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## Amended agency disclosure law to take effect on January 1, 2008

By Anthony Gatto, Esq., NYSAR Legal Counsel

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 as such all licensees will be required to use the new form starting January 1, 2008.

At the beginning of 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 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," which is the term licensees in New York have been using for  
*See Agency disclosure, page 2*

## New CE requirement to take effect July 1, 2008 for all license renewals

By Anthony Gatto, Esq., NYSAR Legal Counsel

On August 1, 2007, Gov. Eliot Spitzer signed into law an amendment to section 441(3)(a) of the Real Property Law. The amendment requires all real estate licensees renewing their real estate license after July 1, 2008 to have at least three hours of training in fair housing and/or discrimination in the sale or rental of real property. The three hours of training required under the amendment is not an additional requirement to the 22.5 hours already required. The new requirement mandates that the three hours of additional training "shall include at least three hours of instruction pertaining to fair housing and/or discrimination in the sale or rental of real property or an interest in real property" (Real Property Law §441(3)(a)).

The state Department of State (DOS) has implemented the following policies for those licensees who will be renewing their license on or after July 1, 2008:

- Any real estate licensee who renews their license after July 1, 2008 will be required to complete 22.5 hours of continuing education, three hours of which must include fair housing/discrimination.
- Any licensee who has already completed their 22.5 hours that did not contain at least three hours of fair housing will be required to complete the additional education prior to renewal.

An e-mail will be sent to all real estate schools that teach continuing education, requesting that they send the Education Unit a list of currently approved courses that contain at least three hours of fair housing. The list will subsequently be posted on the DOS website so that students can determine if they have met the fair housing requirement prior to renewal.

*See CE requirement, page 8*

## Agency disclosure continued from page 1

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 to which the 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. The new section is provided in the box in the next column.

This form was provided to me by \_\_\_\_\_ (print name of licensee) of \_\_\_\_\_ (print name of company, firm or brokerage), a licensed real estate broker acting in the interest of the:

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

Dual agent  
 Dual agent with designated sales agents

As can be seen, a licensee is now required to indicate whether he/she is 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 he/she is 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 they explain agency to consumers.

At the time of publication, NYSAR was in the process of scheduling numerous webinars (web-based seminars) to educate members on the changes to the agency disclosure form. Visit the members' section of [www.nysar.com](http://www.nysar.com) for additional information.

NYSAR offers  
a variety of  
legal resources at [nysar.com](http://nysar.com).

Visit the  
members' section for the Brokers'  
Reference Manual and  
Legal Compendium.



NEW YORK STATE DISCLOSURE FORM FOR BUYERS AND SELLERS  
THIS IS NOT A CONTRACT

New York state law requires real estate licensees who are acting as agents of buyers or sellers of property to advise the potential buyers or sellers with whom they work of the nature of their agency relationship and the rights and obligations it creates. This disclosure will help you to make informed choices about your relationship with the real estate broker and its sales associates.

Throughout the transaction you may receive more than one disclosure form. The law requires each agent assisting in the transaction to present you with this disclosure form. A real estate agent is a person qualified to advise about real estate.

If you need legal, tax or other advice, consult with a professional in that field.

DISCLOSURE REGARDING REAL ESTATE  
AGENCY RELATIONSHIPS

SELLER'S AGENT

A seller's agent is an agent who is engaged by a seller to represent the seller's interests. The seller's agent does this by securing a buyer for the seller's home at a price and on terms acceptable to the seller. A seller's agent has, without limitation, the following fiduciary duties to the seller: reasonable care, undivided loyalty, confidentiality, full disclosure, obedience and duty to account. A seller's agent does not represent the interests of the buyer. The obligations of a seller's agent are also subject to any specific provisions set forth in an agreement between the agent and the seller. In dealings with the buyer, a seller's agent should (a) exercise reasonable skill and care in performance of the agent's duties; (b) deal honestly, fairly and in good faith; and (c) disclose all facts known to the agent materially affecting the value or desirability of property, except as otherwise provided by law.

BUYER'S AGENT

A buyer's agent is an agent who is engaged by a buyer to represent the buyer's interests. The buyer's agent does this by negotiating the purchase of a

home at a price and on terms acceptable to the buyer. A buyer's agent has, without limitation, the following fiduciary duties to the buyer: reasonable care, undivided loyalty, confidentiality, full disclosure, obedience and duty to account. A buyer's agent does not represent the interests of the seller. The obligations of a buyer's agent are also subject to any specific provisions set forth in an agreement between the agent and the buyer. In dealings with the seller, a buyer's agent should (a) exercise reasonable skill and care in performance of the agent's duties; (b) deal honestly, fairly and in good faith; and (c) disclose all facts known to the agent materially affecting the buyer's ability and/or willingness to perform a contract to acquire seller's property that are not inconsistent with the agent's fiduciary duties to the buyer.

BROKER'S AGENT

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 can not 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.

DUAL AGENT

A real estate broker may represent both the buyer and the seller if both the buyer and seller give their informed consent in writing. In such a dual agency situation, the agent will not be able to provide the full range of fiduciary duties to the buyer and seller. The obligations of an agent are also subject to any specific provisions set forth in an agreement between the agent, and the buyer and seller. An agent acting as a dual agent must explain carefully to

Sample only: This form cannot be used until January 1, 2008

both the buyer and seller that the agent is acting for the other party as well. The agent should also explain the possible effects of dual representation, including that by consenting to the dual agency relationship the buyer and seller are giving up their right to undivided loyalty. A buyer or seller should carefully consider the possible consequences of a dual agency relationship before agreeing to such representation.

agent works under the supervision of the real estate broker. With the informed consent of the buyer and the seller in writing, the designated sales agent for the buyer will function as the buyer's agent representing the interests of and advocating on behalf of the buyer and the designated sales agent for the seller will function as the seller's agent representing the interests of and advocating on behalf of the seller in the negotiations between the buyer and seller. A designated sales agent cannot provide the full range of fiduciary duties to the buyer or seller. The designated sales agent must explain that like the dual agent under whose supervision they function, they cannot provide undivided loyalty. A buyer or seller should carefully consider the possible consequences of a dual agency relationship with designated sales agents before agreeing to such representation.

**DUAL AGENT WITH DESIGNATED SALES AGENTS**

If the buyer and the seller provide their informed consent in writing, the principals or the real estate broker who represents both parties as a dual agent may designate a sales agent to represent the buyer and another sales agent to represent the seller to negotiate the purchase and sale of real estate. A sales

This form was provided to me by \_\_\_\_\_ (print name of licensee) of \_\_\_\_\_ (print name of company, firm or brokerage), a licensed real estate broker acting in the interest of the

- 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
- Dual agent with designated sales agents

If dual agent with designated sales agents is checked:

\_\_\_\_\_ is appointed to represent the buyer; and  
\_\_\_\_\_ is appointed to represent the seller in this transaction.

(I)(We) \_\_\_\_\_

acknowledge receipt of a copy of this disclosure form:

Signature of [ ] Buyer(s) and/or [ ] Seller(s):

\_\_\_\_\_  
\_\_\_\_\_

Date: \_\_\_\_\_

Date: \_\_\_\_\_

**Sample only: This form cannot be used until January 1, 2008**

NEW YORK STATE DISCLOSURE FORM FOR LANDLORD AND TENANT  
THIS IS NOT A CONTRACT

New York state law requires real estate licensees who are acting as agents of landlords and tenants of real property to advise the potential landlords and tenants with whom they work of the nature of their agency relationship and the rights and obligations it creates. This disclosure will help you to make informed choices about your relationship with the real estate broker and its sales associates.

Throughout the transaction you may receive more than one disclosure form. The law requires each agent assisting in the transaction to present you with this disclosure form. A real estate agent is a person qualified to advise about real estate. If you need legal, tax or other advice, consult with a professional in that field.

DISCLOSURE REGARDING REAL ESTATE  
AGENCY RELATIONSHIPS

LANDLORD'S AGENT

A landlord's agent is an agent who is engaged by a landlord to represent the landlord's interest. The landlord's agent does this by securing a tenant for the landlord's apartment or house at a rent and on terms acceptable to the landlord. A landlord's agent has, without limitation, the following fiduciary duties to the landlord: reasonable care, undivided loyalty, confidentiality, full disclosure, obedience and duty to account. A landlord's agent does not represent the interests of the tenant. The obligations of a landlord's agent are also subject to any specific provisions set forth in an agreement between the agent and the landlord. In dealings with the tenant, a landlord's agent should (a) exercise reasonable skill and care in performance of the agent's duties; (b) deal honestly, fairly and in good faith; and (c) disclose all facts known to the agent materially affecting the value or desirability of property, except as otherwise provided by law.

TENANT'S AGENT

A tenant's agent is an agent who is engaged by a tenant to represent the tenant's interest. The tenant's agent does this by negotiating the rental or lease of an apartment or house at a rent and on terms acceptable to the tenant. A tenant's agent has,

without limitation, the following fiduciary duties to the tenant: reasonable care, undivided loyalty, confidentiality, full disclosure, obedience and duty to account. A tenant's agent does not represent the interest of the landlord. The obligations of a tenant's agent are also subject to any specific provisions set forth in an agreement between the agent and the tenant. In dealings with the landlord, a tenant's agent should (a) exercise reasonable skill and care in performance of the agent's duties; (b) deal honestly, fairly and in good faith; and (c) disclose all facts known to the tenant's ability and/or willingness to perform a contract to rent or lease landlord's property that are not inconsistent with the agent's fiduciary duties to the buyer.

BROKER'S AGENT

A broker's agent is an agent that cooperates or is engaged by a listing agent or a tenant's agent (but does not work for the same firm as the listing agent or tenant's agent) to assist the listing agent or tenant's agent in locating a property to rent or lease for the listing agent's landlord or the tenant agent's tenant. The broker's agent does not have a direct relationship with the tenant or landlord and the tenant or landlord can not provide instructions or direction directly to the broker's agent. The tenant and the landlord therefore do not have vicarious liability for the acts of the broker's agent. The listing agent or tenant's agent do provide direction and instruction to the broker's agent and therefore the listing agent or tenant's agent will have liability for the acts of the broker's agent

DUAL AGENT

A real estate broker may represent both the tenant and the landlord if both the tenant and landlord give their informed consent in writing. In such a dual agency situation, the agent will not be able to provide the full range of fiduciary duties to the landlord and the tenant. The obligations of an agent are also subject to any specific provisions set forth in an agreement between the agent, and the tenant and landlord. An agent acting as a dual agent must explain carefully to both the landlord and tenant that the agent is acting for the other party as well. The agent should also explain the possible effects of dual

Sample only: This form cannot be used until January 1, 2008

representation, including that by consenting to the dual agency relationship the landlord and tenant are giving up their right to undivided loyalty. A landlord and tenant should carefully consider the possible consequences of a dual agency relationship before agreeing to such representation.

of the tenant and the landlord, the designated sales agent for the tenant will function as the tenant's agent representing the interests of and advocating on behalf of the tenant and the designated sales agent for the landlord will function as the landlord's agent representing the interests of and advocating on behalf of the landlord in the negotiations between the tenant and the landlord. A designated sales agent cannot provide the full range of fiduciary duties to the landlord or tenant. The designated sales agent must explain that like the dual agent under whose supervision they function, they cannot provide undivided loyalty. A landlord or tenant should carefully consider the possible consequences of a dual agency relationship with designated sales agents before agreeing to such representation.

DUAL AGENT WITH DESIGNATED SALES AGENTS

If the tenant and the landlord provide their informed consent in writing, the principals or the real estate broker who represents both parties as a dual agent may designate a sales agent to represent the tenant and another sales agent to represent the landlord. A sales agent works under the supervision of the real estate broker. With the informed consent in writing

This form was provided to me by \_\_\_\_\_ (print name of licensee) of

\_\_\_\_\_ (print name of company, firm or brokerage),

a licensed real estate broker acting in the interest of the

Landlord as a (check relationship below)

Landlord's agent

Broker's agent

Tenant as a (check relationship below)

Tenant's agent

Broker's agent

Dual agent

Dual agent with designated sales agents

If dual agent with designated sales agents is checked:

\_\_\_\_\_ is appointed to represent the tenant; and

\_\_\_\_\_ is appointed to represent the landlord in this transaction.

(I)(We) \_\_\_\_\_

acknowledge receipt of a copy of this disclosure form:

Signature of [ ] Tenant(s) and/or [ ] Landlord(s):

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Date: \_\_\_\_\_

Date: \_\_\_\_\_

Sample only: This form cannot be used until January 1, 2008

## Federal court asks NY Court of Appeals to determine duty of buyer's agent

On March 27, 2007, the United States Court of Appeals for the Second Circuit heard the case of *Rivkin v. Century 21 Teran Realty et al.* The facts of the case pertinent to the legal issue in question are as follows. Century 21 Teran Realty (Teran) is a duly licensed real estate brokerage with an office in Woodstock, NY. Oleg Rivkin (Rivkin) contacted Teran regarding an interest in purchasing waterfront property in Ulster County. Teran then acted as Rivkin's buyer's agent and Rivkin worked with Joshua Luborsky, an agent with Teran.

Several days later, Rivkin submitted an offer to purchase a particular waterfront property. Two days following Rivkin's offer, and without the knowledge of Rivkin or Luborsky, an offer was made by the Martins at a higher price than Rivkin's by Chloe Dresser, another agent with Teran. Rivkin inquired with Luborsky as to the status of his offer and Luborsky stated he had not heard anything. Luborsky contacted the listing agent and found out the sellers had accepted another offer (this ultimately turned out to be the offer by the Martins). Rivkin asked for an opportunity to submit another offer, but Luborsky was informed that the sellers were not entertaining any other offers.

Rivkin then contacted the listing agent personally and was advised of the higher offer, and was further advised that the offer was submitted by another agent of Teran (Dresser). Shortly thereafter, Rivkin instructed Luborsky to offer \$1,000 more for the property than the Martin's offer. (Rivkin also stated he would go as high as \$10,000 above Martin's offer). The sellers stated that would not entertain any additional offers when Luborsky submitted the offer of \$1,000 more than the Martins). Rivkin instructed Luborsky to offer \$5,000 more than the Martins, and seller responded they would consider the offer. Rivkin terminated his relationship with Teran the next day. Up to this point, neither Dresser nor Luborsky knew that the other was representing individuals that were bidding on

the same property. According to the facts of the case, the broker of Teran also had no knowledge that two of his agents were bidding on the same property. Luborsky never spoke with Dresser regarding the property prior to the sale of the property to the Martins.


The Martins purchased the property and Rivkin filed a lawsuit that included a claim that Teran, as Rivkin's buyer agent, breached their fiduciary duties to Rivkin. Herein lies the legal issue the New York Court of Appeals must address. Rivkin claims that Teran represented two parties bidding on the same property and as such, should have disclosed this fact to Rivkin (and likewise to the Martins). Rivkin claims that Teran should have had a "conflict checking system" in place to avoid situations like the one that is the subject of the litigation. Rivkin claims that had he known the Martins were also bidding on the property, he would have been able to strengthen his position. Rivkin also claimed that he would have made his higher offers sooner and due to the alleged conflict would not have relied on the advice of Luborsky. Teran has argued, among other things, that no breach occurred, but if one did, it did not harm Rivkin.

The Second Circuit has certified the following question to New York Court of Appeals: "Did any or all of the defendants-appellees (Teran, Luborsky and Dresser) breach a fiduciary duty to plaintiff-appellant

(Rivkin) by failing to disclose, in any form, defendant-appellees' representation of a competing buyer for the property Rivkin sought to buy? This legal issue is important to the everyday operation of real estate brokerages in New York since it will establish what duty a buyer's agent (and the broker of the buyer's agent) owes to customers/clients in situations where multiple licensees from the same brokerage are submitting offers on the same property on behalf of their customer/client.

At the time of publication of this article, the NYSAR Legal Action Committee has not voted on whether or not NYSAR will submit an Amicus Curiae brief. NYSAR will follow this case and provide additional information following the decision.

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Note: NYSAR's Legal Hotline does not provide a client-lawyer relationship. For confidential legal advice consult an attorney.



### CE requirement continued from page 1

In the future, schools will be required to have prior approval from DOS to satisfy the fair housing requirement, however, for the initial continuing education audits after July 1, 2008, the Education Unit staff will verify that the topic was covered in courses offered prior to that date.

Subsequent to July 1, 2008, the new courses submitted to meet the fair housing requirement must contain a minimum of three hours of fair housing, however, they need not be stand alone modules. Alternatively, these three hour modules may be included in larger course offerings.

As can be seen from the DOS policy, if a licensee has already completed the required 22.5 hours of CE and the training did not include at least three hours of fair housing and/or discrimination in the sale or rental of real property training, the licensee will be required to complete the three hours prior to renewing his/her license on or after July 1, 2008. As this issue went to press, NYSAR was investigating offering an online, stand-alone, three-hour course to accommodate those individuals who require training in fair housing and/or discrimination in the sale or rental of real property.

NYSAR offers a variety of legal resources online.

Visit the members' section at [www.nysar.com](http://www.nysar.com) to learn more

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