

UPDATED: April 8, 2011

Q: Is it true that the New York State Department of State (DOS) has recently issued an opinion letter on “substantive contact” and agency disclosure forms?

A: Yes. The DOS has always stated that the Agency Disclosure Form must be given to the buyer at the time of the first substantive contact. The DOS has stated that “any communication between a broker/salesperson and buyer wherein the price, condition of the house, school districts, and taxes are part of the discussion would certainly seem to trigger the first substantive contact concept.” Another view is that first substantive contact would be triggered when the buyer began asking questions that went beyond the four corners of the fact sheet that is typically handed out at the open house.

Now DOS is stating that “a broker does not have substantive contact with a party when that party is in the presence of his or her own broker” (or agent). This is because in such situations any considerable communications involving matters of major or practical importance will take place between the brokers.

Q. Does an Agency Disclosure Form need to be provided when a consumer is accompanied by his or her real estate broker or agent?

A. DOS now says that a broker does not have to provide an Agency Disclosure Form to a consumer if the broker has substantive contact that occurs in the presence of a consumer who is accompanied by his or her own real estate broker.

Q. What if the consumer is not accompanied by a real estate broker or agent?

A. If the party is unrepresented by a broker or agent, is represented but unaccompanied, or is accompanied by a broker or agent who is acting as a landlord/seller or dual agent, the disclosure form must be provided.

Q. Does this mean that when a consumer is accompanied by a broker or agent the agency disclosure does not have to be made?

A. No. Most importantly is that even in those situations where the parties are accompanied by their own agents, each agent still has an obligation to ensure that the other party understands who the licensee represents in the transaction. Merely because agents are excused from presenting Agency Disclosure Forms in certain circumstances does not release them from this duty.

Q. Am I better off not presenting an Agency Disclosure Form when a consumer is accompanied by a broker or agent?

A. Brokers and Agents should be aware that a benefit of providing the Agency Disclosure Forms is that they serve as evidence that a broker disclosed his or her agency status. Even in those situations where Agency Disclosure Forms are not required, brokers and agents may consider presenting them to represented parties as proof that the disclosure was made.