ILLINOIS REALTORS®

AGENCY COMPLIANCE MANUAL

Under Article 15 of the

ILLINOIS REAL ESTATE LICENSE ACT OF 2000

(225 ILCS 454/15-5 et seq.)

A Guide to Compliance for REALTORS®

REALTOR®

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Introduction

Article 15 of the Real Estate License Act of 2000 (the "Act") governing agency relationships can be found at: 225 ILCS 454/15, beginning with Section 15-5 et seq.

Before Article 15 was added, the Act did not attempt to regulate, with any detail, the licensee-consumer relationship. Both licensee and consumer were expected to look to the common law (i.e., recorded case law) of agency to ascertain their duties and rights with respect to each other. Relying on the common law oftentimes was difficult for both the licensee and the consumer. First, because it was not clearly spelled out in any one place, it was sometimes difficult to ascertain what the common law rules and duties were. You had to be familiar with the law as developed through judicial decisions. Second, the common law of agency, when strictly applied, did not mesh well with the realities of the modern real estate profession. Therefore, Illinois REALTORS® pushed for and was successful in modifying and codifying agency principles. That legislation provided a better fit with the modern realities of the business, and both the consumer and the broker can readily ascertain their respective rights and duties owed to one another by simply looking to the statutes. Article 15, regarding agency duties has proven itself over time to be easier to apply in practice than common law principles of agency.

Illinois REALTORS® is confident that you will find that this statutory agency law serves the best interests of the broker and the consumer. These materials are provided to you so that you can learn statutory agency law and its impact on your business.

The statutory agency law changes common law and these changes fall into one of five major categories. These five categories do the following: 1) Modify the common law of agency and replace it with statutory duties; 2) Consider the licensee to be representing the person with whom that licensee is working; 3) Consider the licensee to be the designated agent for the person the licensee is working with; 4) Eliminate consumers' vicarious liability for acts committed by a licensee; and 5) Create a private right of action for violations of Article 15.

To understand agency law, it is helpful to first understand some basic terms used in the Act. "Client" — this is the person you represent and to whom you owe certain statutory duties that are similar to the common law fiduciary duties. "Customer" — a person who is not represented by you, but one for whom you might perform more clerical type functions. "Consumer" — means a person or entity seeking or receiving real estate licensed activities. Consumer includes both clients and customers as well as those who have not yet established any relationship with you.

Following is a synopsis of some of the specifics found in the five major categories. Its purpose is to give you a quick overview of agency law so that you may better understand the more detailed materials that follow.

I. Modification of the Common Law of Agency

Agency law replaces the common law concepts of agency and fiduciaries with defined statutory duties that are more consistent with today's real estate realities. The statutory duties owed to "clients" are similar to common law fiduciary duties, but they are conveniently and clearly set out in §15-15 of the Act. Section 15-25 governs the relationship between licensees and "customers" and sets out the limited duties owed to customers. The basic duty owed to a customer is disclosure of material information relating to defects in the physical condition of the property. Section 15-30 outlines the duties owed to clients after the brokerage relationship ends, i.e., account for all moneys and keep confidential all confidential information learned during the brokerage agreement relationship.

Agency law allows a licensee to work as a disclosed dual agent. Article 15 provides statutory disclosure forms for the potential of dual agency and for the confirmation of dual agency. The duties owed to clients and the things that a licensee can and cannot do while acting as a dual agent are set out in §15-45 of the Act.

II. Presumption that Licensee Represents Consumer with Whom Licensee Works

Section 15-10 states: "[l] licensees shall be considered to be representing the consumer they are working with..." This means that if you are working with a buyer, you are considered to be a buyer's agent, and if working with the seller, a seller's agent. The only way around this presumption is to have a written agreement otherwise. Additionally, it is very important to note that the law considers you to be the designated agent for the consumer you work with; therefore, each real estate company is presumed to have adopted designated agency as an office policy, unless explicitly provided for otherwise in office policy.

Though normally considered agent for the person they are working with, in some limited circumstances licensees are not considered the agent of the person with whom they are working. This situation arises if the licensee merely performs clerical type functions and thus establishes a "customer" relationship. The licensee needs to be aware that you cannot assume to be in a "customer" relationship as opposed to a "client" relationship simply because you choose to be. Treating consumers on opposite sides of the same transaction is not designed to create a way to work with a consumer while claiming to be a non-agent. A licensee is considered to be in a "customer" relationship only in narrowly defined circumstances along the lines set out in §1-10. If the licensee is performing only clerical activities in order to help the licensee's existing client, then the licensee must give written disclosure to the customer at a time intended to prevent disclosure of confidential information by the customer. (See §15-35(c)).

III. Agent Is Considered Acting as Designated Agent

Section 15-10 of the Act not only considers the agent to be representing the person they are working with, but also, considers the agent to be the "designated" agent for that person. Remember, with designated agency, an agent in one office may represent a seller while another agent in the same office represents buyer, and still no dual agency arises. Dual agency exists only when one agent represents both buyer and seller in the same transaction. Because the law allows for disclosed dual agency, the agent, upon entering into a brokerage agreement, must provide the client with a statutory disclosure form explaining dual agency. As long as the client consents to dual agency, the agent is free to enter into a disclosed dual agency relationship.

IV. Elimination of Consumer’s Liability for Licensee’s Acts

Under common law, a principal can be liable for their agent’s actions. That meant a seller was potentially liable for the listing agent’s acts. Likewise, a buyer could be liable for the buyer’s agent’s acts. This concept is known as vicarious liability, i.e. the principal is vicariously liable for their agent’s actions or omissions. Section 15-60 does away with this liability. However, it still remains to be seen if courts will apply this section in cases involving federal civil rights and fair housing violations. Though this section purports to do away with vicarious liability, federal law in these areas may preempt the state statute, thus potentially leaving a consumer vicariously liable, in those areas governed by federal law.

V. Private Right of Action Created

A private right of action exists when a consumer or broker or other person can bring a civil suit against a licensee based upon a violation of a provision in the Act. No private right of action exists with respect to the other Articles of the Act. This means that licensees cannot be sued, civilly, by a consumer based solely on a licensee’s violation of a specific section of the Articles outside of Article 15, such as, paying fees directly to a licensee, instead of to the licensee’s broker. Only the Illinois Department of Financial and Professional Regulation (IDFPR) can prosecute violations of the other Articles.

However, a private right of action *does* exist for violation of Article 15 of the Act. A private right of action is allowed because Article 15 replaces the common law of agency, and a person always had the right to bring a suit based upon the common law. Replacing the common law and failing to provide for a private right of action would raise serious constitutional issues. Therefore, a private right of action is provided in Article 15 *but relates only to the provisions of Article 15.*

Now that we have given you an overview of agency law, it is time for you to forge ahead with the following materials. These materials go into detail about what you must do to comply with the agency law. If you still have questions after reviewing these materials, contact your attorney, Illinois REALTORS®, or the Legal Hotline for help.

ARTICLE 15.
AGENCY RELATIONSHIPS

For the most current version of the following statute section, please go to www.ilga.gov.

DEFINITIONS UNDER SECTION 1-10 OF THE ACT

For the most current version of the Definitions section of the Act, please go to www.ilga.gov.

Note: Brokerage Agreements shall be in writing and may be exclusive or non-exclusive

DUTIES OWED TO CLIENTS

Licensees owe certain duties to their clients. Case law has held that a real estate agent and the client are in a principal-agent relationship and that the agent owes fiduciary duties to the client. However, traditional rules of agency and fiduciaries do not always fit with the realities of the real estate profession. Article 15: Agency Relationships replaces the common law agency fiduciary duties with modified agency duties that are codified in the Act. The licensee must note, however, that there is *still* liability under the common law for *fraud and misrepresentation* — the Act does not change common law with respect to these issues. The duties that a licensee owes to clients whom the licensee represents are set out in Section 15-15 of the Act.

The following is a list and discussion of the specific statutory duties owed to clients.

(1) Perform the terms of the brokerage agreement. The licensee must know what is contained in the brokerage agreement in order to comply with this duty. Besides the statutory duties specifically defined in the Act, the brokerage agreement may provide for additional duties that the licensee must fulfill. For instance, though the Act itself does not impose a duty upon a licensee to advertise particular property that a licensee has listed, the brokerage agreement may obligate the licensee to advertise.

(2) Promote the best interests of the client in the following ways:

> **(A) Seek a transaction on terms stated in the brokerage agreement or that are otherwise acceptable to the client.** A licensee should attempt to learn what terms a client is seeking in a transaction and what types of property (including location, price, and style) the client desires. A licensee owes a duty to a buyer-client to seek out the type of property sought by the buyer in the price range sought by the buyer. Only seek a transaction which you reasonably believe will be acceptable to the client. If the client has indicated the specific types of properties of interest or has told you a price range or location desirable, refrain from showing just any property, regardless of price or location.
>
> Additionally, if you have a seller-client that is interested only in offers that contain no financing contingencies and the client directs that the licensee does not have to present an offer unless there are no financing contingencies, then the licensee should only seek and present non-contingent offers. (See the discussion in the following paragraph regarding presenting all offers.)
>
> **(B) Timely present all offers to and from a client.** Offers should be presented as soon as practicable.
>
> The duty to “timely present” offers does not mean that each offer must be presented individually in the order in which the offers came. Two or more offers that come in before a client is available for a presentation may be presented simultaneously if the client wishes.
>
> The duty to present offers to a seller-client extends to the time of closing unless waived by the client. Therefore, even though the seller accepts an offer, until the sale is closed, a licensee must timely present to the seller other offers received.

The duty to timely present all offers may be waived by the client. For instance, the brokerage agreement could provide that the licensee only has a duty to present all offers until such time as an offer is accepted by the client. Additionally, even if not in the brokerage agreement, waiver could be affected by the client's written or oral direction. However, a licensee should attempt to procure a waiver in writing so that, if necessary, a licensee could demonstrate that such a waiver was made by the client.

Waiver could also come in a more limited form. A seller-client could direct that the client is interested only in offers with no financing contingency and that offers with such a contingency should not be presented. This would be a limited waiver of the duty to present all offers. Again, it is always best to get a waiver in writing.

(C) Disclose material facts concerning the transaction of which the licensee has actual knowledge. "Material facts concerning the transaction" is a broad concept. It can be difficult to always know what may constitute "material facts." Generally, any information concerning the buyer, the seller, the licensee, the property, or the surrounding property's impact upon the property, is a material fact if the reasonable buyer or seller (whichever the case may be) would want to take this fact into consideration in negotiating the transaction. To be "material," it is not necessary that the particular "fact" would have changed the client's decision regarding the transaction had the client been aware of it. Rather, any fact that a reasonable client would want to take into consideration in any transaction generally suffices as "material."

The duty to disclose material facts does *not* include a duty to disclose confidential information. The licensee owes a duty to protect and not to disclose confidential information. Therefore, if a licensee obtained confidential information from a former client, this information cannot be disclosed to a present client, even if the confidential information includes material facts concerning the present client's transaction. (Section 15-30.) For example, assume a licensee previously represented a buyer who planned to purchase certain contiguous pieces of property for development. Also, assume the buyer told the licensee, in confidence, of this plan. Assume that later, after termination of the brokerage agreement with buyer, the same licensee represents an owner of a piece of property that the previous buyer-client needs fora development project. Though the licensee now represents the seller, the licensee should not tell the new seller-client that this particular piece of property is key to the development project of the former buyer-client. The exception to this would be if the information was no longer confidential as defined in Section 1-10 of the Act.

(D) Timely account for all money and property received in which the client has, may have, or should have had an interest. For example, a licensee who receives an earnest money deposit from a buyer-client should document the date and the amount received, including the check number. The licensee should then timely give this check to the escrow agent and deposit the check in the escrow account once the offer to purchase has been accepted. For new broker licensees who have not completed post-license education, earnest money handling must involve the company's managing broker. Also, if earnest money is not delivered by check, but by some other electronic means, all of the required rules and timelines still apply.

A licensee who acts as a property manager and who receives rent payments on behalf of the client should have reasonable bookkeeping procedures in place to account for the receipt of the payments. The licensee should ascertain from the client clear instructions about whether the licensee is to deposit the payments into the client's account or forward the payments to the client in another manner. Keep records of the date and amounts of the payments deposited or otherwise forwarded.

If payments are exchanged electronically, the methods should be safe and the recordkeeping accurate and as secure as possible, including the designated managing broker where required.

(E) Obey lawful, specific directions of the client. The licensee owes no duty to act at the direction of the client if the client's directions result in a violation of fair housing laws, release of escrow money rules, or other statutory or case law. There is no duty to violate the law, even if at the specific direction of the client. However, there is a duty to act in accordance with the lawful instructions of your client. If you choose not to follow those lawful directions then you should not be representing that client.

(F) Promote the client's best interests over that of the licensee's or any other person's interest. For example, a licensee should not try to prevent the occurrence of a transaction because of a dispute with a cooperating licensee, or other third party. The licensee owes a duty to promote the best interests of the client. This interest is served by putting a transaction together upon terms agreeable to the client. Any dispute with a licensee or other third party should be handled separately through arbitration or litigation outside of the transaction. Another example of the duty to promote the client's best interests over that of the licensee's is that a licensee must not utilize any information learned for the licensee's own benefit as opposed to the benefit of the client. For instance, a licensee learns that a new interchange is going to provide access from an interstate to a property the licensee's client is interested in purchasing. The licensee should not be purchasing the property for licensee's own account in order to gain a quick profit on resale without disclosing the information concerning the interchange to licensee's own buyer-client.

(3) Exercise reasonable skill and care in the performance of brokerage services. A licensee or broker must do what a reasonable licensee or broker would do in the situation. For example, when conducting a market analysis of a property make sure that you conduct a proper investigation of the relevant factors. When representing a buyer, explain to the buyer the general benefits of home inspections and other common contract riders. However, don't begin giving legal advice to your client. If a problem arises and legal advice would benefit the client, tell the client. If a price put on a particular piece of property is not a proper or competitive market price, let the client know your opinion. Another example of exercising reasonable skill and care is that if you know your client wants to put the property to certain use, advise the client that steps need be taken to ensure the property is zoned for that particular use and that the necessary permits can be obtained. If the licensee notices water stains or other evidence that indicates a potential problem with the property, the licensee should notify the client of the potential problem.

Section 15-15 of the Act clearly states that a licensee does not breach any duty or obligation owed to a client by showing alternative properties to prospective buyers or tenants or by showing the same properties available for purchase to other clients. The licensee does owe a duty to buyer-clients that licensee is representing where the buyers want to make offers on the same property to disclose this fact and give each buyer written disclosure which includes an opportunity for each buyer to be referred to another designated agent (Section 15-15(b): Disclosure of Contemporaneous Offers). Additionally, a licensee breaches no duty or obligation to the client by the mere fact that the licensee will receive a higher fee based upon a higher sale or lease price. Conversely, a buyer agent with an agreement providing that buyer would owe the buyer broker compensation, will have a duty to show a property that meets the buyer's needs regardless of whether there is other compensation offered to the buyer agent or not.

Section 15-15 of the Act also provides that a licensee shall *not* be liable to a client for providing false information as long as the information was provided by a customer and the licensee did not know nor should have known that the information was false. This means that prior case law holding a licensee liable for fraudulent or negligent misrepresentation of material information still applies. Fraudulent misrepresentation includes knowingly giving false information as well as failing to convey material information of which the licensee is aware. Negligent misrepresentation involves a licensee disclosing information that is false even though the licensee did not have actual knowledge of the falsity but circumstances were such that the licensee *should have known* that the information was false. Negligent misrepresentation could also include a failure to ascertain and convey information to the client when the facts are such that the licensee should have known of the existence of material information and should have conveyed it to the client.

QUESTIONS AND ANSWERS: DUTIES OWED TO CLIENTS

1. Licensee is a buyer's agent. The seller asks the licensee whether the buyer has a home to sell and whether the buyer is financially qualified to purchase the property.

This question touches upon the buyer agent's duty to keep certain information confidential. Whether the buyer has a home to sell is usually going to be public information because the person has advertised the home, put a sign in the yard or put a listing in the MLS. Once the buyer has done one of these things regarding the buyer's home, this information is no longer confidential and therefore could be disclosed to the seller. Financial information indicating whether or not a buyer is financially qualified to purchase a home is confidential and should not be disclosed unless authorized by the buyer.

Your opinion about whether someone is qualified is not confidential information and therefore could be disclosed. However, a buyer agent should always refrain from opining that a client is not qualified because of the duties to the client. If the buyer agent believes that the buyer is not qualified, the buyer agent should say that buyer agent's opinion as to whether or not buyer is qualified does not matter and that qualification can only truly be determined by a lender.

The buyer agent should take the attitude of "let's write up a contract and find out." If the buyer agent believes that the buyer is qualified, the agent should state that "in my opinion" buyer seems to be qualified, unless the agent knows for sure that the buyer has been pre-qualified by a lender. In that case, the buyer agent can factually represent that the buyer has been pre-qualified.

This question brings up another issue: is the fact that a buyer has a home to sell material information that the buyer agent must disclose to the seller? No. The buyer agent owes no duty to disclose information to a seller. The only time any licensee owes a duty to disclose information to someone other than their client is when the information is material information relating to the physical condition of the property being sold.

2. The Act replaces common law agency, but don't we still owe some fiduciary duties to our clients?

Technically no, although some of the statutory duties found in Section 15-15 of the Act are similar to the common law fiduciary duties. The common law fiduciary duties include the duty of loyalty (i.e. to act in best interest of the client), obedience (i.e. follow lawful instructions of the client), confidentiality, disclosure (i.e. provide client with all relevant, material information), and accounting (i.e. account for all money and property of the client that is entrusted to you). For the most part, these duties still exist under the Act, but these duties have been modified and clarified so that they can be more equitably applied in modern real estate practice.

3. Are licensees still liable for their actions under other laws governing the sale of real estate besides statutory agency duties under the Act?

Yes. The licensee is still subject to liability based upon misrepresentations under the Illinois Consumer Fraud and Deceptive Business Practices Act. Additionally, licensees are liable under common law for fraud and misrepresentation. A licensee is also still subject to all of the Federal and State and local fair housing laws and subject to RESPA provisions such as the prohibition on naked referral fees from lenders, as examples.

4. What are some other examples of statutes that apply to our real estate practice?

Examples include:

(A) Consumer Fraud and Deceptive Business Practices Act (815 ILCS 505/1). This Act prohibits unfair methods of competition including the use of deception and misrepresentation.

(B) RESPA (12 U.S.C. §2601 et. seq.) applies to real estate licensees with regard to transactions financed by certain loans. This Act, among other things, prohibits naked referral fees from settlement service providers.

(C) Federal, State and local fair housing laws.

(D) Commercial Real Estate Broker Lien Act (770 ILCS 15/1).

(E) There are also various acts that do not directly apply to licensees, but with which the licensee should be familiar because they impact sellers and property owners. Examples are: (a) Residential Real Property Disclosure Act (Seller's Disclosure law) (765 ILCS 77/1); (b) The Security Deposit Return Act (765 ILCS 710/1); (c) Security Deposit Interest Act (765 ILCS 715/1) which applies to residential property containing 25 or more units; and (d) the Radon Awareness Act (420 ILCS 46/1).

5. If I have two buyers interested in the same property and I am acting as a buyer's agent for both, do I need a dual agency disclosure signed?

No. Dual agency only exists when you are representing both the buyer and seller. (See definition of dual agency under §1-10 of the Act). Representing two buyers interested in the same property does not create a dual agency situation. A licensee may represent more than one buyer interested in the same property without violating any duty owed to your buyer clients. (See §15-15(b)). Remember, however, that even though you can represent more than one buyer with regard to the same property, you must not disclose confidential information of one client to the other client or any other third party, even if you believe that the other client may benefit from the information. However, if your buyer clients want to make offers on the same property, you must disclose that to your buyer clients and give them the option of being referred to another designated agent (§15-15 (b)).

6. Does the buyer representation contract have to have an expiration date?

An expiration date is specifically required by the Act for a buyer representation contract at Section 10-25. This section provides that a written brokerage agreement must have an automatic expiration date or in the alternative, the brokerage agreement, if for longer than one year, must allow an annual right to cancel on no more than thirty (30) days' notice. In addition, the Act requires by definition that all brokerage agreements be in writing (Section 1-10, definition of "brokerage agreement").

AGENCY DISCLOSURE

Section 15-35 addresses agency relationship disclosures and provides:

1. That the licensee advises the consumer of the designated agency relationship that will exist. Remember, under Article 15, you are considered to be representing the party with whom you are working. The designated agent(s) disclosure must be included as part of your brokerage agreement.

2. That the licensee advises the consumer about the broker's compensation and whether the broker is authorized to share compensation with cooperating brokers, and what amount licensee is authorized to share, if any.

Each of the above items must be accomplished no later than entering into a brokerage agreement with the consumer. It is important to note that these disclosures are required for both buyers and sellers. These disclosures should be made in the listing agreement or buyer representation agreement.

Section 15-35 requires one other disclosure in certain circumstances. Where a licensee is merely performing clerical type acts for a "customer," the licensee must disclose, in writing, to the customer that the licensee is not acting as the agent of the customer. A licensee must make this disclosure at a time "intended to prevent the disclosure of confidential information from a customer to a licensee, but in no event later than the preparation of an offer to purchase or lease real property." (§15-3(c)). The reason behind the requirement of disclosure in this situation is that you are providing some service to a consumer without being considered theiragent. This is contrary to the general rule that you represent the person with whom you are working, thus, the need for disclosure. In fact, in most cases, you represent the opposing party and you are treating the unrepresented party as a customer. This is not intended to imply that you must give Notice of No Agency disclosure merely because someone is asking about your services. Rather, it is intended to apply when performing clerical acts while assisting your own client that might result in the disclosure of confidential information or a misunderstanding as to your work with the customer.

This no agency disclosure must be provided in either a sale or lease transaction. Disclosure that you will not serve as a person's agent must be made in commercial transactions and residential lease transactions, as well.

> (**Note:** Here, it is important to remind you of the difference between a "consumer" and a "customer." "Consumer" is a broad term referring to persons seeking, as well as receiving, real estate services. "Consumers" may become "clients." "Customers" on the other hand, by definition, are not "clients." A "customer" is a person for whom you perform only clerical type activities. Therefore, when reading these materials or the Act, be sure to note that each of these terms has a specific meaning).

When you are performing only ministerial or clerical-type acts for a consumer, a consumer is considered to be a "customer" under Article 15 and not a "client." (Definition of customer §1-10 of the Act). The Act specifically provides that performing ministerial or clerical-type acts does not violate any duty that the licensee owes to the client the licensee represents.

The term “customer” is important because it turns up again in Section 15-25 — the section on licensee’s relationship with customers. Only certain limited duties are owed to “customers.” The licensee has a duty to treat all customers honestly and shall not negligently or knowingly give them false information. A licensee has a duty to disclose to customers who are prospective buyers all material adverse facts pertaining to the physical condition of the property that are actually known by the licensee and that are not discoverable by a customer’s reasonably diligent inspection. Regarding disclosure of physical condition of properties, an important protection for licensees is afforded by Section 15-25. This section provides in part that:

> *…A licensee shall not be liable to a customer for providing false information to the customer if false information was provided to the licensee by the licensee’s client and the licensee did not have actual knowledge that the information was false.*

Additional protection is afforded the licensee under Article 15 in that the law specifically provides that no cause of action shall arise against the licensee for revealing to the customer information regarding material adverse facts about the physical condition of the property. Article 15 provides specific statutory language protecting the licensee in this situation.

Also note, usually when performing clerical acts the licensee is representing the opposing party but treating the other as a customer in order to better assist the licensee’s own client (the opposing party). The category of “customer” is not a non-agency “business model” in Illinois and is not recognized as such under the Act.

QUESTIONS AND ANSWERS: CUSTOMERS

The following five questions are based upon this scenario: Andy is designated agent for Sally who is selling her property. Andy’s office represents both buyers and sellers and has a policy of allowing disclosed dual agency.

1. Bill calls in to Andy’s office and speaks to Andy. Bill tells Andy that he is interested in buying property and is wondering if Andy or anyone in his office will represent buyers and if so, how much will it cost. If Andy answers only these questions, is he a buyer agent under Article 15?

> No, Andy can answer phone inquiries from a person concerning the availability of and pricing of brokerage services without being considered as representing the buyer. These are clerical functions.

2. Same facts as above except that instead of calling, Bill walks into the office.

> Andy will not be considered Bill’s agent; instead, Bill is merely a “customer” at this point.

3. Bill reads an ad that Andy put in the paper about Sally's home. Bill decides he would like to see Sally's home. Bill calls Andy and says he would like to see the home. Bill says he is not working with any other licensee. Bill tells Andy that he is only interested in seeing Sally's property and that he does not want Andy to show him any other listings or provide any other brokerage services other than showing him Sally's home. Can Andy show the home and treat Bill merely as a "customer," or will Andy be acting as a dual agent?

Under these facts, Andy would not be a dual agent. Bill is merely Andy's "customer." Because Andy is only showing Bill one property, for which he is designated agent, at the specific request of Bill, and because Andy is not providing Bill any other brokerage services or discussing any other properties with Bill, Andy is considered to be performing only clerical functions for Bill. However, Andy will need to provide Bill with a non-agency disclosure form advising Bill of this fact. (The form is called Notice of No Agency Relationship.) Bill is a customer and Sally is Andy's client.

4. Same facts as in #3, except that Bill comes to Andy with two specific properties already in mind, both of which are listings for which Andy serves as designated agent. Can Andy show both properties to Bill without being considered representing Bill?

Yes. If all Andy is doing is showing these specific properties in response to Bill's request, Bill remains a customer. (Provide disclosure of no agency). However, if Andy began inquiring about the type of properties Bill is interested in, or inquired about Bill's price range, or offered to show Bill other properties, whether or not they are listings in which Andy is designated agent, then Andy has gone beyond the realm of the customer relationship and would be considered to be representing Bill, as a client. When this happens, Andy will need a buyer brokerage agreement with Bill.

5. Same facts as in #3, except that Bill, when first talking to Andy, asks Andy to tell him about any other listings Andy has that might interest Bill. If Andy shows Sally's property will he be a dual agent?

Yes. Andy and Bill are no longer in a customer relationship. Andy, by responding to Bill's request to tell him about other properties, has gone beyond the customer relationship, and is now considered by law to be representing Bill. Therefore, if Andy shows Bill through Sally's property, he is acting as a dual agent and should make all necessary disclosures. To avoid dual agency, Andy would need to refer Bill to another agent in the office. Also, Andy needs a buyer brokerage agreement with Bill,

The following questions are based on the following scenario: Andy and Floyd are sales associates in an office that engages in designated agency and disclosed dual agency. Barney is a buyer that saw a sign in seller's yard with Floyd's name and office phone number on it. Floyd is the designated agent for seller. Barney calls the number because he wants to speak with Floyd about seeing the property.

6. Andy answers the phone and says that Floyd is out of the office, but that he could set up a time at which Floyd and Barney could meet and view the property. Is Andy representing Barney?

Andy is performing only clerical acts when he sets an appointment to view property, so he is not representing Barney.

7. Same facts as in #6, except that Floyd is on vacation and Barney really wants to see the property. Can Andy take Barney through the property? If Andy does show the property, is Barney a customer or is he representing Barney as a client?

Andy can show the property as an additional designated agent for the seller helping Floyd while he is on vacation. If all Andy does is show Barney this one specific property and gives Barney only factual information like that found on a property data form, Barney is just his customer. However, if Barney starts asking and Andy responds to questions such as "what do you think this property is worth," or "what other listings are in this neighborhood," then Andy is performing more than clerical type services. Any time that Andy begins discussing availability of other properties, or starts giving his opinion as to the property he is showing, or otherwise says things about the property other than factual information concerning the price or description, he is beginning to act as if he is representing the buyer as a client, in which case a buyer brokerage agreement will be needed

8. Assume Andy shows the property to Barney, treating him as a customer. A few days later, Barney contacts Andy about seeing the property again. If Andy shows the property again, is Barney a customer or a client?

This is a difficult question, the answer to which will depend upon the facts. If Floyd is still gone, and Andy is showing the property because Floyd can't, then as long as Andy only shows the property without doing more Barney is likely a customer. However, if Floyd is available, but Andy decides he wants to show Floyd through the property so he can get paid if Barney buys the property, Andy is probably actively representing Barney as a client, and needs a buyer brokerage agreement

9. Floyd is still on vacation, so Andy again takes Barney through the property. After viewing the property a second time, Barney decides he wants to make an offer. Barney asks Andy for a form so that he can make an offer to purchase. Is Barney a "customer" or a "client?"

By this time, Barney is probably considered a "client" if Andy is representing Barney, he must have a brokerage agreement with Barney by this time. If Andy assists him in making the offer by advising Barney as to what sort of contract riders are available or giving advice about the type of terms Barney should offer (for now we put aside unauthorized practice of law issues), then Andy is representing Barney as a client. Even if Andy only completes factual information for Barney on the offer, he still is probably representing Barney. However, if Andy was named as an additional designated agent for the seller along with Floyd, then Barney could legitimately say that he is only in a "customer" relationship with Barney so long as this was the only property Andy showed Barney. This is so because Andy can say he is helping Barney complete the factual information on behalf of his "client," the seller. Helping a consumer complete factual information on an offer to purchase on behalf of your own client is clerical in nature. The key factor is that when you help a consumer complete factual information, you must be doing it on someone's behalf. If you are not doing it on behalf of a seller-client, you must be doing it on behalf of the buyer. Therefore, you are representing the buyer as a client.

The following questions are based upon the following scenario: Alice Agent is the designated seller's agent for Sam Seller who is selling his home. Alice holds an open house. Marcia, Jan, Bobby, Greg, Peter, and Cindy all come to the open house and walk through it.

10. Is Alice considered a dual agent since she is sitting in the open house?

No, Alice is the listing agent hosting the open house for her seller client and at most, the people who went through the house had only a customer relationship with Alice, if they had any relationship at all with Alice.

11. Same facts as in #10, except that Greg asks Alice about the property taxes and square footage of Sam's house. If Alice answers Greg's questions, is Greg a customer?

Alice's response to a consumer's question about the property where she is hosting the open house is clerical in nature. So, Greg is still a customer.

12. Same facts as in #10. Does Alice have to give written disclosure to everyone who comes through the open house that she is not acting as their agent?

No. Section 15-35(c) requires that a licensee make a written disclosure to a customer that the licensee is not their agent. However, the disclosure is only required to be made "at a time intended to prevent disclosure of confidential information from [the customer]." Therefore, if at the open house Alice does not anticipate anyone coming up to her and disclosing confidential information, written disclosure would not be required. However, if Marcia or one of the others who goes through the property starts expressing a real interest in the property and begins asking many questions about the property, Alice should be prepared to make her no agency disclosure at that time. The goal is to make the disclosure before the customer tells the agent something confidential, *but in no event should it be made later than the preparation of an offer.*

13. Would the answer in #10 be different if Alice was not the designated seller's agent but sat the open house as a favor?

No, the answer would not change — Alice is performing only clerical acts. It does not matter whether you are the listing agent or not when you host the open house as long as it is true that you do not represent any of the buyers coming through the house. However, it is important that the listing agent inform the seller that the host of the open house is NOT representing the seller. Make sure the seller has no objection to this. IF Alice is hosting trying to find buyer clients, she will need a brokerage agreement when/if this happens.

14. Same facts as in #10, but let's assume that after walking through the open house, Bobby wants to make an offer. Can Alice help Bobby prepare an offer? If she does, must she be a dual agent?

Alice can assist Bobby in preparing an offer. Alice would not have to be a dual agent as long as she did not engage in activities that would constitute active representation of Bobby. If Alice is merely completing business or factual information for a consumer (Bobby) and is doing so on behalf of her client (Sam), then she can treat Bobby as a customer with proper Notice of No Agency. Alice would need to make a written disclosure to Bobby of no agency, stating that she represents the seller and is not acting as the agent for Bobby.

Note that the situation could evolve to dual agency if Bobby seeks more services from Alice, such as trying to get qualified for a loan. This will require disclosure and consent from both seller and buyer and a buyer brokerage agreement where Alice is the designated agent for Bobby.

15. Does a licensee have to give a Notice of No Agency disclosure to a customer if he is performing clerical activities in the context of a residential lease transaction?

Yes, if the licensee represents the landlord and does not or will not represent the tenant the Notice of No Agency must be given to the tenant. Property managers who represent the landlord only should routinely provide Notices of No Agency to unrepresented tenant prospects.

The next two questions are based upon the following scenario: Clark is the designated agent for Lex who has listed his home for sale with Metropolis Realty. Lois saw the property at an open house. The next day she comes to Clark with an offer she prepared herself.

16. If Clark takes the offer and presents it to Lex, is Clark representing Lois and is therefore acting as a dual agent?

If Clark presents the offer, he is not considered a dual agent. Merely taking a completed offer from a consumer and presenting it to your client is considered a clerical act done for the benefit of the seller, who is the client in this example. Lois is a customer here. Clark should give Lois a Notice of No Agency.

17. Same facts as in #16, except that Lex rejects the offer. Lois then approaches Clark and says she is interested in the property and wants help in putting together another offer. Can Clark, help Lois put an offer together that is more appealing to Lex while still treating Lois as a customer?

No. If Clark is offering assistance in any way beyond simply completing factual or business information, then he is outside the scope of a customer relationship and would be actively representing the buyer. Thus, Clark would be considered a dual agent, requiring disclosure with informed consent, and a buyer brokerage agreement with Lois.

18. Arthur is a designated seller's agent for Spike. Arthur is also a designated buyer's agent for Bob. Bob happens to drive by Spike's house and decides he wants to see it, so he walks into Arthur's office to ask about the property. Because Spike refused dual agency, Arthur cannot represent Spike and Bob in the same transaction. Can Arthur say he is treating Bob as a customer if he responds to Bob's inquiries?

Even though responding to a consumer's questions regarding particular properties is an example of an activity that could be performed for a customer, under these circumstances Arthur cannot legitimately say Bob is a customer. Once a licensee is a designated agent for a client, the licensee cannot then try to limit his role and treat the buyer as a "customer." Therefore, Arthur would be a dual agent in this situation. If the facts were such that Spike had previously indicated that he does not agree to dual agency, then Arthur would have to refer either Spike or Bob to another agent and could not answer Bob's questions regarding Spike's property.

19. Do I have to send a written buyer's agent disclosure to the seller?

If the seller is represented by an agent, then no, you will not have to make any agency disclosure. However, in limited circumstances where the seller is not represented by a seller's agent and you represent the buyer, you will have to make a written non-agency type disclosure that says you represent the buyer, not the seller. One such situation would be where you are showing your buyer client through a FSBO property. You should make this disclosure at a time aimed at preventing the seller from disclosing confidential information to you. Therefore, you would want to make the disclosure before you show the property to your client, but in no case, later than making an offer to purchase.

CONFIDENTIAL INFORMATION

Article 15 provides that a licensee owes a duty to his or her client to "keep confidential all confidential information received from the client." (Section 15-15(a)(4) of the Act). The duty to keep confidential information confidential continues even after the brokerage agreement terminates. (Section 15-30(2) of the Act).

Section 1-10 of the Act defines "confidential information" as:

> Information obtained by a licensee from a client during the term of a brokerage agreement that (i) was made confidential by the written request or written instruction of the client; (ii) deals with the negotiating position of the client; or (iii) is information the disclosure of which could materially harm the negotiating position of the client; unless at any time:
>
> (1) the client permits the disclosure of information given by that client by word or conduct;
>
> (2) the disclosure is required by law; or
>
> (3) the information becomes public from a source other than the licensee.

Note that the duty not to disclose confidential information is owed only to a "client," not to a "customer". This means, of course, that a seller's agent owes this duty to the seller while a buyer's agent owes it to a buyer. In order to determine whose confidential information the agent must protect, the agent might ask themself, "Who is my client?" The agent must protect the confidential information of their client.

"Confidential information" includes three categories. The first category is information that is made confidential by the written request or written instruction of the client. This is self-explanatory. The second and third categories, however, (information dealing with the client's negotiating position and information that could materially harm the client's position) are not so self-explanatory. The licensee will need to use caution and common sense in determining whether information possessed is "confidential."

The following is a non-comprehensive list of some examples of "confidential information":

1) Information relating to the minimum price a seller-client will accept;

2) Information relating to the fact that the seller-client must sell quickly as this may weaken a seller's bargaining position if buyer is aware that seller must sell quickly;

3) Information relating to the client's financial condition. (This information could hurt a seller's bargaining position if disclosed that a seller is in financial difficulty or has an immediate need for money. This becomes even more complicated in a distressed or short sale situation. Likewise, a buyer could be harmed if information relating to buyer's financial condition were disclosed and other buyers used this information to gain a competitive edge in purchasing particular property. However, the licensee may provide sufficient information or assurances that a buyer-client is qualified — this information is not considered confidential);

4) Information relating to the terms of a buyer-client's offer when the buyer is your client. (Making known to other buyers a particular buyer-client's offer terms allows another buyer to use this information to structure a more competitive offer.);

5) Information relating to any financial projection prepared by a client that estimates the value of a particular piece of property — especially commercial property. (For example, this information could be used by other buyers to help them determine the nature of an offer they may submit as competition to your client's offer.);

6) Information relating to a buyer-client's plan to re-sell or lease the property to a third party. (This information, if learned by a seller, could result in the seller dealing directly with the third party.)

Not only must licensees keep confidential information confidential, licensees must not use the information to their own advantage. For instance, assume you know that a particular client is planning to buy up land on the edge of town for development. If you buy some of the land because you know you can turn around and sell it to the client at a higher price, you have breached your duty to the client, even though you did not disclose the confidential information to another party. (Section 15-15(a)(2)(F) of the Act).

Confidential information *does not* include "material information about the physical condition of the property." (Section 1-10 of the Act). Therefore, a licensee cannot withhold information from a non-client about defects or information regarding the property's physical condition on the grounds that it is confidential and would hurt the seller's bargaining position. A licensee has the duty to disclose information about known material physical defects in the property that are not reasonably discoverable by a customer. This duty is not changed by the duty of confidentiality owed to the client.

QUESTIONS AND ANSWERS: CONFIDENTIAL INFORMATION

1. Can confidentiality be waived by the client?

Yes. The Act recognizes that even though information is of the type normally considered confidential (for instance, it deals with the client's negotiating position) there may not be a duty to keep it confidential for one of the following reasons: (1) **the client permits the disclosure of information given by that client by word or conduct.** For instance, if the client directs that information be disclosed to the other party, it is no longer confidential. Additionally, if the client does not treat the information as confidential and begins to make it known to others, there is no duty to keep the information confidential. (2) **The disclosure is required by law.** An example of this is the requirement placed upon a licensee to disclose material information relating to the physical condition of the property. Another example: a court order requiring a licensee to disclose information or testify. (3) **The information becomes public from a source other than the licensee.** For example, if a licensee knows that the client is planning to buy a piece of property and then lease it to a new business coming into town, this is confidential information. However, if the local newspaper were to publish this information, it would no longer be considered confidential.

2. Once the client authorizes disclosure of information to a party other than the licensee, is it assumed that the information is no longer confidential?

Not necessarily. Example: a buyer-client completes a financial statement and directs the licensee to give it to the seller — does it mean that there is no duty of confidentiality as to this financial information? There still may be a duty to keep this information confidential as to sellers of other properties or other third persons. Be aware that a client may give a licensee only limited authority to disclose confidential information. Be careful, if the information is such that it would normally be considered confidential, a licensee should not assume that because the client allowed disclosure to one seller or buyer that the client wants the information disclosed to other sellers, buyers, or third parties.

3. How should a licensee respond to a question from a customer or another agent that delves into information considered confidential?

If you are asked a question, the answer to which includes confidential information, you should respond that the question seeks information that is normally considered confidential, and the question will have to be directed to the client or the licensee will have to obtain permission to disclose it. Remember, even if the information sought is confidential, a licensee cannot respond with a misleading or untruthful answer.

4. What if a client specifically directs that information be confidential, but the licensee believes that there is a legal duty to disclose the information?

If there is a legal duty placed upon the licensee to disclose the information, then the licensee must disclose, regardless of the client's direction. The licensee should inform the client that as a matter of law, the information must be disclosed and that the information is thus not considered confidential under the Act. If the client still insists upon keeping the information confidential, the licensee needs to consider whether it is worth maintaining a client relationship with that client and risk violating various license law or other legal duties.

5. What if a client orally instructs the licensee to keep information confidential?

Section 1-10 discusses information that is "made confidential by the written request" of the client. Obviously an oral instruction does not meet this criteria. However, this does not mean that the licensee must only keep information confidential for which there is a written request or instruction. Section 1-10 (as set out above) *also* defines confidential information as information dealing with or that could materially harm the client's negotiating position. Therefore, it is not necessary that there be a *written request* that information dealing with the client's negotiating position remain confidential.

6. What does "material information" relating to the "physical condition" of the property mean?

There is no duty to keep this type of information confidential. However, it can sometimes be difficult to determine exactly what this "category" of information encompasses. A major hole in the foundation hidden by a basement wall is "material" information relating to the physical condition of the property. A squeaky cabinet door in the kitchen, in most cases, is probably not “material.” However, where the line exists between these two extremes is hard to tell. If the client is asking you to keep something confidential, you need to determine if it relates to the physical condition of the property. If it does, next determine if it is “material.” If the reasonable buyer would consider the defect as more than a minimal consideration in the negotiation of the value of the property, then it is probably “material” and therefore should be disclosed.

LICENSEE LIABILITY FOR FRAUD AND MISREPRESENTATION

Licensees are still subject to common law liability for fraud and misrepresentation. Additionally, licensees face liability for misrepresentation under the Consumer Fraud and Deceptive Business Practices Act. (815 ILCS 505/1 et. seq.). This article discusses common law fraud and misrepresentation and how it relates to the licensee and Article 15 of the Act.

Under Illinois common law, the elements of fraudulent misrepresentation are: (1) a statement of material fact; (2) that is false or that was made in reckless disregard of its truth or falsity; (3) that is relied upon by the victim; (4) the statement was made for purposes of inducing the victim to act or rely upon the statement; and (5) reliance by the victim led to injury.

In addition to fraudulent misrepresentation, a broker can be held liable for negligent misrepresentation. The elements of negligent misrepresentation are the same as the elements of fraudulent misrepresentation, except that instead of "knowingly" making a false statement or making a statement with "reckless disregard of its truth or falsity," the statement need only be negligent. This means that a licensee can be held liable for making an untrue statement, even if the licensee believes the statement to be true, if in fact, the circumstances are such that the licensee should have known that the statement was false. Negligent misrepresentation may also result from failing to obtain and communicate information when the licensee should have obtained and communicated the information.

One important issue that arises in the context of misrepresentation is: what is the licensee's liability for repeating information that was provided to the licensee by a customer or client? Under the common law, a licensee generally has no duty to independently substantiate representations made by the client unless the licensee is aware of facts that indicate that the client's representations might be false. This common law liability still remains and is set forth in Article 15, with one exception. Article 15 makes a modification in favor of protecting licensees from liability.

Section 15-25 of the Act provides in part that:

> *…A licensee shall not be liable to a customer for providing false information to the customer if the false information was provided to the licensee by the licensee's client and the licensee did not have actual knowledge that the information was false.*

The practical effect on the licensee is that if the licensee is making a statement to the customer that is based upon information provided by the licensee's client, there is no liability for negligent misrepresentation. In other words, the licensee will be liable in that specific situation only if the licensee has *actual knowledge* that the information provided by the client is false. Because the section uses the term "actual knowledge" and does not include language regarding what the licensee "should have known," the theory of negligent misrepresentation does not apply in the specific circumstances where the licensee is providing information to a *customer* that was supplied to the licensee by the *client*.

Please note, however, that negligent misrepresentation *still* survives where the licensee's representations to the customer are not based upon information supplied by the client.

Be aware that the Act also retains a negligent misrepresentation standard in the situation where the licensee provides false information to the client, even if the licensee was merely passing on information provided by the customer. (Section 15-15(d) and (e) of the Act).

In addition to these common law theories of fraud and misrepresentation, the licensee is subject to liability for misrepresentation and deception under the Consumer Fraud and Deceptive Business Practices Act. The Consumer Fraud Act prohibits unfair or deceptive acts or practices including the misrepresentation, concealment, or omission of any material fact with the intent that others rely on such misrepresentation, concealment, or omission. 815 ILCS 505/2. The Consumer Fraud and Deceptive Business Practices Act applies to misrepresentations made by real estate licensees. *Seligman v. First National Investments Inc.*, 133 Ill. Dec. 191 (1st Dist. 1989). *Capiccioni v. Brennan Naperville, Inc.*, 339 Ill. App. 3d 927 (2003). It even applies to innocent misrepresentations, i.e., statements that are false even though the licensee had a reasonable belief that the representation was true. It is also important to note that under the Consumer Fraud Act, a victim does not have to prove all of the elements of common law fraud.

For instance, a licensee is liable for misrepresentation or concealment of a fact even if the victim was not actually misled, deceived, or damaged by the misrepresentation or concealment. Additionally, under the Consumer Fraud Act, a licensee can be liable to the victim for actual damages, punitive damages, and may be required to pay the victim's attorney's fees. One positive point, however, is that the Consumer Fraud and Deceptive Business Practices Act does not apply to the situation where the licensee is repeating information that was provided by the seller of real estate, unless the licensee actually knows that the information is false, misleading, or deceptive. 815 ILCS 505/10b(4).

SAMPLE OFFICE POLICY

Illinois REALTORS® has a Sample Office Policy Manual available which provides some suggested language that a sponsoring broker could use in the office depending upon the types of agency relationships the office will be allowing in its practice (See Illinois REALTORS® Sample Office Policy Manual, available at https://www.illinoisrealtors.org/legal/forms/.

LIST OF FORMS RELATING TO AGENCY

- Additional Agent Designation, #340
- Buyer Agency Checklist, #343
- Buyer Information Checklist, #344
- Confirmation of Consent to Dual Agency, #336
- Disclosure and Consent to Dual Agency, #335
- Disclosure of Buyer's Designated Agent, #349B
- Disclosure of Contemporaneous Offers, #427
- Disclosure of Seller's Designated Agent, #349S
- Disclosure of Tenant's/Lessee's Designated Agent, 349T
- Exclusive Buyer Representation *with* Dual Agency Disclosure, #338
- Exclusive Seller Representation *with* Dual Agency Disclosure, #425
- Exclusive Buyer Representation *without* Dual Agency Disclosure, #338a
- Exclusive Seller Representation *without* Dual Agency Disclosure, #425a
- Exclusive Right to Sell *with* Dual Agency Disclosure, #342
- Exclusive Right to Sell *without* Dual Agency Disclosure, #342a
- Non-Exclusive Buyer Representation *with* Dual Agency Disclosure, #339
- Non-Exclusive Buyer Representation *without* Dual Agency Disclosure, #339a
- Non-Exclusive Buyer Representation Agreement, #341
- Non-Exclusive Tenant Representation Agreement, #341T
- Notice of No Agency Relationship, #350
- Notice of No Agency Relationship for Tenants, #350T
- Rider to Brokerage Agreements, #351
- Seller Agency Checklist, #345

USE OF THE “DISCLOSURE AND CONSENT TO DUAL AGENCY” FORM AND “CONFIRMATION OF CONSENT TO DUAL AGENCY” FORM

Section 15-45 of the Act (225 ILCS 454/15-45) addresses dual agency. A licensee may act as a dual agent only with the informed written consent of all clients. Under Section 15-45 there are two parts to the dual agency disclosure: initial disclosure and confirmation. First, the licensee must make an initial disclosure of the potential for dual agency, and then at the time of execution of any offer or contract to purchase or lease, the licensee must obtain a confirmation from the client that the client consents to dual agency representation.

The form entitled “Disclosure and Consent to Dual Agency” represents the initial disclosure. If you are a licensee who may potentially engage in dual agency representation, then the law requires that you make this potential known to your client. This will apply to all licensees except those that work in an office that prohibits dual agency representation. The disclosure must be presented by a licensee, who offers dual representation, to the client at the time the written brokerage agreement is entered into. The client may then give consent by signing the form at the time it is presented or any time before the licensee acts as a dual agent as to the client. At the time the brokerage agreement is entered into, it is likely that the dual agency situation will not yet have occurred, so the client could be consenting to the possibility that dual agency will occur.

This disclosure of the potential for dual agency must be made if the licensee may potentially act as a dual agent. The form must be signed by the licensee or licensees who are the designated agent or agents of the client. The form must be signed by the client for whom the licensee is the designated agent. Again, you can get the client’s signature when you present this form or at any time before you actually act as a dual agent. If a dual agency situation ultimately occurs, it is not necessary that all the parties sign the same initial disclosure form, but all the parties must sign a “Disclosure and Consent to Dual Agency” form. This language is included in our agency brokerage agreement forms which would satisfy the disclosure and consent requirements. The client should initial this section in the brokerage agreement form.

The form referred to below is a sample form for this initial disclosure. The form contains a brief introduction and the required statutory language.

The “Confirmation of Consent to Dual Agency” sample forms are referenced below as well.

The operative language may be set out in a separate form or included with another document such as the contract to purchase or a rider to a contract to purchase. However, if incorporated in another document, the confirmation must be separately initialed by the clients, even if the document is signed. In transactions where the licensee is actually acting as a dual agent, the confirmation should be obtained no later than when the clients are executing any offer or contract to purchase or lease.

Disclosure and Consent to Dual Agency, #335

Confirmation and Consent to Dual Agency, #336

QUESTIONS AND ANSWERS: DUAL AGENCY

1. May I practice disclosed dual agency when I have an ownership interest in the property being sold?

No. The Act at Section 15-45(g) and rules under the Act at Section 1450.820 state that "a licensee may not serve as a dual agent in any transaction when the licensee, or an entity in which the licensee has or will have an ownership interest, directly or indirectly, is a party to the transaction." The reason for this is that the Act requires agents to keep confidential information to themselves. If the licensee is one party to the transaction there is no way to keep the other party's confidential information from themself.

Also, as a reminder, there is a license law requirement to disclose the fact that a licensee has an ownership interest in the property sold or being sought (Section 10-27).

2. What if during the course of dual agency representation, one of the clients decides that they no longer want to be represented by a dual agent?

This contingency is covered in Section 15-45(f). In the case where one client no longer consents to dual agency, the licensee may withdraw from representing that client without liability. The licensee may still continue to represent the other client.

3. If one of my clients in a dual agency situation wishes to no longer be represented by a dual agent, may I refer that client to another agent and receive a referral fee? If so, do I have to have permission from the clients before I receive the referral fee?

In this situation you may only receive a referral fee if written disclosure is made to both the withdrawing client and the client that continues to be represented by you. The Act, however, does not require that you get the clients' permission, it merely requires disclosure.

4. When I make the initial disclosure to a consumer about the potential for dual agency by using the Disclosure and Consent to Dual Agency form, must I get the client to sign the form at the time I give it to them?

If possible it is good practice to obtain the client's signature at the time you make the disclosure. However, the Act only requires that the form be signed at any time before the licensee acts as a dual agent. (See §15-45(b)).

5. On my disclosure forms, must I use the language in the statute?

To answer this question we must point out that there are two sets of disclosures that need to be made under the law regarding dual agency. First, there is the Disclosure and Consent to Dual Agency form and second, at the time of entering into a contract to purchase, the clients in the dual agency situation must sign or initial language regarding Confirmation of Consent to Dual Agency.

Both sets of disclosures should contain the exact language set forth in the Act so that you will have the benefit of informed consent when the clients sign disclosure documents containing that language (§15-45(a)).

6. When do I have to present the forms on Disclosure and Consent to Dual Agency and Confirmation of Consent to Dual Agency?

The Disclosure and Consent to Dual Agency form must be provided to the buyer or seller at the time of entering into the brokerage agreement. For additional help in meeting this requirement, Illinois REALTORS® has form brokerage agreements that contain the Disclosure and Consent to Dual Agency language. This section must be separately initialed by the client(s). However, the signature of the client can be obtained at any time before the licensee actually acts as a dual agent.

The Confirmation of Consent to Dual Agency form must be provided no later than at the time the clients are executing any contract to purchase or lease. The statutory language may be provided on a separate form that the clients would need to sign, or the language could be provided within another document such as the contract to purchase, in which case, the law requires the clients to separately initial the language, even though the clients sign at the bottom of the contract to purchase.

7. What do I do if I provide the disclosure forms to my client but they refuse to sign the form?

If the client is refusing to sign the form, you must treat this as a refusal to consent to a dual agency relationship. Therefore, you cannot enter into a dual agency relationship.

8. If I am a buyer's agent and my buyer is interested in a FSBO property and either my buyer or I am able to negotiate a commission arrangement whereby the owner pays all or part of my commission, am I automatically acting as a dual agent?

No. The mere fact that compensation comes from the seller does not mean that there is an agency relationship. Section 15-40 of the Act specifically states that "compensation does not determine agency relationship." Dual agency would arise only if you performed more than mere clerical acts on behalf of the seller. If you engaged in an activity that constitutes active representation of the seller, then you would in fact be a dual agent. The mere acts of showing a client through a FSBO property or passing on to the owner your client's offer to purchase are considered clerical or ministerial acts, not active representation of the seller. Note that you would have given a Notice of No Agency to the FSBO seller.

9. Assume the following: Albert is the broker of the office. Russell and Rudy are sales associates in Albert's office. Albert takes a listing and designates himself as agent for the seller, Harold. If Russell or Rudy represent a buyer interested in Harold's property, would a dual agency situation automatically arise by virtue of the fact that the broker of the office, Albert, represents the seller while Russell or Rudy represents the buyer?

Dual agency is not automatic simply because the broker of the office represents one of the parties while one of the sales associates represents the other party in the same transaction. Dual agency only arises when one licensee represents both buyer and seller in the same transaction. A broker's agency relationship is not imputed to sales agents, nor is the agency of the sales agents imputed to the broker, assuming the legal presumption for designated agency in the office.

However, please note that in the situation where the broker is representing one of the parties, a sales associate who represents a buyer could not go to the broker to seek consultation concerning problems with the transaction. A neutral party should be named as the person from whom consultation is sought concerning that particular transaction.

10. Assume the following: Bonnie was the designated agent for Clyde, the seller. Clyde's home did not sell during the term of the brokerage agreement with Bonnie's broker. If Clyde lists his property with another company, can Bonnie represent buyers interested in Clyde's property without being a dual agent?

Yes. However, Bonnie could not disclose any confidential information concerning Clyde that she learned in the course of her representation of Clyde. (See §15-30).

11. Assume the following: Ulysses was designated agent for Homer, the seller. Homer for one reason or another did not like Ulysses and asked for a new designated agent, Helen, who works in the same office as Ulysses. May Ulysses represent a buyer who might be interested in Homer's property without being considered a dual agent?

Yes. Once the agency relationship between Homer and Ulysses terminates, Ulysses is free to represent buyers interested in Homer's home. However, Ulysses cannot disclose confidential information that he learned about Homer while representing Homer. (See §15-30).

ELIMINATION OF CONSUMER LIABILITY

Under common law, a principal can be liable for an agent's actions. That meant a seller was potentially liable for a listing agent's or subagent's acts. Likewise, buyer could be liable for the buyer agent's acts. This concept is known in the law as vicarious liability. Section 15-60 does away with this liability. The section reads:

> A consumer shall not be vicariously liable for the acts or omissions of a licensee in providing licensed activities for or on behalf of the consumer.

However, it remains to be seen if courts will apply this section in cases involving federal civil rights and federal fair housing violations. It is possible that, despite the intent of the Illinois legislature in enacting this section, federal civil rights and fair housing laws may preempt this section of the Act. The section should, however, apply in many other situations such as actions based on fraud or misrepresentation.

GENERAL QUESTIONS AND ANSWERS

1. When I cover an open house for someone in my office, what type of relationship do I have with whom?

> This may well depend on the terms of the listing agreement with the seller. That agreement may allow for the appointment of a substitute designated agent who will then be representing the seller. If the person substituting for the designated agent at an open house is not to be considered as the representative of the seller, then it would be wise to so provide in the listing agreement. Remember, the seller's general expectation will be that the person conducting the open house is the seller's representative. Thus, any departure from that expectation should be in writing.

2. If I have to refer one of my clients to another agent because the client does not consent to a dual agency relationship, I know that I have to disclose to the parties the fact that I receive a referral fee, but do I have to disclose what my referral fee is?

> No. The Act only requires that you make written disclosure to both the withdrawing client and the client that you continue to represent. The Act does not require that you disclose the amount of the referral fee. However, you cannot make any misrepresentations concerning the fee.

3. If the buyer refuses to sign a Buyer's Representation Contract, may I still be a buyer's agent?

> To answer this question, you need to ascertain what the buyer means by refusing to sign a buyer agency agreement. If the buyer is actually refusing to allow you to act as his agent, then you must inform him that you cannot actively represent him. Some basic written agreement to represent the buyer is required. Illinois REALTORS® has a variety of forms available for this purpose.

4. When another agent watches my business for me when I am gone, do I need to get a written agency agreement between my sellers and buyers and the licensee watching my business?

No, you do not need new written agency agreements, however, this person should be a new designated agent. When a new designated agent is appointed, you must inform your clients in writing (Section 15-35(a)(2)). Be aware that if this new person already represents a party with whom one of your clients is negotiating, a dual agency situation would arise when the new person began watching your business, thus, dual agency disclosures and consents would be needed.

5. If I want to have a different relationship other than an agency relationship with my seller or buyer, can I write the document or do I have to use an attorney to create the document?

You may create this document yourself if you wish. Because you are creating this document on behalf of yourself, unauthorized practice of law is not an issue. Unauthorized practice of law is only an issue when you are performing legal services for another. However, it may be wise to have an attorney at least review any agreement that you create to make sure that it accomplishes what you intended. Also if you are not the managing broker in your office, check to be sure this meets office policy. Also, be aware that departure from statute could leave the interpretation open to the discretion of the courts.

6. Does a brokerage agreement have to be in writing or can it be oral?

You must have a written brokerage agreement. This agreement may be an exclusive or non-exclusive arrangement.

7. Prior to entering into an agency agreement, what duty do I have to ascertain whether or not my potential client already has an exclusive agreement with another licensee?

Under Standard of Practice 16-9 of NAR's Code of Ethics, REALTORS® have "an affirmative obligation to make reasonable efforts" to determine if the client has already entered into another agreement. Therefore, at a minimum, the REALTOR® needs to ask the client if they have been working with any other agents and whether they have signed any other agency agreements. It is also a prudent practice for all licensees. Exclusive agency relationships are protected under the License Act so you should always try to confirm whether the consumer is the exclusive client of another agent/company.

8. Article 15 requires that licensees timely present offers to their clients. What if I represent a buyer and I feel that the listing agent is not presenting the offer? What can I do?

The listing broker has the right to control the establishment of appointments for presentations, whether physical or electronic. However, the NAR's Model MLS Rules gives a cooperating broker the right to be present during the presentation of an offer **if** the listing was in the MLS and **if** the particular MLS has a rule granting such right. If the seller, however, gives written instructions to the listing broker that they do not want the cooperating broker to be present, then the cooperating broker has no right to be present but does have the right to see the written instructions.

In addition, REALTOR® Code of Ethics and REALTOR®-related MLS Policy requires the seller's broker to affirm presentation in writing or notify buyer's side in writing that the seller waived the offer presentation.

Remember, the cooperating broker does not have the right to directly contact the seller and present the offer. Section 20-20(a)(33) of the Act prohibits a licensee from directly negotiating with a seller, if that seller has a written exclusive brokerage agreement with another broker. Additionally, Standard of Practice 16-13 of NAR's Code of Ethics, Article 16 provides that all "dealings concerning property exclusively listed . . . shall be carried on with the client's representative or broker."

CONCLUSION

It is important that every licensee read the Act. One of the main reasons for Article 15 of the Act is to allow licensees to look in one place to ascertain the duties they owe to a consumer and how the relationship with the consumer is to be developed.

As a final summation, the following outline is offered as a sketch of what Article 15 requires in the usual course of business:

1. When the consumer contacts you about brokerage services, advise the consumer of the designated agency relationship that will exist unless there is a written agreement providing otherwise (§§15-10 and 15-35(a)(1));

2. Advise the consumer about compensation and, any policy whether compensation will be shared with other brokers, and any amounts of the cooperating compensation that might be authorized by the client;

3. Upon entering into a brokerage agreement, advise the consumer regarding dual agency and provide written disclosure of the potential for dual agency. You must get your client's signature on the disclosure of the potential for dual agency at any time before actually entering into a dual agency situation (§15-45);

4. Advise the seller of the name of the designated agent or agents in writing as part of your brokerage agreement, or separately as an amendment to your brokerage agreement to add an additional designated agent(s) (§15-35(a)(2));

5. Once you start actively working for your client, remember that you are the designated agent of that client and owe certain statutory duties outlined in this article (§15-15);

6. If in the course of representing your client, you come into contact with another consumer who is not represented by another agent, you must ascertain whether or not you are performing only clerical activities for the consumer (§15-10). If so, disclose in writing to the consumer that you represent another party and that the consumer will be treated as a customer (§15-35(c)). If not, then you may either refer that consumer to another agent in your office or seek to act as a disclosed dual agent;

7. If acting as a dual agent, be sure to get each client's signature on an initial disclosure form informing them of the potential for dual agency. Also, you must have the clients sign the Confirmation of Consent to Dual Agency language. Look to Section 15-45 to find out what you can and cannot do as a dual agent;

8. Once the brokerage relationship terminates, you owe no further duties to that client except that you must account for all moneys and property relating to the transaction, and you must keep confidential all confidential information received during the course of the brokerage agreement (§15-30). Remember, confidential information does not include information concerning material defects in physical condition of the property.

Illinois REALTORS® believes these materials will help the practitioner's understanding of agency duties under Article 15 of the Act. If you have questions about Article 15 contact your attorney, your local association, or the Illinois REALTORS® Legal Hotline for help.