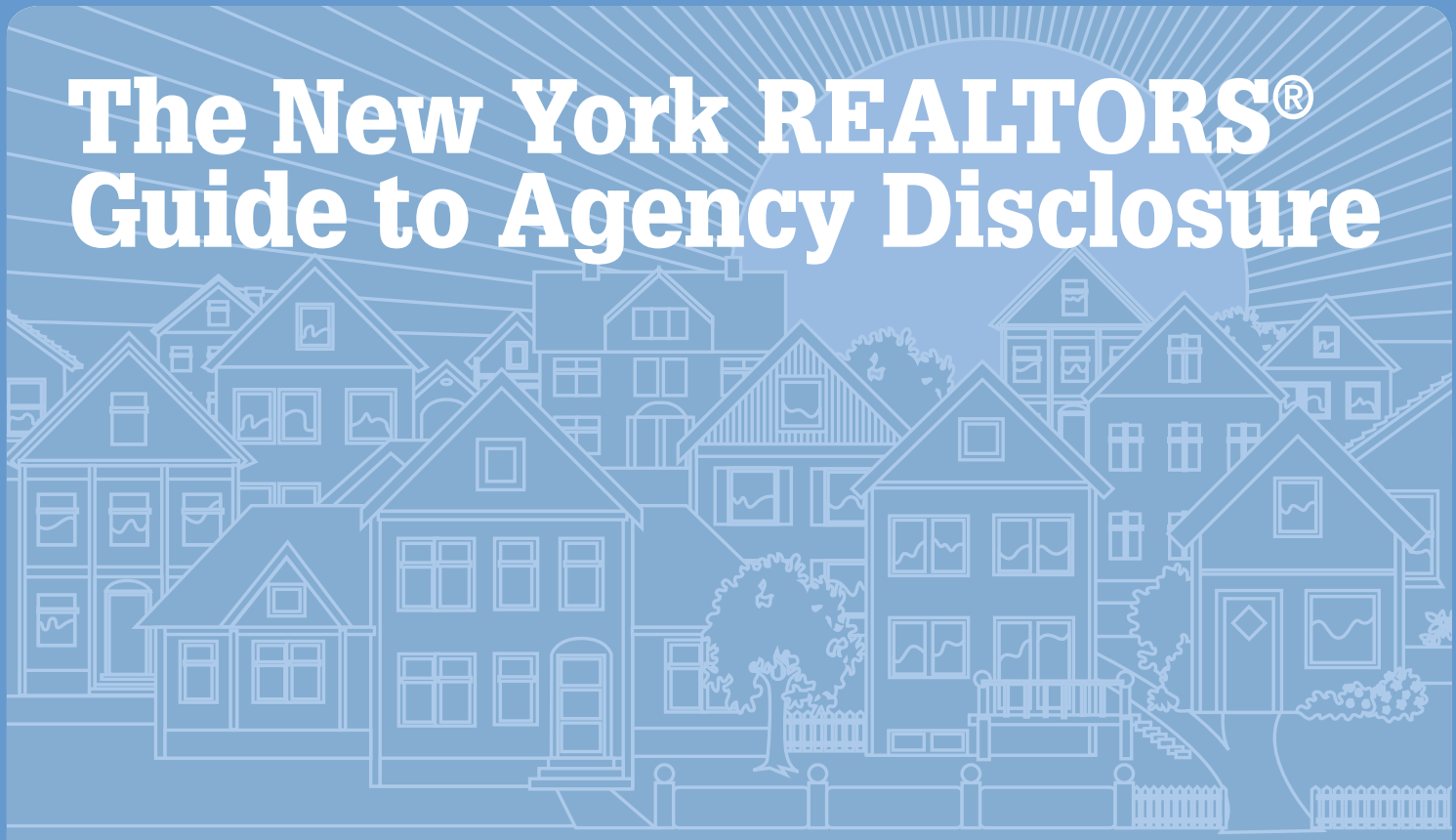
The New York REALTORS® Guide to Agency Disclosure



Amended law effective as of January 1, 2011

On August 30, 2010, the most recent revisions to the agency disclosure law were signed by former Gov. David Paterson. This amendment includes changes to the agency disclosure form as it relates to dual agency and designated agency as well as requiring the agency disclosure form to be used for all condominiums and cooperative apartments. As such, all licensees are required to use the new form after January 1, 2011. This guide 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 Law

The first major change is the requirement that the agency disclosure form be used in all transactions involving condominiums and cooperative apartments. Prior to January 1, 2011, condominiums and cooperative apartments were specifically exempt from the definition of "residential real property" that would have required the use of the agency disclosure form. Now, with the passage of the new law, the exemption has been removed. After January 1, 2011 agency disclosure forms must be used in all transactions involving "residential real property," which now includes condominiums and cooperative apartments.

The Department of State Division of Licensing Services (DOS) has always considered dual agency to be transactional in nature. As a result, clients could not consent to dual agency in advance of dual agency actually occurring. In a legal memorandum published on the DOS website, it was clearly stated: "As soon as the buyer's agent introduces the buyer to property in which the seller is represented by the seller's agent, dual agency arises." (DOS Legal Memorandum LI12). For years, licensees have been hampered by this narrow approach to dual agency. As a result, licensees who represented consumers as a buyer's agent were unable to show properties listed with their brokerage unless the buyers agreed to change agency relationships and have the licensee show the property as a seller's agent, or the buyer and seller both consented to dual agency and acknowledged the same by signing the agency disclosure form. Only then could the licensee show the buyer property listed by their brokerage. As a result, buyers were forced to change agency relationships with the licensee, thereby losing the fiduciary duties owed by the buyer's agent if the sellers did not consent to dual agency or were unable to be reached prior to the showing (which disadvantaged the seller because fewer buyers were viewing the property).

With the new changes to the agency disclosure law, consumers can now consent to dual agency and dual agency with designated sales agents in advance of dual agency actually arising.

Changes to the statute not found on the form

The first change involves the definition of "residential real property." The new definition includes condominiums and cooperative apartments, and is defined as "real property used or occupied, or intended to be used or occupied, wholly or partly, as the home or residence of one or more persons improved by (i) a one-to-four family dwelling or (ii) a condominium or cooperative apartments, but shall not refer to unimproved real property upon which such dwellings are to be constructed." As can be seen, vacant land and commercial property are exempt from the requirement of using the form, but there is still an obligation under 19 NYCRR §175.7 to "make it clear for which party he is acting." Although this can be done verbally, it is highly recommended that disclosure of agency relationships be acknowledged in writing.

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The second change not found on the form is the addition of two new paragraphs defining advanced consent to dual and designated agency. Real Property Law §443(1) now contains the following definitions:

p. "Advanced Consent to Dual Agency" means written consent signed by the Seller/Landlord or Buyer/Tenant that the Listing Agent and/or buyer's agent may act as a Dual Agent for that Seller/Landlord and a Buyer/Tenant for residential real property which is the subject of a listing agreement.

q. "Advanced Consent to Dual Agency with Designated Sales Agents" means written consent signed by the Seller/Landlord or Buyer/Tenant that indicates the name of the agent appointed to represent the Seller/Landlord or Buyer/Tenant as a Designated Sales Agent for residential real property which is the subject of a listing agreement.

Overall, the changes to the form and the addition of the definitions will help to simplify the disclosure process for licensees. The option to allow sellers and buyers to consent to dual agency and designated agency will benefit both consumers and licensees as they all now have to fill out numerous agency disclosure forms in dual agency situations.

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 used or occupied, or intended to be used or occupied, wholly or partly, as the home or residence of one or more persons improved by (i) a one-to-four family dwelling or (ii) a condominium or cooperative apartments, but shall not refer to unimproved real property upon which such dwellings are to be constructed. 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 acknowledgement 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 a buyer express serious interest in discussing the terms of an offer or where a seller's agent is helping a 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 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, improperly muddied the issue and was a demonstration of incompetency." *DOS v. Holzbach*, 49 DOS 02 (2002). As such, it is foreseeable that the same standard should be applied in scenarios involving licensees communicating with consumers via e-mail, fax or via the Internet. The agency disclosure form can be provided to the consumer via fax, e-mail or by download from the Internet (DOS has the form available for download at its real estate broker/salesperson page). 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.

When dual agency is discussed with the client, the client will have the option to indicate their consent to dual agency in advance by indicating the same on the agency disclosure form. Advanced consent to dual agency with designated sales agents can be done in the same manner. The only difference is that the seller, landlord, buyer or tenant will be able to designate a specific licensee as a designated agent should it arise. It is not required that both designated agents are filled in when advanced consent is given. In other words, when a seller consents to dual agency with designated sales agents in advance, it is likely that the seller will designate their listing agent (unless the listing agent is the principal broker since principal brokers are prohibited from acting as a designated agent). Likewise, a buyer will most likely designate their buyer's agent as their designated agent (except in the instance where the buyer's agent is the principal). Once dual agency with designated sales agents arises, both sides will know the identity of the other designated agent.

In discussions with the Department of State, NYSAR has clarified the responsibility of a licensee once dual agency or dual agency with designated sales agents arises. If dual agency arises as a result of a showing, the licensee is not required to notify the seller immediately since the seller should reasonably presume that dual agency showings will occur during the time of the listing. However, it is highly recommended that the seller be informed as to all instances of dual agency that are the result of a showing. This notification can be done via telephone, e-mail (using the address provided by the seller), fax (using the fax number provided by the seller) or by letter. As always, NYSAR recommends all notices be in writing, so the licensee will have documented proof of any such notification.

After dual agency arises, if a potential purchaser begins negotiations of any type, it is required that the licensee contact the seller and inform them that there is a dual agency situation where the buyer is showing interest in the property. Again, this notification can be done via telephone, e-mail (using the address provided by the seller), fax (using the fax number provided by the seller) or by letter. In order to minimize the potential for liability, all notices should be in writing and made at the time of negotiations or immediately thereafter. If a dual agency showing results in the presentation of a purchase offer, it is recommended that the signed agency disclosure forms be attached to the purchase offer so it is clear to the seller and buyer that the transaction is dual agency in nature. There is nothing prohibiting a licensee from having their client(s) execute a new agency disclosure form at the time of contract to memorialize their understanding of a licensee's agency status.

Licensees should be aware that dual agency must be discussed with the seller and/or buyer at the onset of discussions concerning agency. The law specifically states that the client is agreeing to "advanced informed consent." This means the client must be fully informed as to all aspects of dual agency. Clients need to be fully informed as to the fiduciary obligations they will be losing by agreeing to dual agency as well. Licensees must make it perfectly clear what the client is consenting to and how it will affect the representation they are receiving from the licensee. Failure to do so can be considered a violation of Article 12-A of the Real Property Law and may subject the licensee to DOS disciplinary action.

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."

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 acknowledgement. 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.

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How to complete the agency disclosure form

Figure A

Listing agent or subagent of seller 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 the licensee is a sub-agent of the seller.

(X) Seller as a (check relationship below)
(X) Seller's agent
( ) Broker's agent

( ) Buyer as a (check relationship below)
( ) Buyer's agent
( ) Broker's agent

( ) Dual agent
( ) Dual agent with designated sales agents

Figure B

Brokers agent of seller 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 a listing broker from another non-affiliated brokerage.

(X) Seller as a (check relationship below)
( ) Seller's agent
(X) Broker's agent

( ) Buyer as a (check relationship below)
( ) Buyer's agent
( ) Broker's agent

( ) Dual agent
( ) Dual agent with designated sales agents

Figure C

Listing agent with advanced informed consent to dual agency 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 and the seller has also consented to dual agency in advance. Licensees should utilize this method of completing the form when the licensee is the listing agent, licensee's brokerage is the listing brokerage and the seller has consented to dual agency in advance.

(X) Seller as a (check relationship below)
(X) Seller's agent
( ) Broker's agent

( ) Buyer as a (check relationship below)
( ) Buyer's agent
( ) Broker's agent

( ) Dual agent
( ) Dual agent with designated sales agents

For advance informed consent to either dual agency or dual agency with designated sales agents complete section below:
(X) Advance informed consent dual agency
( ) Advance informed consent to dual agency with designated sales agents

Figure D

Listing agent with advanced informed consent to dual and designated agency 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 and the seller has also consented to dual agency and designated agency in advance. Licensees should utilize this method of completing the form when the licensee is the listing agent, licensee's brokerage is the listing brokerage and the seller has consented to dual agency and designated agency in advance.

(X) Seller as a (check relationship below)
(X) Seller's agent
( ) Broker's agent

( ) Buyer as a (check relationship below)
( ) Buyer's agent
( ) Broker's agent

( ) Dual agent
( ) Dual agent with designated sales agents

For advance informed consent to either dual agency or dual agency with designated sales agents complete section below:
(X) Advance informed consent dual agency
(X) Advance informed consent to dual agency with designated sales agents

If dual agent with designated sales agents is indicated above:
_____ is appointed to represent the buyer; and
John Doe _____ is appointed to represent the seller in this transaction.

Figure E

Buyers agent 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 the agent of the buyer or the licensee's brokerage is an agent of the buyer.

( ) Seller as a (check relationship below)
( ) Seller's agent
( ) Broker's agent

(X) Buyer as a (check relationship below)
(X) Buyer's agent
( ) Broker's agent

( ) Dual agent
( ) Dual agent with designated sales agents

Figure F

Buyers agent with advanced informed consent to dual agency 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 and the buyer has consented to dual agency in advance. Licensees should utilize this method of completing the form when the licensee is the buyer's agent or the licensee's brokerage is the agent of the buyer and the buyer has consented to dual agency in advance.

( ) Seller as a (check relationship below)
( ) Seller's agent
( ) Broker's agent

(X) Buyer as a (check relationship below)
(X) Buyer's agent
( ) Broker's agent

( ) Dual agent
( ) Dual agent with designated sales agents

For advance informed consent to either dual agency or dual agency with designated sales agents complete section below:
(X) Advance informed consent dual agency
( ) Advance informed consent to dual agency with designated sales agents

Figure G

Buyers agent with advanced informed consent to dual and designated agency 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 when the buyer has consented to dual agency and designated agency in advance. Licensees should utilize this method of completing the form when the licensee is the buyer's agent or the licensee's brokerage is the agent of the buyer and the buyer has consented to dual agency and designated agency in advance.

( ) Seller as a (check relationship below)
( ) Seller's agent
( ) Broker's agent

(X) Buyer as a (check relationship below)
(X) Buyer's agent
( ) Broker's agent

( ) Dual agent
( ) Dual agent with designated sales agents

For advance informed consent to either dual agency or dual agency with designated sales agents complete section below:
(X) Advance informed consent dual agency
(X) Advance informed consent to dual agency with designated sales agents

If dual agent with designated sales agents is indicated above:
Jennifer Jones _____ is appointed to represent the buyer; and
_____ is appointed to represent the seller in this transaction.

Figure H

Traditional dual agency (not advanced consent) 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 the transaction are represented by the licensee's brokerage, but not as a seller's or buyer's agent.

( ) Seller as a (check relationship below)
( ) Seller's agent
( ) Broker's agent

( ) Buyer as a (check relationship below)
( ) Buyer's agent
( ) Broker's agent

(X) Dual agent
( ) Dual agent with designated sales agents

Figure I

Traditional designated agency (not advanced consent) demonstrates how a licensee should fill out the agency disclosure form when the licensee is a designated sales agent. Licensees should utilize this method of completing the form when the consumers consent to designated 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 seller to represent the seller and one licensee will be designated by the broker and buyer to represent the buyer. It should be noted that the broker remains a dual agent and can never be a designated agent.

( ) Seller as a (check relationship below)
( ) Seller's agent
( ) Broker's agent

( ) Buyer as a (check relationship below)
( ) Buyer's agent
( ) Broker's agent

( ) Dual agent
(X) Dual agent with designated sales agents

For advance informed consent to either dual agency or dual agency with designated sales agents complete section below:
( ) Advance informed consent dual agency
( ) Advance informed consent to dual agency with designated sales agents

If dual agent with designated sales agents is indicated above:
Jennifer Jones _____ is appointed to represent the buyer; and
John Doe _____ is appointed to represent the seller in this transaction.