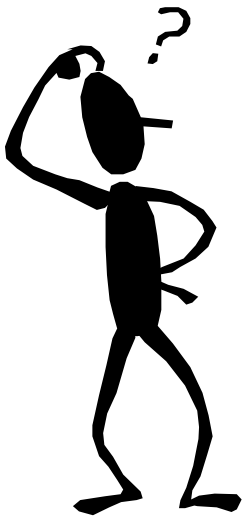
Material Facts in Commercial Real Estate

a North Carolina approved real estate continuing course for commercial brokers



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North Carolina Real Estate Commission

CONTINUING EDUCATION
STUDENT INFORMATION SHEET

READ IMMEDIATELY UPON CHECKING IN

Basic CE Requirement (21 NCAC 58A.1702)

To maintain a license on active status every licensee must complete **eight (8) hours of continuing education each license year.**

- Provisional brokers and brokers who are **NOT** Brokers-in-Charge or Broker-in-Charge eligible must complete the ***General Update*** course plus a Commission-approved four (4) hour elective course.
- Brokers who **ARE** Brokers-in-Charge or Broker-in-Charge eligible must complete the **BIC Update** course each year beginning the first full license year after the license year in which the broker declared himself/herself a broker-in-charge plus a Commission- approved four (4) hour elective course.

  The content of both ***Update*** courses changes each year.

Important Points to Note

- Newly licensed brokers do NOT need to take any CE courses *prior* to their **first license renewal,** but must satisfy the CE requirement *prior* to their **second license renewal** and each year thereafter.
- A course may not be taken for CE credit twice in the same license year. Make sure you have not already taken the course during the current license year. Remember, the license year runs from July 1 to June 30 and all CE must be complete by June 10 of each year.
- If your license is **inactive**, you should check with the Commission to ascertain the amount of CE you need to activate your license.
- **The deadline for completing CE – live courses or online courses – is ALWAYS**
  June 10th each year!

Attendance Requirement (21 NCAC 58E.0510)

*A student must always attend a **minimum** of 90% of the scheduled class session* in order to receive a course completion certificate and CE credit.

Students shall not be admitted to a class session after 10% of the scheduled classroom hours have been conducted. The 10% absence allowance is generally permitted for any reason at any time during the course; however **sponsors and instructors shall not permit students to use the 10% absence allowance to avoid the last 10% of the course or to leave the course early** unless the absence is for circumstances beyond the student's control that could not have been reasonably foreseen by the student and is approved by the instructor**.**

No exceptions to the 90% attendance requirement are permitted for any reason.

Student Participation Requirement (21 NCAC 58E.0511)

In order to assure that the mandatory continuing education program will be one of high quality, the Commission requires that students comply with the following student participation standards:

> **A student shall direct his undivided attention to the instruction being provided and refrain from engaging in activities unrelated to the instruction which are distracting to other students or the instructor, or which otherwise disrupt the orderly conduct of a class.**
>
> **Examples of Prohibited Conduct include *but are not limited to*:**

Sleeping; rattling or shifting papers; performing office work; making or receiving a call on a cellular phone; receiving a page on a pager that makes a noise; or repeatedly interrupting and/or challenging the instructor in a manner that disrupts the teaching of the course. In addition, unless requested by the instructor as a part of the class instruction, students should not read a newspaper or book (other than the course text) during class, carry on a conversation with another student, send or read text messages, or operate a tablet, laptop computer, or other electronic device.

Sponsors and instructors are required to enforce the student participation standards. Sponsors have been directed to NOT issue a course completion certificate to a licensee who violates the standards and sponsors must report improper behavior to the Commission.

Course Completion Reporting

Sponsors are responsible for reporting course completion information to the Commission via the Internet within **7 days of course completion,** but *no later than* **June 15th**. Licensees are responsible for assuring that the real estate license number that they provide to the course sponsor is **correct.** Licensees may address comments/complaints about courses, instructors, and/or sponsors to:

Continuing Education Officer
North Carolina Real Estate Commission
PO Box 17100
Raleigh, NC 27619-7100

Certificates of Course Completion

Course sponsors will provide each licensee who satisfactorily completes an approved CE course a Certificate of Completion on a form prescribed by the Commission within 15 calendar days following a course. The certificate should be retained as the licensee's personal record of course completion. **It should not be submitted to the Commission unless the Commission specifically requests it.**

Please avoid calling the Commission office to verify the crediting of continuing education credit hours to your licensee record unless you believe that an error has been made. *It is each licensee's responsibility to check his/her CE record to insure that s/he has actually received credit for all CE taken.* Please use the Commission's website (www.ncrec.gov) to verify that your credit hours have been reported. Your cooperation in this regard will be especially needed during the May 15 - June 30 period each year.

Material Facts

"Do I need to disclose that?"

"Should I have known that?"

"Where do I find that out?"

"Should that broker have told us that?"

These are questions commonly asked in all real estate transactions. While agents know that they are expected to "discover and disclose materials facts", there is no list of material facts. While some are self-evident (leaky roof, rezoning) others may depend upon unique facts and circumstances. Can anyone give you a list of material facts? No, but "I'll know it when I see it" may be the response from a regulator or a judge.

In commercial real estate, agents tend to keep their dealings "close to the vest", as their business deals with ongoing businesses - their plans to relocate, plans to upsize or downsize, plans to merge, plans to develop. So much of this is proprietary that it is the nature of a commercial agent to keep all information confidential.

But……. Where does the duty of confidentiality end and the duty of disclosure begin? That is the area which concerns **all** agents.

Certainly there are issues and situations which are easy to identify, and there are those which are fairly easy to identify and then there are those which are difficult to identify.

Let's look at some common situations. Are they material facts which **MUST be discovered** or **MUST be disclosed** or both or does it **depend** on the specifics of the situation?

Situation	Discover	Disclose	Depends
1. Leaky roof	_____	_____	_____
2. Busy public street	_____	_____	_____
3. Soils polluted per EPA	_____	_____	_____
4. Mineral rights severed	_____	_____	_____
5. Seller getting divorced	_____	_____	_____
6. Seller having financial problems	_____	_____	_____
7. Foreclosure documents filed	_____	_____	_____
8. Bankruptcy coming soon	_____	_____	_____
9. Bankruptcy filed	_____	_____	_____
10. Competition under construction nearby	_____	_____	_____
11. Death occurred in building	_____	_____	_____
12. Tenant in default	_____	_____	_____
13. Rezoning next door	_____	_____	_____
14. Variance needed	_____	_____	_____
15. Presence of a property owner's association	_____	_____	_____
16. Seller in default	_____	_____	_____
17. Change of use permit needed	_____	_____	_____
18. Improvements not built to code	_____	_____	_____
19. Unpermitted improvements	_____	_____	_____
20. DOT planning new roads	_____	_____	_____

So what does the North Carolina Real Estate Commission say about material facts?

Excerpt from North Carolina Real Estate Commission's "License Law and Rules Comments" (http://www.ncrec.gov/Resources/LicenseLaw)

G.S. 93A-6 provides a list of prohibited acts which may result in disciplinary action against licensees. Discussed below are various prohibited acts, except for those related to handling and accounting for trust funds, broker's responsibility for closing statements, and the failure to deliver certain instruments to parties in a transaction, which are discussed in the subsequent sections on "General Brokerage

Provisions" and "Handling Trust Funds."

Important Note

The provisions of the License Law relating to misrepresentation or omission of a material fact, conflict of interest, licensee competence, handling of trust funds, and improper, fraudulent or dishonest dealing generally apply independently of other statutory law or case law such as the law of agency. Nevertheless, other laws may affect the application of a License Law provision. For example, the N.C. Tenant Security Deposit Act requires an accounting to a tenant for a residential security deposit within 30-60 days after termination of a tenancy. License Law provisions (and Commission rules) require licensees to account for such funds within a reasonable time. Thus, in this instance, a violation of the Tenant Security Deposit Act's provisions would also be considered a violation of the License Law.

Similarly, the law of agency and the law of contracts as derived from the common law may impact the application of License Law. Thus, a licensee's agency status and role in a transaction might affect the licensee's duties under the license law. Examples of how an agent's duties under the License Law may be affected by the application of other laws are included at various points in this section on "Prohibited Acts by Licensees."

Misrepresentation or Omission [G.S. 93A-6(a)(1)]

Misrepresentation or omission of a material fact by a licensee is prohibited, and this prohibition includes both "willful" and "negligent" acts. A "willful" act is one that is done intentionally and deliberately, while a "negligent" act is one that is done unintentionally. A **"misrepresentation"** is communicating false information, while an **"omission"** is failing to provide or disclose information where there is a duty to provide or disclose such information.

Material Facts

For purposes of applying G.S. 93A-6(a)(1), whether a fact is "material" depends on the facts and circumstances of a particular transaction and the application of statutory and/or case law. The Commission has historically interpreted **"material facts"** under the Real Estate License Law to include at least:

Facts about the property itself (such as a structural defect or defective mechanical systems);

Facts relating directly to the property (such as a pending zoning change or planned highway construction in the immediate vicinity); and

Facts relating directly to the ability of the agent's principal to complete the transaction (such as a pending foreclosure sale).

Regardless of which party in a transaction a real estate agent represents, the facts described above must be disclosed to both the agent's principal and to third parties the agent deals with on the principal's behalf. In addition, an agent has a duty to disclose to his or her principal any information that may affect the principal's rights and interests or influence the principal's decision in the transaction.

What about death of occupant?

Death or Serious Illness of Previous Property Occupant

— Note, however, that G.S. 39-50 and 42-14.2 specifically provide that the fact that a property was occupied by a person who died or had a serious illness while occupying the property is NOT a material fact. Thus, agents do not need to voluntarily disclose such a fact. If a prospective buyer or tenant specifically asks about such a matter, the agent may either decline to answer or respond honestly. If, however, a prospective buyer or tenant inquires as to whether a previous owner or occupant had AIDS, the agent is prohibited by fair housing laws from answering such an inquiry because persons with AIDS are considered to be "handicapped" under such laws and disclosure of the information may have the effect of discriminating against the property owner based on the handicapping condition.

§ 39-50. Death, illness, or conviction of certain crimes not a material fact.

In offering real property for sale it shall not be deemed a material fact that the real property was occupied previously by a person who died or had a serious illness while occupying the property or that a person convicted of any crime for which registration is required by Article 27A of Chapter 14 of the General Statutes occupies, occupied, or resides near the property; provided, however, that no seller may knowingly make a false statement regarding any such fact. (1989, c. 592, s. 1; 1998-212, s. 17.16A(a).)

EXERCISE:

List a material fact regarding:

The property _____

Directly relating to the property _____

Ability of the principal to complete the transaction _____

_____

Misrepresentation & Omission

Excerpt from North Carolina Real Estate Commission's "License Law and Rules Comments" (http://www.ncrec.gov/Resources/LicenseLaw)

Willful Misrepresentation — *This occurs when a licensee who has "actual knowledge" of a material fact deliberately misinforms a buyer, seller, tenant or landlord concerning such fact.* A misrepresentation is also considered to be "willful" when a licensee who does NOT have actual knowledge of a matter material to the transaction provides incorrect information concerning such matter to a buyer, seller, tenant or landlord *without regard for the actual truth of the matter* (i.e., when a licensee intentionally provides information without knowing whether it is true and the information provided is in fact not true).

Example: *An agent is completely unfamiliar with the features or condition of a listed property; however, the agent informs a prospective buyer that the plumbing is in good working order without first checking with the owner. (The agent in such instance is acting without regard for the truth of the matter being represented. If the plumbing in fact needs significant repair, then the agent may be guilty of willful misrepresentation.)*

Negligent Misrepresentation — *This occurs when a licensee unintentionally misinforms a buyer, seller, tenant or landlord concerning a material fact either because the licensee does not have actual knowledge of the fact, because the licensee has incorrect information, or because of a mistake by the licensee*.

If a reasonably prudent licensee *"should reasonably have known"* the truth of the matter that was misrepresented, then the licensee may be guilty of "negligent misrepresentation" even though the licensee was acting in good faith.

Negligent misrepresentation by real estate licensees occurs frequently in real estate transactions. A very common situation is the recording of incorrect information about a property in an MLS listing due to the negligence of the listing agent. When a prospective buyer is subsequently provided the incorrect information from the MLS by the agent working with the buyer, a negligent misrepresentation by the listing agent occurs.

A listing agent is generally held to a higher standard with regard to negligent misrepresentation of material facts about a listed property to a buyer than is a selling agent who is acting as a seller's subagent. This is because (1) The listing agent is in the best position to ascertain facts about the property, (2) the listing agent is expected to take reasonable steps to assure that property data included with the listing is correct and (3) it is generally considered reasonable for a selling agent to rely on the accuracy of the listing data except in those situations where it should be obvious to a reasonably prudent agent that the listing information is incorrect. However, *a buyer's agent may in some cases be held to a higher standard than a seller's subagent because of the buyer's agent's duties to the buyer under the law of agency and the buyer's agent's special knowledge of the buyer's particular situation and needs*.

Example: *An agent has previously sold several lots in a subdivision under development and all those lots passed a soil suitability test for an on-site septic system.*

The agent then sells Lot 35 without checking as to whether this lot satisfies the soil test; however, the agent informs the buyer that Lot 35 will support an on-site septic system when in fact the contrary is true. (While the agent's conduct may not rise to the level of willful disregard for the truth of the matter, the agent was at least negligent in not checking the soil test result on Lot 35 and is therefore guilty of negligent misrepresentation. This result is not affected by the agent's agency status or role in the transaction.)

Willful Omission *— This occurs when a licensee has "actual knowledge" of a material fact and a duty to disclose such fact to a buyer, seller, tenant, or landlord, but deliberately fails to disclose such fact.*

Example: *An agent knows that a zoning change is pending that would adversely affect the value of a listed property, but fails to disclose such information to a prospective buyer. The agent has committed*

*a willful omission regardless of the agent's agency status or role in the transaction. [**Note:** Information about a zoning change, planned major highway or similar matter that would significantly enhance the value of a seller's property must also be disclosed to the seller, even if the licensee is a buyer's agent.]*

Example: A buyer's agent becomes aware that the seller with whom his buyer is negotiating is under pressure to sell quickly and may accept much less than the listing price. Believing such information should always be kept confidential, the buyer's agent does not provide the buyer with this information. The buyer's agent is guilty of a willful omission. An agent must disclose to his/her principal any information that might affect the principal's decision in the transaction.

Example: Suppose in the immediately preceding example that the seller's property is listed with the firm of the buyer's agent and the firm's policy is to practice traditional dual agency in in-house sales situations where it represents both the seller and the buyer. In this situation, the buyer's agent would not be considered to have committed a willful omission under the License Law by not disclosing the information about the seller's personal situation to the buyer. NOTE: This assumes, however, that the buyer's agent properly disclosed his/her status as a buyer's agent to the seller or seller's agent upon "initial contact," that dual agency was properly authorized by both the seller and buyer prior to showing the seller's property to the buyer, the authorization was timely reduced to writing in the agency agreements that also limit the disclosure of information in dual agency situations (as is the case with the agency agreement forms provided by the North Carolina Association of REALTORS® for use by its members).

Negligent Omission — *This occurs when a licensee does NOT have actual knowledge of a material fact and consequently does not disclose the fact, but a reasonably prudent licensee "should reasonably have known" of such fact.* In this case, the licensee may be guilty of "negligent omission" if he/she fails to disclose this fact to a buyer, seller, tenant or landlord, even though the licensee acted in good faith in the transaction.

The prohibition against negligent omission creates a *"duty to discover and disclose" material facts* which a reasonably prudent licensee would typically have discovered in the course of the transaction. *A listing agent is typically in a much better position than a selling agent to discover material facts relating to a listed property and thus, will be held to a higher standard than will a selling agent acting as a seller's subagent.*

On the other hand, a buyer's agent in some circumstances may be held to a higher standard than a seller's subagent because of the buyer's agent's duties to the buyer under the law of agency, particularly if the buyer's agent is aware of a buyer's special needs with regard to a property. Again we see how the agency relationships between agents and principals to a transaction and the licensee's role in the transaction can affect a licensee's duties and responsibilities under the License Law.

Instances of negligent omission occur much less frequently than instances of negligent misrepresentation. This is because most facts about a listed property are recorded on a detailed property data sheet from which information is taken for inclusion in MLS computer files/books. If incorrect information taken from an MLS computer file/book is passed on to a prospective purchaser, then a "misrepresentation," rather than an "omission," has occurred. Nevertheless, there are examples of negligent omission which can be cited.

Example: A seller has a 30,000 square foot commercial property for sale which cannot be expanded under local zoning laws. The buyer is looking for property in the 25,000 - 30,000 square foot range, but has told his buyer's agent that he needs a property where he can expand to 50,000 square feet or more in the future. The seller does not think to advise the buyer's agent that the property cannot be expanded, and the buyer's agent makes no inquiry about it although he is aware of the buyer's special needs. If the buyer purchases the property without knowing about the restriction on expansion, the buyer's agent is guilty of a negligent omission for failing to discover and disclose a special circumstance that the agent knew was especially important to his/her client.

Making False Promises [G.S. 93A-6(a)(2)]

Real estate brokers are prohibited from "making any false promises of a character likely to influence, persuade or induce." It is unimportant whether the broker originally intended to honor his/her promise – failure to honor a promise is sufficient to constitute a violation of this provision. The promise may relate to any matter which might influence, persuade or induce a person to perform some act he/ she might not otherwise perform.

Other Misrepresentations [G.S. 93A-6(a)(3)]

Real estate brokers are prohibited from pursuing a course of misrepresentation (or making of false promises) through other agents or salespersons or through advertising or other means.

Example: In marketing subdivision lots for a developer, a broker regularly advertises that the lots for sale are suitable for residential use when in fact the lots will not pass a soil suitability test for on-site sewage systems.

Example: A broker is marketing a new condominium complex which is under construction. Acting with the full knowledge and consent of the broker, the broker's agents regularly inform prospective buyers that units will be available for occupancy on June 1, when in fact the units won't be available until at least September 1.

Exercise:

Give an example of:

Willful Misrepresentation

Negligent Misrepresentation

Willful Omission

Negligent Omission

Making False Promises

We call these "The Prohibited Acts" (emphasis mine)

§ 93A-6. Disciplinary action by Commission.

(a) The Commission has power to take disciplinary action. Upon its own initiative, or on the complaint of any person, the Commission may investigate the actions of any person or entity licensed under this Chapter, or any other person or entity who shall assume to act in such capacity. If the Commission finds probable cause that a licensee has violated any of the provisions of this Chapter, the Commission may hold a hearing on the allegations of misconduct.

The Commission has power to suspend or revoke at any time a license issued under the provisions of this Chapter, or to reprimand or censure any licensee, if, following a hearing, the Commission adjudges the licensee to be guilty of:

(1) Making any willful or negligent misrepresentation or any willful or negligent omission of material fact.

(2) Making any false promises of a character likely to influence, persuade, or induce.

(3) Pursuing a course of misrepresentation or making of false promises through agents, advertising or otherwise.

(4) Acting for more than one party in a transaction without the knowledge of all parties for whom he or she acts.

(5) Accepting a commission or valuable consideration as a real estate broker on provisional status for the performance of any of the acts specified in this Article or Article 4 of this Chapter, from any person except his or her broker-in-charge or licensed broker by whom he or she is employed.

(6) Representing or attempting to represent a real estate broker other than the broker by whom he or she is engaged or associated, without the express knowledge and consent of the broker with whom he or she is associated.

(7) Failing, within a reasonable time, to account for or to remit any monies coming into his or her possession which belong to others.

(8) Being unworthy or incompetent to act as a real estate broker in a manner as to endanger the interest of the public.

(9) Paying a commission or valuable consideration to any person for acts or services performed in violation of this Chapter.

(10) Any other conduct which constitutes improper, fraudulent or dishonest dealing.

(11) Performing or undertaking to perform any legal service, as set forth in G.S. 84-2.1, or any other acts constituting the practice of law.

(12) Commingling the money or other property of his or her principals with his or her own or failure to maintain and deposit in a trust or escrow account in a bank as provided by subsection (g) of this section all money received by him or her as a real estate licensee acting in that capacity, or an escrow agent, or the custodian or manager of the funds of another person or entity which relate to or concern that person's or entity's interest or investment in real property, provided, these accounts shall not bear interest unless the principals authorize in writing the deposit be made in an interest bearing account and also provide for the disbursement of the interest accrued.

(13) Failing to deliver, within a reasonable time, a completed copy of any purchase agreement or offer to buy and sell real estate to the buyer and to the seller.

(14) Failing, at the time a sales transaction is consummated, to deliver to the broker's client a detailed and accurate closing statement showing the receipt and disbursement of all monies relating to the transaction about which the broker knows or reasonably should know. If a closing statement is prepared by an attorney or lawful settlement agent, a broker may rely on the delivery of that statement, but the broker must review the statement for accuracy and notify all parties to the closing of any errors.

(15) Violating any rule adopted by the Commission.

(b) The Commission may suspend or revoke any license issued under the provisions of Chapter or reprimand or censure any licensee when:

(1) The licensee has obtained a license by false or fraudulent representation;

(2) The licensee has been convicted or has entered a plea of guilty or no contest upon which final judgment is entered by a court of competent jurisdiction in this State, or any other state, of any misdemeanor or felony that involves false swearing, misrepresentation, deceit, extortion, theft, bribery, embezzlement, false pretenses, fraud, forgery, larceny, misappropriation of funds or property, perjury, or any other offense showing professional unfitness or involving moral turpitude which would reasonably affect the licensee's performance in the real estate business;

(3) The licensee has violated any of the provisions of G.S. 93A-6(a) when selling, leasing, or buying the licensee's own property;

(4) The broker's unlicensed employee, who is exempt from the provisions of this Chapter under G.S. 93A-2(c)(6), has committed, in the regular course of business, any act which, if committed by the broker, would constitute a violation of G.S. 93A-6(a) for which the broker could be disciplined; or

(5) The licensee, who is also licensed as an appraiser, attorney, home inspector, mortgage broker, general contractor, or member of another licensed profession or occupation, has been disciplined for an offense under any law involving fraud, theft, misrepresentation, breach of trust or fiduciary responsibility, or willful or negligent malpractice.

Case Studies

Instructions:

1. Appoint a spokesperson (do this first)
2. As a group, review your case study
3. If you need additional facts, make them up but make note of them.
4. Respond to query/s
5. When it is time for your group to report, your spokesperson/s need to:
    - Introduce yourself
    - Tell group which case study your group had and the page #
    - Summarize your case study (remember, class hasn't read yours, they were reading theirs)
    - Tell any additional facts or assumptions you added
    - Share your responses to the queries
    - Bring up any additional questions or issues raised during your discussion

Case Study #1

Barry Broker has a Food Lion anchored 100,000 sf shopping center listed for lease in a popular area. He has had the listing for 9 months, since last July 1st. There are 3 vacancies, two of 1500 sf and one of 3000 sf. The properties which surround his center are office, vacant land, and a Walgreens. Barry's center is in an affluent area with plenty of upscale residential nearby.

At a Chamber function on March 2nd of this year, Jenna, an owner of an upscale gourmet food store, store asks Barry what is being developed on the vacant land near his center. Barry researched the surrounding parcels when he got the listing, he found it was zoned low density residential, but hasn't seen any construction going on. He tells Jenna that it's probably condominiums as it is zoned low density residential. He cites the zoning of the site and explains what can be built on it.

Jenna expresses interest in opening a second location. Her customers are upscale and while the surrounding neighborhood is her type of client, she is nervous about being in a Food Lion center.

Barry assures her that it's an upscale center and that Food Lion got in early, and is an upscale store. He further assures her that Food Lion would likely allow a specialty store who does not sell what they do. Jenna agrees to tour the center and the surrounding area.

After looking at the demographics for the area, Jenna realizes that there is no one serving the gourmet prepared food market in a 7 mile radius. Looks like a home run. Barry assures her that it appears that she will be the only game in the area. And that Food Lion has agreed to her use.

Jenna executes a 5 year lease on March 21st for the 3000 sf space and opens July 1st. By this time Barry has leased the remaining spaces in the center and has moved on to other deals.

In early October, Jenna notices construction on the vacant land. Great! More upscale residential she thinks. She calls zoning to verify exactly what is being built and discovers that it is a new shopping center with a Whole Foods and during her call, discovers that the site was rezoned a year ago, last October, six months before she signed her lease to a conditional use which includes a grocery store and retail shops.

She calls the shopping center owner to ask if they knew this and further discovers that the Food Lion is closing although there are a few years left on their lease. The owner tells her that they expected this for some time. Jenna is unhappy.

Query:

What happened here and who should have done what?

Case Study #2

Sarah Broker is the listing agent of an office building. The building can be sold or leased. Further, a tenant can lease less than the entire building. The owner is "flexible". Bring all offers!
Sarah shows the building to a tenant, represented by Bill Agent. Bill is with a large national firm and their local office, where Bill and Sarah are located is the largest commercial brokerage firm in the area. Bill's firm frequently brings in tenants coming from outside the area through his national contacts. His firm is a GREAT source of high quality tenants.

Bill's tenant is a high quality tenant coming into the area. They like the location, the building, the owner's attitude and the price. It would be a feather in any owner's cap to have this tenant. They are seeking 25,000 sf.

Sarah checks the financials on the tenant and sends them to the owner for his approval. The tenant is strong. In fact, this is not the tenant's first deal and they have learned what to ask in addition to price and tenant improvement allowance.

The tenant asks for the owner's financials to insure that the owner is a strong operator. One of the factors for the tenant is the attitude of this owner, his apparent flexibility.

The owner comments to Sarah that as of RIGHT NOW his financials are OK, he's covered his tracks well, but he is worried that because of another deal gone bad, there may be issues with this property as he has cross collateralized it. He is in default on the other property and has no way to remedy it. It is a real possibility that the lender may foreclose on the property Sarah has listed to satisfy the debt on the other deal. He refers Sarah to his CPA for all of the details.

This is the first Sarah has heard about this wrinkle. While she knew his other deal was in trouble, the owner assured her that it would not impact his other properties. Bill is waiting for the owner's financials. Sarah encourages the owner to disclose this issue or allow her to. The owner does not want it to get out that he is in that much trouble and hopes that the lender won't go after this property. He hopes that with this great tenant he may be able to bail himself out with a refinance. Sarah has talked to the owner's CPA and it does not look good at all for the owner. Foreclosure looks likely.

Sarah dreads doing this deal only to have the owner crater and potentially leave the tenant in a lurch. The timing stinks. They could be in the middle of tenant improvements when this happens. She is afraid her name will be mud with this firm and others when the word gets out.

Query:

What should Sarah do?

Case Study #3

Bert Broker is representing an owner of 50 acres as the listing agent. It is not entitled. He assures the owner that he will do some research about the property so he can successfully market it.

Bert visits zoning and discovers that a rezoning should not be an issue from staff. He relays this to the owner. Bert also checks on water and sewer and finds that with an appropriate "tap fee" these can be available. He relays this to the owner. The owner asks about the other utilities needed in typical developments and Bert checks on them. To get a more definite opinion on any of this, the city and county will need to see a site plan. That will be the Buyer's duty.

Bert gets the property under contract with a Buyer who is represented by Deborah. He discloses what he knows. The Buyer then begins their due diligence spending several thousand dollars. Eventually the buyer finds out that the site is one of 6 potential routes for a realigned highway. Furious, Deborah asks Bert what he knows about this. The Buyer cancels.

Bert then contacts the Department of Transportation and discovers that there are 6 potential routes for a re-routed highway, one of which goes through this property. If this is the route selected, then it can create an issue for development. These routes have been on the books for 2 years. Any building permits or site plan approvals would have to take this to account. The DOT official confides to Bert that this route is the least favorite because of environmental concerns. It may be years before a decision is made or construction starts or it could start happening in the next year. Bert's owner says it is not a big deal, their site is unlikely, best to downplay it.

Bert figures that the property can still be marketed. Even with the routing through this site, it is very attractive. Besides it is unlikely that it will EVER happen but it may muddy the waters as people don't like uncertainty.

Queries:

1. Should Bert have discovered this initially?
2. Should Bert tell Buyers about the potential highway once he knows?
3. What if the Seller says to not tell?
4. Is there any other due diligence Bert might want to consider based upon what he's learned?
5. Should Deborah have discovered this?

Case Study #4

Casey is the listing agent for an industrial property located in an industrial park. She is a highly experienced office broker. She has an information packet on her listing which she sends to interested parties.

She gets a call from Sam, a buyer, who is not represented. Casey asks Sam if he intends to hire an agent and explains that she is happy to work with his agent if he has one.

Sam says he is knowledgeable about his business and knows what he wants and needs. Casey does the proper disclosures that she represents the seller. Sam seems to understand.

Casey emails Sam a package on the property for his review. He asks her many questions about the property and tours it with Casey twice.

Sam is a personable guy and while they are eating lunch, tells Casey how he plans to use the property and all about his business and his operations. He explains to Casey that he deals with outdoor products and landscaping equipment and likes the site because there is so much outside area where he can store trucks, equipment, supplies and merchandise. He mentions that his use appears to be like that of the owner of the property.

Her current owner uses the outside areas for short term storage and she has seen many service vehicles parked there during her visits.

Casey encourages Sam to talk to the folks in zoning and building standards regarding his exact needs and proposed use. Sam says he will but his use is not that different from the current owner's.

Sam buys the property.

A month later he discovers that he CANNOT use the site for long term storage and that service vehicles over a certain size cannot be parked on the site overnight per the zoning and the covenants, conditions and restrictions of the industrial park. In other words, he cannot run his business there. He files suit against Casey for failure to disclose materials facts and misrepresentation, saying that she knew what he was planning and should have given him a heads up.

Queries:

1. What is Casey's duty to Sam?
2. Should Casey have known that Sam could not use the property the way he wanted?
3. Did Casey do anything wrong?
4. If you were the judge, how would you rule?

Case Study #5

Don is the listing agent on a small industrial site. It has a building which has ceased operations some time ago and is in disrepair. The site has attractive zoning as the town wants it redeveloped to something else so there are many potential uses and the pool of buyers is vast.

There were some EPA issues but they have been remedied and Don's owner has a letter from EPA saying that no further action is required to comply with EPA requirements on this issue. He includes "the letter" in his marketing package.

Many show interest in the site. It borders a creek so questions are asked about flooding, the building envelope, run off, etc. Don refers them to the appropriate city and county officials.

Several submit offers with free or low fee due diligence periods. The owner selects the best offer and they go under contract with ABC Builders. During their due diligence, ABC discovers that because of the stream, the buildable area is much smaller than it appears from looking at the site. They try a variety of site plans but none are financially feasible. They tell Don about this and ask him if he investigated this issue.

Don explained that he knew that the stream would enter into any site planning but not specifics, as it depended upon the site plan. ABC cancels during their due diligence period.

Don circles back to the other interested parties. They go under contract with XYZ. When they meet with county officials regarding the stream and their site plan, the official says he is familiar with this site as he worked with another firm last month to no avail and the site is not easily developable. After 3 weeks of due diligence, XYZ comes to the same conclusion as ABC and cancels.

XYZ asks Don if he knew this and Don says it depends upon the development. He speculates that perhaps XYZ is trying to over develop the site.

Don has an inquiry from Innovative Developers and he sends his package. They ask about the building envelope, the stream and say they have heard there are "issues", but they like the location and the zoning. What all can Don tell them?

Queries:

1. What can/should Don tell them?
2. Should Don have told XYZ about ABC's site problem?
3. Should Don have done more due diligence about the building envelope?
4. Did Don do anything wrong?

Case Study #6

Ken is a tenant representative for Dress 4 Less, an off price clothing store chain. It is privately held and has been successful. They typically seek affluent locations, requiring 20,000 sf of either free standing or inline space in well located retail centers.

Dress 4 Less embarked upon an aggressive expansion program in 2008 and has some underperforming stores. The owner's son in law, Ted, a part owner, runs the day to day operations while the founder, Herb, deals with new sites. Dress 4 Less has 12 stores in NC and SC.

Kay is a developer with Century Centers, Inc., a regional shopping center developer. She handles the leasing of the larger tenants. She and Ken have done many deals together and have an excellent relationship.

Century Centers is developing a new center in a great area. Dress 4 Less is very interested in the location as they have been hoping to have a store in that area for some time but there has been little vacancy. Herb instructs Ken to contact Century Centers asap. Ken does.

Negotiations start and Kay candidly shares that there are 2 other similar clothing store operators interested in her site. The rate she quotes is much higher than Dress 4 Less has ever paid. Herb is frantic he will miss out and agrees to Kay's terms. They start negotiating the lease. Kay waves off the other 2 stores who will seek locations elsewhere.

The center will have Dress 4 Less' space ready to turn over to them for fixturing in 5 months.

During lease negotiations, Herb confides to Ken that Herb's son in law, Ted, has run the business in the ground, he has just discovered it, it will hit the fan in a couple of months. However, Herb wants to pursue this deal with Century Centers because he feels that this store will be his showplace and will eventually be profitable. Ken advises him to rethink this and asks Herb if he will be able to pay the high rent and make payments to Century Centers on the tenant improvements they are agreeing to finance for Dress 4 Less, based upon Dress 4 Less' previous financials. Herb says "he will find some way".

The lease has not been signed yet only because the Dress 4 Less corporate counsel is tied up out of the country but all are proceeding as if it will be in the next 2 weeks.

Ken is told by Ted that he, Ted, has really made a mess of things, has hidden it well until now and will likely have to declare bankruptcy. Ted confides to Ken that his mess will "take Herb down" too and it will be sooner rather than later. Ken is concerned that Herb will not be able to perform and Kay will hold it against him because she blew off 2 other stores and she changed some design features to meet Dress 4 Less' needs. He works a lot with Kay.

Query:

What should Ken do?