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®

ILLINOIS ASSOCIATION OF REALTORS®
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Introduction

A section of the License Law governing agency relationships was added to the Real Estate License Act in 1995. The applicable sections of the Real Estate License Act of 2000, as amended and effective December 31, 2009, (the Act) governing agency relationships can be found at Article 15, beginning with Section 15-5 et seq. (225 ILCS 454/15-5).

Before that section 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, the Illinois Association of 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 REALTOR® can readily ascertain their respective rights and duties owed to one another by simply looking to the statutes. Article 15, regarding agency duties is now over 10 years old and has proven itself over time to be easier to apply in practice than common law principles of agency.

The Association is confident that you will find that this statutory agency law serves the best interests of the REALTOR® 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 “ministerial acts” as defined in §1-10. “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 of change. 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 in tune 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 monies 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]icensees 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 “ministerial acts” for that person and thus establishes a “customer” relationship. “Ministerial Acts” is defined in §1-10. 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. Use of “Ministerial Acts” 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 merely a “customer” relationship only in narrowly defined circumstances along the lines set out in §1-10. If the licensee is performing only “ministerial acts,” 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)). When the licensee is selling one of his or her own listings, the licensee is likely acting as a dual agent (because of the narrow definition of “ministerial acts”), whether the licensee professes to be or not.

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 dual agency relationship.

IV. Elimination of Consumer's Liability for Licensee's Acts
Under common law, a principal can be liable for his 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 his 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 the new 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 Articles 1 through 10 and 20 through 30, 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, the Illinois Association of REALTORS®, or the Legal Hotline for help.
Below is a reprint of Article 15:

ARTICLE 15. AGENCY RELATIONSHIPS

Section 15-5. Legislative intent.
(a) The General Assembly finds that application of the common law of agency to the relationships among real estate brokers and salespersons and consumers of real estate brokerage services has resulted in misunderstandings and consequences that have been contrary to the best interests of the public. The General Assembly further finds that the real estate brokerage industry has a significant impact upon the economy of the State of Illinois and that it is in the best interest of the public to provide codification of the relationships between real estate brokers and salespersons and consumers of real estate brokerage services in order to prevent detrimental misunderstandings and misinterpretations of the relationships by consumers, real estate brokers, and salespersons and thus promote and provide stability in the real estate market. This Article 15 is enacted to govern the relationships between consumers of real estate brokerage services and real estate brokers and salespersons to the extent not governed by an individual written agreement between a sponsoring broker and a consumer, providing that there is a relationship other than designated agency. This Article 15 applies to the exclusion of the common law concepts of principal and agent and to the fiduciary duties, which have been applied to real estate brokers, salespersons, and real estate brokerage services.

(b) The General Assembly further finds that this Article 15 is not intended to prescribe or affect contractual relationships between real estate brokers and the broker’s affiliated licensees.

(c) This Article 15 may serve as a basis for private rights of action and defenses by sellers, buyers, landlords, tenants, real estate brokers, and real estate salespersons. The private rights of action, however, do not extend to the provisions of any other Articles of this Act.

Section 15-10. Relationships between licensees and consumers.
Licensees shall be considered to be representing the consumer they are working with as a designated agent for the consumer unless:

(1) there is a written agreement between the sponsoring broker and the consumer providing that there is a different relationship; or

(2) the licensee is performing only ministerial acts on behalf of the consumer.

Section 15-15. Duties of licensees representing clients.
(a) A licensee representing a client shall:

(1) Perform the terms of the brokerage agreement between a broker and the client.

(2) Promote the best interest of the client by:

(A) Seeking a transaction at the price and terms stated in the brokerage agreement or at a price and terms otherwise acceptable to the client.

(B) Timely presenting all offers to and from the client, unless the client has waived this duty.
(C) Disclosing to the client material facts concerning the transaction of which the licensee has actual knowledge, unless that information is confidential information. Material facts do not include the following when located on or related to real estate that is not the subject of the transaction:
   (i) physical conditions that do not have a substantial adverse effect on the value of the real estate,
   (ii) fact situations, or
   (iii) occurrences.
(D) Timely accounting for all money and property received in which the client has, may have, or should have had an interest.
(E) Obeying specific directions of the client that are not otherwise contrary to applicable statutes, ordinances, or rules.
(F) Acting in a manner consistent with promoting the client's best interests as opposed to a licensee's or any other person's self-interest.
(3) Exercise reasonable skill and care in the performance of brokerage services.
(4) Keep confidential all confidential information received from the client.
(5) Comply with all requirements of this Act and all applicable statutes and regulations, including without limitation fair housing and civil rights statutes.

(b) A licensee representing a client does not breach a duty or obligation to the client by showing alternative properties to prospective buyers or tenants, by showing properties in which the client is interested to other prospective buyers or tenants, or by making or preparing contemporaneous offers or contracts to purchase or lease the same property. However, a licensee shall provide written disclosure to all clients for whom the licensee is preparing or making contemporaneous offers or contracts to purchase or lease the same property and shall refer to another designated agent any client that requests such a referral.

(c) A licensee representing a buyer or tenant client will not be presumed to have breached a duty or obligation to that client by working on the basis that the licensee will receive a higher fee or compensation based on higher selling price or lease cost.

(d) A licensee shall not be liable to a client for providing false information to the client if the false information was provided to the licensee by a customer unless the licensee knew or should have known the information was false.

(e) Nothing in the Section shall be construed as changing a licensee's duty under common law as to negligent or fraudulent misrepresentation of material information.

Section 15-20. Failure to disclose information not affecting physical condition.
No cause of action shall arise against a licensee for the failure to disclose:
   (i) that an occupant of the property was afflicted with Human Immunodeficiency Virus (HIV) or any other medical condition .
   (ii) that the property was the site of an act or occurrence that had no effect on the physical condition of the property or its environment or the structures located thereon;
   (iii) fact situations on property that is not the subject of the transaction; or
physical conditions located on property that is not the subject of the transaction that do not have a substantial adverse effect on the value of the real estate that is the subject of the transaction.

Section 15-25. Licensee's relationship with customers.
(a) Licensees shall treat all customers honestly and shall not negligently or knowingly give them false information. A licensee engaged by a seller client shall timely disclose to customers who are prospective buyers all latent material adverse facts pertaining to the physical condition of the property that are actually known by the licensee and that could not be discovered by a reasonably diligent inspection of the property by the customer. 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. No cause of action shall arise on behalf of any person against a licensee for revealing information in compliance with this Section.

(b) A licensee representing a client in a real estate transaction may provide assistance to a customer by performing ministerial acts. Performing those ministerial acts shall not be construed in a manner that would violate the brokerage agreement with the client, and performing those ministerial acts for the customer shall not be construed in a manner as to form a brokerage agreement with the customer.

Section 15-30. Duties after termination of brokerage agreement.
Except as may be provided in a written agreement between the broker and the client, neither a sponsoring broker nor any licensee affiliated with the sponsoring broker owes any further duties to the client after termination, expiration, or completion of performance of the brokerage agreement, except:
(1) to account for all moneys and property relating to the transaction; and
(2) to keep confidential all confidential information received during the course of the brokerage agreement.

Section 15-35. Agency relationship disclosure.
(a) A licensee shall advise a consumer in writing of the following no later than beginning to work as a designated agent on behalf of the consumer:
(1) That a designated agency relationship exists, unless there is written agreement between the sponsoring broker and the consumer providing for a different brokerage relationship.
(2) The name or names of his or her designated agent or agents. The written disclosure can be included in a brokerage agreement or be a separate document, a copy of which is retained by the sponsoring broker for the licensee.
(b) The licensee representing the consumer shall discuss with the consumer the sponsoring broker's compensation and policy with regard to cooperating with brokers who represent other parties in a transaction.
(c) A licensee shall disclose in writing to a customer that the licensee is not acting as the agent of the customer at a time intended to prevent 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.

**Section 15-40. Compensation does not determine agency.**
Compensation does not determine agency relationship. The payment or promise of payment of compensation to a licensee is not determinative of whether an agency relationship has been created between any licensee and a consumer.

**Section 15-45. Dual agency.**
A licensee may act as a dual agent only with the informed written consent of all clients. Informed written consent shall be presumed to have been given by any client who signs a document that includes the following:

“The undersigned (insert name(s)), ("Licensee"), may undertake a dual representation (represent both the seller or landlord and the buyer or tenant) for the sale or lease of property. The undersigned acknowledge they were informed of the possibility of this type of representation. Before signing this document please read the following: Representing more than one party to a transaction presents a conflict of interest since both clients may rely upon Licensee's advice and the client's respective interests may be adverse to each other. Licensee will undertake this representation only with the written consent of ALL clients in the transaction. Any agreement between the clients as to a final contract price and other terms is a result of negotiations between the clients acting in their own best interests and on their own behalf. You acknowledge that Licensee has explained the implications of dual representation, including the risks involved, and understand that you have been advised to seek independent advice from your advisors or attorneys before signing any documents in this transaction.

**WHAT A LICENSEE CAN DO FOR CLIENTS**
**WHEN ACTING AS A DUAL AGENT**

1. Treat all clients honestly.
2. Provide information about the property to the buyer or tenant.
3. Disclose all latent material defects in the property that are known to the licensee.
4. Disclose financial qualification of the buyer or tenant to the seller or landlord.
5. Explain real estate terms.
6. Help the buyer or tenant to arrange for property inspections.
8. Help the buyer compare financing alternatives.
9. Provide information about comparable properties that have sold so both clients may make educated decisions on what price to accept or offer.

**WHAT LICENSEE CANNOT DISCLOSE TO CLIENTS WHEN**
**ACTING AS A DUAL AGENT**

1. Confidential information that Licensee may know about a client, without that client's permission.
2. The price or terms the seller or landlord will take other than the listing price without permission of the seller or landlord.
3. The price or terms the buyer or tenant is willing to pay without permission of the buyer or tenant.
4. A recommended or suggested price or terms the buyer or tenant should offer.
5. A recommended or suggested price or terms the seller or landlord should counter with or accept.

If either client is uncomfortable with this disclosure and dual representation, please let Licensee know. You are not required to sign this document unless you want to allow Licensee to proceed as a Dual Agent in this transaction. By signing below, you acknowledge that you have read and understand this form and voluntarily consent to Licensee acting as a Dual Agent (that is, to represent BOTH the seller or landlord and the buyer or tenant) should that become necessary.”

(b) The dual agency disclosure form provided for in subsection (a) of this Section must be presented by a licensee, who offers dual representation, to the client at the time the brokerage agreement is entered into and may be signed by the client at that time or at any time before the licensee acts as a dual agent as to the client.

(c) A licensee acting in a dual agency capacity in a transaction must obtain a written confirmation from the licensee's clients of their prior consent for the licensee to act as a dual agent in the transaction. This confirmation should be obtained at the time the clients are executing any offer or contract to purchase or lease in a transaction in which the licensee is acting as a dual agent. This confirmation may be included in another document, such as a contract to purchase, in which case the client must not only sign the document but also initial the confirmation of dual agency provision. That confirmation must state, at a minimum, the following:

“The undersigned confirm that they have previously consented to (insert name(s)), ("Licensee"), acting as a Dual Agent in providing brokerage services on their behalf and specifically consent to Licensee acting as a Dual Agent in regard to the transaction referred to in this document”

(d) No cause of action shall arise on behalf of any person against a dual agent for making disclosures allowed or required by this Article, and the dual agent does not terminate any agency relationship by making the allowed or required disclosures.

(e) In the case of dual agency, each client and the licensee possess only actual knowledge and information. There shall be no imputation of knowledge or information among or between clients, brokers, or their affiliated licensees.

(f) In any transaction, a licensee may without liability withdraw from representing a client who has not consented to a disclosed dual agency. The withdrawal shall not prejudice the ability of the licensee to continue to represent the other client in the transaction or limit the licensee from representing the client in other transactions. When a withdrawal as contemplated in this subsection (f) occurs, the licensee shall not receive a referral fee for referring a client to another licensee unless written disclosure is made to both the withdrawing client and the client that continues to be represented by the licensee.
NOTE: Administrative Rules Section 1450.820 states quite clearly that a licensee (or any entity in which licensee has an ownership interest) who has any ownership interest in the property being sold, purchased or leased may not serve as a dual agent in the transaction.

Section 15-50. Designated agency.
(a) A sponsoring broker entering into an agreement with any person for the listing of property or for the purpose of representing any person in the buying, selling, exchanging, renting, or leasing of real estate may specifically designate those licensees employed by or affiliated with the sponsoring broker who will be acting as legal agents of that person to the exclusion of all other licensees employed by or affiliated with the sponsoring broker. A sponsoring broker entering into an agreement under the provisions of this Section shall not be considered to be acting for more than one party in a transaction if the licensees specifically designated as legal agents of a person are not representing more than one party in a transaction.

(b) A sponsoring broker designating affiliated licensees to act as agents of clients shall take ordinary and necessary care to protect confidential information disclosed by a client to his or her designated agent.

(c) A designated agent may disclose to his or her sponsoring broker or persons specified by the sponsoring broker confidential information of a client for the purpose of seeking advice or assistance for the benefit of the client in regard to a possible transaction. Confidential information shall not be disclosed by the sponsoring broker or other specified representative of the sponsoring broker unless otherwise required by this Act or requested or permitted by the client who originally disclosed the confidential information.

Section 15-55. No subagency.
A broker is not considered to be a subagent of a client of another broker solely by reason of membership or other affiliation by the brokers in a multiple listing service or other similar information source, and an offer of subagency may not be made through a multiple listing service or other similar information source.

Section 15-60. Vicarious liability.
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.

Section 15-65. Regulatory enforcement.
Nothing contained in this Article limits the Department in its regulation of licensees under other Articles of this Act and the substantive rules adopted by the Department. The Department, with the advice of the Board, is authorized to promulgate any rules that may be necessary for the implementation and enforcement of this Article 15.

Section 15-70. Actions for damages.
(a) In any action brought under this Article 15, the court may, in its discretion, award only actual damages and court costs or grant injunctive relief, when appropriate.

(b) Any action under this Article 15 shall be forever barred unless commenced within 2 years after the person bringing the action knew or should reasonably have known of such act or
omission. In no event shall the action be brought more than 5 years after the date on which the act or omission occurred. If the person entitled to bring the action is under the age of 18 or under legal disability the period of limitations shall not begin to run until the disability is removed.

**Section 15-75 Exclusive Brokerage Agreements**

All exclusive brokerage agreements must specify that the sponsoring broker, through one or more sponsored licensees, must provide, at a minimum, the following services:

1. accept delivery of and present to the client offers and counteroffers to buy, sell, or lease the client’s property or the property the client seeks to purchase or lease;
2. assist the client in developing, communicating, negotiating, and presenting offers, counteroffers, and notices that relate to the offers and counteroffers until a lease or purchase agreement is signed and all contingencies are satisfied or waived; and
3. answer the client’s questions relating to the offers, counteroffers, notices and contingencies.
SELECTED DEFINITIONS FROM SECTION 1-10 OF THE ACT

“Agency” means a relationship in which a real estate broker or licensee, whether directly or through an affiliated licensee, represents a consumer by the consumer’s consent, whether express or implied, in a real property transaction.

“Broker” means an individual, partnership, limited liability company, corporation, or registered limited liability partnership other than a real estate salesperson or leasing agent who, whether in person or through any media or technology, for another and for compensation, or with the intention or expectation of receiving compensation, either directly or indirectly:

1. Sells, exchanges, purchases, rents, or leases real estate.
2. Offers to sell, exchange, purchase, rent, or lease real estate.
3. Negotiates, offers, attempts, or agrees to negotiate the sale, exchange, purchase, rental, or leasing of real estate.
4. Lists, offers, attempts, or agrees to list real estate for sale, lease, or exchange.
5. Buys, sells, offers to buy or sell, or otherwise deals in options on real estate or improvements thereon.
6. Supervises the collection, offer, attempt, or agreement to collect rent for the use of real estate.
7. Advertises or represents himself or herself as being engaged in the business of buying, selling, exchanging, renting, or leasing real estate.
8. Assists or directs in procuring or referring of leads or prospects, intended to result in the sale, exchange, lease, or rental of real estate.
9. Assists or directs in the negotiation of any transaction intended to result in the sale, exchange, lease, or rental of real estate.
10. Opens real estate to the public for marketing purposes.
11. Sells, leases or offers for sale or lease real estate at auction.

“Brokerage agreement” means a written or oral agreement between a sponsoring broker and a consumer for licensed activities to be provided to a consumer in return for compensation or the right to receive compensation from another. Brokerage agreements may constitute either a bilateral or a unilateral agreement between the broker and the broker’s client depending upon the content of the brokerage agreement. All exclusive brokerage agreements shall be in writing.

“Client” means a person who is being represented by a licensee.

“Compensation” means the valuable consideration given by one person or entity to another person or entity in exchange for the performance of some activity or service. Compensation shall include the transfer of valuable consideration, including without limitation the following:

1. Commissions;
2. Referral fees;
3. Bonuses;
4. Prizes;
5. Merchandise;
6. Finder fees;
7. Performance of services;
8. Coupons or gift certificates;
(9) discounts;
(10) rebates;
(11) a chance to win a raffle, drawing, lottery, or similar game of chance not prohibited by any other law or statute;
(12) retainer fee; or
(13) salary.

“Confidential information” means 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.

“Confidential information” shall not be considered to include material information about the physical condition of the property.

“Consumer” means a person or entity seeking or receiving licensed activities.

“Customer” means a consumer who is not being represented by the licensee but for whom the licensee is performing ministerial acts.

“Department” means the Department of Financial and Professional Regulation.

“Designated agency” means a contractual relationship between a sponsoring broker and a client under Section 15-50 of this Act in which one or more licensees associated with or employed by the broker are designated as agent of the client.

“Designated agent” means a sponsored licensee named by a sponsoring broker as the legal agent of a client, as provided for in Section 15-50 of this Act.

“Dual agency” means an agency relationship in which a licensee is representing both buyer and seller or both landlord and tenant in the same transaction. When the agency relationship is a designated agency, the question of whether there is a dual agency shall be determined by the agency relationships of the designated agent of the parties and not of the sponsoring broker.

“Licensed activities” means those activities listed in the definition of “broker” under this Section.

“Licensee” means any person, as defined in this Section, who holds a valid unexpired license as a real estate broker, real estate salesperson, or leasing agent.

“Listing presentation” means a communication between a real estate broker or salesperson and a consumer in which the licensee is attempting to secure a brokerage agreement with the consumer to market the consumer’s real estate for sale or lease.
“Managing broker” means a broker who has supervisory responsibilities for licensees in one or, in the case of a multi-office company, more than one office and who has been appointed as such by the sponsoring broker of the real estate firm.

“Medium of advertising” means any method of communication intended to influence the general public to use or purchase a particular good or service or real estate.

“Ministerial acts” means those acts that a licensee may perform for a consumer that are informative or clerical in nature and do not rise to the level of active representation on behalf of a consumer. Examples of these acts include without limitation (i) responding to phone inquiries by consumers as to the availability and pricing of brokerage services, (ii) responding to phone inquiries from a consumer concerning the price or location of property, (iii) attending an open house and responding to questions about the property from a consumer, (iv) setting an appointment to view property, (v) responding to questions of consumers walking into a licensee’s office concerning brokerage services offered or particular properties, (vi) accompanying an appraiser, inspector, contractor, or similar third party on a visit to property, (vii) describing a property or the property’s condition in response to a consumer’s inquiry, (viii) completing business or factual information for a consumer on an offer or contract to purchase on behalf of a client, (ix) showing a client through a property being sold by an owner on his or her own behalf, or (xi) referral to another broker or service provider.

“Office” means a real estate broker’s place of business where the general public is invited to transact business and where records may be maintained and licenses displayed, whether or not it is the broker’s principal place of business.

“Person” means and includes individuals, entities, corporations, limited liability companies, registered limited liability partnerships, and partnerships, foreign or domestic, except that when the context otherwise requires, the term may refer to a single individual or other described entity.

“Personal assistant” means a licensed or unlicensed person who has been hired for the purpose of aiding or assisting a sponsored licensee in the performance of the sponsored licensee’s job.

“Real estate” means and includes leaseholds as well as any other interest or estate in land, whether corporeal, incorporeal, freehold, or non-freehold, including time share interests, and whether the real estate is situated in this state or elsewhere.

“Salesperson” means any individual, other than a real estate broker or leasing agent, who is employed by a real estate broker or is associated by written agreement with a real estate broker as an independent contractor and participates in any activity described in the definition of “broker” under this Section.

“Sponsoring broker” means the broker who has issued a sponsor card to a licensed salesperson, another licensed broker, or a leasing agent.
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 in the 2000 Act (the Act) 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. You may wish to indicate in your buyer’s representation agreement whether your search will extend beyond the MLS. 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 client 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 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 for his 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.

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 and the pay or of the payments deposited or otherwise forwarded.

(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 the client’s property. The licensee should not be purchasing the property for his/her own account in order to gain a quick profit on resale without disclosing the information concerning the interchange to the 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 he 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.

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. A 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 his 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 fair housing laws and subject to RESPA provisions such as the prohibition on naked referral fees from lenders, as examples.

4. **What are some examples of statutory laws concerning our real estate practice?**

Examples include: (1) 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.

   (2) 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.

   (3) Federal and State fair housing laws.

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

   (5) 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. **As the listing company, do I have to disclose the split I offer to buyer’s agents to the seller?**

Generally, there is no duty in the Act to disclose the actual split to buyer’s agents, but there is a duty to generally inform the consumer about compensation and cooperation. Under §15-35(b)(3) of the Act, the licensee must inform the consumer about the broker’s compensation and whether the broker shares the compensation with cooperating brokers. It is important to note that Standard of Practice 1-12(1) of the NAR Code of Ethics states that REALTORS®, when entering into listing contracts, must advise the client about the company’s general policies and the amounts of any compensation regarding cooperation with other agents. Again, though the general legal rule is that you do not have to disclose what the cooperating split actually is, there may be times when in fact disclosure of the split amount would be prudent. If the commission split is such that it may hinder the seller’s marketing of the property, then it should be disclosed because this is material information relating to the transaction that an agent has a duty to disclose to the client. For instance, if the listing office only offers a very low commission split, this may be detrimental to the seller because other buyer agents may be deterred from aggressively marketing the property to their buyers.

Remember, if you are a REALTOR® member, your Code of Ethics does require you to disclose the amount of the cooperating split. This is a bit more restrictive than requirements of the Act.

6. **As a buyer’s agent, do I have to disclose my fee to the seller or the listing company?**

No. A licensee only owes limited duties to a customer (non-client). A licensee owes a duty to disclose material adverse facts pertaining to the physical condition of the property. Additionally,
a licensee owes a duty to treat customers honestly, and not to knowingly or negligently give a customer false information. Therefore, a buyer agent owes no duty to disclose to the seller or listing company his fee received from the buyer. However, if the circumstances are such that the buyer agent receives compensation from the buyer and seller both, then the licensee must disclose this to all parties in the transaction under Article 7 of the NAR Code of Ethics and under Section 10-10 of the Act.

7. 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)).

8. 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. In the license rules promulgated by the Department, Section 1450.195 also provides that a brokerage agreement must contain “the duration of the [contract.] clearly set forth.”. In addition, the Act requires by definition that all exclusive brokerage agreements be in writing (Section 1-10, definition of “brokerage agreement”).
AGENCY DISCLOSURE AND MINISTERIAL ACTS

Section 15-35 addresses agency relationship disclosures and provides:

1. That the licensee advise 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. Therefore, if a buyer/tenant comes to you, you are considered to be a buyer’s/tenant’s agent, unless you act as a dual agent or merely perform “ministerial acts” for the consumer. (Ministerial acts are discussed below).

2. That the licensee put in writing the name or names of the consumer’s designated agent or agents. The sponsoring broker should keep copies of this disclosure in the office files.

3. That the licensee advise the consumer about the broker’s compensation and whether the broker will share compensation with cooperating brokers.

Each of the above items must be taken care of no later than entering into a brokerage agreement with the consumer. Of the above disclosures, only one is required to be in writing — the disclosure of the consumer’s designated agent(s). However, the other items should also be put in writing so that the licensee can prove such disclosures were made. It is important to note that these disclosures are required for both buyers and sellers. These disclosures may be made in the listing agreement or buyer representation agreement or made on separate forms if the broker so chooses.

Section 15-35 requires one other disclosure in certain circumstances. Where a licensee is merely performing “ministerial 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.” (§15-35(c)). The reason behind the requirement of disclosure in this situation is that you are providing some service to a consumer without being considered his/her agent. This is contrary to the general rule that you represent the person with whom you are working, thus, the need for disclosure. This is not intended to imply that you must give an agency disclosure merely because someone is asking about your services. Rather, it is intended to apply when performing ministerial acts that might result in the disclosure of confidential information or a misunderstanding as to your work with the customer.

This agency disclosure must be provided when performing “ministerial acts” 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.

(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 “ministerial
acts.” Therefore, when reading these materials or the Act, be sure to note that each of these terms has a specific meaning).

“Ministerial Acts”
Section 15-10 of the Act states that licensees are considered to be representing the party they are working with, unless the licensee is only performing “ministerial acts.” Ministerial act is defined in Section 1-10 as:

Those acts that a licensee may perform for a consumer that are informative or clerical in nature and do not rise to the level of active representation on behalf of a consumer.

The Act provides examples of ministerial acts. These include, but are not limited to:

1. Responding to phone inquiries by consumers as to the availability and pricing of brokerage services;
2. Responding to phone inquiries from a consumer concerning the price or location of a property;
3. Attending an open house and responding to questions about the property from a consumer;
4. Setting an appointment to view property;
5. Responding to questions of consumers walking into a licensee’s office concerning brokerage services offered or particular properties;
6. Accompanying an appraiser, inspector, contractor, or similar third party on a visit to a property;
7. Describing a property or the property’s condition in response to a consumer’s inquiry;
8. Completing business or factual information for a consumer on an offer or contract to purchase on behalf of a client;
9. Showing a client through a property sold by an owner on his or her own behalf; or
10. Referral to another broker or service provider. (§1-10 of the Act).

When you are performing only ministerial 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 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.
QUESTIONS AND ANSWERS: MINISTERIAL ACTS

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 “ministerial acts.”

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

Andy is still only performing ministerial acts and 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 “ministerial acts” 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.)

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, Andy is performing only ministerial acts. (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 ministerial acts and would be considered to be representing 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 performing only ministerial acts, 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.

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 performing ministerial acts or is he representing Barney?

Andy is performing only ministerial acts when he sets an appointment to view property.

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 he performing only ministerial acts or is he representing Barney?

Andy can show the property. 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, then Andy is only performing ministerial acts, and, therefore, 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 ministerial acts. 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 performing more than just ministerial acts and is beginning to act as if he is representing the buyer.

8. Assume Andy shows the property to Barney and does nothing other than “ministerial acts.” A few days later, Barney contacts Andy about seeing the property again. If Andy shows the property again, is it a ministerial act, or is he representing Buyer?

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 it is probably only a ministerial act. However, if Floyd is available, but Andy decides he wants to show Floyd through the property so he can get a commission if Barney buys the property, Andy is probably actively representing Barney and thus is outside of the ministerial acts category.
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?”

Barney is probably considered a “client,” depending on exactly what Andy does. 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 is 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. 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 a “ministerial act.” 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.

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, attending an open house is a ministerial act; therefore, at most, the people who went through the house had only a customer relationship 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 it a ministerial act or is it more?

It is only a ministerial act to respond to a consumer’s question about a property that you are attending in an open house setting.

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 his/her 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 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 ministerial acts. It does not matter whether you are the listing agent or not when you attend the open house as long as it is true that you do not represent any of the buyers coming through the house.

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 preparing the offer is considered a “ministerial act.” 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. If Alice were to do more than perform ministerial acts, then she would be acting as Bobby’s agent and a dual agency situation would arise.

15. Does a licensee have to give a Notice of No Agency disclosure to a customer if he is performing ministerial acts 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.

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, with an offer she prepared herself, to Clark.

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 ministerial act done for the benefit of the seller, who is the client in this example. Lois is a customer here.

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, under the guise of “ministerial acts,” help Lois put an offer together that is more appealing to Lex?
No. If Clark is offering assistance in any way beyond simply filling in factual or business information, then he is outside the scope of ministerial acts and would be actively representing the buyer. Thus, Clark would be considered a dual agent.

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 only performing ministerial acts for Bob if he responds to Bob’s inquiries?**

Even though responding to a consumer’s questions regarding particular properties is an example of a ministerial act pursuant to the Act, under these circumstances Arthur cannot legitimately say he is performing only ministerial acts for Bob. 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 are performing “ministerial acts” for an owner, 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).

In order to help determine whose confidential information the agent must protect, the agent might ask himself/herself “who is my client?” The agent must protect the confidential information of his/her client.

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 himself/herself, “Who is my client?” The agent must protect the confidential information of his/her 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 his 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. (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 a 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 fills out 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. See, e.g., Zimmerman v. Northfield Real Estate Inc., 109 Ill. Dec. 541 (1st Dist. 1986); Munjal v. Baird and Warner Inc., 92 Ill. Dec. 809 (2nd Dist. 1985). Besides being based upon affirmative statements of material facts, fraudulent misrepresentation can also be based upon the intentional concealment of a material fact. Zimmerman, 109 Ill. Dec. 541 (1st Dist. 1986).

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. Sohaey v. Van Cura, 180 Ill. Dec. 359 (2nd Dist. 1993), (Aff’d. 199 Ill. Dec. 654) (1994)); Lyons v. Christ Episcopal Church, 27 Ill. Dec. 559 (5th Dist. 1979). 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). *Capicctoni 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

IAR 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 IAR Sample Office Policy Manual. Form #542, available at http://www.illinoisrealtor.org/licenselaw/iar-sample-office-policy-manual)

LIST OF FORMS RELATING TO AGENCY

- Additional Agent Designation, #340
- Buyer Agency Checklist, #343
- Buyer Information Checklist, #344
- Confirmation and Consent to Dual Agency, #336
- Disclosure and Consent to Dual Agency, #335
- Disclosure of Buyer's Designated Agent, #349
- 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 (legal-size format), also #338 (letter-size format)
- Exclusive Seller Representation with Dual Agency Disclosure, #425
- Exclusive Buyer Representation without Dual Agency Disclosure, #338a
- Exclusive Seller Representation without Dual Agency Disclosure, #426
- 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 (legal-size format), also #339 (letter-size format)
- Non-Exclusive Buyer Representation without Dual Agency Disclosure, #339a
- Notice of No Agency Relationship, #350
- Notice of No Agency Relationship for Tenants, #350T
- Rider to Brokerage Agreements, #351
- Seller Agency Checklist, #345
- Terms of Non-Exclusive Buyer Representation, #341
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 brokerage agreement is entered into (whether the agreement is written or oral – like under some buyer representations). 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. Remember when you are a buyer’s agent, the brokerage agreement might be an oral understanding so you need to analyze when to disclose the potential for dual agency. At the time the brokerage agreement is entered into, it is likely that the dual agency situation will not yet have occurred.

Nonetheless, 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 form 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 on the following pages 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 set out on the page following the initial disclosure form. 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.

The following “Confirmation and Consent to Dual Agency” forms contain the required statutory language. One form is an example of what to use when the confirmation is included within
another document such as a rider to a contract to purchase. The second form is an example of an independent form that uses the statutory language.

Disclosure and Consent to Dual Agency, #335

Confirmation and Consent to Dual Agency, #336
QUESTIONS AND ANSWERS: DUAL AGENCY

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

No. The rules under the Act at Section 1450.820 state that “a licensee may not serve as a dual agent in any transaction to which her or she or an entity in which he or she has an ownership interest is a party to the transaction.” The reason for this rule 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 yourself.

Also, you are reminded here that 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 him?

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, IAR 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 ministerial 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 property that is FSBO or passing on to the owner your client’s offer to purchase are considered ministerial acts, not active representation of the seller. Note that you would have given to the FSBO seller Notice of No Agency.

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 his sales agents, nor is the agency of the sales agents imputed to the broker.

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. Can Ulysses represent buyers 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. If our office does not engage in buyer agency, how can we ever be involved in the sale of a property on a cooperating side?

Because the Act prohibits the offer of subagency through the MLS or similar service, subagency is dead. The only way, then, to engage in subagency would be by separate written agreement between the listing broker, the seller, the cooperating broker, and the buyer. By not engaging in buyer agency, the office’s ability to work as a cooperating agent is hindered.

The agency could attempt to act as a non-agent (sometimes known as a “finder” or “facilitator”), but this would require a special agreement, preferably in writing, with the buyer. Additionally, if you purport to be a non-agent, you must in fact act as a non-agent. This means that you could not actively represent the buyer. Therefore, you could not give any negotiating advice to the buyer or help the buyer prepare an offer. As a non-agent, your role is strictly limited to finding property for the buyer and then making the buyer aware of the property’s existence. Finally, you would need to ascertain whether or not the listing broker offers cooperating compensation to non-agents. If not, you would have to look to the buyer for compensation. A buyer is likely to be reluctant to pay much in the way of compensation because a non-agent, by definition, is not representing the buyer.

Some licensees may be tempted to get involved in the cooperating side of a transaction by purporting to be performing only “ministerial acts”. Ministerial acts are not a substitute for subagency. Ministerial acts are those types of activities that may be performed without creating a client relationship. In other words, if you are truly performing ministerial acts you are not in any way representing the buyer, nor are you representing the seller since there is no subagency. Generally, ministerial acts will occur in a situation in which you are already representing either the buyer or seller as a “client” and are providing very limited services to the other party which do not result in a dual agency.

2. 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.

3. 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.

4. **If the buyer refuses to sign a Buyer’s Representation Contract, can 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.

On the other hand, if the buyer is not intending to renounce buyer agency, but simply just does not want to sign any document, you may still, under the law, represent the buyer. The law allows for oral brokerage agreements. The danger with an oral agreement, however, is that if the situation arises where you need to enforce your rights under the agreement against the buyer, it may be difficult for you to prove the terms of the agreement. You may try to define this relationship by providing the buyer with a written document defining your role should the buyer choose to work with you. An example of this type of document is the “Terms of Non-Exclusive Representation” form found in the Sample Forms section of this manual.

5. **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 would be needed.

6. **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.

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

You can have an oral brokerage agreement. The only exception to this is that all exclusive brokerage agreements must be in writing. However, it is always best to get any brokerage agreement in writing.
8. Prior to entering into an agency agreement, what duty do I have to ascertain whether or not my potential customer already has an exclusive agreement with another licensee?

Under Standard of Practice 16-9 of NAR’s 2011 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.

9. 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. 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 he or she does 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.

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 agent.”
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. We hope you found these materials helpful. 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, if representing the seller, whether compensation will be shared with other brokers who represent buyers (§15-35(b)). Note the ethical duty of sellers’ agents who are REALTORS® to disclose the amount of the cooperating compensation to their seller clients;

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 (§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 “ministerial acts” 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.
The Illinois Association of 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 Legal Hotline for help.