parties understand and agree to all material terms of their negotiated agreement; and
- **legal contractual capacity of the parties**, meaning all parties to the agreement must be legally capable of entering into a contract.

Additionally, the NC Statute of Frauds dictates that contracts for the sale or lease* of real property must be IN WRITING to be enforceable.

*Leases exceeding three years.

THE OFFER

Under basic contract law, an offer:

- is a promise by an offeror,
- to enter into a contract on certain terms.

An offer is made **BY** an offeror **TO** an offeree.

Rule 58A .0112, Offers and Sales Contracts, states a broker acting as an agent in a real estate transaction shall not use a preprinted offer or sales contract form unless the form describes or specifically requires certain information. Additionally, this rule specifies provisions that should not be included in the preprinted offer or sales contract.

Does an offer to purchase real estate have to be in writing to be enforceable?

YES. The NC Statute of Frauds requires an offer (and any resulting contract) for the purchase of real estate to be IN WRITING and:

- identify the parties to the contract by individual legal name;
- identify the subject matter of the contract;
- contain all material terms and conditions; and
- be signed by the offeror (party making the offer).

ACCEPTANCE = CONTRACT FORMATION

Upon receipt of an offer, an offeree may choose to:

1) reject the offer outright;
2) accept the offer as tendered without any modifications;
3) alter or change some of the terms and return it to the original offeror; or
4) neither accept nor reject the offer and engage in oral negotiations with the offeror concerning terms the offeree would consider more favorable.

Any Change in Offer Terms = Counteroffer

Once an offeree changes any term in an offer, the original offer is rejected and a COUNTEROFFER is created.

A counteroffer is basically a brand new offer. Once an offeree submits a counteroffer, that former offeree becomes the offeror. The initial offer was rejected, so it is no longer in existence. Should the parties wish to return to the terms of the initial offer, they would have to create a new offer.

Acceptance

Acceptance occurs when an offeree…

1) signs an offer without making any changes, and
2) communicates that the offer has been signed to the offeror.

Acceptance is not complete until the last offeree has actually signed the offer and that fact is communicated to the last offeror or his/her agent. Once the offeree's written

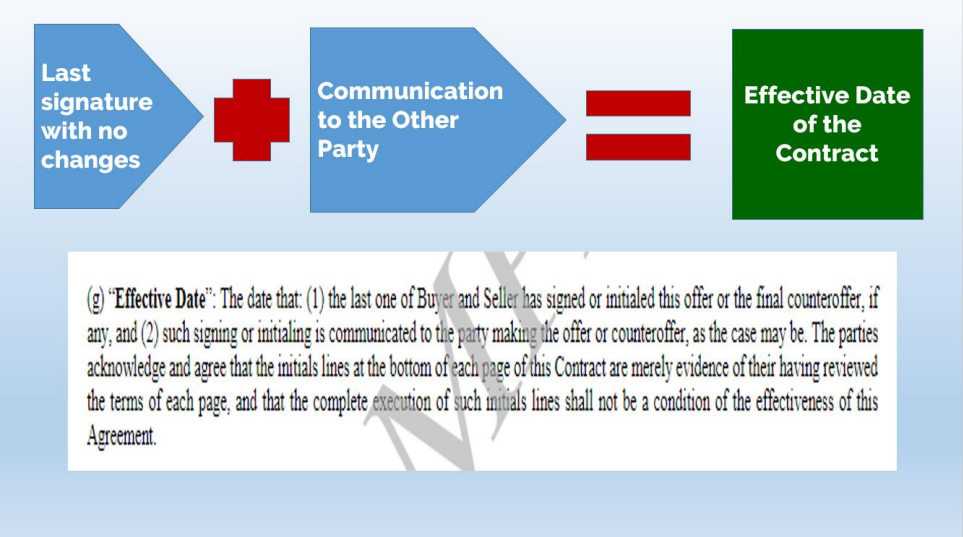
acceptance has been communicated to the last offeror, then the parties have an enforceable contract.

Until acceptance is communicated to the last offeror or his/her agent, that offeror may still withdraw his/her offer even though it has been signed by the offeree.

Effective Date = Date of Acceptance

Standard Form 2T – Offer to Purchase and Contract defines Effective Date as the date that:

1. the last one of Buyer and Seller has signed or initialed this offer or the final counteroffer, if any, and
2. such signing or initialing is communicated to the party making the offer or counteroffer, as the case may be.



BIC ALERT: If an offer, acceptance, and/or contract will be created electronically ensure that all requirements dictated by the North Carolina Uniform Electronic Transactions Act (UETA) are met.

1. A buyer's agent submits an offer to Holly, a listing agent, at a cooperating firm. Holly sends the offer via email to the seller and reviews it. The seller agrees to the terms, signs the offer, and scans and emails it back to the listing agent.
   Was a contract created? _____

2. Thomie, a dual agent, represents Jay in purchasing a home listed by his firm. Jay and the seller provide written authority for Thomie to act as a dual agent. Thomie assists Jay with preparing an offer. Thomie then presents the offer to the seller, and the seller signs it.
   Was a contract created? _____

Communicating Acceptance

Under contract law, acceptance of an offer may be communicated in a variety of ways such as:

- oral communication;
- hand delivery;
- mail ("snail mail" or other services, such as FedEx or UPS); or
- electronic communication such as email, text, or fax.

If the contract is "silent" about the method(s) of communication, whatever method the party customarily uses will be considered reasonable. Reasonable communication is determined by the Courts to be the usual way in which parties handled the transaction and the intent of the parties.


Communication to a party that the offer will be signed or the parties accept the offer without evidence of a signed offer does not create an enforceable contract.

WHAT ABOUT TEXT MESSAGING?

Disclaimer: The following case mentioned in this section is not a NC or Federal court ruling. Therefore, it does not have jurisdiction in NC. However, most brokers utilize electronic communication in brokerage transactions; therefore, this case provides valuable knowledge and a warning regarding the usage of text messages.

Real estate transactions must be in writing to comply with the Statute of Frauds. In St. John's Holding, LLC v. Two Electronics, LLC, NO 16 MIS 000090RBF (2016), the Court stated that during the negotiations, the parties' agents extensively used electronic communication (i.e. email, text) and phone to communicate.

Therefore, the issue before the Court was whether text messaging sufficiently satisfied the Statue of Frauds. The Court analyzed the following:

1. whether text messaging can be considered a "writing" under the Statute of Frauds;
2. whether *alleged writing* contains sufficiently complete terms and an intent to be bound by those terms;
3. whether the text message is signed; and
4. whether there is an offer and acceptance.

In this case, the Court found negotiations and exchanges between the parties contained sufficient terms to create a binding contract between the Buyer and Seller. The multiple text messages evidenced:

- that the subject matter of the agreement contained all material terms; and
- was authenticated by the sellers' agent signature at the end of the text message which evidenced the intent for the parties to be bound.

On appeal, the Court reversed the lower court's disposition and held:

- the seller-agent lacked implied authority to bind the parties; but
- text messages are considered writings under the Statute of Frauds.

So, the moral of the story is: If text messaging is normally used between parties, the Courts may consider them "writings" sufficient enough if they contain:

- all material terms;
- a signature;
- intent to bind the parties; and
- memorialize the offer and acceptance.

In conclusion, if brokers are communicating via text messaging, it is plausible that an acceptance of an offer can be communicated via text messaging as long as the offer has been signed by the respective party. Court cases like St. John Holdings, LLC v. Two Electronics, LLC, NO 16 MIS 000090 RBF (20016), reminds brokers that the law will continually adapt to modern technology.

 BIC ALERT: Any communication (e.g. text, email, direct message) regarding a real estate transaction must be retained in the transaction file per Rule 58A .0108, Record Retention.

Mailbox Rule

Though not frequently used in today's electronic age, the "mailbox rule" does still apply in some situations. According to the mailbox rule, acceptance of an offer is communicated by means of dropping the signed offer in the mail to the offeror (or offeror's broker). Acceptance occurs at the time the item is dropped into the mailbox. This rule operates only as a method of communicating acceptance of an offer. It does not pertain to rejection of offers or to counteroffers. Rejections and counteroffers are only effective upon receipt by the addressee and not at the time of mailing.

Questions for Review

 ***How does acceptance occur?***

Acceptance occurs when an offeree signs an offer without making any changes and communicates to the offeror that the offer has been signed.

 ***How will I be notified of the other party's acceptance of my offer?***

An individual will be notified about the acceptance in the manner in which they specified in the offer (i.e. in writing, personal delivery, orally, or electronic means) or, when the contract does not specify a means of communication, by a reasonable method.

 Communication to a principal's broker is the same as communicating directly to the principal. Remember that a broker stands in the place of the principal, at least for communication of acceptance purposes.

Additional Information about Offer and Acceptance

To assist consumers in understanding offers and acceptance, the Commission publishes the "Questions and Answers on Offer and Acceptance" brochure.

The brochure is provided on the Commission's website at https://www.ncrec.gov/Brochures/Print/OfferandAcceptance.pdf

WHAT ARE THE DIFFERENCES BETWEEN A DUE DILIGENCE FEE (DDF) AND AN EARNEST MONEY DEPOSIT (EMD)?

Due Diligence Fee (DDF)

The due diligence fee is defined in the Standard Form 2T, Offer to Purchase and Contract, as:

> …a negotiated amount, **if any**, paid by Buyer to Seller with this Contract for Buyer's right to terminate the contract for any reason or no reason during the Due Diligence Period.

The amount of the DDF may be influenced by such matters as the market for the property, number of days on the market, personal circumstances of buyer and seller, and the length of the "Due Diligence Period."

Is a DDF required?

No. A DDF is not required to create a valid contract.

To whom does the buyer pay the DDF?

The buyer pays the DDF directly to the seller, generally at the time the contract is executed. The amount of the DDF is credited to buyer at closing against the purchase price unless the contract is otherwise terminated.

If the contract is terminated, which party gets to keep the DDF?

Answer: The seller. Per paragraph 12 in Form 2T: the DDF is non-refundable, except in the event of a material breach of the contract by the seller or if the property is destroyed prior to closing.

Earnest Money Deposit (EMD)

An EMD is a negotiated amount of money deposited by the buyer with an escrow agent to evidence the buyer's good faith.

Is an EMD required?

No. An EMD is not required to create a valid contract.

To whom does the buyer pay the EMD?

The buyer pays the EMD to the escrow agent identified in the contract. Often, the escrow agent is a real estate company or an attorney or a title company.

The Standard Form 2T, Offer to Purchase and Contract states:

> …the initial earnest money deposit, the additional earnest money deposit, and any other earnest monies paid or required to be paid in connection with this transaction, collectively the "Earnest Money Deposit", shall be deposited and held in escrow by Escrow Agent until Closing, at which time it will be credited to Buyer, or until this Contract is otherwise terminated.

In other words, all earnest monies are to be held by the named escrow agent and credited to buyer at closing against the purchase price unless the contract is otherwise terminated.

If the buyer terminates the contract, which party gets to keep the EMD?

It depends on WHEN the buyer terminates.

According to Form 2-T, all earnest money deposits will be refunded to the buyer IF the buyer terminates prior to the expiration of the Due Diligence Period (DDP). If the buyer terminates AFTER the expiration of the DDP, the EMD will be retained by the seller.

If the seller terminates the contract, which party gets to keep the EMD?

If the seller breaches the contract, then Form 2-T dictates that all EMDs are to be refunded to the buyer upon buyer's request, but "... shall not affect any other remedies available to Buyer for such breach."

Additional Information about EMDs

To assist consumers in understanding EMDs, the Commission publishes the "Questions and Answers on Earnest Money Deposits."

This brochure is provided on the Commission's website at https://www.ncrec.gov/Brochures/EarnestMoney.pdf.

WHAT IF THE CONTRACT INCLUDES A DDF OR AN EMD BUT THE BUYER DOESN'T DELIVER THE FUNDS RIGHT AWAY? DO WE HAVE A CONTRACT?

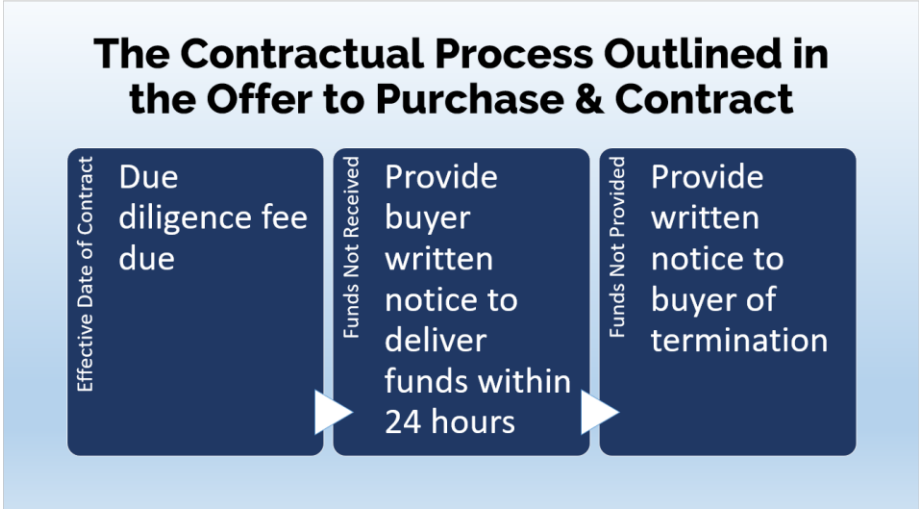
In order to create a valid real estate sales contract, there must be a written offer, an acceptance of the offer, and communication of the acceptance to the last offeror. Neither a DDF nor an EMD is required for a valid contract.

If the contract requires the remittance of a DDF and/or EMD, and the buyer fails to timely submit the required funds with the contract or by the specified due date, a valid contract still exists. However, the buyer may be in breach depending upon the provisions agreed upon by the parties.

Standard Form 2T, Offer to Purchase and Contract, includes a provision that provides the Sellers a remedy if the Buyer fails to deliver the DDF and/or EMD or if the bank dishonors the funds. The provision states:

> Should Buyer fail to deliver either the Due Diligence Fee or any Initial Earnest Money Deposit by their due dates, or should any check or other funds paid by Buyer be dishonored, for any reason, by the institution upon which the payment is drawn, Buyer shall have one (1) banking day after written notice to deliver cash, official bank check, wire transfer or electronic transfer to the payee. In the event Buyer does not timely deliver the required funds, Seller shall have the right to terminate this Contract upon written notice to Buyer.

The provision provides Sellers with a remedy to terminate the contract after notifying the Buyer. Therefore, it is up to the Sellers to decide whether they wish to continue with the contract even if the Buyer fails to remit funds after given written notice. Standard Form 2T indicates that a valid contract exists absent a due diligence fee(s) or remittance of insufficient due diligence fee(s).



Brokers should advise their clients (i.e. Buyers and Sellers) on the contract provisions and the consequences of failing to comply with those terms, such as a breach or termination of the contract.

PRESENTING OFFERS

Under the law of agency, a seller's agent (listing agent) has a duty to communicate (present) all offers on a listed property to the seller as soon as possible and to disclose to the seller all information in the agent's possession that might affect the seller's decision to accept an offer.

In addition, Real Estate Commission Rule 58A .0106 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."

It is important to note that this Commission rule applies to all agents involved in a transaction regardless of whom they represent or from whom they will receive compensation.

The three-day provision specified in Rule 58A .0106(c) is included to allow for situations where the seller is not immediately available, and represents an outside time limit within which offers must always be presented.

In cases where the seller is available, all offers, the likelihood of future offers, and information that may affect the seller's decision, should be presented as soon as possible and delivered to the client via electronically, face-to-face, or via postal mail.

Even if a contract is pending on the property, all offers should still be submitted to the sellers.

 License Law and Commission rules do not allow brokers to accept or reject an offer on behalf of their client. For example, a seller's agent has no authority to reject an offer on behalf of the seller, even if the offer is clearly disadvantageous to the seller. Instead, the broker must present all offers and disclose the advantages/disadvantages of the offer to the seller.

Multiple Offers

If a broker receives more than one offer on a subject property, the broker is considered to have multiple offers that must be presented to the seller as soon as possible but no later than three days after receipt according to Rule 58A .0106(c).

Should the broker submit offers to the seller in a certain order?

No. If a broker receives multiple offers on a listed property at about the same time, the broker should not present one offer to the seller and withhold a second offer until the seller makes a decision on the first offer. It does not matter which offer was reviewed first, or was the lowest; all offers should be presented at the same time.

Is it a material fact that there are multiple offers?

No. The existence of multiple offers is not a material fact that must be disclosed to other brokers and/or their principals. A listing broker must get the seller's consent to disclose that the owner has received or is considering more than one offer. However, if the owner provides consent, the broker has a duty to disseminate information to everyone fairly, equally, and honestly.

When can a broker disclose confidential terms, such as price and financing, with competing buyers?

Commission Rule 58A .0115, states 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.

In other words, you must have the permission of the BUYER to disclose the terms of their offer to other buyers. It is not sufficient to have the permission of the seller.

Best Practice: Brokers should document receipt of all offers upon submission and immediately deliver them to the seller for consideration.

REVIEWING OFFERS AND CONTRACTS

A real estate broker must have an active, current license in order to:

- assist and advise clients on the completion of contract offers and counteroffers;
- use preprinted forms; and
- communicate offers and acceptances.

Brokers owe Skill, Care, and Diligence to Clients

Agency law requires that a real estate broker exercise a high degree of skill, care, and diligence in the conduct of the agent's duties. Agents who do not perform with the required degree of skill, care, and diligence, or are guilty of negligence or misconduct, not only are liable to the principal for any damages the principal may sustain, but may also forfeit any claim to compensation.

A broker exhibiting skill, care, and diligence, assists clients by:

- competently and accurately completing approved preprinted sales contract forms, and
- understanding general terminology and contract provisions.

Brokers are expected to know when it is appropriate to use a particular contract form and to recognize situations where sellers and buyers should be referred to an attorney to have a suitable contract drafted.

QUESTIONS FOR DISCUSSION

Are brokers in violation of License Law and Commission rules if they fail to review contract provisions with a client?

Reviewing and explaining the provisions of offers and contracts to clients are part of a broker's responsibility for proper skill, care, and diligence. However, brokers are reminded to refer their clients to an attorney for an in-depth explanation of legal concepts to prevent the practice of law.

N.C. Gen. Stat. §93A-6(a)(8) authorizes the Commission to discipline a licensee who is found to be "… unworthy or incompetent to act as a real estate broker in a manner as to endanger the interest of the public."

A real estate broker who:

- completes a sales contract improperly;
- uses forms that are not legally adequate; or
- fails to adequately explain the contract provisions and protect the interests of their clients

may be deemed to be in violation of License Law and Commission rules.

 ***My company transmits all transaction documents to clients and customers using an electronic management system. When clients and customers receive documents, the software shows them where to insert their initials and signatures. Am I still expected to explain the forms and contracts?***

YES! Brokers must review contract provisions with their clients regardless of whether they are using printed copies or an electronic platform. Brokers may violate License Law and Commission rules if they utilize an electronic program for document management and fail to review the provisions with their clients before they sign. Brokers should ensure clients are knowledgeable about the provisions of offers, contracts, and other forms before the clients affix their initials or signatures.

Further, as a "fiduciary" for a client, the broker is obligated to act in the client's best interests, placing the client's interests before any self-interest. For example, a broker or firm may prefer to use electronic documents. However, if a client is uncomfortable with the technology, or prefers to receive printed copies of executed documents, the broker should provide information and documentation in a way that suits the client's needs.

 If a broker fails to review the contract provisions with a client, the broker may be found to be in violation of License Law and Commission rules.

ANSWER TO DISCUSSION QUESTIONS

For Discussion on page 27

1. Mark, a buyer's agent, submits an offer on behalf of his clients for $27,000. The listing agent reviews the offer with his seller. The seller marks out $27,000, writes in $37,000, initials the change, and signs all pages.

   Was a contract created? Why or why not? *No, because the seller rejected the buyer's offer and created a counteroffer by changing the price.*

2. Mae, a buyer's agent with ABC Realty, submits an offer on behalf of her buyer-client to Tammy, a seller's agent with XYZ Realty. The offer includes a $1000 due diligence fee (DDF) and a $2000 initial earnest money deposit (EMD). Tammy presents the offer to her seller-client, and the seller signs the offer as-is, without making any changes. Tammy calls Mae to let her know the seller has signed contract. Tammy reminds Mae that the DDF and EMD checks must be delivered to Tammy's office by the end of the day.

   Are the parties under contract? *YES*
   If YES, when was the contract formed? *When Tammy called Mae to let her know the seller had signed without making any changes to the buyer's offer. Delivery of DDF and EMD are not required for contract formation.*
   If NO, what is required for contract formation? *An offer must be signed without making any changes and the signed acceptance is communicated to the offeror or their agent.*

3. Sam, a buyer's agent, submits an offer on behalf of his buyer-client to Malik, the listing agent. Malik presents the offer to his seller-client. The seller agrees to all terms except the due diligence fee. The seller wants to increase the fee from $2500 to $5000. Malik calls Sam to discuss the DDF change, and Sam tells him the buyer will agree to the increase. Malik adjusts the amount of the DDF on the Offer to Purchase form, and the seller initials the change and signs all pages. Malik forwards the paperwork to Sam.
   A few hours later, Malik calls Sam again and tells him the seller is rescinding the offer, because the seller has accepted another offer.

   Did Malik's and Sam's clients form a contract? Why or why not? *No, because the original offer was rejected when the seller changed the amount of the DDF. To form a contract, the buyer would have had to*

sign the counteroffer, and the buyer's agent would have had to communicate to the listing agent that the buyer had signed.

For Discussion on page 33

1. A buyer's agent submits an offer to Holly, a listing agent, at a cooperating firm. Holly sends the offer via email to the seller and reviews it. The seller agrees to the terms, signs the offer, and scans and emails it back to the listing agent.

   Was a contract created? *No, because the fact that the seller signed the contract was not communicated to the buyer or the buyer's agent.*

2. Thomie, a dual agent, represents Jay in purchasing a home listed by his firm. Jay and the seller provide written authority for Thomie to act as a dual agent. Thomie assists Jay with preparing an offer. Thomie then physically presents the offer to the seller, and watches as the seller signs it.

   Was a contract created? *Yes, because Thomie is a dual agent, representing both the buyer and the seller. When the seller signed the offer in front of Thomie, communication of acceptance to the buyer occurred.*

Section 3

Cybersecurity

1. Kristi, a broker with ABC Realty, is updating documentation in a transaction file while at a local coffee shop. Kristi uses the public Wi-Fi and sends her client a reminder via email to sign the engagement letter for the closing attorney's office. Because Kristi has worked with the attorney previously, she has a copy of the attorney's wiring instructions, so she attaches a copy of the wiring instructions in the email to her client.

   What did Kristi do wrong? _____

2. Sandra, a broker with Houz Realty, uses her smartphone to access transaction files and client information. One day while Sandra is searching for listings, a text message pops up, with a link to set up delivery preferences for a package. Sandra does not remember ordering a package, but she clicks on the link anyway.

   Has Sandra compromised the information of her clients?
   _____

3. Joe, a BIC with Farm Realty, answers a call one day. He receives an unfamiliar call from Tom, who claims to be a representative with the firm's cloud storage provider, Documents R' Us. Tom informs Joe of a new upgrade, and during the conversation Joe states that the firm is not paying for an additional service. Tom convinces Joe that the upgrade is needed and free. Joe then provides his email address, receives an email with a link, and clicks on it.

   What, if anything, has Joe done wrong?
   _____

LEARNING OBJECTIVES

By the end of this section, you should be able to:

- describe common types of cybersecurity attacks in real estate transactions;
- list best practices for brokers to prevent wire fraud, and
- describe fraudulent activities that have become more prevalent during the COVID-19 pandemic.

TERMINOLOGY

The following definitions are provided by the Cybersecurity and Infrastructure Security Agency (CISA).

- Cybersecurity: The art of protecting network, devices, and data from unauthorized access or criminal use and the practice of ensuring confidentiality and integrity, and availability of information.
- Malware: Software designed to steal sensitive information, and/or gain access to private computer systems.
- Ransomware: A type of malicious software or malware designed to deny access to a computer system or data until a ransom is paid.

The division of the Department of Justice / FBI that tracks and investigates computer crime is IC3

TYPES OF CYBERSECURITY ATTACKS

Business Email Compromise/Email Account Compromise (*BEC/EAC)*

According to the Internet Crime Complaint Center (hereafter known as IC3), business email compromise/email account compromise (hereafter known as BEC/EAC) is a sophisticated scam that targets both businesses and individuals who perform legitimate transfer-of-funds requests.

Following is a common fact scenario for BEC/EAC scams in real estate transactions:

1. Unbeknownst to the account holder, the email account of an individual in the transaction is hacked (broker, attorney, mortgage representative, buyer, or seller).
2. The hacker monitors email communications for transaction details such as closing costs, property location, and/or funds to be wired.
3. The hacker creates and sends a "spoof" email with instructions for the wire transfer on behalf of the attorney or broker to the buyer or seller. The hacker's email address and the style of the email closely resembles that of the original account holder, so the recipient is unlikely to realize it is not an authentic communication.

Also, it is important to note that this scam is not always associated with a transfer of funds request. Business emails can also be compromised to gain access to an employees' Personal Identifiable Information or Wage and Tax Statement (W-2) forms according to IC3.

 BIC ALERT: BICs should consider specifying in their office policy the types of email accounts that are permissible for brokers to use (e.g. free email accounts, firm email accounts, encrypted emails) to help prevent their email from being compromised.

Case Analysis: A Business Email Compromise

- The buyers entered into a contract to buy a property for $180,000 and did not intend to obtain mortgage financing to purchase the property. The buyers indicated their closing date would be in two weeks.
- A hacker obtained the name of an employee at the closing attorney's office and created a fake email address for the employee.
- The email contained a misspelled word and utilized a public email account (e.g. samm@gmail.com).

- The hacker sent an email masquerading as the attorney's employee to the buyer's agent asking for the buyer's email address.
- The buyer's agent responded to the hacker with the email address of the buyers and asked to reschedule the closing for ten calendar days later.
- The hacker responded to the buyer's agent and confirmed the new closing date and asked when they would receive the down payment from the buyers.
- The buyer's agent forwarded the email to the buyers. The email did not include any wire fraud verbiage or warning.
- The hacker sent an email directly to the buyers asking if they received the new wiring instructions and for them to wire the funds to escrow immediately.
- The buyers responded to the email from the hacker inquiring about the new instructions.
- The hacker responded to the email with an attachment that included the new wiring instructions and the amount to be escrowed of $175,854.30.
- The buyers made two wire transfers to the account specified in the hacker's wiring instructions.
- The wire fraud was not discovered until a couple of weeks later when recovery of the money was not possible.

Based upon the facts, what could the buyer's agent have done differently to better protect the buyers?

_____
_____
_____
_____

What could the buyers have done differently?

_____
_____

 Brokers should continuously remind clients about wire fraud and potential scams even though wire fraud information is included in various contract forms.

Cloud Storage Attacks

How do you store transaction files and documents for brokerage activities? Do you store this information in a cloud? As brokers conduct more real estate transactions virtually, the importance of ensuring the security of transaction files and personal data may require additional safety protocols.

Therefore, cloud data storage providers allow brokers and brokerage firms to secure their data, collaborate more effectively with others, and access information with convenience from a variety of locations. However, cloud storage providers are susceptible to cyber-attacks just like any other individual or business. According to Virtua, a data protection solutions company, hackers may attack cloud storage providers by retrieving the passwords of users or the security tokens of the computer.

Brokers who use the "cloud" for storage should implement the following practices to minimize the likelihood of a cyber-attack on their cloud storage:

- create a unique password with a mixture of letters, special characters, and numbers (e.g. 20 or more characters represent a strong password);
- change the password frequently;
- clear caches regularly;
- refrain from saving passwords on your computer;
- disable automatic synchronization of data; and
- encrypt files.

Although cloud providers have a responsibility to safeguard the information of its customers, brokers are obligated to secure transaction files as well. If there is a breach which leads to a potential loss suffered by a client, a broker may be held liable.

 BIC ALERT: BICs should consider implementing "best practices" to prevent a cyber-attack in their office policies. Additionally, in cases of a breach, recovery protocols should be addressed.

Malware

According to the Cybersecurity Infrastructure Security Agency (hereafter known as CISA), malware is software that disrupts service, steals sensitive information and gains access to private computer systems. The most commonly used malware is spyware or Trojans. Hackers utilize this type of software to retrieve financial information, personal information (e.g. social security number, credit card number), and client data.

Historically, malware has been delivered via phishing emails. Phishing emails are used by hackers to trick you into giving them personal, confidential information. According to the Federal Trade Commission, the emails resemble emails from trusted sources; however, they usually:

- have incorrect grammar, punctuation;
- indicate a problem with your account;
- insist that you take immediate action to verify an account;
- include a fake invoice;
- offer free merchandise or a coupon; or
- inform you to click on a link to make a payment.

Ransomware

According to CISA, ransomware is a type of malicious software or malware designed to deny access to a computer system or data until a ransom is paid. It is usually disseminated in a link within an email or disguised as an attachment. Once the link or attachment is clicked, the device and/or network is infected with ransomware.

The Federal Bureau of Investigation (hereafter known as the FBI), states that cybercriminals are becoming more sophisticated and are sending legitimate websites with malicious codes or phishing emails.

Once the infection occurs, the malware encrypts the files, attached drives, and other computers on the network. This attack will lead to inaccessible data and a request for a ransom payment in exchange for a decryption key to retrieve lost data.

The FBI does not support paying a ransom due to the probability that a decryption key may not be received. Some of the following tips are recommended by the FBI to prevent ransomware attacks:

- educate employees on ransomware attacks;
- install anti-virus and anti-malware software; and
- back up data regularly.

Crypto-Jacking

Have you ever noticed that your computer is performing poorly, for example, operating slowly or overheating for no reason? If so, your computer may be infected with malware that runs unknowingly in the background. An example of this type of malware attack is crypto-jacking.

Crypto-jacking is a popular alternative to ransomware attacks because hackers can make more money with less risk of exposure. Crypto-jacking occurs when:

- victims receive a legitimate looking email that encourages them to click on a link; or
- hackers inject a code on a website.

Whatever method hackers use to distribute the code, once the code is enabled, it runs in the background on the victim's computer while it is in use. The hacker uses the victim's computer only as a hub to perform illegal activities and does not steal any of the victim's information. Therefore, this type of cyber-attack will not be obvious. A pop-up window will not appear nor will files be held hostage or lost. An individual who has been a victim of crypto-jacking will experience a computer than operates differently and more slowly.

Brokers can protect the operating systems of their computers by:

- scanning for malware;
- monitoring computer usage;
- using ad blockers to block malicious codes in online advertisements;
- closing out browsers after each use; and
- not clicking on ads or links without verification.

Smishing

Brokers communicate with a multitude of individuals daily who never become their clients or parties in a transaction. Therefore, brokers should exercise extreme caution when receiving text messages, links, or attachments from unknown sources.

One type of scam that brokers could experience is smishing. Smishing is similar to phishing scams that are sent via email. It involves links or attachments being sent via text and occurs when hackers use mobile devices such as tablets and phones, to gain access to confidential information.

Tech Support Scams

On a daily basis, brokers are filtering through emails, text messages, and answering phone calls. This activity makes brokers susceptible to tech support scams.

Tech support scams are conducted by scammers who call and pretend to be a computer technician from a well-known company. The scammers indicate that a problem has been found with your computer and often ask for remote access to run a fictitious diagnostic test. Additionally, the scammers insist on receiving payment to fix a problem that does not exist.

Also, the scammers may use pop-up windows that indicate an error has occurred with your operating system or antivirus software. A telephone number is usually included in the pop-up and individuals are instructed to call the number to receive technical assistance.

Brokers should be aware that legitimate technical support companies will not display a pop-up warning asking you to contact them about potential viruses or security problems.

In an effort to prevent technical support scams, brokers should:

- keep security software up-to-date;
- contact a trusted computer technician;
- not allow anyone control of their computer;
- not click links or attachments; and
- not provide their bank or credit card information over the telephone.

 BIC ALERT: BICs should indicate in their firm policies who is authorized to make changes to services rendered by vendors.

BEST TIPS FOR PREVENTING WIRE FRAUD

Cybersecurity attacks and wire fraud are prevalent in brokerage transactions due to the nature of the business. The following are best practices as indicated by Old Republic Title, a title insurance company, for preventing wire fraud:

- secure devices and accounts (authenticate, encrypt, use strong passwords);
- be vigilant about educating brokers and clients about cybersecurity and wire transfer protocols;
- utilize cashier checks (cashier checks can be verified with the bank prior to funding);
- know the company's wire fraud policies and procedures;
- read all emails cautiously and slowly (analyze requests, check and verify sender's email address, use forward instead of reply);
- be suspicious of changes to wiring instructions; and
- remind clients to review wire fraud disclaimers.

The North Carolina Bar Association has provided guidance to attorneys that is also beneficial to brokers. They recommend the following to prevent fake wiring instruction scams:

- don't allow changes in disbursement methods to be made via email;
- confirm all wiring instructions with a phone call to a trusted number and initiate the call;
- confirm email addresses and encrypt all sensitive information; and
- require multiple people to review wiring instructions before sending wire transfers.

The North Carolina Bar Association's video can be accessed by clicking here: https://www.youtube.com/watch?v=mgI_QX1oK6E&feature=youtu.be&utm_source=Wiring+Instructions+Alert&utm_campaign=WiringInstructionsAlert&utm_medium=email

Additionally, the National Association of Realtors® provides a plethora of resources to ensure that brokers are equipped with the knowledge to prevent wire fraud and to educate their clients of its prevalence as well.

A wire fraud video developed by the National Association of Realtors® can be accessed here: https://www.youtube.com/watch?v=amPQEO1n1rM

COVID-19 and FRAUD

On April 8, 2020, the United States Department of Homeland Security (hereafter known as DHS), Cybersecurity and Infrastructure Security Agency (CISA), and the United Kingdom's National Cyber Security Centre (hereafter known as NSCC) issued an alert entitled, COVID-19 Exploited by Malicious Cyber Actors, AA20-099A.

The alert provides information regarding the types of cyberattacks that have occurred due to the COVID-19 global pandemic. Cyber criminals are conducting COVID-19 related scams by sending phishing emails and malware that use COVID-19 as a common theme. Additionally, due to the increase in curiosity that has occurred due to the pandemic, hackers are able to use social engineering to gain access to data, devices, and personal information.

Brokers should be aware of the following attacks specifically related to COVID-19:

- phishing emails that include an email subject line referencing COVID-19;
- smishing messages that request demographic information to receive governmental support or financial assistance; and
- exploitation of VPN's (Virtual Private Network) and remote access desktop programs by sending malicious files via email.

The NSCC has identified four red flags that can assist a broker in determining whether an email is phishing. The red flags are an email that:

- has an authoritative tone commanding an action;
- has an urgency with a timeline to complete the requested action;
- provokes emotions such as anxiety or nervousness if the action is not completed in a timely manner; or
- indicates that a product is scarce or in short supply.

Brokers have adapted their brokerage services to meet the needs of clients by offering virtual showings, teleconferences, and assisting them with scheduling virtual settlement conferences. On March 30, 2020, the Federal Bureau of Investigation (FBI)

issued a press release entitled, FBI Warns of Teleconferencing and Online Classroom Hijacking during COVID-19 Pandemic.

The press release provided the following tips to prevent the hijacking of online meetings:

- create passwords for meetings and use a “virtual” waiting room to control the admittance of guests;
- do not share meeting room links on unrestricted, public social media posts;
- ensure screen sharing options are disabled and provide for “Host Only”;
- ensure that current versions of the teleconferencing tools are employed; and
- implement telework polices that specify requirements for physical and information security.

Real estate transactions are still occurring during this pandemic and cybercriminals are still hacking business email accounts, sending phishing emails, and smishing messages to obtain confidential information for financial gain.

Old Republic Title has created a wire fraud prevention drill that can be used by any party in a real estate transaction to help prevent fraudulent activity especially during times of crisis such as COVID-19. The drill consists of three important steps:

STOP: Upon receiving a call with potential wiring instructions, hang up and tell the caller you will verify the information. If you receive an email or text message with wiring instructions, do not reply.

CALL: In an effort to make sure that the request you receive is legitimate, call a trusted, approved telephone number used in the past to contact individuals involved in the transaction or on the contract. Refrain from using telephone numbers given over the phone, in an email or text sent to you.

VERIFY: After calling the trusted number, speak with the person that allegedly called, emailed, or texted you to verify that the changes to the instructions are legitimate.

Brokers have a duty to receive education on the prevention of wire fraud and inform their clients of potential threats.

BICs should ensure brokers have access to adequate resources to prevent wire fraud and educate clients. Most importantly, protocols should be specified to assist brokers in reporting the fraud and possibly assist in the recovery of the lost funds.

ANSWERS TO DISCUSSION QUESTION

For Discussion on page 45:

1. Kristi, a broker with ABC Realty, is updating documentation in a transaction file while at a local coffee shop. Kristi uses the public Wi-Fi and sends her client a reminder via email to sign the engagement letter for the closing attorney's office. Because Kristi has worked with the attorney previously, she has a copy of the attorney's wiring instructions, so she attaches a copy of the wiring instructions in the email to her client.

   What did Kristi do wrong?

   Answer: Kristi should not use a public Wi-Fi to send personal, confidential information to clients. In addition, Kristi should not send wiring instructions to her client. Wiring instructions and protocols should be communicated directly to the client by the attorney's office and not via the broker.

2. Sandra, a broker with Houz Realty, uses her smartphone to access transaction files and client information. One day while Sandra is searching for listings, a text message pops up, with a link to set up delivery preferences for a package. Sandra does not remember ordering a package, but she clicks on the link anyway.

   Has Sandra compromised the information of her clients?

   Answer: Probably. Sandra should not click on links from unverified sources due to the potential of being hacked and client data being lost or stolen.

3. Joe, a BIC with Farm Realty, answers a call one day. He receives an unfamiliar call from Tom, who claims to be a representative with the firm's cloud storage provider, Documents R' Us. Tom informs Joe of a new upgrade, and during the conversation Joe states that the firm is not paying for an additional service. Tom convinces Joe that the upgrade is needed and free. Joe then provides his email address, receives an email with a link, and clicks on it.

   What, if anything, has Joe done wrong?

   Answer: Yes, Joe should not have given his email address to an unverified individual/company. Also, Joe should have verified the information from the representative by calling the company before providing his email address. In addition, Joe should not have clicked on any links from an unverified source.

Case Analysis on pages 47-48:

Based upon the facts, what could the buyer's agent have done differently to better protect the buyers?

> The buyer's agent should have called the attorney's office to question / verify the change in instructions. Also, the buyer's agent should have provided the buyers some information / education regarding potential risks of and best practices for wire transfers.

What could the buyers have done differently?

> The buyer's agent should have called the broker and/or attorney's office to question / verify the change in instructions.

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Section 4

Provisional Brokers on a Team

1. 15 "full" brokers and 3 provisional brokers (PBs) are affiliated with XYZ Realty at 123 Main St. Sally is the BIC of the office. Sally allows brokers to work as teams within the office. Hank, one of the full brokers with XYZ, has formed a team with two other "full" brokers to work together to increase productivity, and they are calling themselves the "The Hankster Team of XYZ Realty." Hank wants one of the PBs to join the team. Is that ok? Why or why not?

   _____

2. The Hankster Team is growing fast, and Hank decides to create an entity for the team. Hank creates and registers The Hankster Team, LLC, with the NC Secretary of State and obtains a firm license from the Real Estate Commission. Hank and his team continue to advertise as "The Hankster Team of XYZ Realty." May a PB legally be on Hank's team? Why or why not?

   _____

LEARNING OBJECTIVES

After completing this section, you should be able to:

- explain various team structures;
- recognize when a team structure requires a firm license and/or a BIC;
- recognize when a provisional broker (PB) may affiliate with a team within a firm; and
- describe a BIC's responsibility for supervision of a PB.

PROVISIONAL BROKERS AND TEAMS

Historically, Commission Rule 58A. 0506 dictated that PBs were only allowed to affiliate with and be supervised by one BIC at a time.

Effective July 1, 2020, Rule 58A. 0506 states:

> *A provisional broker shall be supervised by only one broker-in-charge at a time **except** that a provisional broker may be supervised by no more than two brokers-in-charge of two licensed affiliated firms located in the same physical location and acting as co-listing or co-selling agents in real estate transactions. When a provisional broker is supervised by more than one broker-in-charge, both brokers-in-charge shall bear all supervision responsibility at all times.*

Consequently, it is now legal for a PB to be affiliated with two BICs of two licensed firms, as long as the firms are affiliated and located in the same physical location. In such case, BOTH BICs will share responsibility for supervision of the dually-affiliated PB.

Let's explore several different team structures and determine whether a PB may be legally part of each team.

Team Scenario 1:
No Team Entity; All Team Members Affiliated ONLY with XYZ Realty

KEY POINTS: Scenario 1

- XYZ Realty is a large firm with multiple office locations.
- Betty is the Broker-in-Charge at the Downtown office location, and she has 10 affiliated brokers in the office.
- Bill Starr is a high producing broker in the Downtown office, and he wants to recruit other brokers within the same office to work together with him on transactions.
- Bill does not create a business entity for the team (e.g., a corporation, limited liability company (LLC), or partnership).
- Bill and all team members will advertise the team as "The Bill Starr Team of XYZ Realty."
- The team will continue to work out of the Downtown office location.

QUESTIONS FOR DISCUSSION: Scenario 1

1. **Does Bill's team need a firm license? Why or why not?**

   Answer: No, because there is not a separate entity for this team.

2. **Does Bill's team need a designated team BIC? Why or why not?**

   Answer: No, because there is not a separate entity for this team. Also, the team is operating out of the Downtown office, which already has a BIC (Betty).

3. **Commission records will show that team members are affiliated with which firm(s) and with which BIC(s)?**

   Answer: All team members will be affiliated with XYZ Realty, with Betty as BIC.

4. **Who will be responsible for supervising team members?**

   Answer: Betty is the BIC of the Downtown office, and she is responsible for supervising all brokers affiliated with that office.

5. **What company name will team members use when completing agency disclosures and agreements with consumers?**

   Answer: XYZ Realty will be the agent for all agency agreements with consumers, including property management agreements, listing agreements, buyer agency agreements, and dual agency agreements.

6. **How may the team name be advertised?**

   Answer: The team's advertising (e.g., signs, business cards, websites, etc.) must always include the name of the brokerage firm with which the agents are affiliated (XYZ Realty). Example: "The Bill Starr Team of XYZ Realty."

7. **Must the team name be registered as an assumed name (d/b/a)?**

   Answer: No, because the team name is only being used for branding. There is no change in the name of the registered entity, XYZ Realty.

8. **Is it legal for a PB to be a part of *The Bill Starr Team of XYZ Realty*? Why or Why not?**

   Answer: Yes, because all team members are affiliated with XYZ Realty, at the Downtown office location, under the supervision of Betty BIC.

9. If a PB is on the team, how / by whom must the PB receive compensation for brokerage activities performed on behalf of the team?

Answer: As required by N.C.G.S. § 93A-6, a PB may only be compensated for brokerage activities by the PB's supervising BIC. Thus, only Betty may legally pay the PB for brokerage activities.

Team Scenario 2:
A Licensed Entity for the Team; All Team Members Dually Affiliated with Both Firms at Same Physical Address

KEY POINTS: Scenario 2

- XYZ Realty is a large firm with multiple office locations.
- Betty is the Broker-in-Charge at the Downtown office location, and she has 10 affiliated brokers in the office.
- Bill Starr is a high producing broker in the Downtown office, and he wants to recruit other brokers within the same office to work together with him on transactions.
- Bill creates an entity for the team, named Best Brokers, Inc.
- Bill and all team members will advertise the team as "Best Brokers of XYZ Realty."
- The team will continue to work out of the Downtown office location.

QUESTIONS FOR DISCUSSION: Scenario 2

1. **Does Bill's team need a firm license? Why or why not?**

   Answer: Yes, because there is a separate entity for this team.

   Remember: To create an entity and obtain a firm license, Bill must:
   a) create and register the entity with the NC Secretary of State;
   b) if the business name is different than the legal name, register a d/b/a with the County Register of Deeds office; and
   c) submit a Firm License Application to the Real Estate Commission.
   To submit a firm license application, a Qualifying Broker (QB) must be designated for the firm, and a BIC must be designated for each office location.

2. **Does Bill's team need a designated team BIC? Why or why not?**

   Answer: Yes, because there is a separate firm license. To obtain a firm license, a Qualifying Broker (QB) must be designated for the firm, and a BIC must be designated for each office location.

3. **Commission records will show that team members are affiliated with which firm(s) and with which BIC(s)?**

   Answer: All team members must be dually affiliated with XYZ Realty, with Betty as BIC, and with Best Brokers, Inc., with Bill as BIC.

   Remember: To affiliate a broker with a firm / office location, a BIC must complete and submit a ***License Activation & Broker Affiliation form (REC 2.08)*** for each broker.

4. **Who will be responsible for supervising team members?**

   Answer: Betty and Bill will share responsibility for supervising team members.

5. **What company name(s) will team members use when completing agency disclosures and agreements with consumers?**

   Answer: Both Best Brokers, Inc., and XYZ Realty must be named as the agents on all agency agreements with consumers, including property management agreements, listing agreements, buyer agency agreements, and dual agency agreements.

6. **How may the team name be advertised?**

   Answer: The team's advertising (e.g., signs, business cards, websites, etc.) must always include the name of the brokerage firm(s) with which the agents are

affiliated (XYZ Realty); therefore, dually affiliated team members must include the names of both firms. Example: "Best Brokers, Inc., of XYZ Realty."

7. **Must the team name be registered as an assumed name (d/b/a)?**

   Answer: No, because Best Brokers, Inc., is the legal name of the entity.

8. **Is it legal for a PB to be a part of Best Brokers, Inc., of XYZ Realty? Why or Why not?**

   Answer: Yes, because all team members are dually affiliated with two BICs of two firms that are affiliated and are located at the same physical location (Downtown office).

9. **If a PB is on the team, how / by whom must the PB receive compensation for brokerage activities performed on behalf of the team?**

   Answer: Because the PB has two BICs, both of the BICs may compensate the PB for brokerage activities. A firm policy may dictate which BIC distributes compensation.

Team Scenario 3:
A Licensed Entity for the Team; All Teams Members Dually Affiliated with Both Firms at Separate Office Locations.

KEY POINTS: Scenario 3

- XYZ Realty is a large firm with multiple office locations.
- Betty is the Broker-in-Charge at the Downtown office location, and she has 10 affiliated brokers in the office.
- Bill Starr is a high producing broker in the Downtown office, and he wants to recruit other XYZ brokers to work together with him on transactions.
- Bill creates an entity for the team, named Best Brokers, Inc.
- Bill and all team members will advertise the team as “Best Brokers of XYZ Realty.”
- The team decides to move to a new office location, a few miles away from the Downtown office.

QUESTIONS FOR DISCUSSION: Scenario 3

1. **Does Bill's team need a firm license? Why or why not?**

   Answer: Yes, because there is a separate entity for this team.

   Remember: To create an entity and obtain a firm license, Bill must:
   a) create and register the entity with the NC Secretary of State;
   b) if the business name is different than the legal name, register a d/b/a with the County Register of Deeds office; and
   c) submit a Firm License Application to the Real Estate Commission.
   To submit a firm license application, a QB must be designated for the firm, and a BIC must be designated for each office location.

2. **Does Bill's team need a designated team BIC? Why or why not?**

   Answer: Yes, because there is a separate firm license. To obtain a firm license, a QB must be designated for the firm, and a BIC must be designated for each office location.

3. **Commission records will show that team members are affiliated with which firm(s) and with which BIC(s)?**

   Answer: All team members must be dually affiliated with XYZ Realty, with Betty as BIC, and with Best Brokers, Inc., with Bill as BIC.

   Remember: To affiliate a broker with a firm / office location, a BIC must complete and submit a License Activation & Broker Affiliation form (REC 2.08) for each broker.

4. **Who will be responsible for supervising team members?**

   Answer: Betty and Bill will share responsibility for supervising team members.

5. **What company name(s) will team members use when completing agency disclosures and agreements with consumers?**

   Answer: Both Best Brokers, Inc., and XYZ Realty must be named as the parties on all agency agreements with consumers, including property management agreements, listing agreements, buyer agency agreements, and dual agency agreements.

6. **How may the team name be advertised?**

   Answer: The team's advertising (e.g., signs, business cards, websites, etc.) must always include the name of the brokerage firm with which the agents are affiliated (XYZ Realty). Example: "Best Brokers, Inc., of XYZ Realty."

7. **Must the team name be registered as an assumed name (d/b/a)?**

   Answer: No, because Best Brokers, Inc., is the legal name of the entity.

8. **Is it legal for a PB to be a part of Best Brokers, Inc., of XYZ Realty, in this scenario? Why or Why not?**

   Answer: NO, because the two licensed firms are NOT at the same physical address.

   NOTE: Scenario 3 assumes that the team, Best Brokers, Inc., has moved to another office location. In such case, no provisional brokers may legally be on the team. However, if XYZ Realty wishes to establish a branch office in the same office location as the team [in scenario 3], then a BIC will be needed for the branch location, which may, in turn, make it possible for PBs to be part of the team. Please direct specific questions regarding team and branch office setup to the Commission's Regulatory Affairs Division.

9. **If a PB is on the team, how / by whom must the PB receive compensation for brokerage activities performed on behalf of the team?**

   Answer: N/A. A PB may not be on this team.

BROKER-IN-CHARGE: HOW MUCH RESPONSIBILITY FOR A PB?

A BIC will be held accountable for all of a PB's brokerage conduct, because the PB cannot have an active license, and thus cannot engage in brokerage activity, without a supervising BIC.

If a PB is affiliated with two BICs, as permitted by Rule 58A .0506(a), BOTH BICs will share responsibility and accountability for the PB.

Commission Rule 58A .0506(d) states:

> A broker-in-charge shall supervise the provisional broker in a manner that assures that the provisional broker performs all acts for which a real estate license is required in accordance with the Real Estate License Law and Commission rules. A supervising broker who fails to supervise a provisional broker as prescribed in this Rule may be subject to disciplinary action pursuant to Rule .0110 of this Subchapter.

The Commission has developed criteria to guide in assessing how adequately a BIC supervises a PB. The presence or absence of these factors will be considered along with all other pertinent information in arriving at a disciplinary decision. As noted in the 2017-18 BICUP course, the guiding criteria include:

1) Is the BIC available to assist, advise, and review the PB's practices and is the PB available to be supervised?
2) Has the BIC established written policies and procedures under which all affiliated brokers are expected to operate?
3) Does the BIC review and monitor the brokerage activities of PBs?
4) Does the BIC hold regular meetings and otherwise assure proper implementation of and adherence to office policies and procedures?
5) Does the BIC provide ongoing quality training programs and materials to affiliated licensees and disseminate in a timely manner all regulatory information s/he receives pertaining to real estate brokerage practice?
6) What is the experience level of the PB?
7) Has the BIC delegated supervisory duties to another licensee in the office and, if so, what is the level of training and experience of that supervisory licensee?
8) In what types of brokerage activities is the PB engaged?
9) How many PBs does the BIC supervise and what is the ratio of supervisors to PBs?
10) What, if any, corrective or remedial action does the BIC take upon learning of a violation of the License Law or rules by a PB for whom the BIC is responsible?

Refer to the 2017-18 BICUP course for a full explanation of these criteria.
[Direct link: https://www.ncrec.gov/Pdfs/bicupdate/bicreminders.pdf]

ANSWERS TO DISCUSSION QUESTION

For Discussion on page 59

1. 15 "full" brokers and 3 provisional brokers (PBs) are affiliated with XYZ Realty at 123 Main St. Sally is the BIC of the office. Sally allows brokers to work as teams within the office. Hank, one of the full brokers with XYZ, has formed a team with two other "full" brokers to work together to increase productivity, and they are calling themselves the "The Hankster Team of XYZ Realty." Hank wants one of the PBs to join the team. Is that ok? Why or why not?

   Answer: Yes, because all team members are affiliated with XYZ Realty, at 123 Main Street, under the supervision of Sally BIC.

2. The Hankster Team is growing fast, and Hank decides to create an entity for the team. He creates and registers The Hankster Team LLC with the NC Secretary of State and obtains a firm license from the Real Estate Commission. Hank and his team continue to advertise as "The Hankster Team of XYZ Realty." May a PB be legally be on Hank's team? Why or why not?

   Answer: Yes, because all team members are dually affiliated with two BICs of two firms that are affiliated and are located at the same physical location.

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Section 5

Law & Rules Updates

1. Lisa, a BIC, opens a trust account for her real estate office at a local bank.

   Must Lisa take the Commission's trust account course? Yes / No
   If so, when must she take the course? _____

2. Chandra, a Prelicensing student, tells her instructor that she had a criminal conviction in her past and asks if it will prevent her from being granted a real estate license. Her instructor tells her she can petition the Commission for a decision about the conviction prior to completing the Pre course and/or prior to taking the license examination.

   Is Chandra's instructor correct? Yes / No

3. TRUE or FALSE? Pre and Postlicensing courses may now be taken in an online, self-paced environment.

LEARNING OBJECTIVES

By the end of this section, you should be able to describe updates to License Law and Commission rules that were effective on July 1, 2020.

OVERVIEW

The Commission revised several rules with an effective date of July 1, 2020, in Chapters 58A and 58H. The changes that directly impact brokers will be summarized in this section. Also, all revised rules can be viewed on the Commission's website.

COMMISSION RULE CHANGES EFFECTIVE JULY 1, 2020

Rule 58A .0110: Broker-In-Charge (BIC)

Commission Rule 58A .0110 dictates the duties and responsibilities of the BIC. One of the BIC's primary responsibilities, per 58A .0110(g)(3), is "maintaining the trust or escrow account of the firm and the records pertaining thereto."

By law, when must a BIC have a trust account?

N.C.G.S. 93A-6(a)(12) dictates that

- all funds of another person or entity which relate to or concern that person's or entity's interest or investment in real property
- that are received by [a licensee] as a real estate licensee acting in that capacity
- MUST be maintained and deposited in a trust or escrow account in a bank as provided by 93A-6(g).

In other words, the BIC MUST open and properly maintain a trust account if the BIC or any affiliated brokers within the BIC's office collect or otherwise handle the "funds of another person or entity" when acting in the capacity of a broker.

If an active practicing broker does not collect or otherwise handle the funds of others, no trust account is required. Also, a broker who is inactive or otherwise not using his/her real estate license is not required to open or maintain a trust account.

What are examples of "funds of another person or entity" that would prompt the need for a trust or escrow account?

Per N.C.G.S. 93A-6(a)(12), "trust money" is defined as money belonging to others received by a real estate broker who is acting as an agent in a real estate transaction.

The most common examples of trust money are:

- Earnest money deposits
- Down payments
- Tenant security deposits
- Rents
- Homeowner Association dues and assessments
- Money received from buyers for final settlements

In the case of resort and other rentals, trust money also includes:

- Advance reservation deposits
- State (and local, if applicable) sales taxes on the gross receipts from such rentals

If a BIC opens a trust account, must that BIC take any special education?

Yes!

As of July 1, 2020, subsection (g)(9) of rule 58A .0110 dictates that a designated BIC shall "complete the Commission's Basic Trust Account Procedures Course within 120 days of opening a trust account in accordance with G.S. 93A-6(g)."

The Commission's Basic Trust Account Procedures Course provides instruction on the laws, rules and trust account guidelines as they pertain to trust accounting. The course is offered only by the Commission and is available in classroom and distance instruction formats.

To register for the course, go to the Commission's homepage (ncrec.gov), click on the Education menu, and select Course Registration.

Rule 58A .0302: License Application and Fee

Commission Rule 58A .0302 dictates the fees and requirements for broker and firm license applications.

As of July 1, 2020, if an application is incomplete, and the Commission requests the additional information, the applicant must provide such information / documentation within 45 days of the request. If an applicant fails to submit the documentation within 45 days, the application will be cancelled. Prior to July 1, 2020, the timeframe was 90 days.

Rule 58A .0305: Petition for Predetermination

House Bill 770 was passed by the NC General Assembly in June 2019 and was signed into law by Governor Cooper on July 8, 2019. The law required occupational licensing boards in North Carolina to institute a process by October 1, 2019, by which:

> *an individual with a criminal history may petition a board at any time, including before an individual starts or completes any mandatory education or training requirements, for a predetermination of whether the individual's criminal history will likely disqualify the individual from obtaining a license.*

To meet the October 1 deadline, the Commission initiated a temporary rulemaking process in August 2019. Temporary Rule 58A .0305 became effective on October 1, 2019. It became effective as a permanent rule on July 1, 2020.
Rule 58A .0305 enables an individual to file a Petition for Predetermination to determine whether their criminal history will preclude them from receiving a real estate license.

The Petition for Predetermination is available on the Commission's website. The fee to submit a petition is $45. Per 58A .0305(b), the petitioner must provide:

1. legal name;
2. mailing, physical, and email address;
3. social security number;
4. date of birth;
5. telephone number;
6. places of residence for the past seven years;
7. employment history since the date the crime was committed;
8. criminal record report prepared no more than 60 days prior to the date of the petition;
9. written statement describing the circumstances surrounding the commission of the crime(s);
10. written statement of any rehabilitation efforts, if applicable;
11. rehabilitative drug or alcohol treatments, if applicable;
12. certificate of relief granted pursuant to G.S. 15A-173.2, if applicable;

13. affidavits or written documents, including character references, that the petitioner intends to submit for review;
14. certification; and
15. signature.

The Commission is required to provide a determination within 45 days of receipt of a petition and the determination is binding for the Commission. In other words, if the Commission determines today that an individual's criminal history will not prevent that individual from obtaining a license, the Commission must honor the decision whether that individual files an application today or 30 years from today.

It is important to note that Petition for Predetermination is only related to criminal history. At the time of license application, an individual must disclose any/all criminal convictions, civil judgments or liens, and disciplinary actions by a professional licensing agency. Therefore, it is possible that an applicant who had previously filed a Petition for Predetermination and had been approved by the Commission under the petition, may still be required to undergo a character review – and even be denied a license – based on civil judgments or liens and disciplinary actions.

Also, if the information surrounding a criminal conviction changes between the time of the petition and license application, or if the individual fails to disclose any convictions at the time of petition, the Commission's response to the Petition for Predetermination will no longer apply. In such case, a full character and fitness review will occur.

Rule 58A .0506: Provisional Broker to be Supervised by Broker-in-Charge

Commission rule 58A .0506 dictates that a provisional broker (PB) must be actively licensed and affiliated with a broker-in-charge (BIC) to engage in activities requiring a real estate license.

Prior to July 1, 2020, PBs were only allowed to be supervised by one BIC at a time. However, as of July 1, 2020, Rule 58A .0506 permits a PB to be supervised by no more than two BICs of two licensed affiliated firms, AS LONG AS the two firms are located in the same physical location and are acting as co-listing or co-selling agents in real estate transactions.

The effect of the rule is that PBs may now legally be affiliated with a licensed team that is operating under the umbrella of a larger firm, as long as the team is located in the same physical location as the umbrella firm. An in-depth discussion of this rule change is provided in the "PBs on a Team" section of the 2020-2021 BICUP course.

Rule 58A .1708: Equivalent Credit

Commission rule 58A .1708 dictates the conditions under which a broker may apply and receive "equivalent" CE credit.

While the types of courses and events that may qualify for equivalent credit have not changed, subsection (h) was added, as follows, to clarify when / how credit will be awarded:

> Any equivalent continuing education credit awarded under this Rule shall be applied first to make up any continuing education deficiency for the previous license period and then to satisfy the continuing education requirement for the current license period; however, credit for an unapproved course or educational activity, other than teaching an approved elective course, that was completed during a previous license period shall not be applied to a subsequent license period.

To clarify, the new subsection dictates:

- if a broker has a CE deficiency in the previous and current license periods, then the equivalent credit will first be applied to the previous year's deficiency; and
- equivalent credit for a course or activity that was completed during a previous license period will not be applied to a later license period.

NOTE: This rule does not impact carry-over CE elective credit, which is dictated by Rule 58A .1707.

Rule 58A .1711 Continuing Education Required of Nonresident Brokers

Commission rule 58A .1711 dictates the conditions under which a nonresident* broker may satisfy NC's CE requirement.

* To be considered a nonresident for CE purposes, a broker may not have any NC address, meaning the broker does not have an NC business/office, residence, or mailing address.

As of July 1, 2020, nonresident NC brokers who wish to renew their licenses on active status may satisfy the continuing education requirement EITHER by

1. certifying that they hold an active license in another state at the time of license renewal; OR

2. complete the Commission-prescribed Update course plus one Commission-approved continuing education elective course, or complete two Commission-approved continuing education elective courses.

To clarify, the options are only available to nonresident brokers with active NC licensees who wish to renew those licenses on active status.

Nonresident brokers with inactive NC licenses who wish to activate their licenses are subject to the requirements of Commission Rule 58A .1703.

To assist those nonresident brokers who need to complete Postlicensing courses as a condition of license activation, subsection (b) has been added to Commission rule 58A .1711 as follows:

> When a nonresident broker's license has been on inactive status for more than 2 years and the broker is satisfying the requirements of Rule .1703(c) of this Subchapter, if a distance education Postlicensing course is unavailable, a nonresident broker may apply for equivalent education credit for a Postlicensing course by submitting a written request that includes a course completion certificate or transcript evidencing the completion of an education program in another state that:
> (1) consisted of at least 30 hours of instruction;
> (2) was completed within six months prior to application, and
> (3) is parallel to the topics and timings described in the Commission's Postlicensing course syllabi.

Rule 58A .1904: Denial or Withdrawal of Postlicensing Education Credit

Commission Rule 58A .1904 dictates the conditions under the Commission may deny or revoke Postlicensing education credit. Previously, this rule limited the number of hours of Postlicensing education a PB could attend within a given 7-day period. As of July 1, 2020, no such limit exists. This restriction was eliminated because education rules in Subchapter H permit Postlicensing education courses to be delivered via various online formats as of July 1, 2020.

CHANGES IN SUBCHAPTER H RULES

Senate Bill 590 was ratified on August 1, 2019, and signed by Governor Roy Cooper on August 9, 2019. This legislative bill predicated two fundamental and important changes to License Law [Chapter 93A of NC's General Statutes], effective July 1, 2020, as follows:

1) In order to offer Prelicensing (Pre), Postlicensing (Post), and Continuing Education (CE) courses, a company (either sole proprietorship or entity) must be certified as an Education Provider.

   Prior to July 1, 2020, a company had to be approved or licensed as a "School" to offer Pre/Post courses and/or had to be approved as a "Sponsor" to offer continuing education courses. The criteria and process for approval/licensure as a School was separate from the criteria and process for approval as a Sponsor. Plus, renewal of each approval or licensure was required each year.

   As of July 1, 2020, these approval and renewal processes have been streamlined.

2) Pre, Post, and CE courses may be delivered online.

The Commission's rules dictating the delivery and instruction of education courses are found in Subchapter H. All rules in that Subchapter were revised as of July 1, 2020, to comply with SB 590. These rules are not discussed during the Update course. All rules in Subchapters A-H may be viewed on the Commission's website.

ANSWERS TO DISCUSSION QUESTIONS

For Discussion on page 73:

1. Lisa, a BIC, opens a trust account for her real estate office at a local bank.

   Must Lisa take the Commission's trust account course? *YES*
   If so, when must she take the course? *WITHIN 120 DAYS OF OPENING THE ACCOUNT*

2. Chandra, a Prelicensing student, tells her Prelicensing instructor that she has a criminal conviction in her past and asks if it will prevent her from being granted a real estate license. Her instructor tells her she can petition the Commission for a decision about the conviction prior to completing the Pre course and/or prior to taking the license examination.

   Is Chandra's instructor correct? *YES*

3. TRUE or FALSE? Pre and Postlicensing courses may now be taken in an online, self-paced environment. *TRUE*

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Section 6

LICENSING & EDUCATION

DISCLAIMER: This Licensing & Education section reflects standard License Law and Commission rules. However, in response to the COVID-19 health crisis, the Commission approved extensions to various education deadlines during the 2019-20 license period. If you have questions about your education requirements and deadlines, contact the Commission's Education and Licensing Division at 919.875.3700 or LS@ncrec.gov.

1. Amin paid his renewal fee this year but did not take CE. Amin's parents want to sell their house.
   a) Can he represent them in this transaction? _____
   b) Would the answer to (a) change if Amin takes CE? _____

2. It's March 2021, and Debbie's license has been expired for nine months because she failed to renew it between May 15-June 30, 2020. What must Debbie do to reinstate her license and return it to active status? _____

LEARNING OBJECTIVES

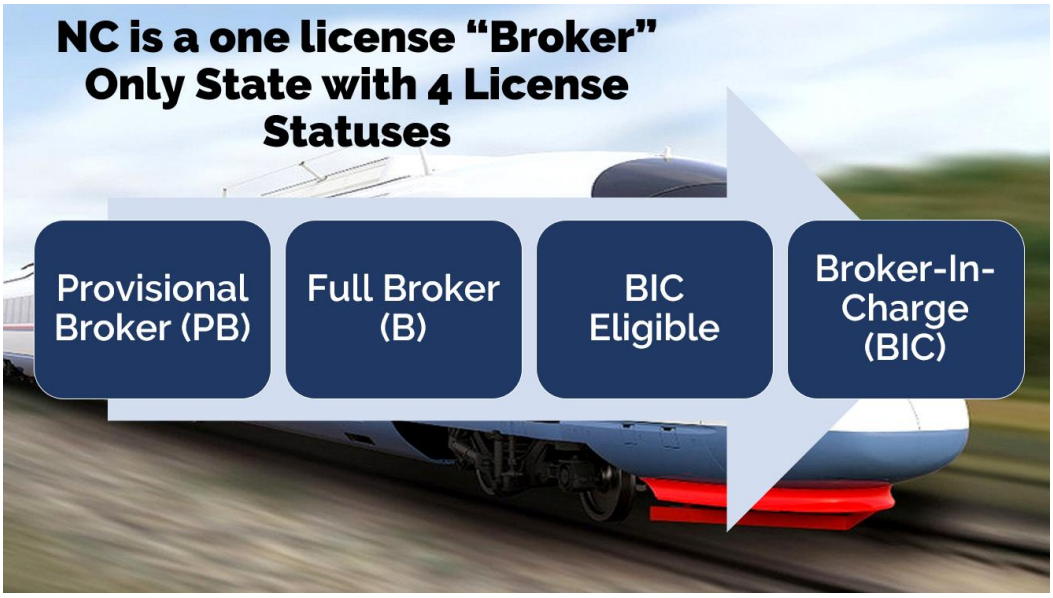
By the end of this section, you should be able to:

- define license categories and statuses;
- explain how to maintain a current and active license;
- describe how to attain *BIC Eligible* status;
- explain how to request or terminate BIC designation; and
- explain how to regain *BIC Eligible* status and BIC designation.

LICENSE CATEGORIES AND STATUSES

Category: Individual Broker License

North Carolina is a "broker only" state, meaning there are not separate salesperson and broker licenses. Instead, there are several categories of the individual broker license as follows:



Provisional Broker (PB) Status

- Entry-level license status.
- A PB must be under the supervision of a BIC to be on active status and legally provide brokerage services.
- A PB must complete the 90-hour Postlicensing education program within 18 months after initial licensure to maintain active license status.

Broker (B) Status

- Primary individual license status.
- A "full" broker can engage in brokerage:
    - as an affiliated agent of a real estate brokerage company (firm or sole proprietorship) under a (BIC),

  OR
    - independently as a sole proprietor or an entity. In such case, the broker must also be designated as a BIC.

BIC Eligible Status

This status is granted to a broker who has…

- satisfied the qualification requirements for BIC Eligible status;
- submitted a Request for BIC Eligible Status and/or BIC Designation form (REC 2.25); and
- successfully completed the 12-hour Broker-in-Charge Course within one year prior to or 120 days after submitting form REC 2.25.

Broker-in-Charge (BIC) Designation

- A broker with BIC Eligible status may be designated as broker-in-charge (BIC).
- Each real estate firm or sole proprietorship must have a different BIC for each office.
- A BIC is responsible for:
  (1) assuring that all brokers employed at the office are maintaining active, current licenses and are maintaining up-to-date information in Commission records;
  (2) notifying the Commission of firm name or address changes;
  (3) advertising;
  (4 maintaining trust/escrow account(s);
  (5) retaining records;
  (6) supervising affiliated provisional brokers;
  (7) ensuring that all affiliated brokers are adhering to agency agreement and disclosure requirements; and
  (8) notifying the Commission in writing that he or she is no longer serving as BIC of a particular office within 10 days following any such change.

Category: Firm License

- This license is issued to a business entity, such as a corporation, limited liability company, limited partnership, general partnership, association, or joint business venture.
- A sole proprietorship does NOT need a firm license because no entity has been created.

Category: Limited Nonresident Commercial License (LCB)

A limited nonresident commercial broker (LCB) license is a license issued to a person who:

- does NOT live in North Carolina (NC),
- has an active real estate broker or salesperson license in another state,
- wants to enter NC to engage in a commercial transaction, and
- must enter into a Declaration of Affiliation and a Brokerage Cooperation Agreement with a resident NC broker who will be responsible for supervising the nonresident.

This restricted license permits the nonresident to enter NC to engage only in "commercial real estate transactions" as defined in Commission Rule 58A .1802(1).

If the LCB obtains any home, business or delivery address in North Carolina, the individual must apply for and obtain a NC broker license in order to engage in brokerage.

CURRENT AND ACTIVE LICENSURE

To lawfully engage in brokerage activity, an individual or entity must have a CURRENT real estate broker license on ACTIVE STATUS at the time the broker provides the brokerage services.

Renewing a license every year allows the person or entity to keep the license. If the person/entity fails to timely renew the license, the person/entity no longer has a license. One may renew and keep a license for years without it being on active status, but those with licenses on inactive status may NOT engage in brokerage services during that period.

Current vs. Expired INDIVIDUAL BROKER Licenses

 CURRENT license status means the broker timely renewed their license by paying the annual license renewal fee of $45 and providing required information/disclosures during May 15-June 30.

 EXPIRED license status means the broker failed to timely renew their license.

ALL LICENSES EXPIRE ON JUNE 30.

Brokers, firms, and LCBs must renew their licenses every year during May 15-June 30. A broker must have a Current license on Active status to legally engage in brokerage.

The $45 renewal fee…

- must be paid online at the Commission's website, and
- must be received by the Commission by 11:59:59 pm on June 30.

There is no grace period. If your license expires on June 30, you may not engage in brokerage activities beginning July 1. You may not resume brokerage practice until your license has been reinstated and is back on "active" status.

Brokers who serve in the military and are on active deployment during the renewal period may be granted special consideration under federal law.

Reinstating an Expired Individual License (21 NCAC 58A .0505)

License expired up to 6 months:

Pay $90 reinstatement fee online (www.ncrec.gov).

NOTE: To regain active status, a license activation form (REC 2.08) must also be submitted.

License expired more than 6 months and up to 2 years:

1. Successfully complete one 30-hour Postlicensing course within 6 months prior to submitting reinstatement application;
2. submit a reinstatement application with $90 application fee and all required documentation, including criminal background report; and
3. submit license activation form (Rec 2.08).

-OR-

1. Submit a reinstatement application with $90 application fee and all required documentation, including criminal background report;
2. pass National and State sections of license exam; and
3. submit license activation form (Rec 2.08).

License expired more than 2 years: START OVER AS IF NEVER LICENSED

1. Successfully complete 75-hour NC Broker Prelicensing course;
2. Submit a license application with $100 original application fee and all required documentation, including criminal background report; and
3. Pass National and State sections of license exam.

For a detailed review of reinstatement requirements, please visit the "Reinstate your License" page on the Commission's website. You may also contact the Commission's Education & Licensing Division for specific instructions.

Current vs. Expired FIRM License

CURRENT firm license means the Qualifying Broker (QB) timely renewed the firm's license by paying the annual license renewal fee of $45 and providing required information/disclosures during May 15-June 30.

The QB (Qualifying Broker) must renew the firm's license each year (as well as his/her individual broker license) and periodically verify with the North Carolina Secretary of State's Office that the entity remains in good standing.

A firm that fails to renew its license by 11:59pm on June 30 will not have a license as of July 1.

Reinstating an Expired FIRM License (21 NCAC 58A .0505)

Firm license expired up to 6 months:

Pay $90 reinstatement fee online (www.ncrec.gov).

NOTE: If the QB's individual broker license is on active status, the firm's license will be returned to active status as soon as the reinstatement fee is processed.

Firm license expired more than 6 months and up to 2 years:

Submit a firm reinstatement application with $90 application fee and all required documentation.

Firm license expired more than 2 years:

Submit a firm license application with $100 original application fee and all required documentation.

Active vs. Inactive INDIVIDUAL BROKER Licenses

To legally receive any income from brokerage activity, including referral fees, you must have an ACTIVE North Carolina license at the time you provide the brokerage service or make the referral.

To maintain active status, brokers* must both timely renew their licenses and complete the appropriate 8 hours of Continuing Education by June 10 each year.

*Provisional Brokers must also timely complete Postlicensing Education and be affiliated with a BIC to maintain active status.

Continuing Education (CE)

MINIMUM REQUIRED CE:

Provisional Brokers and non-BIC Eligible Brokers must take:	Brokers with BIC Eligible status/BIC Designation* must take:
GenUp (General Update) AND ONE Commission-approved Elective Between July 1 – June 10	BICUP (Broker-in-Charge Update) AND ONE Commission-approved Elective Between July 1 – June 10

*To determine whether you have BIC Eligible status and/or BIC designation, log into your license record on the Commission's website.

If you don't complete the correct CE courses by June 10, your license will be changed to "inactive" status on midnight on June 30. You must CEASE all brokerage activity immediately. You may not resume brokerage practice until your license is back on "active" status.

I took the Update in May but forgot to take an elective by June 10. Can I go online and take an elective on June 12?

Answer: No. NC brokers may not take courses for CE credit from June 11 through June 30, and providers of NC real estate CE courses are not allowed to offer CE during this period. This period is used as an administrative period, during which CE providers upload CE course results and the Commission updates its databases to determine which brokers will have active status as of July 1.

 ***My license is Inactive because I didn't take CE. What do I need to do to reactivate it?***

Answer: It depends on how long your license has been on inactive status.

Individual broker license on Inactive status with NO CE deficiency:

Submit the License Activation form (REC 2.08 - available online).

Individual broker license on Inactive status for LESS THAN 2 license years with a CE deficiency:

Complete the current year's CE requirement in full (i.e., take the General Update + 1 Commission-approved elective),

AND

take either 1 or 2 approved electives to make up for the number of hours you did not complete during the preceding license year;

AND THEN

submit the License Activation form (REC 2.08 - available online).

Individual broker license on Inactive status for MORE THAN 2 license years with a CE deficiency:

Successfully complete two 30-hour Postlicensing courses within 6 months prior to submitting activation form,

AND

complete the current year's CE requirement in full (i.e., take the General Update + 1 Commission-approved elective);

AND THEN

submit the License Activation form (REC 2.08 - available online).

The Commission doesn't automatically activate licenses.

A broker (or the BIC with whom the broker will be affiliated) must submit the License Activation form (REC 2.08) to notify the Commission of the broker's desire for Active status and of the office with which they will be affiliated and doing business.

Since entities don't take education, what determines whether a firm's license is on active or inactive status?

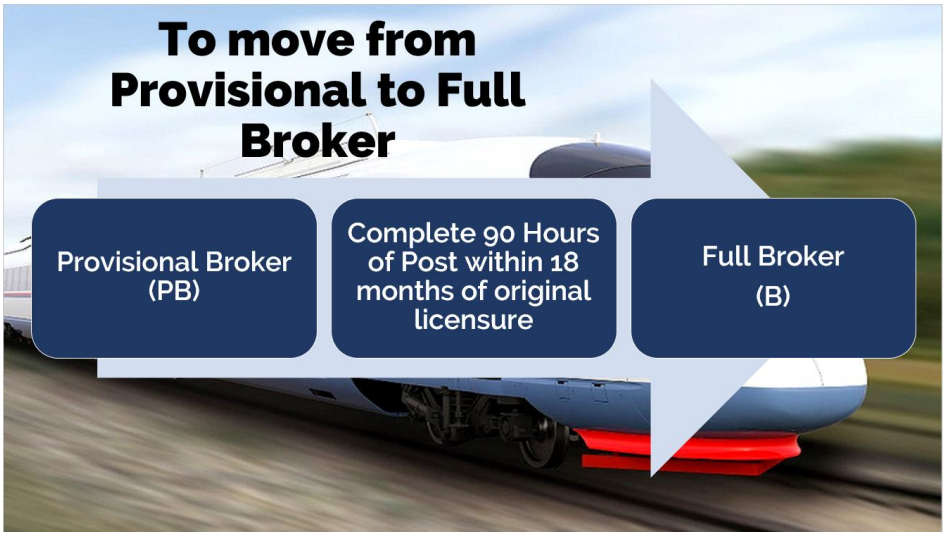
The firm must have a QB (Qualifying Broker) whose license is on active status. As long as the firm has an actively licensed QB, and the firm's license is timely renewed, the firm license will remain active.

If the QB's license expires or is inactive on July 1, the firm's license will also be inactive, meaning no brokers may engage in brokerage under the firm's umbrella. While losing a BIC only takes one office down, losing a QB takes the entire firm down.

In such case, the firm license cannot be activated until either the QB's license has returned to active status or the firm appoints a new actively-licensed QB. Note that even if the firm license is active, the firm cannot legally perform brokerage at any office location without a designated BIC.

Postlicensing Education

Beginning July 1, 2020, a PB must complete the 90-hour Postlicensing education program within 18 months after initial licensure to maintain active license status.



What are the Postlicensing courses?

Answer: Post 301-Broker Relationships & Responsibilities, Post 302-Contracts & Closing, and Post 303-NC Law, Rules, and Legal Concepts. Course syllabi are available on the Commission's website.

Do I have to take the Postlicensing courses in a certain order?

Answer: No. Postlicensing courses may be taken in any sequence. However, the Commission recommends that you follow the course number sequence (301, 302, & 303), as course materials were developed with that sequence in mind.

When do I have to complete the Postlicensing courses?

Answer: Beginning July 1, 2020, a PB will be required to complete the Postlicensing Education program within 18 months after initial licensure. In other words, all three Postlicensing courses – Post 301, Post 302, and Post 303 - must be completed within 18 months of the date of initial licensure in order for the PB to maintain active license status.

Can I get CE credit for Postlicensing courses?

Answer: No. Postlicensing courses do not provide CE credit.

Are there course exams in Postlicensing courses?

Answer: Yes, and you must pass the end-of-course examinations to successfully complete the courses.

What happens if I don't take the Postlicensing courses before the deadline?

Answer: If you do not take the courses before the 18-month deadline, your license will be placed on inactive status. You may NOT perform any brokerage activities or collect brokerage fees (including referral fees) while your license is Inactive. Refer to Rule 58A .1902.

Where can I take the Postlicensing courses?

Answer: The courses are offered by the same education providers that conduct the Prelicensing course. A list of approved certified education providers is available on the Commission's website.

SUMMARY: Maintaining a Current and Active License

Provisional Brokers	"Full" Brokers (non-BIC Eligible)	Brokers-in-Charge AND Brokers with BIC Eligible Status
Renew license each year between May 15-June 30 Complete GENUP + 1 Elective by June 10 each year (after first renewal) Complete three 30-hour Postlicensing courses within 18 months of licensure. Maintain affiliation with a BIC	Renew license each year between May 15-June 30 Complete GENUP + 1 Elective by June 10 each year	Renew license each year between May 15-June 30 Complete BICUP + 1 Elective by June 10 each year

Tina has renewed her "full" broker license every year but hasn't taken any CE since 2017.

a. What is the status of Tina's license? _____
b. How many courses must Tina take to activate her license? _____
c. Which courses must she take?_____
d. Will Tina's license be "active" once she completes the course(s)? YES / NO
   Why or Why not? _____
e. Assume Tina was a BIC before her license changed to "inactive" status. Will that change the courses she should take now to reactivate? YES / NO
f. When she reactivates, will she still be a BIC? YES / NO

BIC ELIGIBLE STATUS AND BROKER-IN-CHARGE (BIC) DESIGNATION

As of July 1, 2018, in order for a broker to designate as a BIC for a sole proprietorship, real estate firm, or branch office, a broker must FIRST have BIC Eligible status.

Obtaining BIC Eligible Status

To qualify for and obtain BIC Eligible Status, a broker must:

1. hold a **"full" broker license** (not provisional) **on active status;**
   AND
2. have acquired at least **2 years of full-time** or 4 years of part-time real estate **brokerage experience within the previous 5 years** or be a North Carolina licensed attorney with a practice that consisted primarily of handling real estate closings and related matters in North Carolina for 3 years immediately preceding application;
   AND
3. submit the ***Request for BIC Eligible Status and/or BIC Designation*** **form (REC 2.25)**;
   AND
4. complete the Commission's ***12-hour Broker-in-Charge Course*** no earlier than one year prior to and no later than 120 days after submission of form REC 2.25.

 ***What is "full-time" brokerage experience?***

Answer: The intent is that the individual's primary occupation is real estate brokerage.

Accordingly, the rough formula is:

50 weeks/year at 40/hours per week = 2000 hours/year x 2 years = 4000 hours total.

Thus, if a broker has acquired 4000 hours of brokerage experience within a five year period, the broker may request BIC Eligible status.

Note: Merely taking the 12-hour Broker-in-Charge Course does NOT automatically make you BIC Eligible. You will not gain BIC Eligible status until you submit the Request for BIC Eligible Status and/or BIC Designation form (REC 2.25).

 ***What will happen if I obtain BIC Eligible status, but I don't complete the 12-hour Broker-in-Charge course within 120 days?***

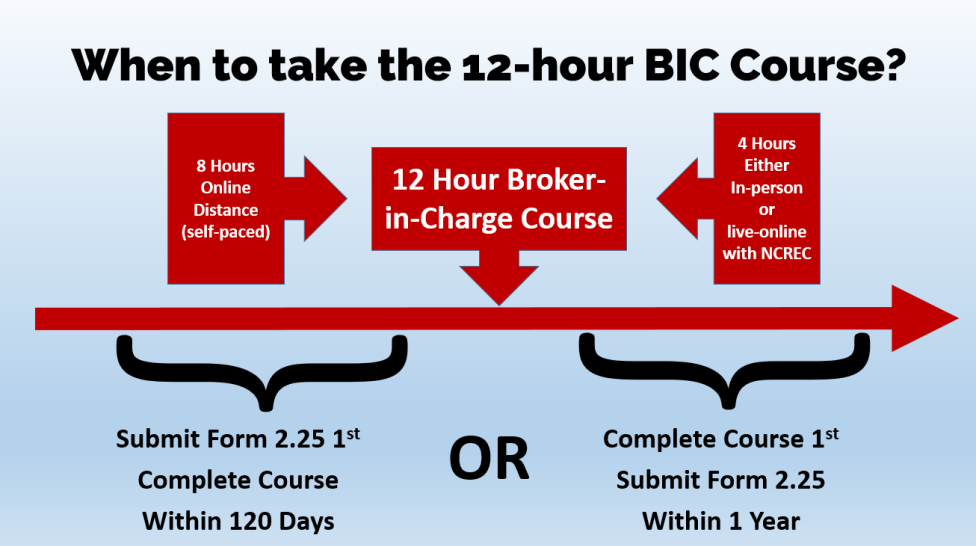
Answer: Your BIC Eligible status will be terminated, and it will not be re-granted until the course is completed.

 ***I am a nonresident. Do I have to take the 12-hour Broker-in-Charge Course?***

Answer: Yes. The requirement to complete the 12-hour Broker-in-Charge Course applies to all brokers who wish to obtain BIC Eligible status.

12-Hour Broker-in-Charge Course

To obtain BIC Eligible status, a broker must complete the 12-hour Broker-in-Charge Course. The course may be completed either within one year prior to application for BIC Eligible status or within 120 days after being granted the status.



The 12-hour Broker-in-Charge Course is comprised of two segments, an 8-hour online prerequisite segment and a 4-hour live instruction (classroom or synchronous distance learning) segment. Brokers register on the Commission's website for both segments of the 12-hour Broker-in-Charge Course at the same time.

The 8-hour online segment is a required prerequisite for the 4-hour live segment. In addition, the 8-hour segment must be completed within 30 days of registration. A broker who has not completed the 8-hour segment will not be permitted entry into the 4-hour live segment.

Upon timely completion of the 8-hour segment, the broker must attend the 4-hour live segment. Both segments must be completed within the same 120-day period. Once the broker completes both segments of the 12-hour Broker-in-Charge Course, they will be awarded 4 hours of CE elective credit in the license year in which the course was completed.

How many days does a broker have to complete both sections of the 12-hour Broker-in-Charge Course after obtaining BIC Eligible status?

A broker has 120 days to complete the *12-hour Broker-in-Charge Course* after obtaining BIC Eligible Status. If a broker fails to complete both segments of the *12-hour Broker-in-Charge Course* within the 120 days of obtaining BIC Eligible status, BIC Eligible status (and BIC Designation) will be terminated. The broker will not be granted BIC Eligible status (and, in turn, BIC designation) until the course is completed.

How many days does a broker have to complete both sections of the 12-hour Broker-in-Charge Course after registration for the course?

A broker has 120 days to complete the *12-hour Broker-in-Charge Course* after registering for the course. If a broker fails to complete both segments of the *12-hour Broker-in-Charge Course* within the 120-day period following course registration, the broker will be required to register and pay for the course again and will be required to restart the course.

What happens if I fail to complete the first 8 hours of instruction within 30 days of registration?

If a broker fails to complete the 8- hour segment within 30 days of course registration, the broker will be required to register and pay for the course again and will be required to restart the course.

What happens if I complete the 8 hour segment but fail to complete the 4-hour segment within 120 days?

If a broker fails to complete both segments of the *12-hour Broker-in-Charge Course* within the 120-day period following course registration, the broker will be required to register and pay for the course again and will be required to restart the course.

How much CE elective credit will a broker receive upon successful completion of the 12-hour Broker-in-Charge Course?

A broker will receive 4 hours of elective credit upon successful completion of the *12-hour Broker-in-Charge Course*.

 ***What year will the 4 hours of elective credit be applied in the broker's record?***

The 4 hours of elective credit will be applied in the broker's record for the license year in which they completed the course.

Broker-in-Charge (BIC) Designation

Once a broker has obtained BIC Eligible status, the broker may step in and out of active BIC designation by submitting a request form.

As long as the broker maintains BIC Eligible status by timely renewing his/her license and completing the correct CE each year, the broker will not be required to repeat the 12-hour Broker-in-Charge Course.

Requesting Broker-in-Charge Designation:

Submit the ***Request for BIC Eligible Status and/or BIC Designation*** **form (REC 2.25)**. You must indicate the firm or sole proprietorship for which you will be serving as BIC.

Terminating Broker-in-Charge Designation:

If another broker submits a *Request for BIC Eligible Status and/or BIC Designation* form to be designated as the BIC at your office, your BIC designation will be automatically terminated when the new BIC's form is processed.

However, if you wish to be removed as BIC immediately, you may submit a *Request for Termination of Affiliation form* (REC 2.22).

 ***I am not BIC Eligible, but I need to be designated as BIC right away. Can I request BIC Eligible status and BIC designation at the same time?***

Answer: Yes. The ***Request for BIC Eligible Status and/or BIC Designation*** **form (REC 2.25)** enables a broker to request both statuses at the same time.

Maintaining BIC Eligible Status and BIC Designation

A broker may maintain BIC Eligible status and BIC designation by:

- renewing his/her license between May 15-June 30 each year;
  AND
- completing the BICUP (Broker-in-Charge Update) course plus 1 Commission-approved elective by June 10 each year.

When do I have to begin taking the BICUP course?

Answer: Per Commission Rule 58A .0110(h):

> *A broker holding BIC Eligible status shall take the Broker-in-Charge Update Course during the license year of designation, unless the broker has satisfied the requirements of Rule .1702 of this Subchapter prior to designation.*

Loss of BIC Eligible Status and BIC Designation

BIC Eligible status and BIC designation will be lost if:

- the broker's license is inactive, expired, surrendered, suspended, or revoked,
  OR
- the broker fails to take the BICUP course during any license year.

What happens to the licenses of affiliated brokers in an office if a BIC's license expires or goes inactive?

When a BIC's license expires or goes inactive on July 1, his/her office may not continue to provide brokerage services. The "full" brokers will still be on active status at the broker's home address since they will no longer be affiliated with the company, and all provisional brokers will be on inactive status since they do not have supervising BIC.

How can the office get back in business while the former BIC is expired or inactive?

Answer:

It depends on whether the former BIC was acting only as BIC for an office or was both BIC for the office and QB for the entity.

If the former BIC was serving only as BIC…

The firm still has an active license, but brokerage services may NOT be legally provided at this office location without a designated BIC.

The QB may appoint a new broker to serve as BIC and direct that broker to submit a ***Request for BIC Eligible Status and/or BIC Designation*** **form (REC 2.25)** to the Commission. Once the form is processed, the newly designated BIC must file activation/affiliation forms (REC 2.08) to re-associate all full and provisional brokers with the office.

If the former BIC was both the BIC and the QB…

The firm's license will be on inactive status (assuming the firm's license was timely renewed) because it doesn't have a QB.

As long as the QB's license is expired or on inactive status the firm's license will also be on inactive status, meaning the company may NOT legally engage in brokerage anywhere in NC. The firm's license will remain on inactive status until EITHER the former QB activates his/her individual license OR the QB is replaced. To inform the Commission of a new QB, the ***Change in Qualifying Broker*** **form (REC 2.20)** must be submitted.

Then, the QB may appoint a broker to serve as BIC and direct that broker to submit a ***Request for BIC Eligible Status and/or BIC Designation*** **form (REC 2.25)** to the Commission. Once the form is processed, the newly designated BIC must file activation/affiliation forms (REC 2.08) to re-associate all full and provisional brokers with the office.

Regaining BIC Eligible Status and Broker-in-Charge Designation

A broker who attains but later loses BIC Eligible status must complete the following steps in the order indicated to regain the status.

1. Do whatever is necessary to return the broker license to active status, i.e., pay reinstatement fee and/or complete required education;

   THEN
2. Submit the ***License Activation form (REC 2.08)*** to the Commission;

   THEN
3. Complete the Commission's *12-hour Broker-in-Charge Course*,

   AND THEN
4. Submit the ***Request for BIC Eligible Status and/or BIC Designation*** **form (REC 2.25)** requesting BIC Eligible status (and BIC designation if needed).

   NOTE: You must meet the qualification requirements for BIC Eligible status as prescribed by Rule 58A .0110(e)(6)(b).

Answers to Discussion Questions

For Discussion on page 83

1. Amin paid his renewal fee this year but did not take CE. Amin's parents want to sell their house.

   Can he represent them in this transaction?

   Answer: No. Amin's license is on Inactive status so he may not practice brokerage.

   Would the answer to (a) change if Amin takes CE and cures his CE deficiency?

   Answer: Yes, after he submits a License Activation & Broker Affiliation Form 2.08 to reactivate his license. His license must be on active status if he wishes to represent his parents in selling their house.

2. Debbie's license has been expired for nine months because she failed to renew between May 15-June 30, 2020. What must Debbie do to reinstate her license and return it to active status?

   Answer:

   - Complete one 30-hour Postlicensing course within 6 months prior to submitting reinstatement application);
   - submit a reinstatement application with $90 application fee and all required documentation, including criminal background report; and
   - submit license activation form (REC 2.08)

     OR

   - submit reinstatement application with $90 application fee and all required documentation, including criminal background report;
   - pass National and State sections of license exam; and
   - submit license activation form (REC 2.08)

For Discussion on page 94

Tina has renewed her "full" broker license every year but hasn't taken any CE since 2017.

a) What is the status of Tina's license?
   Answer: Inactive.
b) How many courses must Tina take to activate her license?
   Answer: 4 courses totaling 68 hours (two 30-hour Postlicensing courses PLUS GenUp PLUS an elective)
c) Which courses must she take?

Answer: Two 30-hour Postlicensing courses PLUS current year's GenUp PLUS one Commission-approved elective.

d) Will Tina's license be "active" once she completes the course(s)?
Answer: No, because she still needs to submit the License Activation form (REC 2.08).

e) Assume Tina was a BIC before her license changed to "inactive" status. Will that change the courses she should take now to reactivate?
Answer: No, because she lost BIC Eligible status when her license became inactive.

f) When she reactivates, will she still be BIC?
Answer: No. She still needs to take the 12-hour BIC Course and file form REC 2.25.

Note: At this point she may not have the requisite brokerage experience to qualify again to be a BIC.