

# GUIDANCE FOR REVISED FORM BROKERAGE AGREEMENTS



## List by Title and Short Descriptions for Each Form

### BUYER BROKERAGE AGREEMENTS (w/ short descriptions)

#### 341 Non-Exclusive Buyer Representation Agreement

- ▶ The most basic of the buyer brokerage form agreements
- ▶ Formerly known as “Terms of Buyer Brokerage”

#### 339 Non-Exclusive Buyer Representation Contract (w/Dual Agency Consent)

- ▶ Another “non-exclusive” option but with more provisions to define the relationship
- ▶ Contains dual agency disclosure and consent

#### 339a Non-Exclusive Buyer Representation Contract (w/o Dual Agency Consent)

- ▶ Same as 339 but no dual agency disclosure and consent included

#### 338 Exclusive Right to Acquire (w/Dual Agency Consent)

- ▶ Binds buyer to brokerage company in an exclusive relationship
- ▶ Contains dual agency disclosure and consent

#### 338a Exclusive Right to Acquire (w/o Dual Agency Consent)

- ▶ Same as 338 but no dual agency disclosure and consent included

#### 337 Exclusive Buyer Representation Agreement (w/Dual Agency Consent)

- ▶ Buyer reserves the right to acquire on their own without any agents, i.e. purchasing a for sale by owner property where there are no agents on either side
- ▶ Contains dual agency disclosure and consent

#### 337a Exclusive Buyer Representation Agreement (w/o Dual Agency Consent)

- ▶ Same as 337 but no dual agency disclosure and consent included

#### Compensation Disclosure Statement to Buyer

- ▶ This document amends existing agreements that don't contain the required “fully negotiable” statement

#### Affirmation to Seller's Broker

- ▶ This document assures the listing broker who asks that there is a written buyer brokerage agreement in place

## SELLER'S BROKERAGE AGREEMENTS (w/ short descriptions)

### 342 Exclusive Right to Sell Contract (w/Dual Agency Consent)

- ▶ Binds seller to brokerage company in an exclusive relationship
- ▶ Contains dual agency disclosure and consent

### 342a Exclusive Right to Sell Contract (w/o Dual Agency Consent)

- ▶ Same as 342 but no dual agency disclosure and consent included

### 425 Exclusive Seller Representation Contract (w/Dual Agency Consent)

- ▶ Binds seller to brokerage company in an exclusive relationship but seller reserves the right to try to sell to an unrepresented buyer where there are no agents involved on either side
- ▶ Contains dual agency disclosure and consent

### 425a Exclusive Seller Representation Contract (w/o Dual Agency Consent)

- ▶ Same as 425 but no dual agency disclosure and consent

### Compensation Disclosure Statement to Seller

- ▶ This document amends existing agreements that don't contain the required "fully negotiable" statement

**Note:** Illinois REALTORS® has not historically, and to date, has not created any non-exclusive seller brokerage agreements, due to a lack of demand for these forms. Sellers are free to search for listing brokers who will provide services on a non-exclusive basis and draft agreements that suit their needs and purposes. Illinois REALTORS® will monitor requests for this type of agreement and analyze whether a sufficient demand exists for production in the future.

## General Explanations on use of Illinois REALTORS® Forms

1. Managing brokers should educate their brokers on the requirement to use some type of basic written agreement when they are serving their clients. Companies must make independent business decisions on the types of brokerage services they will offer and select the appropriate forms for their use.
2. A written agreement should be provided to the client at the time the broker begins performing brokerage services for the client. The form will contain the required written disclosure of the clients' designated agent, and it should be signed by all parties no later than when touring a property, whether physically or virtually.
3. Determine whether the office permits disclosed dual agency. This will help in selecting the appropriate forms.
4. **Some options for payment of brokerage compensation are purposely left off the brokerage agreement forms. Brokers should have conversations with their respective clients about the possibilities for making requests for concessions to cover buyers' costs and/or covering the cost of the buyers' brokers' compensation through their purchase contract negotiations.**

For example, where there is a buyer brokerage agreement obligating the buyer to pay compensation to their broker, the broker might counsel the buyer about trying to recoup that cost, as well as other buyer's costs as part of their offer to purchase. If there is not a form that is part of the local/regional form purchase contract, the broker might need to advise their client to seek legal assistance for drafting purchase contract language.

On the other hand, sellers may elect to offer concessions to assist with buyer closing costs to attract more buyers, which, where permitted by the local/regional MLS, could be mentioned in MLS remarks so long as

they are not limited to or conditioned on payment to buyer brokers.

In short, concessions or assistance with buyers' costs can be negotiated between the parties in the context of their purchase contracts.

While Illinois REALTORS® acknowledges and trains on these options, and encourages brokerages to train on these options, they are purposely not mentioned in the brokerage agreement forms, which are between the listing brokerages and sellers on the listing side, and buyer brokerages and their buyer clients on the buyers' side.

5. Illinois REALTORS® intentionally includes blanks where decisions need to be made between the parties to the agreement they are negotiating. Brokers should take care to also leave these sections blank until they are at the "table" negotiating the specific terms of their brokerage relationships with their respective clients. Negotiation is the key to consumer understanding and buy-in in exchange for the professional services brokers provide for their clients, serving the clients' best interests over their own.
6. It is highly recommended that brokers take time to go through brokerage agreements with their seller clients, so everyone is on the same page as the brokers use their expertise to market and sell their homes seeking the largest pool of prospective buyers possible.

Likewise, it is equally important and recommended that brokers do the same for their buyer clients so their buyers understand the valuable services their brokers will provide them in exchange for their negotiated compensation.

## **“Form Specific” Explanations on use of Illinois REALTORS® Forms**

This explainer document does not break down every single provision of each form but does highlight some of the changes that were made to the various types of agreements.

### **Notes for Non-Exclusive Buyer Representation Contract (Form 341)**

- ▶ Duration – This form is the most basic one of the buyer brokerage agreements. As such, the duration provision is very straightforward and provides for a definite termination date which can be any length of time so long as it is less than one year. If more than a year is needed, this form is not recommended.
- ▶ Property Specific Option – The parties may agree to use this agreement for touring one particular property.
- ▶ Compensation – There are options for the broker and the client to consider and negotiate. If the third option is selected, be sure that the amount due from the buyer will be clear and can be determined, e.g. a retainer of \_\_\_\_, and hourly fee of \_\_\_\_.
- ▶ Agreement By Buyer Not to Enter an Exclusive Agreement – This provision is included to avoid “battle of the contracts issues.”

### **Notes for Non-Exclusive Buyer Representation Contracts (Forms 339 and 339a)**

- ▶ Duration – Select the appropriate option depending on the situation. The language in each is required by Illinois law. In short there can be a definite termination date negotiated. Or the contract could renew annually. But, if any brokerage agreement is for longer than one year, the client must have an option to cancel each year on at least 30 days' notice.
- ▶ Property Specific Option – Like the basic non-exclusive form, this one also provides that this agreement can be made related to one (or maybe more) particular property(ies).

- ▶ Compensation - There are options for the broker and the client to consider and negotiate. If the third option is selected, be sure that the amount due from the buyer will be clear and can be determined, e.g. a retainer of \_\_\_\_, and hourly fee of \_\_\_\_\_. There might be options to help the buyer client recoup the compensation they have agreed to pay per this agreement, which should be fully discussed with the buyer client, some of which are discussed above.
- ▶ Wire Fraud Warning – This is new to Illinois REALTORS® form brokerage agreements.
- ▶ Consent to Contact – This provision used to be included at the end of the agreements after signatures but given interest by federal agencies in service providers contacting consumers by various methods, like texting, without consent, Illinois REALTORS® now includes this as clearly part of their contractual agreement.

**Notes for Exclusive Right to Acquire Contracts and Exclusive Buyer Representation Contracts (Forms 338, 338a, 337 and 337a)** – Each of these forms contain similar provisions so they will be discussed together. The “Right to Acquire” contracts are analogous to the exclusive right to sell agreement where the buyer agrees to pay if they buy within the contract period. The “Buyer Representation” forms reserve buyer the right to try to buy on their own where no other broker is involved on either side of the transaction, i.e. buyer on their own purchases from a FSBO. In both sets of forms, one has dual agency disclosure and consent language in it, and the other does not.

- ▶ Duration – Select the appropriate option depending on the situation. The language in each is required by Illinois law. In short there can be a definite termination date negotiated. Or the contract could renew annually. But, if any brokerage agreement is for longer than one year, the client must have an option to cancel each year on at least 30 days’ notice.
- ▶ Compensation - There are options for the broker and the client to consider and negotiate. If the third option is selected, be sure that the amount due from the buyer will be clear and can be determined, e.g. a retainer of \_\_\_\_, and hourly fee of \_\_\_\_\_. There might be options to help the buyer client recoup the compensation they have agreed to pay per this agreement, which should be fully discussed with the buyer client, some of which are discussed above.
- ▶ Wire Fraud Warning – This is new to Illinois REALTORS® form brokerage agreements.
- ▶ Consent to Contact – This provision used to be included at the end of the agreements after signatures but given interest by federal agencies in service providers contacting consumers by various methods, like texting, without consent, Illinois REALTORS® now includes this as clearly part of their contractual agreement.

**Notes regarding the Disclosure Statement and Affirmation documents**

- ▶ **Compensation Disclosure Statement to Buyer** – This document will amend existing buyer brokerage agreements with the conspicuous statement that the compensation is fully negotiable and not set by law as required by the practice changes.
  - ▷ If the brokerage agreement does not refer to the MLS in a cooperating or compensation section, no further amendment should be needed.
  - ▷ If the brokerage agreement does refer to the MLS in a cooperating or compensation section, the agreement should be amended to remove those references, or a new agreement should be executed.
  - ▷ If a purchase contract was pending prior to August 17, 2024, you should be able to close the transaction with no further action. Consult with your attorney for specific advice.
- ▶ **Affirmation to Seller’s Broker of Buyer’s Representation Agreement** – this document is very simply a written statement assuring the listing side that the buyer has signed some form of written buyer brokerage agreement. The listing side does not have a right to many of the details of that relationship without the buyer’s consent.

**Notes for Exclusive Right to Sell Contracts and Exclusive Representation Contracts (Forms 342, 342a, 425 and 425a)** – These forms are familiar except for changes needed due to the settlement agreement. This is where the focus will be on these documents. The “Exclusive Representation” contracts allow the seller the right to try to sell on their own with no brokers involved. In both sets of forms, one has dual agency disclosure and consent language in it, and the other does not.

- ▶ Compensation – This section calls for the seller to pay the listing broker only, with no authority for the listing broker to offer compensation to the buyer’s side cooperating broker.
  - ▷ There are options for how to pay the listing broker. Seller and listing agent should negotiate and determine which option is best for their seller and select one.
  - ▷ The third option is available for the parties to select a method of payment other than a percentage of the purchase price or a predetermined flat fee. If the third option is chosen, such as a retainer with an hourly fee, the amounts should be objectively ascertainable.
  - ▷ There is also a note that the seller’s agent has discussed options for offering to assist the buyer’s side to encourage the largest possible pool of buyers for the listing. One possible option is for the seller to authorize the listing broker to suggest that the buyer include any request for help with their buyer brokerage compensation in the buyer’s offer to purchase.
- ▶ Wire Fraud Warning – This is new to Illinois REALTORS® form brokerage agreements.
- ▶ Consent to Contact – This provision used to be included at the end of the agreements after signatures but given interest by federal agencies in service providers contacting consumers by various methods, like texting, without consent, Illinois REALTORS® now includes this as clearly part of their contractual agreement.

**Notes regarding the Disclosure Statement**

- ▶ **Compensation Disclosure Statement to Seller** – This document will amend existing listing side brokerage agreements with the conspicuous statement that the compensation is fully negotiable and not set by law as required by the practice changes.
  - ▷ If the brokerage agreement does not refer to the MLS in a cooperating or compensation section, no further amendment should be needed.
  - ▷ If the brokerage agreement does refer to the MLS in a cooperating or compensation section, the agreement should be amended to remove those references, or a new agreement should be executed.
  - ▷ If a purchase contract was pending prior to August 17, 2024, you should be able to close the transaction with no further action. Consult with your attorney for specific advice.