

Broker Responsibilities

Core B2

Land Use Controls & Environmental

Understanding land use controls is important to real estate licensees. Almost every property is subject to some form of control, whether it is the result of city zoning ordinances, general subdivision restrictions, deed restrictions unique to one parcel of land, or federal legislation. Any of these forms of land control may have a major impact on the owner's rights.

Real estate Brokers are obligated to be knowledgeable regarding existing public and private land use controls within their market area and must keep abreast of changes in requirements as they happen. Lack of knowledge in these areas may subject real estate salespeople to civil liability and even possible criminal liability under certain state and federal laws.

Zoning

Zoning begins with city or county planning; zoning laws implement and enforce the plan. Violations of zoning laws can be punished by fines, corrected by a court injunction requiring the violation to be discontinued, or corrected by extreme measures such as demolishing an unlawful structure.

Zoning ordinances consist of two parts: (a) the zoning map, which divides the community into various designated districts and (b) the text of the zoning ordinance, which sets forth the type of use permitted under each zoning classification and specific requirements for compliance. The government unit can only regulate the zoning in the area subject to the geographic boundaries of the government unit enacting the zoning laws. For example, city zoning ordinances may not extend beyond city limits into the county. A county government, however, sometimes authorizes the extension of city zoning for some specified distance into the county, and in some cases the state empowers cities to specifically extend zoning beyond the city limits.

Real estate licensees, while not expected to be experts on zoning, will be held responsible for zoning matters when they harm a consumer by when their statements, representations or actions. A licensee sells a vacant lot to a consumer looking for a vacant lot to build a gas station. After purchasing the lot the consumer discovers that the zoning does not allow for a gas station. The consumer will be looking to the licensee for monetary damages.

Special Service Areas (SSAs)

In an increasing number of communities, Special Service Areas (SSAs) are being created. Traditionally, developers have always been financially responsible for installing the infrastructure in a subdivision: streets, curbs, sidewalks, streetlights, water, and sewer. Over the past 10 years, more towns have been setting up SSAs. The town issues a bond to raise money for the installation of a subdivision's infrastructure. Each lot in the subdivision will have a special assessment that they must pay in addition to their general rate estate taxes. These special assessments will typically be for several thousand dollars and might last for 10 years or more. Homes in SSAs should sell for less than similar homes in other subdivisions because of the special assessments on the SSA properties.

Environmental Concerns and Legislation

Real estate agents are not expected to be environmental experts and should be careful they do not represent themselves as such. Real estate agents should be knowledgeable about environmental problems, but should not answer questions about specific environmental hazards. They should instruct their clients to seek out the information from someone qualified in the field. It is important to an agent's liability in a transaction that he not answer questions that are beyond the scope of his real estate expertise and the agent should never minimize the need for seeking the services or advice of an expert. Residential salespeople and commercial salespeople will encounter various environmental problems.

Radon

Radon is an odorless, colorless, radioactive gas. Radon is not a manufactured product or a by-product of manufacturing. Radon occurs naturally in the soil. Radon is found in the soil in all 50 states including Illinois. Radon is produced by the decay of radium and uranium found in many different soil types. Radon is a known carcinogen and smoking greatly enhances the risk of getting lung cancer.

No one knows for sure what constitutes a safe level of radon exposure. The U.S. EPA recommends mitigating a home when the radon level tests at 4.0 pCi/L (pico curies per liter) or higher.

There are two types of tests for radon: passive tests and tests using active devices. The passive devices are small test canisters placed for a minimum of two days. Testing is done in the lowest level of the home suitable for occupancy. Active devices require electricity and take a reading once an hour.

Tests can be long term and short term. Short-term tests using alpha track detectors (ATDs) or charcoal canisters are usually used for initial radon testing. Short-term tests can generally predict the level of radon in a home, but long-term tests give better results. In a real estate transaction, testing procedures are usually limited due to the time constraints of the contract.

All homes can test high for radon no matter which year it was built. Also, houses built adjacent to each other can have widely varying results. The only way to know for sure is to perform testing.

Mitigation, to lower the levels below 4.0 pCi/L, is usually accomplished using “sub-slab depressurization” for basement or slab homes or “sub-membrane depressurization” for crawl spaces. These systems consist of a large pipe that is installed through the slab or basement floor into the ground below. The pipe is routed up and out of the home and includes a fan. The fan sucks air from under the slab, pulling with it any radon gasses and blowing them outside. There are also radon-resistant construction techniques used by many builders.

Illinois requires licensure of both testers and mitigators. They are not allowed to both test and mitigate the same property. In a real estate transaction, it is wise to use these professionals and look to them for advice.

Illinois Radon Awareness Act

The Illinois Radon Awareness Act took effect January 1, 2008. The Radon Awareness Act requires sellers of residential properties of 1- 4 units to give a buyer the radon disclosure form, “Illinois Disclosure of Information on Radon Hazards,” and the Illinois Emergency Management Agency (EMA) pamphlet titled Radon Testing Guidelines for Real Estate Transactions.

The disclosure form should be provided before the initiation of an offer to purchase. If the disclosure form is delivered after an offer to purchase is made, the seller must complete the disclosure requirements before accepting the buyer’s offer and allow the buyer an opportunity to review the information and possibly amend the offer.

The following are certain transactions that are exempt from the Illinois Radon Awareness Act.

- the sale of a property subject to a court order;
- a transfer by a mortgagor to a mortgagee in lien of foreclosure;
- transfers by a fiduciary in the course of the administration of a decedent’s estate;
- guardianship, conservatorship, or trust;
- transfers from one co-owner to another;

- transfers pursuant to testate or intestate succession;
- transfers made to a spouse or the lineal line of consanguinity of one or more of the sellers;
- transfers from an entity that has taken title from a seller for the purpose of assisting in the relocation of the seller;
- transfers to or from any governmental entity;

These exemptions are identical as those for the Illinois Residential Real Property Disclosure Act, with the exception that new construction is NOT exempt under the radon guidelines.

Federal Lead-Based Paint Disclosure Regulations

The Lead-Based Paint Hazard Reduction Act (LBPBRA) requires the disclosure of lead-based paint hazards in the sale or rental of residential properties built before 1978. Under the federal regulations, sellers and lessors of residential properties built before 1978: must disclose the presence of known lead-based paint or lead-based paint hazards in the housing;

- must provide prospective buyers or tenants with any records or reports pertaining to the presence of lead-based paint or lead-based paint hazards;
- must provide a lead hazard information pamphlet that must be given to the buyer or lessee;
- must include required statutory disclosure and acknowledgment language in sales and lease agreements; and
- must provide purchasers with a 10-day opportunity to conduct risk assessment or inspection for the presence of lead-based paint or lead-based paint hazards, prior to the purchaser's becoming obligated under any purchase contract.

The real estate Salesperson must ensure compliance with these requirements. States that have existing lead-based paint disclosure laws may combine the state requirements with federal requirements to satisfy both laws. Some states require the testing, abatement, or removal of lead-based paint. The federal law only requires disclosure.

Lead can be found as a natural ore and as the by-product of smelting silver. Lead becomes a problem when it is processed. Lead may be found in many common items such as solder, water and sewer pipes, roofing, batteries, and, until a few years ago, gasoline. Paints contained large amounts of lead. Lead can be ingested a variety of ways including breathing lead particles and by mouth. Lead water pipes still exist in some areas and many ceramics, pottery, and china add lead to food.

Children six years and under are most susceptible to health problems caused by lead. Lead finds its way into the blood stream and, although it usually passes through the body very quickly, can build up in the tissues of the body. Children are at greater risk because their bodies and their organs are still developing. Children also ingest greater quantities of lead. Children will stick their fingers, toys, and almost anything else into their mouths. Much of their time may be spent crawling or playing on the floor or in the dirt outside. Lead dust from painted windows and doors collects on the floor and toys and finds its way into the systems of these youngsters. A blood test will show the levels of lead present in the system.

There are several ways to test for the presence of lead. Chemical spot testing and paint scrapings are the least reliable in the detection of lead. In addition, both methods destroy the surface finish where the chemicals are placed and from where the scrapings are taken. The most accurate method of lead testing is done by a mechanical device called an x-ray florescence instrument.

Lead hazards can be eliminated or levels reduced. It can, however, be quite expensive. Old windows, the trim, and old doors can be replaced. Chemical stripping is available. Wet scraping of old peeling paint and recovering with fresh nonlead paint may be a solution. Another solution is encapsulation, which involves covering and sealing the lead paint area with another material.

Illinois Lead Poisoning Prevention Act

Day care facilities, nursery schools, and kindergartens, must require blood tests for screening lead levels for enrollment in their facility. Children between the ages of six months and six years are required to provide a statement from a physician or health-care provider that a child has been screened for blood lead levels. If a child tests high, the Department of Public Health will send the owner of the child's residence a mitigation notice.

An owner of a dwelling unit who has received a mitigation notice must post the notices in common areas of the building specifying the identified lead hazards. The posted notices, drafted by the Department of Public Health and sent to the property owner, must indicate the following:

- that a unit in the building has been found to have lead hazards;
- that other units in the building may have lead hazards;
- that the Department recommends that children six years of age or younger receive a blood lead screening;
- where to seek further information; and
- whether mitigation notices have been issued for two or more dwelling units within a five-year period of time.

Once the owner has complied with a mitigation notice or mitigation order issued by the Department, the owner may remove the notices.

The county MAY inspect buildings occupied by a person screening positive. If a child of less than three years of age screens positive, the department MUST inspect the dwelling unit and common areas of the child screening positive.

In 2007, Illinois passed a bill establishing a pilot program that will provide grants to building owners to assist them financially in the replacement of windows that are covered with lead-based paint. The program is not available in all counties. The Department of Public Health when issuing mitigation notices is to inform the building owner of all financial assistance available for mitigation.

Asbestos

Asbestos is a fire-resistant, naturally occurring, fibrous material used in fireproofing and electrical insulation. Asbestos can be found in many building materials. Asbestos siding and roofing shingles were two of its common uses. Other uses include coverings on furnace pipes, furnace coverings, floor tile, adhesives, plasters, and wallboard compounds. Each year less products are manufactured with asbestos in them. Asbestos particles can be inhaled and lodge themselves in the lungs. Once situated in the lungs, a person is at risk for developing lung disease.

Asbestos that is friable is more dangerous than nonfriable asbestos. Friable asbestos can send asbestos fibers into the air where they can be inhaled. Friable asbestos is found in furnace and pipe wrappings and fireproofing material. Nonfriable asbestos is not usually a problem. Nonfriable asbestos is found in floor tile and adhesives. If left undisturbed, asbestos particles will not become airborne from these materials.

Asbestos and materials containing asbestos cannot be readily identified. Samples of the suspect material must be sent to a lab for analysis. Mitigation of asbestos includes removal, enclosure, and encapsulation. Removal of asbestos should be done by licensed removal technicians. Removal creates the greatest risk because some fibers may become airborne. Enclosure entails covering the asbestos areas with a protective material that will enclose the asbestos and seal it tight. Encapsulation, often the preferred method when dealing with boilers, furnaces, and related piping and duct work, involves coating the asbestos with a liquid that seals the material.

Meth Labs

Methamphetamine is processed using ephedrine or pseudoephedrine. Many over-the-counter

cold and allergy tablets contain ephedrine or pseudoephedrine. Meth is often made in illegal “mom and pop” labs in a residential unit. Most meth labs are in areas that are less densely populated than typical urban areas. The reason for this is the horrific stench that is created in the meth cooking process. Closeby neighbors would become offended by the stench and call the authorities. In addition to these chemicals, other chemicals that are used in the production of meth are highly toxic. Lab operators routinely dump the waste from its production into sewage systems, streams, and rivers. The chemical vapors produced during the production process permeate the walls and the carpets making the residence uninhabitable. Properties that have been used for the production of methamphetamine are considered environmental nightmares. Cleaning up a meth site will cost thousands of dollars and should be done by trained personnel.

Mold

Mold is everywhere. Some people are more sensitive to mold than others. Symptoms include those usually associated with a cold or allergies and include sneezing, eye irritation, and runny nose. Areas conducive to mold growth are areas where there is continuous exposure to moisture and porous materials. The Center for Disease Control warns that mold may occur where there is moisture from water damage, excessive humidity, water leaks, condensation, or flooding. While most molds are nontoxic, there are some toxic varieties. Rarely found in homes, one variety of toxic mold is *Stachybotrys Chartarum* which is also known as black mold.

Homes and buildings should be inspected for signs of water damage and visible mold, and the causes of these problems should be corrected immediately. Mold inspectors have instruments that will identify the existence of mold spores, but large infestations of mold can often be seen or smelled.

Carbon Monoxide Detectors Act

The Illinois General Assembly adopted Public Act 094-0741 that took effect January 1, 2007. The Act is known as the Carbon Monoxide Alarm Detector Act.

The Act requires Carbon Monoxide Detectors in all dwellings. According to the Act, a detector must be installed within 15 feet of every sleeping room. The Act does not differentiate between new and existing construction.

Exceptions are allowed for a dwelling that does not rely on fossil fuel for space heating or water heating and that have no direct connection to a garage. Failure to install or maintain in operating condition any carbon monoxide alarm is a Class B misdemeanor.

Brokerage & Agency

There are two main categories of agency: common law agency and statutory agency. Illinois follows a form of statutory agency (passed by State law) called designated agency. Article 15, Agency Relationships, of the Illinois Real Estate License Act defines the duties of an Illinois real estate licensee. Article 15 stipulates that a real estate licensee represents the consumer the licensee is working with, in effect wiping out common law agency and subagency in Illinois.

Creation of Agency

An agency relationship created by an oral or a written agreement between the principal and the agent is called an expressed agency. Typical examples are the written listings, or Brokerage agreements, between a Broker and a seller of real estate or between a Broker and a prospective buyer of real estate.

It is important to note that the creation of an agency relationship has nothing to do with who is paying whom. Agency relationships are created by express agreement, by a licensee's actions or inactions, and even by implication. The source or amount of compensation does not create an agency relationship.

Accidental Agency

Unintended or accidental agency can occur if the buyer is led to believe by the Broker's actions and representations that the buyer is being represented by that Broker. This implication can arise, for example, when a Broker gives a buyer advice on negotiations or suggestions on what price to offer when in fact the Broker is representing the seller.

Agency in Illinois - Designated Agency

Agency Relationships—Article 15

Article 15, Agency Relationships, of the Illinois Real Estate License Act of 2000, became effective December 31, 1994. This law is not intended to affect contractual relationships that exist between Brokers and their licensees, but is intended to prevent the detrimental misunderstandings and misinterpretations of relationships among consumers, real estate Brokers regarding who represents whom.

Article 15 excludes the common law concepts of principal and agent and their fiduciary relationship and duties: Common law agency and subagency, while not illegal, can be considered dead in Illinois. The duties required of an Illinois real estate professional are statutorily defined by Article 15. Article 15 also may serve as a basis for private rights of action by sellers, buyers, landlords, tenants, and real estate Brokers. This private right of action is only in Article 15 and is not extended in other parts of the Illinois Real Estate License Act. In addition, licensees are still subject to liability under the Illinois Fraud and Deceptive Practices Act, and there is nothing in Article 15 that should be construed as changing a licensee's duty under common law regarding the negligent or fraudulent misrepresentation of material information.

Article 15 defines several terms. A Brokerage agreement is an agreement that could be either a listing contract or buyer Brokerage agreement. A client is a person represented by a licensee. A consumer is a person or entity seeking or receiving real estate Brokerage services. A customer is a consumer who is not being represented by a licensee, but for whom the licensee is performing ministerial acts.

Article 15 states that licensees are designated agents considered to be representing the consumer with whom they are working, unless there is a written agreement between the Sponsoring Broker and the consumer providing a different relationship. An exception to this is a licensee who is performing only ministerial acts on behalf of the consumer. Ministerial acts will be discussed later. Payment or the promise of payment has nothing to do with whether an agency relationship has been created.

Contemporaneous Offers

If a client is interested in a property and her designated agent shows that property to other prospective buyers, it might seem to be a breach of duty to the client. Article 15 specifically states, however, that a licensee does not breach a duty or obligation as a designated agent by showing alternative properties to prospective buyers or tenants or by showing properties in which the client is interested to other prospective buyers or tenants. A licensee who receives a higher fee or compensation based on a higher selling price or lease cost also does not violate a duty or obligation to the client.

Since January of 2010, a licensee presenting offers on the same property from two different clients must disclose this fact in writing to the clients and give the clients the opportunity to withdraw from them and have the Sponsoring Broker appoint a different designated agent.

Duties of Licensee to Client—Statutory Duties

Under Article 15, the licensee must perform the terms of the Brokerage agreement and promote the best interests of the client. The licensee should seek a transaction at a price and terms stated in the Brokerage agreement, presenting all offers to and from the client and disclosing any material facts of which the licensee has actual knowledge that concerns the transaction. If this information is confidential, however, the licensee is prohibited from revealing it. The licensee must also provide for a timely accounting of all moneys and property received and must obey the specific instructions of the client that are not contrary to law. The licensee should exercise reasonable skill and care in the performance of Brokerage services and promote the client's best interests as opposed to the licensee's or any other person's self-interest. A licensee will not be held liable to a client for providing false information to the client if the false information was provided to the licensee by the customer unless the licensee knew or should have known the information was incorrect. All offers, with and without earnest money, whether oral or written, must be presented to the client.

Duties of Licensee to Customer

Under Article 15, the licensee must treat all customers honestly and cannot negligently or knowingly give them false information. The licensee also must provide timely disclosure of all material defects actually known to the licensee concerning the physical condition of the property that could not be discovered by the customer completing a reasonably diligent inspection of the property. This is an instance in which a licensee owes a duty to disclose information to someone other than the client. A licensee is not liable to a customer for providing false information to the customer if the false information was provided to the licensee by the client unless the licensee knew or should have known the information was incorrect.

Agency Disclosure

Article 15 requires the Broker to advise the consumer of the designated agency relationship that will exist unless there is a written agreement between them providing for a different Brokerage relationship. With changes in Article 15 that went into effect in January 2010, the licensee must provide the client in writing with the name of his the designated agent before beginning to work with the client. Additionally, the Broker must advise the consumer of any other agency relationships available through the Broker. Although the Broker need not state the amount of the commission to be received, the Broker must advise the consumer as to whether the Broker will share the compensation with Brokers who represent others in a transaction.

The licensee must disclose in writing to the customer that the licensee is not acting as the agent of the customer at a time that will prevent the disclosure of confidential information from the customer to a licensee. This disclosure must take place when first meeting the client/that is beginning to work for a client. This disclosure also applies to leases.

Confidential Information

Article 15 defines confidential information as information obtained by a licensee from a client during the term of a Brokerage agreement, or information that was made confidential by the written request or written instruction of the client. Any information dealing with the negotiating position of the client or information the disclosure of which could materially harm the position of the client is also considered confidential. For example, the designated agent of a buyer could not reveal to the seller or the seller's designated agent that the buyer had to be out of his present home in a week or would make a higher offer for the property if his first offer was rejected. Confidential information can be disclosed only if (a) the client

permits disclosure, (b) the disclosure is required by law, (c) the information becomes public from another source, or (d) the information concerns the physical condition of the property.

Ministerial Acts

A licensee representing a client in a real estate transaction may provide assistance to a customer by performing ministerial acts. Ministerial acts should not be performed in a manner that would violate the Brokerage agreement with the client or would form a Brokerage agreement with the customer. **Ministerial acts** include, but are not limited to those acts that are informative in nature but that do not rise to an active level of representation on behalf of the customer. Some examples of ministerial acts are

- responding to phone inquiries by consumers as to the availability and pricing of Brokerage services;
- responding to phone inquiries from consumers concerning the price or location of property;
- attending an open house and responding to questions about the property from a consumer;
- setting an appointment to view property with a consumer;
- responding to questions of walk-in consumers concerning Brokerage services or particular properties;
- accompanying an appraiser, inspector, contractor, or similar third party on a visit to a property;
- describing a property or a property's condition in response to a consumer's inquiry;
- completing business or factual information for a consumer on an offer to purchase on behalf of the client;
- showing a client through a property being sold by an owner; and
- referring a consumer to another Broker or service provider.

Dual Agency

Dual agency situations arise when a licensee is representing both the buyer and the seller in the same transaction. This takes place on the licensee's personal listings rather than the office's listings, as the licensee would probably not have been named the designated agent on an office listing if there were any question of dual agency.

A licensee answering a phone call in response to an ad on a personal listing or talking to a consumer at an open house on a personal listing would not be considered the agent of that consumer, as these situations are ministerial acts. However, the licensee must be careful not to go beyond ministerial acts and act as an agent for such consumers. The licensee should keep in mind the written disclosure requirements previously mentioned.

Article 15 allows for consensual dual agency, provided certain requirements are met. Consent to a dual agency requires that the licensee who is to act as a dual agent must present the clients with a dual agency disclosure form that includes required statutory language. This form should be presented to the clients at the time the Brokerage agreement is entered into and must be signed by the clients before the licensee may act as a dual agent. Consent to act as a dual agent is presumed to have been given when the clients sign this form. A licensee cannot, however, be a dual agent in any transaction where the licensee or an entity in which the licensee has an ownership interest is a party to the transaction.

In addition to this initial disclosure, when the clients are executing an offer to purchase or lease in a transaction in which the licensee acted as a dual agent, the licensee must obtain a written confirmation from the clients giving their consent for the licensee to act as a dual agent. This confirmation may be included in another document such as a contract to purchase, in which case the clients must initial the confirmation of dual agency.

If a client declines to enter into or wishes to withdraw from a dual agency agreement, the withdrawing client may be referred to another designated agent. To receive a referral fee in this situation, written disclosure of the fee must be given to the withdrawing client and the client that continues to be represented. Note that only disclosure is required, not permission.

In a dual agency relationship, the client and the licensee are considered to possess only actual knowledge and information. There is no imputation of knowledge or information among or between the clients, Brokers, or their affiliated licensees. Licensees cannot act as a dual agent when selling a property in which they own an interest.

Termination of Brokerage Agreement

After the termination, expiration, or completion of a Brokerage agreement, the Broker does not owe any further duties except to account for all moneys and property relating to the transaction, to keep confidential information confidential, or as provided by written agreement.

In any action brought under Article 15, relief is limited to an injunction, actual damages, and court costs. The action must have been started within two years of the time the party bringing the action knew or reasonably should have known of such act or omission. In no case can the action be brought more than five years from the time the alleged act occurred.

Errors and Omissions Insurance

Because of the frequency of litigation against real estate licensees, most Brokers and salespeople purchase errors and omissions (E&O) insurance. E&O insurance can be compared to a doctor's malpractice insurance. When a court finds a licensee has injured someone in a real estate transaction through a mistake or a misrepresentation, the E&O insurance company will pay the injured party the amount of the award up to the limits of the licensee's policy coverage. If the insurance company feels that it is to its monetary advantage to settle out of court (e.g., avoiding additional attorney fees), it will try to come to a settlement with the injured party. A Sponsoring Broker, to reduce financial risk, should carry E&O and either provide his associates with E&O or require them to carry it. This requirement for associates to carry E&O should be addressed in the office policy manual and the employment agreement.

Commercial Broker Lien Act

The Illinois Commercial Broker Lien Act allows lien rights to a real estate Broker who is entitled to a commission from a sale or lease of commercial property. The act defines commercial real estate as any real estate located in Illinois other than the following: (1) real estate containing 1 to 6 residential units, (2) real estate on which no buildings or structures are located, or (3) real estate classified as farmland for assessment purposes under the property tax code. Commercial real estate does NOT include single-family residential units such as condominiums, townhouses, or homes in a subdivision when sold, leased, or otherwise conveyed on a unit by unit basis even though these units may be part of a larger building or parcel of real estate containing more than 6 residential units.

If the Broker is representing the seller, then there must be written Brokerage agreement with the seller, and if the Broker is representing the buyer, there must be a written Brokerage agreement with the buyer. The lien can be claimed when the Broker becomes entitled to the commission as evidenced by a written purchase or lease agreement. The notice of lien must be filed in the recorder's office prior to the actual conveyance of the property and takes effect the day of the recording. Exceptions to the recording of the lien before the conveyance include (a) situations when the commission due the Broker is payable in installments, in the case of a lease and (b) when the Broker claiming the lien actually has a written agreement with a prospective buyer for the payment of the commission to the Broker. Each of these exceptions has specific stipulations that must be followed.

The act includes an escrow provision. When there is a notice of lien that would prevent a property from closing, an amount sufficient to satisfy the lien can be paid into escrow. Upon payment of the moneys into escrow, the Broker must release the lien so that the transaction can close. After the closing, the Broker must pursue the case through litigation. The prevailing party is entitled to have attorney and court costs paid by the other party, in order to discourage frivolous claims.

Antitrust Violations

When two or more Brokers agree or conspire on the setting of commission rates, employee commission splits, etc., the Brokers are price fixing and in violation of the Sherman Antitrust act. The Sherman Antitrust act prohibits any unreasonable interference, by contract, combination, or conspiracy, with the free market pricing and distribution system of trade. A Broker acting individually can set her own commission rates. No group or association of Brokers can set, encourage, or even suggest a certain commission rate. Commission rates are strictly negotiable between the seller and the Broker or the buyer and Broker in the case of buyer Brokerage.

Brokers who conspire to refuse to cooperate with flat fee Brokers or other Brokers with less traditional commission splits are guilty of group boycotting, another violation of the Sherman Antitrust Act. Territorial allocation and tying arrangements are two more examples of antitrust violations. Territorial allocation occurs when Brokers reduce competition between themselves by setting up territories in which each has exclusive marketing rights. Also, some tying agreements are illegal, such as a Broker/developer selling a lot or home to a buyer and requiring, as a condition of the sale, the buyer to list the buyer's home with the Broker/developer.

Real Estate Contracts

Contracts are involved in every aspect of real estate. Some of the most common real estate contracts are listings, sales contracts, leases, options, mortgages, and installment agreements/contracts for deed. While we cannot practice law, we must understand the basics of contract law, which apply to real estate contracts as well as all other contracts. Nearly every controversy or question arising in the real estate business involves the contracts between parties and can be answered by applying basic contract law. A contract establishes both the rights and the duties or responsibilities of the parties to the contract.

Illinois licensees are prohibited from practicing law and cannot draft legal instruments. The Illinois Supreme court decision *Quinlan and Tyson* established authorization for Brokers to complete the blanks in a preprinted contract commonly used in the area.

The Statute of Frauds requires that real estate contracts be written. Licensees, however, must present all offers to their clients. This includes oral offers and offers that provide no earnest money or even offers that they think are ridiculous offers.

Unauthorized Practice of Law & Other Experts

A real estate licensee must be careful not to give legal advice. Licensees should stay within the scope of their license, marketing real estate, and direct buyers and sellers to their attorneys. Licensees should not answer specific questions about environmental hazards, but should instead direct their clients/customers to the expert in the field. A client should never dissuade a consumer from getting advice from the expert in the field: home inspector, structural engineer, environmental inspector or even an exorcist.

Licensees should encourage their clients to seek advice from their attorney. Brokers should seek advice from their Managing Broker.

Illinois Residential Real Property Disclosure Act

The Illinois Residential Real Property Disclosure Act requires that all sellers of residential properties of four units or less make prospective buyers aware of known material defects of the property with a residential real property disclosure form.

A seller is defined as all owners, beneficiaries of a trust, contract purchasers, or lessees of a residential ground lease, who have an interest in residential real property. A person or entity that never occupied the property and did not have the management responsibility for the property is not considered a seller under this act.

This form consists of 22 statements to which the seller must respond regarding the condition of certain aspects of the property, based on the seller's actual knowledge of any known defects in the residential property. The seller is not required to do any testing of the property; he is responsible for revealing known defects in the property. The disclosures are intended to reflect the current condition of the property and do not include previous problems, if any, that the seller reasonably believes have been corrected. While this form does not constitute a warranty by the seller, the buyer may rely on the information in choosing to purchase and defining the terms of the offer. The seller is responsible for completing the disclosure form. Real estate salespeople and even the seller's attorneys should refrain from assisting in the completion of the disclosure form.

The following persons or entities are exempt from this act:

- transfers pursuant to a court order
- transfers ordered by a probate court in administration of an estate
- transfers between spouses resulting from a judgment of dissolution of marriage or legal separation
- transfers pursuant to an order of possession
- transfers by a trustee in bankruptcy
- transfers by eminent domain
- transfers resulting from a decree for specific performance
- transfers from a mortgagor to a mortgagee by deed in lieu of foreclosure or consent judgment
- transfers by judicial deed issued pursuant to a foreclosure sale to the successful bidder or the assignee of a certificate of sale
- transfers by a collateral assignment of a beneficial interest of a land trust
- transfer by a mortgagee or a successor in interest to the mortgagee's secured position
- a beneficiary under a deed in trust who has acquired the real property by deed in lieu of foreclosure
- judicial deed issued pursuant to a foreclosure sale.

Exemptions are further extended to

- transfers by a fiduciary in the course of the administration of a decedent's estate, guardianship, conservatorship, or trust
- transfers from one co-owner to one or more co-owners
- transfers pursuant to testate or intestate succession
- transfers made to a spouse or to a person or persons in the lineal line of consanguinity of one or more of the sellers
- transfers from an entity that has taken title to residential real property from a seller for the purpose of assisting in the relocation of a seller so long as the entity makes available to all prospective buyers a copy of the disclosure form furnished to the entity by the seller are exempt
- transfers to or from a government entity
- transfers of newly constructed residential property that has not been occupied are exempt.

The act requires that the written disclosure statement be delivered to the prospective buyer before the signing of a contract to purchase. If a material defect is revealed by the disclosure after an accepted offer, the prospective buyer may, within three business days after receipt of the report, terminate the contract without liability or recourse. No right to terminate the contract exists once the property has been conveyed. The buyer has no right to terminate the contract if the report is delivered before the prospective buyer enters into a contract for the conveyance of the property.

The act requires the seller to provide a supplement the original disclosure in writing if a seller gains actual knowledge of a material defect after the original disclosure form was delivered. The supplement may take any written form. If a seller discloses a material defect in a supplement, the buyer has no right to terminate the contract. The only exception to this rule is when the seller completes a supplement to the original disclosure form indicating a material defect that the seller had actual knowledge of before completing the original disclosure form. A buyer may terminate a contract if the seller refuses to provide the disclosure document prior to the actual conveyance of the property.

No action can be taken under this act later than one year from the earlier of the date of possession, date of occupancy, or date of recording of the deed. However, this one-year limit applies only to actions available under the act, not to a cause of action that would take place under common law.

Home Inspections

Buyers today often make their offers contingent on a satisfactory home inspection. Brokers should encourage their buyers to obtain a home inspection. Certainly, a Broker should never dissuade a buyer from seeking an expert's advice at any point in the transaction. Sellers, in receiving an offer, usually place a limit on the cost of needed repairs turned up during a home inspection. If after the home inspection is completed the repairs are greater than the cost agreed to in the offer, the buyer will either cancel the offer and walk away or continue to negotiate over price with the seller. Home inspectors must be licensed by the Department of Professional Regulation. In dealing with new buyers in a sale cancelled due to defects uncovered by a home inspection, the Broker must reveal the defects found by the inspector.

Listing Contracts - Definition and Purpose

The first contract in the real estate business is usually the listing contract. A listing contract is one whereby the owner of the property engages a real estate Broker to find a buyer.

Illinois follows Article 15 of the Illinois Real Estate License Act. Under this law, with the Broker and consumer lacking another agreement to the contrary, the Broker is the designated agent of the consumer (buyer or seller) with whom he is working. While other sections of the Illinois Real Estate License Act refer to listings, Article 15 of the act refers to Brokerage agreements. Brokerage agreement is a term that better reflects consumers' trend toward buyer Brokerage, seeking someone to represent the buyer in a real estate transaction.

The following discussion refers to listing agreements under which Brokers represent sellers in the sale of their properties.

Under a listing contract, no transfer of interest in real property is going to occur. No title will pass between seller and Broker. Most states require the listing contract to be in writing because listing contracts relate to the sale of real property and the Broker's eligibility to receive a commission. Illinois only requires exclusive listings to be in writing.

In many cases, the Broker must prove the existence of an employment contract. A written contract clearly spells out that the Broker actually has been hired by the seller, and it sets forth all the terms and conditions of employment. Written listings substantially reduce lawsuits between Brokers and property owners concerning matters of the Broker's employment. In Illinois, a definite expiration date is required for a written listing; a clause automatically extending the listing date is not allowed.

Commission Entitlement

The Broker's entitlement to commission is determined by two tests:

1. **Ready, willing, and able.** If the Broker brings to the seller a buyer who is ready to buy, is willing to buy, and is able (financially) to buy under the terms and conditions of the listing contract, the Broker is legally entitled to the commission. The Broker has done the job he was hired to do in the listing contract—find a buyer who will pay the listed price in cash or other specified, accepted terms. When the Broker does this, the commission has been earned under the ready, willing, and able test. Whether the owner actually agrees to sell the property to the prospective buyer does not matter. The seller may reject any offer, but rejection of an offer that conforms to the terms of the listing contract does not remove the duty to pay the commission.
2. **Acceptance.** If the Broker brings a buyer that the seller accepts, the Broker is legally entitled to the commission, as he has been instrumental in procuring a buyer for the property. Acceptance is based on some price or terms other than the listed price in cash. For example, the listing contract may specify \$80,000 to be payable in cash. A Broker may bring an offer to the seller of \$78,500. This offer may not be for payment in cash but instead may be subject to the buyer's assuming the seller's existing mortgage. If the seller accepts this offer, the Broker is legally entitled to the commission on the basis of acceptance. The Broker has brought the seller a buyer who is acceptable to the seller.

Fulfillment of both tests is not required. This is an either/or situation. The Broker earns a commission either on the basis of having brought a ready, willing, and able buyer or on the basis of having brought an offer the seller accepts. In Illinois, a Broker may use the closing of the sale as proof in court that she has procured that specific buyer and earned a commission.

Types of Listings

The three types of listing contracts in general use are the open listing, the exclusive agency listing, and the exclusive right-to-sell listing. Each of these contracts gives different rights to the Broker and the seller. All written listings in Illinois must contain six items: the property's listing price, the amount of commission and time of payment, duration of the listing agreement, Broker and seller names, the address or legal description of the property, and signatures of the parties. Any of the different listing types may be placed, with the owner's permission, into the MLS. MLS's can and do limit the types of listing that they will accept. In general, they have to be exclusive right to sell or exclusive agency with no open or net listings accepted.

Open Listing

Under an open listing, the seller lists a property with the assistance of one or more Brokers. The Broker effecting the sale is entitled to the commission. If the owner sells the property (to a prospect not generated by any Broker), however, the owner owes no commission.

This type of listing is not overly beneficial to the owner or to the Broker. Usually a Broker cannot afford to spend advertising dollars and utilize sales staff on such an uncertain listing. The Broker is competing rather than cooperating with the owner and every other Broker who has an open listing on the property. This type of listing also can lead to disputes over commissions between Brokers and can present legal problems for the owner. The lack of protection for the Broker provides little incentive for aggressive marketing.

The Sponsoring Broker, through its sponsored licensee's, is to assist in the Brokerage of real estate. Brokerage is the business of bringing the buyer and seller or lessor and lessee together and assisting in the negotiations in the terms of sale or lease of real estate. The designated agent of the client must provide assistance to the client through the negotiation process until an offer or lease is signed and all contingencies are met. The services provided the client, may not be exactly the same in all situations, but the designated agent will be involved in the process in some form.

Exclusive Listings – Minimum Services

In 2004, the Illinois legislature added what are referred to as "minimum service requirements" for exclusive listings. These requirements apply to both exclusive agency and exclusive right-to-sell listings. Any listing, to be considered exclusive, must provide for the licensee to do the following:

- accept delivery of and present to the client offers and counteroffers to buy, sell, or lease;
- 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

- answer the client's questions relating to the offers, counteroffers, notices and contingencies.

Exclusive Agency Listing

In an exclusive agency listing, the property is listed with one Broker as the only agent. If the Broker, or any other real estate licensee, effects sale of the property, he is legally entitled to the commission agreed upon, but if the owner sells the property, the Broker earns no commission.

This type of listing is somewhat better than the open listing in that only one Broker is involved, but the Broker is still competing with the owner. The Broker's advertising programs, including a "for sale" sign on the property, may generate prospects for the owner.

Exclusive Right-to-Sell Listing

An exclusive right-to-sell listing contract is recommended by the National Association of REALTORS®. Under this listing contract, the property is listed with only one Broker, and if anyone else sells the property during the term of the listing contract, the Broker is legally entitled to the commission. The seller is legally obligated to pay the Broker's commission if the Broker or the seller or some third party effects a sale of the property during the term of the listing contract.

The exclusive right-to-sell listing contract benefits the owner because the Broker is secure enough in the opportunity to earn a commission that he can afford to spend time and advertising dollars to effect a quick and satisfactory sale of the listed property.

Listing Contract Provisions

An exclusive is an express bilateral contract. Under most listings, the seller agrees to cooperate with the Broker and to pay a commission if the listed property is sold, and the Broker agrees to make her best efforts to procure a sale of the listed property. Specific provisions must be included to make the terms of the contract between the seller and the Broker clear and unambiguous.

Illinois requires that if the amount of commission or time of commission payment is changed, this change must be stated in writing and signed by all parties. If the listing agreement states that in case of buyer default the seller does not receive the earnest money, this statement must be in letters larger than those generally used in the listing agreement. Listing agreements may contain a protection period for the Broker known as a carryover, extender, protection or safety clause. The protection period is a length of time agreed to by the sellers after the listing period during which they agree to pay a commission if the property is sold to the Broker's prospect introduced to the listed property during the listing period.

After expiration of the listing, the protection period agreed to is voided when the seller enters into a written listing agreement with another broker. This voiding of the protection period, takes place only on residential properties with four units or less. The protection period remains in effect on all other types of properties.

Termination

Listing contracts terminate after expiration of the time period agreed to by the seller and the Broker in the listing or sale of the property. They also terminate upon the death or incapacity of the seller, destruction of the listed property, condemnation of the listed property, bankruptcy of the seller, revocation of the Broker's license, mutual agreement of the seller and the Broker, or breach of the listing terms by either the seller or the Broker. In Illinois, written listing agreements that do not contain a definite termination date are void, and clauses automatically extending the listing period are not allowed.

Stigmatized Property

Illinois licensees are not subject to a cause of action for failure to disclose an occupant of the property is/was affected with HIV or that the property was the site of an act of violence that had no physical effect on the property or its environment. Such a property is referred to as a stigmatized property.

Competitive Market Analysis – Analysis of Short Sales, Foreclosure Sales and Real Estate Owned (REO)

Part of the listing process involves recommending to the owner a market price that will be the listed price. This price should be determined by a competitive market analysis, which compares the listed property with other similar properties that have sold recently. No two properties are exactly alike; however, many are comparable or similar in quality, location, and utility. In comparing the listed property and the selected comparables, allowances are made for differences in things such as lot size, age, number of rooms, square footage, and so on.

A minimum of three comparables is desirable. Comparables should be as similar as possible in all respects to the listed property. Comparables are found in office real estate files, in county assessor files, in MLS closed sales data, and from appraisers. The more recent the date of sale of the comparable, the more valuable the comparable is to the analysis. Also of great importance is the extent of similarity of physical characteristics of the comparable and location of the comparable in relation to the listed property.

In a depressed real estate market the majority of sales in an area might be short sales or foreclosed sales. A short sale is one where the lender has agreed to accept a loan pay-off less than the outstanding loan. Ideally, the lender not only accepts the lesser amount to remove the mortgage lien, the lender also forgives the borrower the amount of loan that they are not recovering. Illinois is deficiency state and the lender, unless they provide a release, can take action against the borrower for the amounts not paid. Unfortunately, a few short sales can lower the values of property in an area. In a short sale, a licensee should remember that the sellers, not the lender, are the clients. Earnest money received by the Broker must be deposited by the next business day after the sellers accept an offer – not the lender ratifying the short sale.

Another type of sale that must be analyzed is the foreclosure sale. These sales must be thoroughly analyzed to find out what kind of sale that really took place. A real foreclosure sale is bought at a downtown auction where properties are being sold by court order. Buyers in a foreclosure sale usually will get the property at a price much lower than prevailing values in the area. This lower price does not come without risk and headaches.

The foreclosure buyer did not get to inspect the interior of the property before purchasing it, they must evict the borrowers (they cannot start their eviction proceedings until 30 days after the court confirms the sale.), they pay 10-25% down the day of the auction and the rest by 2:00 the next day (so they do not get any benefit of leverage) and do not get title insurance. It is very common for the foreclosed borrowers to destroy the premises upon their exiting. Many foreclosure buyers after finally gaining access to their new purchase, find that the borrowers have removed the furnace, hot water tank and the kitchen cabinets, etc. So, there is quite a bit of risk attached to the favorable purchase price. These sales will provide the lowest indication of value in an area.

Many people say they “Bought a foreclosure.” This may be an inaccurate statement. What they should be saying is they bought a bank-owned property, an REO which is an acronym for “Real Estate Owned” other than bank real estate. An REO property is one that already went to the court sale and no third-party bidders bothered to place a bid on it, so the lender becomes the high bidder and the lender gets title to the property. Unlike the buyer in a foreclosure sale, the buyer of a REO is able to inspect the interior of the property, obtain a loan, and get title insurance. These sales, therefore, will be higher than the true foreclosure sale.

Another type of sale that needs to be analyzed is an REJ transaction. REJ stands for “Real Estate in Judgment”. Many sellers are approached by investors when the transaction first hits the foreclosure notices. A seller sensing the pending doom may sell to the investor at a reduced price, while trying to recover some money from the sale and avoiding a foreclosure on their credit. Some such sales take place just days before the judicial foreclosure auction. These sales taking place closer to the auction date will feature an even more distressed seller.

You should adjust your CMA according to the different types of sales in the area. Was the sale down the block a “foreclosure” sale or the sale of an REO? It may take some digging, but conditions in bank-owned properties vary widely. Terms of the sale also vary widely. The seller of an REJ will probably be more motivated to sell his property than a typical seller. Whatever the situation, the seller expects you to price his property accurately.

SALES CONTRACTS AND PRACTICES

REAL ESTATE SALES CONTRACT

The parties to an accepted real estate sales contract are the buyer and the seller, also called offeror and offeree, respectively. This contract is the road map for the real estate transaction. The parties are not in an agency relationship; they are assumed to have equal bargaining power and equal ability from opposing viewpoints. The buyer promises to buy the property if certain terms and conditions are met; the seller promises to convey marketable title to the property as prescribed by the real estate sales contract.

The consideration given consists of the promises made by the parties. Although most real estate sales contracts are accompanied by earnest money, earnest money is not legally required for a valid real estate sales contract. Earnest money is given (a) to show sincerity of the buyer, (b) to demonstrate her financial capability to raise the money called for in the agreement, and (c) to serve as possible liquidated damages to the seller in the event of default by the buyer.

A licensee must present all offers to their client. It does not matter how ridiculous they may seem. This includes offers that are verbal and offers without earnest money.

Because most real estate sales contracts contain specific deadlines to be met, parties to the contract or agents of the parties must keep close track of the calendar. If it appears a deadline is not going to be met, all parties to the contract, to keep the contract in force, must agree to any extension and initial the extension as written on the real estate sales contract. Failure to meet all of the conditions in the real estate sales contract excuses the buyer and the seller from the obligations of the contract. If failure to meet all of the conditions in the real estate sales contract was outside the seller’s control and not caused by the seller, the seller will be excused from payment of a commission per the listing contract.

Illinois Real Estate Licensee Act of 2000

The year 2000 brought a new century and a new real estate license act. Real estate licensees are regulated by the Illinois Real Estate License Act of 2000. We can count on the act to be amended each year with new regulations. As changes in agency evolve and the Internet changes the way consumers shop for and buy real estate, real estate licensees are changing the way they prospect for buyers and sellers and the way they market properties. Substantial changes to the Act came in 2010 with new licensing and new education requirements. Many other changes were made in 2010. New areas of regulation are sure to be added to the act. The Real Estate License Act of 2000 should be considered a living document that is continuously amended. The act's purpose has always been to regulate the real estate business for the protection of the public and to set a level of minimum competency that people entering the business must meet. The act is administered by the Department of Financial and Professional Regulation (DFPR), specifically the Real Estate Unit of the Department of Professional Regulation (DPR).

Licensed Activities

In Illinois, certain acts have been defined as real estate activities. Any person performing any of these activities must be licensed. Specifically, a person must be licensed if he, for another and for compensation, either directly or indirectly or with the intention or expectation of receiving compensation:

- sells, exchanges, purchases, rents, or leases real estate;
- offers to sell, exchange, purchase, rent, or lease real estate;
- negotiates, offers, attempts, or agrees to negotiate the sale, exchange, purchase, rental, or leasing of real estate;
- lists, offers, attempts, or agrees to list residential real estate for sale, lease, or exchange;
- buys, sells, offers to buy or sell, or otherwise deals in options on real estate or improvements thereon;
- supervises the collection, offer, attempt, or agrees to collect rent for the use of real estate;
- advertises or represents himself as being engaged in the business of buying, selling, exchanging, renting, or leasing real estate;
- assists or directs in procuring or referring of prospects, intended to result in the sale, exchange, lease, or rental of real estate;
- assists or directs in the negotiation of any transaction intended to result in the sale, exchange, lease, or rental of real estate;
- opens real estate to the public for marketing purposes; and

- sells, leases, or offers for sale or lease real estate at auction.

There are exemptions to the licensure requirement. There is no license requirement for the following:

- Any person, partnership, or corporation and their employees with respect to the property owned by the person, partnership, or corporation. Real estate acts performed by the employees should be incident to the management, sale, or disposition of the property. Acts are not to be performed in connection with a vocation of selling or leasing any real estate not owned by the person, partnership, or corporation.
- An attorney in fact acting under a duly executed and recorded power of attorney to convey real estate.
- Any person acting as a receiver, trustee in bankruptcy, administrator, executor, or guardian, or acting under a court order, or under the authority of a will or testamentary trust.
- Any person acting as a resident manager for the owner or any employee acting as the resident manager for a Broker managing residential property. The resident manager must reside on the premises and it must be their primary residence.
- Any officer or employee of a federal or state agency when acting in their official capacity.
- Any multiple listing service or other information exchange that is engaged in the collection and dissemination of information concerning real estate available for sale, purchase, lease, or exchange along with which no other licensed activities are performed.
- Railroads and other public utilities, their officers, and full-time employees in connection with properties requiring the approval of their appropriate state regulatory authority.
- Any medium of advertising in the routine course of selling or publishing advertising along with which no other licensed activities are provided.
- An exchange company registered under the Real Estate Time-Share Act of 1999 and the regular employees of the exchange company when conducting an exchange program as defined in the Real Estate Time-Share Act.

Leasing Agent License

Those persons who wish to engage in leasing residential properties can obtain a limited scope license called a leasing agent license

Leasing agents may:

- lease residential property;
- attempt, offer, or negotiate to lease residential real property; and
- supervise the collection, offer, attempt, or agreement to collect rent for the use of residential property.

Licensed Brokers do not need a leasing agent license to lease residential property. A leasing agent who obtains a Broker license will have his leasing agent license terminated. In Illinois, there is no need to hold duplicate licenses, and in fact, Illinois will not allow someone to hold two different types of real estate licenses.

Broker License

One enters the business as a Broker licensee. Broker licensees must work under (be sponsored by) a Broker Manager licensee. A Broker can perform all real estate activities but they must perform these activities under the supervision of their Broker Manager or their Sponsoring Broker.

Broker Manager License

Only Broker Manager licensees can sponsor other licensees. A Broker Manager licensee can manage an office. Those licensee's that wish to hold their own license, must obtain a Broker Manager license. A Broker needs two years of experience out of the last three years and additional coursework before being allowed to sit for the Broker Manager state exam.

Brokerage Offices

Each Sponsoring Broker must maintain a definite office or place of business in Illinois. The office must be identified by a sign on the exterior. The sign must be of a size and nature that is reasonably readable by the public. Listings within a building directory fulfill these requirements. The sign must be professional in appearance and meet all applicable zoning restrictions and restrictive covenants. The identification sign must be plainly visible from an area accessible to the public. The act does not specify any particular size; it merely states the sign must be of "adequate size and visibility."

The Brokerage office cannot be located in a retail or financial business establishment unless it is distinctly separated from the other businesses within the establishment. The Sponsoring Broker or Broker Manager must notify the DFPR within 24 hours of any change in business address.

Closing an Office

A Sponsoring Broker when closing an office must notify the DFPR and must close his/her escrow account. If there are unclaimed earnest money funds in the account, the Broker must pay the funds to the State Treasurer's Unclaimed Property Division.

Compensation and Disclosure of Compensation

Sponsored licensees performing real estate activities can only be compensated by their employing (sponsoring) Broker and cannot accept any kind of compensation directly from a buyer, seller, landlord, tenant, or even another Broker or Sponsoring Broker.

A licensed personal assistant must be compensated by the Sponsoring Broker of the licensee for whom they act as an assistant.

A licensee must discuss with his/her client the Sponsoring Broker's compensation and their policy regarding cooperation with Brokers who represent other parties in a transaction.

The licensee is also required to disclose to a client any compensation from a third party. If a licensee refers a client to a third party (corporation, partnership) in which the licensee has more than one percent ownership, or a third-party business (other than a publicly held or traded company) from which the licensee receives dividends or profit sharing, these facts must be disclosed to the client at the time the referral is made.

Brokers must give written disclosure to the client if they are receiving compensation from both the buyer and seller or the lessor and lessee in the same transaction.

Licensed and Unlicensed Personal Assistants

An unlicensed personal assistant could be the unlicensed secretary in an office or the individual secretary or personal assistant of a licensee. A licensed personal assistant is someone in the same position as a licensed Broker. The act specifically defines what an unlicensed personal assistant can do.

A licensed personal assistant, while working directly for a licensee, is considered to be working for the licensee's Sponsoring Broker. The licensed assistant must have a written employee or independent contractor agreement with the licensee's Sponsoring Broker. In the case of most assistants, licensed or unlicensed, they fit the IRS definition of an employee.

The licensee for whom they work cannot pay a licensed assistant directly. They must be paid through the Sponsoring Broker.

Both the Broker and the licensee who hired the assistant are held responsible for the assistant. A licensed personal assistant is able to perform more tasks. An unlicensed assistant cannot make telephone calls soliciting business on behalf of the licensee and cannot hold an open house (by this term we mean open to the public) or home show fair. These are considered to be licensed activities.

An unlicensed personal assistant may:

- answer the telephone, take messages, and forward calls to a licensee;
- submit listings and listing changes to the MLS;
- follow up on transactions after a contract has been signed;
- assemble documents for a closing;
- secure public information from a courthouse, water district, or other repository of public information;
- have keys made for a listing;
- draft advertising copy and promotional materials for approval by a licensee;
- place advertising;

- record and deposit earnest money, security deposits, and rents;
- complete contract forms with business and factual information under the direction and with the approval of the licensee;
- monitor licenses and personnel files;
- compute commission checks and perform bookkeeping activities;
- place signs on property;
- order items of routine repair as directed by a licensee;
- prepare and distribute flyers and promotional information under the direction and with the approval of the licensee;
- act as a courier to deliver documents, pick up keys;
- place routine telephone calls for rent payments;
- schedule appointments for the licensee (this does not include making phone calls, telemarketing, or performing other activities to solicit business on behalf of the licensee);
- respond to questions by quoting directly from published information;
- sit at a property for a Broker tour that is not open to the public;
- gather feedback on showings; and
- perform other administrative, clerical, and personal activities for which a license is not required.

An unlicensed personal assistant cannot:

- host open houses, kiosks, or home show booths or fairs;
- show property;
- interpret information on listings, titles, financing, contracts, closings, or other information related to a real estate transaction;
- explain or interpret a contract, listing, lease agreement, or other real estate document to anyone outside the licensee's own firm;
- negotiate or agree to any commission, commission split, management fee, or referral fee on behalf of a licensee; and
- perform any activity for which a license is required.

Sponsoring Broker and Employment Agreements

Licensees are allowed to have only one Sponsoring Broker at a time and all real estate activities must be performed for the Sponsoring Broker. A Sponsoring Broker must have an employee or independent contractor agreement with each licensee they sponsor. The agreement must address whether the licensee is an employee or an independent contractor and if an independent contractor state the employee is responsible for his own taxes. The agreement should also state the terms of their relationship, supervision, duties, compensation, termination, and other salient aspects of their relationship.

Licensed personal assistants must also have an employment agreement with the Sponsoring Broker, even if they are not performing licensed activities. This includes any licensed personal assistant that has been hired directly by a sponsored Broker. The Sponsoring Broker must hold the license of the licensed assistant.

Advertising

Licensees are prohibited from placing or participating in any advertising that could be construed as fraudulent, deceptive, inherently misleading, or proven in practice to be misleading. Advertising is considered misleading or untruthful if, when taken as a whole, there is a distinct possibility that it will be misunderstood or will deceive the ordinary purchaser, seller, lessor, or owner. Advertising must be communicated in a direct and readily comprehensible manner.

A blind advertisement is an ad that does not include the name of the Brokerage firm in the ad. Blind ads for the sale or lease of property or for the performance of other real estate activities are prohibited under the act. Blind ads run by a Sponsoring Broker recruiting or seeking licensees are prohibited.

Deceptive or misleading advertising includes advertising an exclusive listing of another Sponsoring Broker without the permission of the Sponsoring Broker and without the identification of the Sponsoring Broker in the ad. It may also include the failure to remove advertising of a listed property within a reasonable period of time after the listing's expiration or sale.

Listing information on a web site, extranet, or similar site behind a firewall that requires a password is not considered advertising. Unsolicited marketing of a licensee's real estate Brokerage services or other prospecting is considered to be advertising.

A licensee cannot advertise in her own name. All advertising must be done under the direct supervision of the Managing Broker. The Brokerage's name, including any franchise affiliation, must be included in all advertising. No licensee can list his name under the heading or title "Real Estate" in the telephone directory or any other medium without listing the Sponsoring Broker's business name. The Sponsoring Broker's business name must appear on all advertisements including business cards. There are no requirements as to specific print size between the Brokerage name and a licensee's name.

A licensee must disclose, in writing, his status as a licensee to all the parties in a transaction. This disclosure is required whether the licensee is selling, leasing, or purchasing any interest in the real estate that is the subject of the transaction. Sponsored or inoperative licensees running ads for the purpose of purchasing or leasing real estate must disclose their status as a licensee in the advertisement.

Internet Advertising

A Sponsoring Broker who has authorized the advertising or marketing of property listings on a website must include the following information on the same page as the advertisement:

- the city or geographic area in which the property being advertised or marketed is located;
- the company's name as registered with the DFPR or the assumed name it has registered with the DFPR; and

- if the Sponsoring Broker does not hold a real estate Brokerage license for the jurisdiction in which the property is located, the regulatory jurisdictions where the Sponsoring Broker does hold a real estate Brokerage license.

A web page is a single document that consists of multiple screens of information. Frames divide web pages into multiple, scrollable regions, or windows. Each region or frame has several features. Elements that the user should always see, such as the office name, agent name, address, and phone, can be placed in a static frame. As the user surfs through the web site, these static frames remain fixed.

Many web sites or servers are password protected. Only those people with the password are able to access the site. Outsiders are locked out. This security or password protection created on the host server is referred to as a firewall. Basically, a firewall is created to protect against unauthorized access to and tampering of a corporate network, while allowing the corporation's own employees to access the Internet.

A Sponsoring Broker advertising or marketing real estate Brokerage services must include the company's name or assumed name as it is registered with the DFPR and the city and state in which the company's principal office is located on the company's home page or on a clearly identified link appearing on that page. Whether advertising or marketing property listings or Brokerage services, this information must be on each web page. If the information is contained on the frame of the Sponsoring Broker's site, it does not have to be included on every page of the site. Licensees working for a Broker who authorizes licensees to advertise or market must include their name in addition to these other requirements.

A Sponsoring Broker using e-commerce or electronic communications, such as e-mail, e-mail discussion groups, or bulletin boards for marketing or transactional purposes, must include on the first or last page of all communications the following data:

- the company's name or assumed name as registered with the DFPR; and
- either the city and state in which the Sponsoring Broker's main office is located or the location of the office from which the communication originated.

Licensees working for a Brokerage, in addition to the above, must include their name in the communication. This information is only required on a Brokerage's or licensee's attempted solicitations of a consumer. If a consumer sends a communication to the Brokerage or licensee in reply to a communication from the Broker or licensee that included all of the required information, the Brokerage or a licensee need not include this information again.

It is a violation of the act if a licensee or Sponsoring Broker takes listing information from an Internet site and posts it to another Internet site for viewing by the general public. Listing information that is taken from another Internet site and placed behind a firewall or other device that is password protected does not violate any rules and need not identify the listing Broker .

A Sponsoring Broker or a licensee may link to listing information on another Internet site without approval unless the owner of the other site specifically requires that consent be

obtained. Any link must be done in a way that does not mislead or deceive the public as to the ownership of any listing information. All licensees, including Sponsoring Broker's, must periodically review the advertising and marketing information on their site to update it and assure the information is current and accurate.

Violations of the Act and Disciplinary Procedures

Unlicensed Practice

The DFPR may impose a fine against an unlicensed person engaged in real estate activities. Any person who practices, offers to practice, attempts to practice, or holds himself out to practice as a real estate licensee without being licensed by the DFPR, in addition to any penalty by law, is subject to a civil fine up to \$25,000 for each offense. The DFPR has the authority and power to investigate all unlicensed real estate activities. The civil fine must be paid within 60 days and constitutes a judgment against the offender. The judgment is filed and executed in the same manner as any civil judgment.

Violations of the Act

The DFPR may refuse to issue or renew a license, may place on probation, suspend, or revoke any license, or may censure, reprimand, or otherwise discipline a licensee, or impose a civil fine not to exceed \$25,000 upon any licensee.

Violations of the Tax Act, Delinquent Student Loans, and Delinquent Child Support

DFPR will refuse to renew and will suspend the license of any individual who fails to file a return; pay the tax, penalty, or interest shown on a filed return; or pay any final assessment of tax, penalty, or interest as required by any Tax Act administered by the Illinois Department of Revenue until such time as the requirements of the Tax Act have been met.

The DFPR will not issue or renew a license of a person who has defaulted on an Illinois student loan. A license already issued by the DFPR may be suspended or revoked. In this case, the licensee will be given the opportunity for a hearing and if found to have failed to make satisfactory repayment to the Illinois Student Loan Assistance Commission, the license will be revoked. The DFPR may issue or reissue a license to a person who has established a satisfactory payment record as determined by the Illinois Student Loan Assistance Commission.

The DFPR will not issue or renew a license and may suspend or revoke a license of any person certified by the Department of Public Aid to be more than 30 days delinquent in child support without a hearing, based solely on the certification of delinquency by the Department of Public Aid. Redetermination of the delinquency by the DFPR is not required. The DFPR may issue or reissue a license to a person that has arranged for payment of past and current child support in a manner satisfactory to the Department of Public Aid.

The DFPR conducts hearings through the disciplinary board or a duly appointed hearing officer when suspending, revoking, or refusing to issue or renew licenses. The board may impose a civil fine up to \$25,000. The board may refuse to issue or renew a license, or place on probation, suspend, censure, reprimand, fine, or revoke a license. The board may restrict a licensee's access to escrow funds, require successful completion of approved real estate courses including continuing education, or require the licensee to submit reports, records, or documents to the DFPR regarding their real estate activity.

Escrow Accounts

In Illinois, escrow accounts, often referred to as special accounts, trust accounts, or earnest money accounts, must be maintained in a federally insured depository. Escrow moneys in Illinois include earnest moneys and rental security deposits. Illinois requires all escrow accounts to be noninterest-bearing, unless the principals have a written agreement stating that escrow funds be placed in an interest-bearing account. This agreement also must specify the recipients of the interest earned in the account. A Sponsoring Broker may maintain more than one special account. It is a violation of the laws of agency for Sponsoring Brokers to commingle the funds or property held in trust for others with personal accounts or with the operating account of the real estate firm. Misappropriation of a client's money is called conversion.

Escrow Regulations

Escrow Moneys, Time of Deposit, and Bookkeeping Systems

Escrow moneys are defined in the Act as all moneys, promissory notes or other type and manner of legal tender or financial consideration deposited with any person for the benefit of the parties to the transaction. This includes earnest money and security deposits. An exception to this definition is security deposits held by a person who is the sole owner of the property being leased.

All escrow moneys collected by a licensee on behalf of owners and pursuant to property management activities must be placed in a special account. These requirements may be waived in writing by the tenants. Such waiver, if included in the lease, shall appear in letters larger than the rest of the agreement (bold print).

Escrow moneys must be put into a special account separate from the operating account. This account must be noninterest bearing, unless the principals to the transaction agree in writing that the money is to be placed in an interest-bearing account. This agreement must also state who is entitled to the interest.

All earnest money accounts must be in a federally insured depository.

A Sponsoring Broker may have more than one escrow account. For instance, a Sponsoring Broker may have an interest-bearing and a noninterest-bearing account, an account for each transaction, or an account for each branch office. If the Sponsoring Broker changes depositories or an account signatory, a new form must be filed with the DFPR within 10 days of the change. Licensees sponsored by a Sponsoring Broker cannot have an escrow account. Only Sponsoring Brokers can maintain such an account. A Sponsoring Broker is not required to have an escrow account unless the Sponsoring Broker receives earnest money or is the custodian of the funds of others. An attorney involved in a transaction may hold the earnest money.

Earnest money and security deposits must be deposited in the Sponsoring Broker's escrow account not later than the next business day following acceptance of the contract. A transaction is considered accepted when the contract or lease is signed by the buyer and the seller or the lessor and lessee. In cases where a branch office has its own escrow account, the money must be deposited not later than the next business day following the contract's acceptance. Where a branch office does not maintain an escrow account, the branch office must hand deliver or mail the money by the next business day to the main office. The main office must deposit the money by the next business day following the receipt of the money from the branch office.

All branch offices, even those that send all escrow moneys to a main office, must maintain records showing the date the escrow moneys were deposited or transferred to the main office.

Security deposits held by a Sponsoring Broker must be maintained in an escrow account for the duration of the lease unless the tenant waives this requirement in writing. Such waiver, if included in the lease, must appear in letters larger than the rest of the agreement.

A Sponsoring Broker who acts as an escrow agent must notify all the principals in writing if a principal fails to tender escrow moneys, a principal's escrow tender is dishonored by the financial institution on which it is drawn, or when there appears, according to the governing contract, to be a deficiency in the amount of the deposit.

Consent to Audit Escrow Accounts

Each Sponsoring Broker must, at the time of the original application for licensure and upon each renewal, file with the DFPR the name of the federally insured institution in which each escrow account is maintained, the name of the account, the names of the persons authorized to withdraw funds from the account, and give the DFPR consent to examine and audit the account. Sponsoring Brokers must notify the DFPR by filing a new form with the DFPR within 10 days of changing the depository, method of doing business, or the persons authorized to withdraw.

Bookkeeping System

The Sponsoring Broker must maintain an in-office bookkeeping system for the escrow account. The bookkeeping system can be of any form, traditional paper systems or computerized systems, but it must conform with sound accounting principles. Computerized bookkeeping systems must be able to produce printed records containing all of the information required by the DFPR. Each bookkeeping system must have a journal, a ledger, and a master escrow account log.

The master escrow account log must identify all escrow bank account numbers and the name and address of the bank(s) where the escrow accounts are located. The master escrow account log must specifically include all bank account numbers for individual accounts even if they are under an umbrella account number.

The journal shows the chronological sequence of deposits and disbursements. Information on deposits must include the deposit date, the name of the party who delivered the funds, the name of the person on whose behalf the funds were delivered, and the amount of the funds. For disbursements, the journal must record the date, the payee, the check number, and the amount disbursed. The journal must indicate a running balance of the account.

Although a journal records all deposits and disbursements together, a ledger shows the receipt and disbursement of all funds involved in a single transaction. The ledger must include the names of both parties to the transaction, the amount of the funds received by the Sponsoring Broker, and the date of the receipt. Disbursements are identified by the date, the payee, the check number, and the amount disbursed. The ledger must segregate one transaction from another. When ledgers are generated by computer programs that use the same information to create both the journal and the ledger, the Broker must maintain copies of the bank deposit slips, disbursement slips, or other bank receipts to account for the data on the ledger.

Within 10 days of receiving the monthly bank statement, the Sponsoring Broker must reconcile each account. When there has been no activity in the account, no reconciliation is required. The reconciliation must include a written worksheet that compares the balances of the account, the ledger, and the journal. Computerized escrow bookkeeping systems must be backed up monthly. The monthly reconciliation, including its worksheet, must be printed out and the hard copy maintained. The journal also must be printed out monthly and the hard copy maintained.

The only personal money a Sponsoring Broker can have in an escrow account is the amount required by the institution to open or maintain the account.

In the event of a dispute over the return or the forfeiture of any escrow moneys held by the Sponsoring Broker or if the Sponsoring Broker should reasonably know that the disposition of the money will be contested, the Broker should continue to hold the money in the escrow account:

1. until receiving written direction from all of the parties;
2. until a civil action is filed by either the Broker or one of the parties to determine its disposition, at which time the money must be paid into the court; or
3. until such funds are turned over to the Illinois Department of Financial Institutions because of account inactivity or the inability to locate the parties.

The earnest money, however, cannot be disbursed by the Sponsoring Broker unless the Sponsoring Broker has the written direction of all parties to the transaction. Even if it is obvious that the buyer has defaulted, the Sponsoring Broker does not have the authority to determine that any performance or lack of performance is a default and must continue to hold the earnest money. If the parties cannot arrive at a mutual agreement as to the disposition of the earnest money, the Sponsoring Broker may file an interpleader action and pay the money to the clerk of the circuit court.

A Sponsoring Broker need not disburse any escrow moneys until the funds have been honored by the payor's depository. Sponsoring Broker s may not withhold an authorized disbursement of escrow moneys due to any claim for a commission or compensation. If a Sponsoring Broker receives written direction from all parties to the transaction or their duly authorized agents agreeing to a disbursement of earnest moneys, the Broker must disburse the funds not later than the next business day following receipt of the last written direction.

Record Keeping

Sponsoring Brokers must retain copies of all escrow money instruments received from a party as part of the transaction, including copies of all personal checks, cashier's checks, certified checks, money orders, promissory notes, or other financial instruments. The Sponsoring Broker must retain copies of all disbursements from escrow accounts.

Specifically, Sponsoring Brokers must maintain all records for two years on site and must keep them a total of five years.

FAIR HOUSING

CIVIL RIGHTS ACT OF 1866

The first significant statute affecting equal housing opportunity is the federal Civil Rights Act of 1866. Far from being obsolete, this statute has had a major impact on fair housing concepts, through a landmark case in 1968, the year the federal Fair Housing Act became law. Although the 1968 statute, provides for a number of exemptions, the 1866 law has no exemptions and contains the blanket statement that “all citizens have the same rights to inherit, buy, sell, or lease all real and personal property” This statute is interpreted to prohibit all racial discrimination.

FEDERAL FAIR HOUSING ACT OF 1968

Originally enacted by congress as Title VIII of the Civil Rights Act of 1968, the Fair Housing Act prohibits discrimination in housing on the basis of race, color, religion, or national origin. An amendment to the Housing and Community Development Act of 1974 added the prohibition against discrimination on the basis of sex. The Fair Housing Amendments Act of 1988 added provisions to prevent discrimination based on mental or physical handicap or familial status.

Prohibited Acts

As the law presently exists, discrimination on the basis of race, color, religion, sex, national origin, handicap, or familial status is illegal in the sale or rental of housing or residential lots, advertising the sale or rental of housing, financing housing, and providing real estate brokerage services. The act also makes blockbusting and racial steering illegal.

The following specific acts are prohibited:

1. Refusing to sell or rent housing, or to negotiate the sale or rental of residential lots on the basis of discrimination because of race, color, religion, sex, national origin, disability, or familial status. This includes representing to any person on discriminatory grounds “that any dwelling is not available for inspection, sale, or rental when in fact such dwelling is available.” It is also illegal “to refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny a dwelling to a person” because of race, color, religion, sex, national origin, disability, or familial status. Examples of violations of these prohibited acts are:

- advising a prospective buyer that a house has been sold, because of the prospect’s national origin, when it has not;

- refusing to accept an offer to purchase because the offeror is a member of a certain religion;
 - telling a rental applicant that an apartment is not available for inspection because the applicant is a female (or male) when the apartment is actually vacant and available for inspection;
 - refusing to rent to a person who uses a wheelchair or make reasonable modifications (at the tenant’s expense) to an apartment to accommodate the wheelchair; and
 - refusing to rent to a family with children.
2. The Act makes it illegal “to discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, national origin, disability, or familial status.” Examples of prohibited acts in this category are:
- requiring tenants to have a security deposit in an amount equal to one month’s rent, except when the rental applicant is Hispanic, in which case the required deposit is increased to two months’ rent;
 - restricting use of the apartment complex swimming pool to white tenants only;
 - including in the purchase of a condominium apartment a share of stock and membership in a nearby country club, provided the purchaser is not Jewish;
 - charging a larger deposit to a couple with young children; and
 - charging a higher rent to a person in a wheelchair.

Blockbusting/Panic Pedaling

The act specifically makes blockbusting illegal. This practice is defined as “to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, national origin, disability or familial status.” Blockbusting is also known as panic pedaling. Blockbusting occurs when real estate Brokers induce owners to list property for sale or rent by telling them that persons of a particular race, color, national origin, sex, religion, disability, or familial status are moving into the area. Blockbusting also occurs when real estate firms sell a home in an area to a person of a particular race, color, national origin, sex, religion, disability, or familial status with the sole intent to cause property owners in the neighborhood to panic and place their property for sale at reduced or distressed prices.

Steering

In steering, another violation resulting from the acts of licensees, real estate licensees direct prospective purchasers, especially minority purchasers, toward or away from specific neighborhoods to avoid changing the racial or ethnic makeup of neighborhoods. The prohibition against steering falls under the general prohibition of refusing to sell, rent, or negotiate the sale or rental of housing or residential lots. Examples of steering are:

- showing a white prospect properties only in areas populated by white people;

- showing African American prospects properties only in integrated areas or areas populated only by African Americans; and
- showing Polish prospects properties only in areas populated by Poles.

Discriminatory Advertising

Discriminatory advertising, that which shows preference based on race, color, religion, sex, national origin, disability, or familial status, is illegal. The Act specifies that it is illegal to make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, concerning the sale or rental of a dwelling, that indicates any preference, limitation, or discrimination based on race, color, religion, sex, national origin, disability, or familial status. Examples of violations are:

- a series of advertisements for the sale of condominium units or rental apartments containing pictures that show owners or tenants on the property of only one race;
- an advertisement stating that the owner prefers tenants who are male college students;
- a for sale sign specifying “no Puerto Ricans”;
- a statement to prospective white tenants by a real estate Salesperson that black tenants are not permitted; and
- an apartment advertisement stating “adults only.”

Discrimination in Providing Brokerage Services

The act prohibits discrimination in providing real estate brokerage services and states “it is unlawful to deny any person access to or membership or participation in any multiple listing service, real estate Broker’s organization, or other service relating to the business of selling or renting dwellings, or to discriminate against him in the terms or conditions of such access, membership or participation on account of race, color, religion, sex, national origin, disability, or familial status.” This provision of the fair housing law makes illegal the denial of membership or special terms or conditions of membership in any real estate organization on discriminatory grounds. The prohibition extends to access to a multiple listing service.

Illinois Human Rights Act

The Illinois Human Rights Act prohibits discrimination against a person because of race, color, religion, national origin, ancestry, age, sex, marital status, physical or mental disability, perceived disability, unfavorable discharge from the military service, sexual orientation, sexual orientation, or familial status. It prohibits discrimination in the sale or rental of real estate against families with children under the age of 18 or against people with vision, hearing, or physical impairments who require a guide, hearing, or support animal, although a charge can be made for actual damages to the property caused by the animal. Further, no discrimination is allowed against persons with these disabilities in the terms, conditions, privileges, provision of services or facilities, or extra charge in a lease or sales contract.

In states such as Illinois that have a law substantially equivalent to the federal fair housing law, a complaint based on the federal law may be referred to the Illinois Human Rights Commission. The case may be heard by the Illinois Human Rights Commission or, if either party so elects, by a state circuit court.

Contracts relating to real property are void and in violation of civil rights if they forbid or restrict the conveyance, encumbrance, occupancy, or lease of, or limit use of or right of entry on the basis of race, color, religion, or national origin. In addition, the law forbids a refusal to sell or rent and prohibits discriminatory differences in price, terms, or other conditions of a real estate transaction, as well as in financing of the transaction. Property operated, supervised, or controlled by religious institutions or charitable organizations and used for religious or charitable purposes can be limited in the use of such properties.

Americans With Disability Act

The Americans With Disabilities Act (ADA), which took effect on January 26, 1992, specifically protects the rights of individuals with disabilities. Disability is defined in USC 42, sec. 12101, as “a physical or mental impairment that substantially limits one or more of the major life activities of a person.” Individuals with aids, alcoholism, or mental illness are included in this category.

Under this law, individuals with disabilities cannot be denied access to public transportation, any commercial facility, or public accommodation. This act applies to all owners and operators of public accommodations and commercial facilities, regardless of the size or number of employees. It also applies to all local and state governments.

Public accommodations are defined as private businesses that affect commerce and trade, such as inns, hotels, restaurants, theaters, convention centers, bakeries, Laundromats, banks, barber shops, attorneys’ offices, museums, zoos, places of education, day care centers, and health clubs. To comply with this law, public accommodations and facilities are to be designed, constructed, and altered to meet the accessibility standards of the new law. Existing facilities are required to be accessible, if readily achievable. “Readily achievable” means easily accomplishable and able to be carried out without much difficulty or expense. Considerations in determining whether the public accommodation can be made accessible are:

- nature and cost of the needed alteration;
- overall financial resources of the facility involved and number of persons employed;
and
- type of operation of the entity.

Examples of barriers to be removed or alterations to be made include placing ramps, lowering telephones, making curb cuts in sidewalks and entrances, widening doors, installing grab bars in toilet stalls, and adding raised letters on elevator controls.

Your real estate office is subject to the ADA. You might need to make a “reasonable accommodation” for a client or customer. If your office is on the second floor without elevator access, you might arrange to meet them on the first floor or at the coffee house or library.

The Americans with Disabilities Act is enforced by the U.S. Attorney General. Punishment for violating this law includes injunctions against operation of a business, a fine up to \$50,000 for the first offense, and a fine of \$100,000 for any subsequent offense.

Office Policy Manual

It is now mandatory for all Brokerage companies or entities to have an office policy manual. This means that all the real estate corporations, limited liability companies, and partnerships must have a policy manual. A sole proprietor, that does not sponsor any other licensees, is not required to have a policy manual.

Some topics that might be included:

- agency
- fair housing
- harassment
- confidentiality of client information
- Advertising
- training and supervision of sponsored licensees
- Disclosures
- handling of risk
- forms to use
- the handling of earnest money.

When a licensee needs direction and the Managing Broker is not around the licensee can go to the policy manual for guidance. New licensees to the firm can become a quick study of operations because of the policy manual. Licensees have a greater understanding of what the Managing Broker expects of him.

Teams in a Brokerage Office

In the last ten years, teams in a Brokerage office have become common. Teams can only be described as a group of licensees in an office working as a group. While there will be a team leader or “team captain” everyone is working for the Sponsoring Broker, not the team captain. The team might more formally be described as a functional unit working within a brokerage office. The Sponsoring Broker is responsible for the licensee in the team and they must have written employment agreements with the Sponsoring Broker. Their compensation must be paid by the Sponsoring Broker not the team captain. Also, the team cannot incorporate or create another business structure within the office.

RESPA – Real Estate Settlement Procedures Act

RESPA is a very extensive and complicated law. While most of RESPA concerns lending and settlement service providers, there are certain provisions of which every real estate licensee should be aware. Real estate licensees cannot accept referral fees from loan officers or home warranty companies. These are violations of RESPA's anti-kickback policies.

Licensees when referring their client/customers to a company that they own or will receive dividends or profit sharing distributions from must disclose their interest to the client/customer.

Mortgage Fraud

In the past few years, mortgage fraud has grown exponentially. Chicagoland is one the areas with the most instances of mortgage fraud. The FBI found it necessary to establish a Mortgage Fraud Division in Chicago.

Mortgage fraud takes many forms. Anytime the facts as told to the lender are not completely accurate, a fraud has occurred. This includes inflating income on loan applications or showing one contract to the lender and having a different contract between the buyer and the seller. Usually for mortgage fraud to take place there is the need for an "industry insider" to be involved in the transaction. Lying about the amount of earnest money being held by the Broker, fraudulent work experience or job verifications, padding the transaction by including the sale of personal property at inflated prices. Anytime a licensee assists in such actions or any action to withhold or distort the information provided to the lender is committing fraud.

CAN-SPAM

The CAN-SPAM Act was passed to regulate unsolicited email. The CAN-SPAM Act does not make sending unsolicited emails illegal, it sets certain requirements for the sender of the email. The Government commonly uses acronyms and CAN-SPAM is such an example. What does CAN-SPAM stand for? Controlling the Assault of Non-Solicited Pornography and Marketing.

The CAN-SPAM Act doesn't apply only to bulk emails; it regulates "any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service." This is deemed to include email that promotes a website. Your commercial email message must meet requirements listed below.

- Cannot use false or misleading header information. The person or business initiating the message must be accurately identified in the "From," "To," "Reply-to," and routing information – including the originating domain name and e-mail address.

- Cannot use deceptive subject lines. The content of the message must accurately be reflected in the subject line. The message must clearly disclose that it is an advertisement.
- You must tell recipients where you are located. The valid physical postal address of the person or business sending the message must be incorporated in the message. This address can be a current street address or post office box registered with the U. S. Postal Service, or a private mailbox registered with a commercial mail receiving agency established under Postal Service regulations.
- You must have an opt-out provision for recipients to prevent the receipt of future emails. The e-mail must include an explanation of a way the receiver can stop receiving e-mails from the sender in the future. Opt-out requests must be handled promptly, but in no case later than 30 days.
- Monitor what others are doing on your behalf. If another company (or service) is doing your e-mail, you, as well as, the company sending the message will both be held legally responsible for violations.

In addition to regulating commercial email messages, the CAN-SPAM Act regulates transactional or relationship messages. A transactional message may be a confirmation of a message already agreed to; gives a purchaser additional information such as a warranty, recall, or safety information; security information; shipping information on products already agreed to, etc.

If your message qualifies as a transactional or relationship message, it is exempt from the CAN-SPAM Act; however, it may not contain false or misleading routing information.

The National Do Not Call Registry

The National Do Not Call Registry pertains to the selling of goods or services through interstate phone calls. It does not limit calls from political organizations, charities, or telephone surveyors. A telemarketer or seller has 18 months after a consumer's purchase, delivery, or payment to call that consumer, even if the consumer's number is on the National Do Not Call Registry. If a consumer makes an inquiry or fills out an application to the company, the company may call the consumer for up to three months. However, if the consumer asks a company not to call, the company should not call even if there is an established business relationship.

Fax Advertising

Without prior permission, it is unlawful to send unsolicited advertisements to any fax machine, including both businesses and residences. If there is an established business relationship, fax advertisements may be sent. Also, a fax advertisement may be sent to an EBR if the sender:

- Obtains the fax number directly from the recipient through an application, contact information form, or membership renewal form
- Obtains the fax number from the recipient's own directory, advertisement, or website, unless the recipient has stated on such materials that it does not accept unsolicited advertisements at the fax number provided
- Has taken reasonable steps to verify that the recipient gave permission to have the number listed, if obtained from a directory or third party

Senders of allowable fax advertisements must allow recipients to "opt-out" of future faxes. The notice must:

- Be clear and noticeable on the first page of the advertisement
- State that the recipient may request that the sender not send any future faxes and that it is unlawful if the sender fails to comply with the request within 30 days
- Include a telephone number, fax number, and a cost-free method (a toll-free telephone number, local number for local recipients, toll-free fax number, website address, or e-mail address) to opt-out of future faxes. These methods must be available to consumers who want to make an opt-out request 24 hours a day seven days a week.