

The New York
REALTORS®'
Guide to Agency
Disclosure

Amended law to
take effect on
January 1, 2008

representing the buyer's best interest

Act as an agent of the seller



at the time of first substantive contact

This form was provided to me by _____

obtain a signed acknowledgement from the seller

Gov. Eliot Spitzer signed into law an amendment to the agency disclosure law on August 15, 2007. This NYSAR-supported amendment includes changes to the agency disclosure form and all licensees will be required to use the new form starting January 1, 2008.

On January 1, 2007, real estate licensees throughout New York State were required to utilize the amended agency disclosure form pursuant to Real Property Law §443. Between December of 2006 and February of 2007, the New York State Department of State (DOS) released numerous directives in an attempt to clarify certain portions of the agency disclosure form. The new amended agency disclosure law incorporated many of DOS's clarifications as well as a few other items aimed at further simplifying the agency disclosure process. This article will highlight the new changes and help to better clarify the role of a licensee in complying with the requirements of Real Property Law §443.

Changes to the agency disclosure form

The first item that many licensees will be glad to see go is the requirement that the agency disclosure form be a one-page, two-sided document. NYSAR membership was extremely vocal concerning this issue and as a result, the amended law removes this requirement. The new agency disclosure form has no requirement as to number of pages or being a single-sided document.

The next item included in the amendment is a more concise definition of "broker's agent." The definition used in the amendment is the same definition that NYSAR has published during the past year. The definition is as follows: "A broker's agent is an agent that cooperates or is engaged by a listing agent or a buyer's agent (but does not work for the same firm as the listing agent or buyer's agent) to assist the listing agent or buyer's agent in locating a property to sell or buy, respectively, for the listing agent's seller or the buyer agent's buyer. The broker's agent does not have a direct relationship with

the buyer or seller and the buyer or seller cannot provide instructions or direction directly to the broker's agent. The buyer and the seller, therefore, do not have vicarious liability for the acts of the broker's agent. The listing agent or buyer's agent do provide direction and instruction to the broker's agent and, therefore, the listing agent or buyer's agent will have liability for the acts of the broker's agent." This definition is much more detailed than the definition previously provided on the agency disclosure form.

Another item that was amended was the term "dual agency with designated sales associates." The amended agency disclosure law changes the term to "dual agent with designated sales agents," the term licensees in New York have been using for more than a decade. More importantly, the phrase "and advocating on behalf of" was added to the explanation of "dual agent with designated sales agents" to indicate that a designated sales agent can advocate on behalf of the party that agent has been assigned. This was included in order to clarify the misconception that just because a designated sales agent cannot provide undivided loyalty, they are not able to advocate on behalf of their seller/buyer.

The most significant change to the agency disclosure form occurs in the area where the licensee is required to identify him/herself, indicate the name of their brokerage and indicate what type of agency relationship the licensee is currently acting under. The licensee is no longer required to provide his/her signature on the form, but is required to print his/her name. Another important change to the form is the manner in which the licensee indicates their agency relationship. Previously, the form lacked specific categories of agency and listed the types of agency in no specific order. The new form divides the types of agency relationships into seller and buyer agency with dual agent and dual agent with designated sales agents separate. A licensee is now required to indicate whether they are acting in the interest of the seller or buyer and then indicate the type of agency itself. For instance, a licensee acting as a sub-agent of the seller would check "Seller as a (check relationship below)" and then "Seller's agent." By categorizing the types of agency, a licensee is now able to clearly indicate that they are acting in the best interest of the seller or buyer without the need for additional annotation of the agency disclosure form.

It should be noted that the same changes were made to the landlord/tenant form and for the sake of simplicity, the same holds true for landlord/tenant agency relationships.

Changes to the statute not found on the form

The most important change to the statute is the removal of the acknowledgement of parties to the contract (Real Property Law §443(3)(d)). Although DOS indicated it was no longer required, it was important that the portion of the statute containing this requirement was removed.

Numerous definitions were added to the statute. Previously, there were no definitions for "broker's agent," "tenant," "landlord," "tenant's agent" or "landlord's agent." Now the statute contains definitions for each.

Overall, the changes to the form and the addition of the definitions will help to simplify the disclosure process for licensees. A more user friendly method by which a licensee indicates his/her type of agency relationship, and an accurate definition of "broker's agent," will benefit licensees when explaining agency to consumers.

NYSAR will schedule several webinars (web-based seminars) to educate members on the changes to the agency disclosure form.

When do you need to fill out an agency disclosure form?

Licensees are required by law and regulation to disclose to consumers what type of agency relationship that licensee is currently acting under. Generally, a licensee is required to "make it clear for which party he is acting." (19 NYCRR §175.7) This requirement applies to all licensees regardless of the type of real property being sold or leased. Although §175.7 does not require a licensee to utilize a form to disclose the licensee's agency relationship, licensees should be diligent in their disclosure to consumers exactly what type of agency relationship the licensee is acting under.

Article 12-a of the Real Property Law sets forth mandatory requirements relating to the disclosure of agency relationships. Pursuant to Real Property Law §443(2), "This section shall only apply to transactions involving residential real property." "Residential real property" is defined as "real property improved by a one-to-four family dwelling used or occupied, or intended to be used or occupied, wholly or partly, as the home or residence of one or more persons, but shall not refer to (i) unimproved real property upon which such dwellings are to be constructed or (ii) condominium or cooperative apartments in a building containing

more than four units.” (RPL§443(1)(f)) The agency disclosure form required under RPL§443(4) must be presented and acknowledged by a consumer pursuant to RPL§443(3)(a)-(c).

Listing agents are required to provide the form to a consumer pursuant to RPL§443(3)(a), which states: “A listing agent shall provide the disclosure form set forth in subdivision four of this section to a seller or landlord prior to entering into a listing agreement with the seller or landlord and shall obtain a signed acknowledgment from the seller or landlord, except as provided in paragraph e of this subdivision.”

Seller’s and landlord’s agents are required under RPL§443(3)(b) to “provide the disclosure form set forth in subdivision four of this section to a buyer, buyer’s agent, tenant or tenant’s agent at the time of the first substantive contact with the buyer or tenant and shall obtain a signed acknowledgment from the buyer or tenant, except as provided in paragraph e of this subdivision.” Likewise, a buyer’s or tenant’s agent pursuant to RPL§443(3)(c) must “provide the disclosure form to the buyer or tenant prior to entering into an agreement to act as the buyer’s agent or tenant’s agent and shall obtain a signed acknowledgment from the buyer or tenant, except as provided in paragraph e of this subdivision. A buyer’s agent or tenant’s agent shall provide the form to the seller, seller’s agent, landlord or landlord’s agent at the time of the first substantive contact with the seller or landlord and shall obtain a signed acknowledgment from the seller, landlord or listing agent, except as provided in paragraph e of this subdivision.” As can be seen by RPL§443(3)(a)-(c), the agency disclosure form set forth in RPL§443(4) must be presented to a consumer at “first substantive contact.”

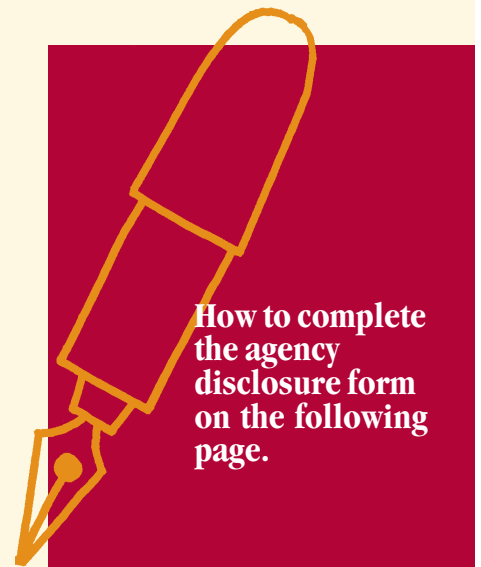
The issue with “first substantive contact” is that the Department of State (DOS) provides no definition as to what would constitute “first substantive contact.” In the past, DOS has used the “warm body” approach when addressing “first substantive contact.” The “warm body” approach is as simple as it sounds. If a licensee comes into contact with a consumer in one of the scenarios set forth in RPL§443(3)(a)-(c), the disclosure must be presented. There are, of course, some exceptions to the “warm body” approach; the most prevalent of which being open houses. DOS has provided an opinion letter dated August 18, 1995, that states a seller’s agent does not have to present a disclosure form to every person who attends an open house where no “substantive contact” has been

made (broker greeting people, showing them the house, providing general information and answering questions about the property). “Substantive contact” occurs should the buyer express serious interest in discussing the terms of an offer or where the seller’s agent is helping the buyer identify suitable property. Another exception to the “warm body” approach is one that is occurring with greater frequency in the modern technology-driven market, consumers are e-mailing, faxing, telephoning or communicating via the Internet with licensees. Through a decision by an administrative law judge, it can be determined what standard licensees will be held to in a situation where the only contact with a consumer is through e-mail, fax, telephone or via the Internet. In the case of *DOS v. Holzbach*, 49 DOS 02 (2002), a licensee had been communicating with a consumer to represent the consumer as a buyer’s agent. On April 25, 2001, the licensee and the consumer agreed via telephone that the licensee would represent the consumer as a buyer’s agent. No agency disclosure form was provided in any manner at this time. On May 6, 2001, the licensee and the consumer met for the first time and a backdated agency disclosure form was provided. The administrative law judge determined that “although the buyers were not present in Rochester at the time of that contact, the evidence amply demonstrates that the form could have been faxed to them and that they could have faxed back their acknowledgements. The backdating of the form, although intended to show when the first substantive contact was made, improperly muddied the issue and was a demonstration of incompetency.” (*DOS v. Holzbach*, 49 DOS 02 (2002)). As such, the same standard should be applied in scenarios involving licensees communicating with consumers via e-mail, fax or the Internet. The agency disclosure can be provided to the consumer via fax, e-mail or by download from the Internet (DOS has the form available for download on its real estate broker/salesperson page at www.dos.state.ny.us/lcns/realist.html). The decision clearly states that the licensee could have satisfied the requirements of RPL§443(3)(c) by faxing the agency disclosure form to the consumer, have the consumer sign the form and fax it back to the licensee. As such, the same should hold true for licensees communicating with consumers where no “warm body” meeting occurs at first substantive contact.

Upon signing the agency disclosure form, the licensee must provide a copy of the form to the consumer. 19 NYCRR §175.12 states as follows: “A real estate broker shall immediately

deliver a duplicate original of any instrument to any party or parties executing the same, where such instrument has been prepared by such broker or under his supervision and where such instrument relates to the employment of the broker or to any matters pertaining to the consummation of a lease, or the purchase, sale or exchange of real property or any other type of real estate transaction in which he may participate as a broker.” It should be noted that the only time sellers and buyers or landlords and tenants should sign the same form is in the situation of “dual agency” or “dual agent with designated sales agents.”

If at first substantive contact with the consumer, a licensee provides the agency disclosure form to a consumer and the consumer refuses to sign the form, RPL§443(3)(e) provides the licensee with a mechanism by which the licensee can document the refusal. RPL§443(3)(e) states: “If the seller, buyer, landlord or tenant refuses to sign an acknowledgment of receipt pursuant to this subdivision, the agent shall set forth under oath or affirmation a written declaration of the facts of the refusal and shall maintain a copy of the declaration for not less than three years.” If a licensee is involved in a situation where a consumer refuses to sign the agency disclosure form, the licensee should clearly state the name(s) of the consumer(s) and the facts surrounding the refusal of the acknowledgment. After which, the licensee needs to sign the declaration in the presence of a notary public and have the declaration notarized. It should be noted that RPL§443(3)(e) is only applicable in those situations where a consumer refuses to sign the form. It would be contrary to the statute if the licensee were to follow the provisions of RPL§443(3)(e) for any other reason such as the licensee forgot to bring the agency disclosure form with them.



**How to complete
the agency
disclosure form
on the following
page.**

How to complete the agency disclosure form

For real estate licensees, merely presenting the form to a consumer does not satisfy the requirements of RPL§443. Licensees must properly fill out the agency disclosure form prior to having the consumer execute the form, acknowledging receipt of the agency disclosure form. Set forth below are those scenarios that may be encountered by a licensee and examples of how the agency disclosure form should be completed.

Figure "A" demonstrates how a licensee should fill out the agency disclosure form when the licensee is representing the seller's best interest as a seller's agent. Licensees should utilize this method of completing the form when the licensee is the listing agent, licensee's brokerage is the listing brokerage, or licensee is a sub-agent of seller.

Figure "B" demonstrates how a licensee should fill out the agency disclosure form when the licensee is representing the seller's best interest as a broker's agent. Licensees should utilize this method of completing the form when the licensee is the agent of the listing broker of another non-affiliated brokerage.

Figure "C" demonstrates how a licensee should fill out the agency disclosure form when the licensee is representing the buyer's best interest as a buyer's agent. Licensees should utilize this method of completing the form when the licensee is an agent of the buyer or the licensee's brokerage is an agent of buyer.

Figure "D" demonstrates how a licensee should fill out the agency disclosure form when the licensee is representing the buyer's best interest as a broker's agent. Licensees should utilize this method of completing the form when the licensee is an agent of a buyer's broker of another non-affiliated brokerage.

Figure "E" demonstrates how a licensee should fill out the agency disclosure form when the licensee is a dual agent. Licensees should utilize this method of completing the form when both sides of a transaction are represented by the licensee's brokerage, but not as a seller's or buyer's agent.

Figure "F" demonstrates how a licensee should fill out the agency disclosure form when the licensee is dual agent with designated sales agents. Licensees should utilize this method of completing the form when the consumers consent to dual agency and agree to have two different licensees from the same brokerage represent the best interest of each respective party. One licensee will be designated by the broker and consumer to represent the seller and one licensee will be designated by the broker and consumer to represent the buyer. It should be noted that the broker remains a dual agent and can never be a designated agent.

| | |
|---|---|
| <p>This form was provided to me by <u>John Doe</u> (print name of licensee) of <u>Hypothetical Realty</u> (print name of company, firm or brokerage) a licensed real estate broker acting in the interest of the</p> <p><input checked="" type="checkbox"/> Seller as a (check relationship below) () Buyer as a (check relationship below)</p> <p><input checked="" type="checkbox"/> Seller's agent () Buyer's agent</p> <p>() Broker's agent () Broker's agent</p> <p>() Dual agent</p> <p>() Dual agent with designated sales agents</p> <p>If dual agent with designated sales agents is checked:</p> <p>_____ is appointed to represent the buyer; and</p> <p>_____ is appointed to represent the seller in this transaction</p> <p style="text-align: right;">Fig. A</p> | <p>This form was provided to me by <u>Jane Doe</u> (print name of licensee) of <u>Hypothetical Realty</u> (print name of company, firm or brokerage) a licensed real estate broker acting in the interest of the</p> <p><input checked="" type="checkbox"/> Seller as a (check relationship below) () Buyer as a (check relationship below)</p> <p>() Seller's agent () Buyer's agent</p> <p><input checked="" type="checkbox"/> Broker's agent () Broker's agent</p> <p>() Dual agent</p> <p>() Dual agent with designated sales agents</p> <p>If dual agent with designated sales agents is checked:</p> <p>_____ is appointed to represent the buyer; and</p> <p>_____ is appointed to represent the seller in this transaction</p> <p style="text-align: right;">Fig. B</p> |
| <p>This form was provided to me by <u>John Doe</u> (print name of licensee) of <u>Hypothetical Realty</u> (print name of company, firm or brokerage) a licensed real estate broker acting in the interest of the</p> <p>() Seller as a (check relationship below) <input checked="" type="checkbox"/> Buyer as a (check relationship below)</p> <p>() Seller's agent <input checked="" type="checkbox"/> Buyer's agent</p> <p>() Broker's agent () Broker's agent</p> <p>() Dual agent</p> <p>() Dual agent with designated sales agents</p> <p>If dual agent with designated sales agents is checked:</p> <p>_____ is appointed to represent the buyer; and</p> <p>_____ is appointed to represent the seller in this transaction</p> <p style="text-align: right;">Fig. C</p> | <p>This form was provided to me by <u>John Doe</u> (print name of licensee) of <u>Hypothetical Realty</u> (print name of company, firm or brokerage) a licensed real estate broker acting in the interest of the</p> <p>() Seller as a (check relationship below) <input checked="" type="checkbox"/> Buyer as a (check relationship below)</p> <p>() Seller's agent () Buyer's agent</p> <p>() Broker's agent <input checked="" type="checkbox"/> Broker's agent</p> <p>() Dual agent</p> <p>() Dual agent with designated sales agents</p> <p>If dual agent with designated sales agents is checked:</p> <p>_____ is appointed to represent the buyer; and</p> <p>_____ is appointed to represent the seller in this transaction</p> <p style="text-align: right;">Fig. D</p> |
| <p>This form was provided to me by <u>Jane Doe</u> (print name of licensee) of <u>Hypothetical Realty</u> (print name of company, firm or brokerage) a licensed real estate broker acting in the interest of the</p> <p>() Seller as a (check relationship below) () Buyer as a (check relationship below)</p> <p>() Seller's agent () Buyer's agent</p> <p>() Broker's agent () Broker's agent</p> <p><input checked="" type="checkbox"/> Dual agent</p> <p>() Dual agent with designated sales agents</p> <p>If dual agent with designated sales agents is checked:</p> <p>_____ is appointed to represent the buyer; and</p> <p>_____ is appointed to represent the seller in this transaction</p> <p style="text-align: right;">Fig. E</p> | <p>This form was provided to me by <u>Jane Doe</u> (print name of licensee) of <u>Hypothetical Realty</u> (print name of company, firm or brokerage) a licensed real estate broker acting in the interest of the</p> <p>() Seller as a (check relationship below) () Buyer as a (check relationship below)</p> <p>() Seller's agent () Buyer's agent</p> <p>() Broker's agent () Broker's agent</p> <p>() Dual agent</p> <p><input checked="" type="checkbox"/> Dual agent with designated sales agents</p> <p>If dual agent with designated sales agents is checked:</p> <p><u>Jane Doe</u> is appointed to represent the buyer; and</p> <p><u>Michael Jones</u> is appointed to represent the seller in this transaction</p> <p style="text-align: right;">Fig. F</p> |