

Core B: Legal Issues – Disclosures COR 1658

Note: Time and space constraints do not allow for discussion of ALL of the required disclosure issues involved in a real estate transaction. Just because something is not discussed in this course does not mean it is not a required disclosure. These issues are – at the moment – the most compelling and are of greatest concern. Obviously these issues could – and do – change frequently.

Enforcement of the Residential Lead-Based Paint Hazard Reduction Act

The Regulations developed by U.S. EPA and HUD requiring disclosure of lead-based paint and lead-based paint hazards in connection with residential housing sale and lease transactions went into effect in December of 1996. Since then, enforcement actions have occurred and substantial fines have been imposed. In cases where a seller or lessor utilizes the services of an agent, the agent has the responsibility to inform the seller/lessor of their obligations under the Act and to ensure compliance. Failure to comply can result in fines of up to \$63,500 per transaction.

- There are 11 possible violations per lease transaction and 13 possible violations per sales transaction. This is due to the inspection issues involved in a sale that are not a part of a lease transaction.
- The base amount of the penalty assessed for a violation is based on the nature, circumstances and extent of harm which may result and may range from \$110 to \$11,000.
- Multiple penalties may be imposed where there are several violations in a single transaction.
- The base penalty amount is adjusted based on factors such as:
 - history of prior violations
 - the extent to which the violator had knowledge of the requirements and/or
 - the extent they had control over the conditions
 - whether the violator voluntarily reported the violation
- Violations involving pregnant women or young children are viewed more harshly than those not involving children and will be subject to more severe penalties

Quiz on Lead Paint Disclosure

1. HUD/EPA do not hold agents responsible for any portion of the Lead Paint Act. T F
2. The maximum fine for non-compliance with the Lead Paint Act is \$63,500. T F
3. There is no difference in the disclosures between sales transactions and lease transactions. T F
4. HUD/EPA take into consideration history of prior violations, whether the violator knew the requirements and the extent to which they had control over the conditions when assessing fines. T F
5. Violations involving young children will be viewed more harshly than those not involving children and will be subject to more severe penalties. T F



Enforcement of the Illinois Residential Real Property Disclosure Law

Who is responsible for making the disclosure?

Sellers of residential property, 4 units or less, regardless of whether they are selling by-owner or with a licensed real estate broker.

Are there any exceptions?

1. Transfers of property pursuant to a court order, including but not limited to, transfers
 - a. ordered by a probate court in administration of an estate
 - b. between spouses resulting from a divorce or legal separation
 - c. pursuant to an order of possession
 - d. by a trustee in a bankruptcy
 - e. eminent domain
 - f. resulting from a decree for specific performance
2. Transfers by deed in lieu of foreclosure, foreclosure sale, consent judgment or judicial deed issued pursuant to a foreclosure sale
3. Transfers by a fiduciary in the course of the administration of an estate, guardianship, conservatorship or trust
4. Transfers from one co-owner to one or more other co-owners.
5. Transfers pursuant to testate or intestate succession.
6. Transfers made to a spouse, or to a person or persons in the lineal line of consanguinity of one or more of the sellers.
7. Transfers from an entity that has take title to residential real property from a seller for the purpose of assisting in the relocation of the 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.
8. Transfers to or from any governmental entity
9. Transfers of newly constructed residential real property that has not been occupied.

Is there a specific form that must be used?

Yes. The Residential Real Property Disclosure Report Form must be used. It can, however, be supplemented by additional forms.

When should it be delivered?

Prior to the signing of the contract

What is the seller's liability?

1. The seller is not liable for any error, inaccuracy or omission of any information delivered pursuant to this act if:
 - a. the seller had no knowledge of the error, inaccuracy or omission
 - b. the error, inaccuracy, or omission was based on a reasonable belief that a material defect or other matter not disclosed had been corrected
 - c. the error, inaccuracy, or omission was based on information provided by a public agency or by a licensed engineer, land surveyor, structural pest control operation, or by a contractor about matters within the scope of the contractor's occupation and the seller had no knowledge of the error, inaccuracy, or omission.
2. The seller shall disclose material defects of which the seller has actual knowledge
3. The seller is not obligated by the Act to make any specific investigation or inquiry in an effort to complete the disclosure statement.

What is the disclosure supplement?

If prior to closing, any seller has actual knowledge of an error, inaccuracy, or omission in any prior disclosure document after delivery of that disclosure document to a prospective buyer, that seller shall supplement the prior disclosure document with a written supplemental disclosure.

What are the buyers rights?

If a material defect is disclosed in the Report Form after acceptance of the offer and prior to the closing, the buyer may, within three business days after receipt of that Report, terminate the contract or other agreement without any liability or recourse except for the return to prospective buyer of all earnest money deposits or down payments paid by them in the transaction.

If a material defect is disclosed in a supplement, the prospective buyer shall not have a right to terminate unless the material defect results from an error, inaccuracy, or omission of which the seller had actual knowledge at the time the prior disclosure document was completed and signed by the seller.

No action for violation of this Act may be commenced later than one year from the earlier of the date of possession, date of occupancy or date of recording of a deed.

Quiz on Illinois Residential Property Disclosure Law

1. Sellers selling without the assistance of real estate licensees are not subject to the Illinois Property Disclosure Law. T F
2. The seller must disclose material defects of which they have actual knowledge. T F
3. If a material defect is disclosed in the Report Form after acceptance of the offer and prior to the closing, the buyer may terminate the contract within three business days. T F
4. The law requires the listing agent to assist the seller in accurately filling out the form. T F
5. Sellers have no responsibility to disclose a prior defect that if they have a reasonable belief the defect has been corrected. T F

Radon Awareness Act

When a buyer and seller sign a contract on residential real estate property in Illinois the new Illinois Radon Awareness Act will apply to the sales transaction. The seller must supply the buyer with two documents before the buyer will become bound on a contract to purchase the property. The first is a pamphlet from the Illinois Emergency Management Agency (IEMA) entitled "Radon Testing Guidelines for Real Estate Transactions." The second is a form to sign called "Disclosure of Information on Radon Hazards."

Exemptions

The law only applies to residential properties with "not less than one nor more than four residential dwelling units." Exemptions include residential real estate property transfers that result from the following:

- a court order
- transfer to a mortgagor to a mortgagee after foreclosure
- to a fiduciary through an estate, guardianship, conservatorship or trust
- a transfer between co-owners
- a transfer from an estate according to provisions in a will, or to statute where there is no will
- transfer to a spouse or other blood relation
- a relocation company who has taken the title, where the original seller has provided the required disclosures
- to or from a governmental body

Disclosure of Stigmatized Properties and Off-Site Influences

The disclosure of stigmatized properties is different depending on who you represent. If you are the listing agent and represent the seller then there is no requirement that you disclose that the property was the site of a murder, suicide, etc. If, on the other hand, you represent the buyer and your obligations are to protect them from foreseeable risks or harm, then disclosing what you know about the property or the surrounding area, provided it does not violate any other laws such as fair housing, would be required.

The Illinois License Law states that no cause of action can be brought against a licensee for not disclosing. This is to protect the listing agent from having to disclose it to a buyer and protects the buyer agent from having to discover it. A buyer agent should disclose what he knows and recommend the buyer seek out other information on the property that may be important to him.

Article 2 of the Code of Ethics

Realtors® shall avoid exaggeration, misrepresentation, or concealment of pertinent fact relating to the property or the transaction. Realtors® shall not, however, be obligated to discover latent defects in the property, to advise on matters outside the scope of their real estate license, or to disclose facts which are confidential under the scope of agency duties owed to their clients.

- **Standard of Practice 2-1**
Realtors® shall only be obligated to discover and disclose adverse factors reasonably apparent to someone with expertise in those areas required by their real estate licensing authority. Article 2 does not impose upon the Realtor® the obligation of expertise in other professional or technical disciplines.

Section 15-20 of the Illinois Real Estate License Act

No cause of action shall arise against a licensee for the failure to disclose:

- (i) that an occupant of the property was afflicted with Human Immunodeficiency Virus (HIV) or any other medical condition
- (ii) that the property was the site of an act or occurrence that had no effect on the physical condition of the property or its environment or the structures located thereon;
- (iii) fact situations on property that is not the subject of the transaction
- (iv) physical conditions located on property that is not the subject of the transaction that do not have a substantial adverse effect on the value of the real estate that is the subject of the transaction.

AIDS Disclosure

The 1988 Fair Housing Act Amendments established the handicapped, which includes people diagnosed with AIDS, as a new protected class.

According to HUD, it is illegal for real estate agents to make unsolicited disclosures that a current or former occupant of the property has AIDS. If a prospective purchaser directly asks an agent if a current or former occupant has AIDS, and the agent knows this is in fact true, HUD advises that the agent should not respond. NAR advises that the agent respond as follows:

"It is the policy of our firm not to answer inquiries of this nature one way or the other since the firm feels that this information is not material to the transaction. In addition, any type of response by me or other agents of our firm may be a violation of the federal fair housing laws. If you believe that this information is relevant to your decision to buy the property, you must pursue this investigation on your own."

Other Stigmas

The National Association of Realtors® defines stigmatized property as “a property that has been psychologically impacted by an event which occurred, or was suspected to have occurred, on the property, such event being one that has no physical impact of any kind.”

Section 15-15: Duties of licensees representing clients

(a) A licensee representing a client shall promote the best interests of the client by:

Disclosing to the client material facts concerning the transaction of which the licensee has actual knowledge, unless that information is confidential information. Material facts do not include the following when located on or related to real estate that is not the subject of the transaction:

- (i) physical conditions
- (ii) fact situations or occurrences that do not have a substantial adverse effect on the value of the real estate

Since the final determination of whether an off-site event or a stigma on the property has a ‘substantial adverse effect on the value of the real estate’ is often left to the courts when Buyer Agents get sued for not disclosing what they know, it would seem prudent that a Buyer Agent who knows of fact situations that could affect the buyer’s decision to purchase the property should disclose those facts and let the buyer-client decide whether they are substantial.

Quiz on Radon Disclosure and Stigmatized Properties and Off-Site Influences

1. Article 2 of the Code of Ethics obligates Realtors® to discover latent defects in the property. T F
2. The Illinois License Act requires that an agent disclose if they know the former or current owner of the property had HIV or any other medical condition. T F
3. Illinois License Law requires that a licensee disclose to their client material facts concerning the transaction of which the licensee has knowledge. T F
4. A buyer agent should not disclose to his buyer client any information related to stigmas on the property since this could harm the seller in the transaction. T F
5. There are two disclosures required under the Radon Awareness Act, the form itself and the informational pamphlet. T F



Agency Disclosure

Section 15-35. Agency relationship disclosure

(a) A consumer shall be advised of the following no later than entering into a brokerage agreement with the sponsoring broker:

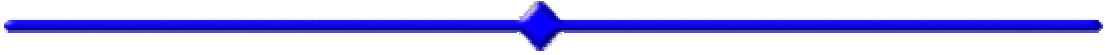
- (1) That a designated agency relationship exists, unless there is written agreement between the sponsoring broker and the consumer providing for a different brokerage relationship
 - (2) The name or names of his or her designated agent or agents in writing (see Notice of Buyer Representation form)
 - (3) The sponsoring broker's compensation and policy with regard to cooperating with brokers who represent other parties in a transaction
- (b) A licensee shall disclose in writing to a customer that the licensee is not acting as the agent of the customer at a time intended to prevent disclosure of confidential information from a customer to a licensee, but in no event later than the preparation of an offer to purchase or lease real property. This subsection (b) does not apply to residential lease or rental transactions unless the lease or rental agreement includes an option to purchase real estate.

Section 15-45. Dual agency

- (a) A licensee may act as a dual agent only with the informed written consent of all clients. Informed written consent shall be presumed to have been given by any client who signs a document that includes the following: (Note: Appropriate language is contained in the Dual Agency Disclosure and Consent form)
- (b) The dual agency disclosure form provided for in subsection (a) must be presented by a licensee who offers dual representation to the client at the time the brokerage agreement is entered into and may be signed by the client at that time or at any time before the licensee acts as a dual agent as to the client.
- (c) A licensee acting in a dual agency capacity in a transaction must obtain a written confirmation from the licensee's clients of their prior consent for the licensee to act as a dual agent in the transaction. This confirmation should be obtained at the time the clients are executing any offer or contract to purchase or lease in a transaction in which the licensee is acting as a dual agent. (See Confirmation of Consent to Dual Agency form)
- (d) In any transaction a licensee may without liability withdraw from representing a client who has not consented to a disclosed dual agency. The licensee shall not receive a referral fee for referring a client to another licensee unless written disclosure is made to both the withdrawing client and the client that continues to be represented by the licensee.

Quiz on Agency Disclosure

1. License Law requires that the name of the designated agent be disclosed in writing at the time the agent begins representing the client. T F
2. License Law does not require any written disclosure if the licensee is not representing the consumer. T F
3. Dual agency may be done only with the informed written consent of all clients. T F
4. License Law does not stipulate the language to be used in the dual agency disclosure. T F
5. Confirmation of the client's consent for the licensee to act as a dual agent must be given at the time the clients are executing an offer or contract to purchase. T F



Disclosure of Compensation

Section 10-10.

- (a) A licensee must disclose to a client the sponsoring broker's compensation and policy with regard to cooperating with brokers who represent other parties in a transaction
- (b) A licensee must disclose to a client all sources of compensation related to the transaction received by the licensee from a third party.
- (c) If a licensee refers a client to a third party in which the licensee has greater than a 1% ownership interest or from which the licensee receives or may receive dividends or other profit sharing distributions, other than a publicly held or traded company, for the purpose of the client obtaining services related to the transaction, then the licensee shall disclose that fact to the client at the time of making the referral.
- (d) If in any one transaction a sponsoring broker receives compensation from both the buyer and seller or lessee and lessor of real estate, the sponsoring broker shall disclose in writing to a client the fact that the compensation is being paid by both buyer and seller or lessor and lessee.

Article 1 of the Code of Ethics (Standard of Practice 1-12)

When representing a buyer, seller, landlord, tenant, or other client as an agent, REALTORS® pledge themselves to protect and promote the interests of their client. This obligation to the client is primary, but it does not relieve REALTORS® of their obligation to treat all parties honestly. When serving a buyer, seller, landlord, tenant or other party in a non-agency capacity, REALTORS® remain obligated to treat all parties honestly. (*Amended 1/01*)

Standard of Practice 1-12

When entering into listing contracts, REALTORS® must advise sellers/ landlords of:

- 1) the REALTOR®'s company policies regarding cooperation and the amount(s) of any compensation that will be offered to subagents, buyer/tenant agents, and/or brokers acting in legally recognized non-agency capacities;
- 2) the fact that buyer/tenant agents or brokers, even if compensated by listing brokers, or by sellers/landlords may represent the interests of buyers/tenants; and
- 3) any potential for listing brokers to act as disclosed dual agents, e.g., buyer/tenant agents. (*Adopted 1/93, Renumbered 1/98, Amended 1/03*)

Article 3 of the Code of Ethics (Standard of Practice 3-4)

Realtors®, acting as listing brokers, have an affirmative obligation to disclose the existence of dual or variable rate commission arrangements (i.e., listings where one amount of commission is payable if the listing broker's firm is the procuring cause of sale/lease and a different amount of commission is payable if the sale/lease results through the efforts of the seller/landlord or a cooperating broker).

Quiz on Disclosure of Compensation

1. A broker cannot receive compensation from both buyer and seller in the same transaction. T F
2. If a licensee refers a client to a third party in which the licensee has interest, the relationship must be disclosed to the client at the time of making the referral. T F
3. The Code of Ethics requires listing brokers to disclose the existence of dual or variable rate commission arrangements. T F
4. At the time the listing agreement is signed the listing agent has a responsibility to disclose to the seller how much compensation is being offer to co-operating brokers in the transaction. T F



Affiliated Business Arrangements

RESPA regulatory requirements apply to transactions that may involve a loan on residential real estate. RESPA generally prohibits payment of referral fees, unearned fees or kickbacks, as well as the splitting or sharing of fees or charges made or received for providing "real estate settlement services."

RESPA has particular provisions and regulations relating to affiliated business arrangements between real estate brokerage firms and affiliated mortgage companies or other settlement service providers, where there is a 1% or more common ownership between the companies. A referrer (who is a settlement service provider) may refer to affiliates (who are settlement service providers) if all of the following three requirements are satisfied:

- (1) Disclosure/notice is given to the consumer at or before the time each referral is made
 - (2) The consumer is not required to use any particular provider of settlement services, and
 - (3) The only thing of value that is received from the arrangement (other than reasonable payments for goods, facilities or services actually furnished) is a return on the ownership interest
- An Affiliated Business Arrangement Disclosure Statement form should be developed and used to comply with the first of these three requirements.
 - If the referral is made verbally, then the written disclosure must be given to the consumer within 3 business days after the referral, and in such case an abbreviated verbal disclosure of the existence of the arrangement and the fact that a written disclosure will be provided within 3 business days must be made to the consumer during the telephone referral.
 - The disclosure form in any situation must be a separate document, and not combined with other forms.

- The consumer should be asked to sign a receipt or acknowledgment of the disclosure; and if the consumer refuses to sign the acknowledgment of such disclosure, that fact should be noted in the records maintain by the referrer regarding such referrals.
- The RESPA regulations require that the referrer retain each signed disclosure document for 5 years after its execution.
- The disclosure form needs to contain a notice stating something like this: "You are NOT required to use [the specified affiliated service provider] as a condition for purchase, sale, or refinance of the subject property."
- The last of the three criteria means that this "exemption" for affiliated business arrangements allows referrals between affiliated businesses, but does not create a mechanism for the payment of referral fees between affiliated businesses. Payment of referral fees between a real estate brokerage firm and its affiliated mortgage company is still prohibited.
- RESPA regulations state that a return on ownership interest does not include payments that vary by the amount of actual, estimated or anticipated referrals or payments based on ownership shares that have been adjusted on the basis of previous referrals.
- Although the agents themselves who make the referrals will generally not be receiving any benefit of the referral since they cannot receive referral fees, the broker or owner of the affiliated entities will. This triggers the need for disclosure.

Quiz on Affiliated Business Arrangements

1. Referral fees between a mortgage company and real estate agents who refer buyers to them can only be done if the broker owns both the real estate office and the mortgage company. T F
2. Disclosure of the affiliated business arrangement must be made to the client at the time the referral is made. T F
3. Disclosure is only required if the agent is receiving benefit of the referral. T F
4. The disclosure form signed by the person who is being referred must state that they are not required to use the affiliated service provider. T F
5. The disclosure form may be a part of a listing agreement, buyer agency agreement or other agreement or disclosure form provided it has been signed by the client being referred. T F



Disclosure of Licensee Status and Advertising

Article 4 of the Code of Ethics

Realtors® shall not acquire an interest in or buy or present offers from themselves, any member of their immediate families, their firms or any member thereof, or any entities in which they have any ownership interest, any real property without making their true position known to the owner or the owner's agent. In selling property they own, or in which they have any interest, Realtors® shall reveal their ownership or interest in writing to the purchaser or the purchaser's representative.

Article 5 of the Code of Ethics

Realtors® shall not undertake to provide professional services concerning a property or its value where they have a present or contemplated interest unless such interest is specifically disclosed to all affected parties.

Section 10-27 of the Illinois License Law

Each licensee shall disclose, in writing, his or her status as a licensee to all parties in a transaction when the licensee is selling, leasing or purchasing any interest, direct or indirect, in the real state that is the subject of the transaction.

Section 10-30. Advertising

- (a) No advertising shall be fraudulent, deceptive, inherently misleading, or proven to be misleading in practice. It shall be considered misleading or untruthful if, when taken as a whole, there is a distinct and reasonable possibility that it will be misunderstood or will deceive the ordinary purchaser, seller, lessee, lessor, or owner. Advertising shall contain all information necessary to communicate the information contained therein to the public in a direct and readily comprehensible manner.
- (b) No blind advertisements may be used by any licensee except as provided for in this Section.
- (c) A licensee shall disclose, in writing, to all parties in a transaction his or her status as a licensee and any and all interest the licensee has or may have in the real estate constituting the subject matter thereof, directly or indirectly, according to the following guidelines:
 - (1) On broker yard signs or in broker advertisements, no disclosure of ownership is necessary. However, the ownership shall be indicated on any property data form and disclosed to persons responding to any advertisement or any sign. The term "broker owned" or "agent owned" is sufficient disclosure.
 - (2) A sponsored or inoperative licensee selling or leasing property, owned solely by the sponsored or inoperative licensee, without utilizing brokerage services of their sponsoring broker or any other licensee, may advertise "By owner". For purposes of this Section, property is "solely owned" by a sponsored or inoperative licensee if he or she (i) has a 100% ownership interest alone, (ii) has ownership as a joint tenant or tenant by the entirety, or (iii) holds a 100% beneficial interest in a land trust. Sponsored or inoperative licensees selling or leasing "By Owner" shall comply with the following if advertising by owner:
 - On "By Owner" yard signs, the sponsored or inoperative licensee shall indicate "broker owned" or "agent owned." "By Owner" advertisements used in any medium of advertising shall include the term "broker owned" or "agent owned."

- If a sponsored or inoperative licensee runs advertisements, for the purpose of purchasing or leasing real estate, he or she shall disclose in the advertisements his or her status as a licensee.
 - A sponsored or inoperative licensee shall not use the sponsoring broker's name or the sponsoring broker's company name in connection with the sale, lease or advertisement of the property nor utilize the sponsoring broker's or company's name in connection with the sale, lease or advertising of the property in a manner likely to create confusion among the public as to whether or not the services of a real estate company are being utilized or whether or not a real estate company has an ownership interest in the property.
- (d) A sponsored licensee may not advertise under his or her own name. Advertising shall be under the direct supervision of the sponsoring or managing broker and in the sponsoring broker's business name, which in the case of a franchise shall include the franchise affiliation as well as the name of the individual firm. This provision does not apply under the following circumstances:
- (1) When a licensee enters into a brokerage agreement relating to his or her own real estate, or real estate in which he or she has an ownership interest, with another licensed broker; or
 - (2) When a licensee is selling or leasing his or her own real estate or buying or leasing real estate for himself or herself, after providing the appropriate written disclosure of his or her ownership interest as required in paragraph (2) of subsection "C" of this Section.
- (e) No licensee shall list his or her name under the heading or title "Real Estate" in the telephone directory or otherwise advertise in his or her own name to the general public through any medium of advertising as being in the real estate business without listing his or her sponsoring broker's business name.
- (f) The sponsoring broker's business name and the name of the licensee must appear in all advertisements, including business cards. Nothing in this Act shall be construed to require specific print size as between the broker's business name and the name of the licensee.

Quiz on Disclosure of Licensee Status and Advertising

1. A licensee must disclose his or her status as a licensee when either buying or selling. T F
2. The License Law prohibits licensees from selling or advertising their property 'by owner'. T F
3. The sponsoring broker's business name must be larger than the agent's name in all advertising. T F
4. Although someone with a Salesperson's license could not advertise without using the Sponsoring Broker's name, someone with a Broker's license can. T F
5. Doing a CMA on a property a REALTOR® has an interest in purchasing without disclosing that interest to the seller would be a violation of both Code of Ethics and License Law. T F

Answers to Quizzes

Quiz on Lead Paint Disclosure Issues

1. F
2. T
3. F
4. T
5. T

Quiz on Illinois Residential Property Disclosure Law

1. F
2. T
3. T
4. F
5. T

Quiz on Radon Disclosure and Stigmatized Properties and Off-Site Influences

1. F
2. F
3. T
4. F
5. T

Quiz on Agency Disclosure

1. T
2. F
3. T
4. F
5. T

Quiz on Disclosure of Compensation

1. F
2. T
3. T
4. T

Quiz on Affiliated Business Arrangements

1. F
2. T
3. F
4. T
5. F

Quiz on Disclosure of Licensee Status and Advertising

1. T
2. F
3. F
4. F
5. T