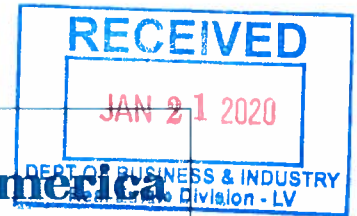




Consumer Federation of America



January XX, 2020

Devin Reiss
Director
Nevada Department of Business & Industry
3300 W. Sahara Avenue, Suite 350
Las Vegas, NV 89102

Dear Mr. Reiss,

Attached is a report (and related release) on the ineffectiveness of many state disclosures about agent representation that we recently released. The report suggests that this ineffectiveness reflects not only the complexity of agency law but also characteristics of the disclosures themselves. We urge you to make every effort to ensure that home buyers and sellers understand whom their agent represents and is loyal to.

As a heads up, later in the year we will be evaluating the information you and other state regulators provide to consumers. I have promised ARELLO that we will consult with them about the methodology of this assessment. However, I would also be happy to communicate with you or your office about this issue.

Sincerely,

Stephen Brobeck
Senior Fellow



Consumer Federation of America

FOR IMMEDIATE RELEASE

January 13, 2020

Contact: Stephen Brobeck, sbrobeck@consumerfed.org

[CFA Link](#); [Facebook Post](#) and [Tweet this](#)

NEW REPORT: REAL ESTATE DISCLOSURES ABOUT AGENT REPRESENTATION OFTEN LACK KEY INFORMATION, ARE TOO COMPLEX, AND ARE NOT TIMELY

*Consequently, Many Home Sellers and Buyers Do Not Understand
Whose Interests Their Agent Represents, Risking the Loss of Thousands
of Dollars in a Home Sale*

Washington, D.C. – Today the Consumer Federation of America (CFA) released a new report analyzing diverse real estate disclosures about agent representation required by 50 states and DC. The report – [Why Required Real Estate Agent Disclosures About Representation Fail and How They Can Be Improved](#) – concludes that these disclosures are often complex and legalistic, lack important information, are not timely, and are not understood by many home sellers and buyers. The fact that different state disclosure laws use more than 50 different terms to identify seven possible agent roles provides an additional barrier to consumer understanding.

“Not knowing whether your real estate agent represents your interests or those of the other party can be costly,” said Stephen Brobeck, a senior fellow at CFA and author of the report. “An agent working for the other party could, and may be legally required to, pass on compromising information such as the purchase price you’re prepared to sell for or spend. And this agent would have no obligation to help you find the right buyer or the right house at the right price,” he added.

In several states, notably Florida, many home sellers and buyers work with “transaction brokers” (i.e., facilitators). And in all states, some consumers work with agents who represent the other party in the home sale. Yet, an October 2018 national survey commissioned by CFA found that two-thirds of respondents mistakenly said that real estate agents are “always” or “almost always” required to represent the interests of the home buyer or seller with whom they are working.

CFA recommends that all states take steps to improve their agency disclosures. Essential information about representation should be prominently, briefly, and simply communicated by agents at first contact with customers, most importantly – the agent does not represent the customer and, if the case, represents another party. Only home sellers and buyers with a signed

agreement from a fiduciary agent can expect complete loyalty from that agent. The three states with disclosures that best meet these criteria are South Dakota, Vermont, and New Hampshire.

“State real estate regulators need to prioritize home sellers and buyers receiving timely information about whom their agent represents,” noted CFA’s Brobeck. “Even when not required by state law, regulators can urge agents to communicate to prospective clients that they do not represent their interests until a written agreement is signed,” he added. CFA also urges these regulators to work with state legislators to make disclosures more consumer-friendly.

The report identified six different types of barriers to effective consumer disclosures on agent representation:

- **No disclosure or awareness of disclosure:** In a 2017 National Association of Realtors survey of recent home buyers, 40 percent said they did not receive the disclosure or did not know whether they had. In a 2015 survey of Utah real estate agents, only 27 percent said they provided a required buyer agency disclosure signed at the first meeting. As one real estate professional explained: Most agents “simply tell the Buyer and the Seller it [agency disclosure] is a required document they must sign before they can assist them in a transaction. The client or consumer signs this form without the slightest idea of what they are signing or what ‘Agency’ means.”
- **No timely disclosure:** Only sixteen states require agency disclosure at the first contact or first substantive contact. Eight states allow this disclosure fairly late in the sales process, for example, “before the sales agreement” or “before sales contract presented.”
- **Complexity of agent roles:** Subject to certain individual state limitations, an agent can play any one of seven different roles – with total loyalty as an independent agent, with required loyalty as a designated agent, with required loyalty to the other party as a subagent, with no loyalty to you as a customer, with partial loyalty to you as a dual agent or as a facilitator, or with total loyalty as a fiduciary agent that later is shifted to partial loyalty as a dual agent.
- **Complexity and diversity of state agency laws:** These laws use more than 50 terms to identify the roles of agents. A facilitator, for example, could also be called a transaction broker, transaction coordinator, transaction licensee, transaction agent, neutral transaction facilitator, neutral dual facilitator, neutral transaction coordinator, transaction facilitator, neutral licensee, or intermediary. And no two states use exactly the same set of roles and terms for these roles. In Rhode Island, for instance, consumers can work with a “neutral transaction facilitator,” “designed client representative,” “neutral dual facilitator,” or neutral transaction coordinator” while in Massachusetts consumers could work with a “seller’s agent,” “buyer’s agent,” “non-agent facilitator,” “designated sellers’ agent,” “designated buyer’s agent,” or “dual agent.”
- **Long, legal, and poorly presented disclosure forms:** Only 31 states have developed a disclosure form that agents are required to use. In most other states, agents can use a disclosure form developed by their state realtor association. Perhaps the least consumer friendly of the state forms is that of Washington State, which includes a one-page legal summary and five attached pages of legal language (headings include “vicarious liability” and “imputed knowledge and notice”). Many

other disclosures are long, use small print, contain long lists that consumers must compare to understand, and use legal language and concepts.

- **Failure to include important information about agency:** The disclosures of 14 states do not clearly identify whom the agent represents if anyone. In only five states do disclosures mention the possibility of an agent switching from single agency to dual agency or transaction brokerage. Most states permitting assigned designated agents do not require mentioning the possibility of conflicts of interest.

The report recommends that the agent's relationship to seller or buyer be defined in terms of loyalty – total, partial, or none. While the term “representative” connotes loyalty to customers, in some states it is used to describe dual agency. The report also recommends that the disclosure be:

- in writing,
- presented at first contact without distractions,
- short, written in plain language with user-friendly format and type size,
- required and written by states not the industry, and
- include the agent's name and the date.

[The Consumer Federation of America](#) is a national organization of more than 250 nonprofit consumer groups that was founded in 1968 to advance the consumer interest through research, advocacy, and education.



Consumer Federation of America

Why Required Real Estate Agent Disclosures about Representation Fail and How They Can Be Improved

Stephen Brobeck
Senior Fellow

January 2020

Introduction

All states require some sort of disclosure by real estate agents to consumers about whom the agents represent in a home sale. These agency disclosures are important. Agents may be representing the interests of a prospective home purchaser or seller, but they also may be representing the interests of the other party in the sale, or as a facilitator, the interests of neither party. A consumer who mistakenly thinks an agent represents their interests can easily lose thousands of dollars in a home sale because they pass on compromising financial information or simply because no agent is seeking to obtain the most beneficial home sale price for them.

As this report shows, there is evidence that many consumers, especially home buyers, do not understand real estate disclosures about agent representation. Many home buyers either do not receive an agency disclosure or are not aware that they have received it. Moreover, when buyers do receive an agency disclosure form, many do not read the document, or if they try, do not understand it. That is not surprising given the general ineffectiveness of consumer disclosures about services and the particular challenges of communicating complex agent roles to home sellers and buyers.

Nevertheless, as this report suggests, disclosures of agent representation can be greatly improved. Most importantly, they should be provided at the earliest possible moment in the relationship between agent and consumer. These disclosures should be presented so that the consumer takes them seriously. If, for example, the agent passes the disclosure on with other documents, and does not explain it, the consumer may well ignore it. The disclosure should feature the most important information about agency. And the document must be easily comprehensible. If the disclosure is long, legal, or poorly formatted, it likely will not be understood or even read.

This report on agency disclosure, researched during the summer of 2019 then sent to ARELLO for review, follows CFA's January 2019 report on "the agency mess," which relied mainly on secondary sources to explain consumer confusion about agency.¹ The new report uses research on effective consumer disclosures to evaluate required disclosures about agent

¹ Stephen Brobeck, The Agency Mess: Home Buyer and Seller Confusion and Costs Related to Diverse and Poorly Enforced State Laws about the Role and Responsibility of Real Estate Agents, Consumer Federation of America (January 14, 2019). That report and this one both call for greater and more effective disclosures about agent representation to home sellers and buyers. Another report released in October 2019 – Hidden Real Estate Commissions: Consumer Costs and Improved Transparency – calls for improved disclosures about commissions. Research on how to improve information about agent service quality available to sellers and buyers is underway. Future research will evaluate and grade state real estate regulators on the information they provide to home sellers and buyers.

representation in 50 states and DC, and how these disclosures could be improved.² More specifically, it discusses:

- research on effective consumer disclosures,
- barriers to effective real estate agency disclosures,
- criteria for effective agency disclosures,
- the most effective state disclosures, and
- the potential for improving agency disclosures.

Consumer Disclosures for All Services Often Ineffective But Can Be Improved

There is wide-ranging research showing that typical consumer disclosures for services are ineffective but could be greatly improved. Only a minority of consumers read lengthy disclosures. One study found that only one or two of 1,000 potential buyers of online software read licensing agreements.³ Another study found that those who read 6,000-word service agreements spent less than one minute doing so.⁴ And when in an experimental setting, participants spent more time reading an agreement, they still did not have good comprehension. In one study, subjects who chose to spend an average of four minutes reading a credit card contract, answered questions about the contract correctly only 25 percent of the time.⁵

Most research on disclosures has found that length, technicality, and lack of perceived relevance are huge barriers to consumer comprehension. One survey suggested that a contract offered by a leading online service provider would take a consumer 86 minutes to fully comprehend.⁶ Another study concluded that a typical sign-in online contract required 14 years of schooling to understand.⁷ Other research has suggested that, confronted by lengthy, incomprehensible disclosures, consumers simply give up and hope that laws provide them with adequate consumer protection.⁸ As one governor of the Federal Reserve Board put it: “Pages

² State agency laws can be found by googling (name of state) real estate agency law. Consumer agency disclosures can be found by googling (name of state) real estate agency disclosure. Often, both are menu items on state real estate commission websites.

³ Yannis Bakos, Florencia Marotta-Wurgler, David R. Trossen, “Does Anyone Read the Fine Print? Consumer Attention to Standard Form Contracts,” New York University Law and Economics Working Paper Number 195 (2014).

⁴ Thomas J. Maronick, “Do Consumers Read Terms of Service Agreements When Installing Software? A Two-Study Empirical Analysis,” International Journal of Business and Social Research, v. 4, no. 6 (2014).

⁵ Jeff Sovern, “Forum: Consumers Often Sign Contracts They Don’t Read or Understand,” Pittsburgh Post Gazette (March 3, 2015).

⁶ “Do You Accept the Terms & Conditions...Or Do They Need to Change?” Lawyer Monthly (April 8, 2019).

⁷ Samuel Becher, “Research Shows Most Online Consumer Contracts are Incomprehensible, But Still Legally Binding,” Phys Org (February 4, 2019).

⁸ Sovern, loc. cit. Adam Levitin, “The Implication of Reasonable Consumers Not Reading Contracts of Adhesion,” Credit Slips (January 11, 2019).

and pages of fine print may provide comprehensive descriptions that lawyers might love but that consumers find confusing or worse, useless.”⁹

Much research has also concluded, however, that consumer disclosures for services can be greatly improved and that these improvements can increase consumer comprehension. An extensive Rand report reviewing research on consumer disclosures found that “simpler disclosures, particularly for credit cards and mortgages, have shown promise in helping consumers make informed decisions.”¹⁰ An FTC Public Workshop on consumer disclosures suggested that the following characteristics were among those contributing to an effective consumer disclosure:

- Contains essential information.
- Briefly explains relevance of information to the reader.
- Places the most important information first.
- Uses simple unambiguous language and an organized structure.
- Considers timing and context.
- Tests the effectiveness of the disclosure.¹¹

The Consumer Disclosures Working Group of the National Association of Insurance Commissioners developed an even more extensive, but complementary, list of characteristics of effective disclosures:

- As short and concise as possible.
- Title communicates relevance of information.
- Information is specific to individual consumers.
- Most important information is at the beginning.
- Information is separated into meaningful sections.
- Technical language is avoided.
- Vertical (not horizontal) lists, color and highlighting, and a large-enough font are utilized.
- “Making a disclosure available early is important.”

The Working Group also suggested that, in general, it was more effective and efficient for government than for industry to develop the disclosure language and any related document.¹²

⁹ Governor Randall S. Kroszner, “Creating More Effective Disclosures,” Speech at George Washington University School of Business policy forum (May 23, 2007).

¹⁰ Angela A. Hung, Min Gong, Jeremy Burke, “Effective Disclosures in Financial Decisionmaking,” RAND Corporation (2014), p. 24.

¹¹ “Putting Disclosures to the Test,” Staff summary of public workshop (September 15, 2016).

¹² Consumer Disclosures Working Group, “Best Practices and Guidelines for Consumer Information Disclosures,” National Association of Insurance Commissioners (October 17, 2012).

Barriers to Effective Consumer Disclosures on Agent Representation

There is evidence that most consumers do not understand how real estate agents work with and represent consumers. In an October 2018 national survey commissioned by the Consumer Federation of America, two-thirds of respondents mistakenly said that real estate agents are “always” or “almost always” required to represent the interests of the home buyer or seller with whom they are working.¹³ No state has this requirement. And when respondents in this survey were asked if they understood the differences between a single agent, a designated agent, a dual agent, a subagent, and a transactional agent, 55 percent said that they did not. This figure is probably much too low because of the tendency of people to overestimate their own knowledge. One longtime industry expert has said that he does not think even most real estate agents fully understand agency laws in their state.¹⁴

Understanding agency representation is of great importance to home sellers and buyers. These consumers can face a number of barriers to achieving this understanding. These barriers include:

- Consumer is not given the disclosure by agent.
- Consumer is not aware they were given the disclosure
- Consumer is not given the disclosure in a timely manner.
- Consumer tries to read but does not understand the disclosure because the information presented is unfamiliar and complex.
- Consumer tries to read but does not understand the disclosure because it is too long, legal, and/or poorly presented.
- Consumer reads the disclosure, but it fails to include important information.

There is evidence that all six barriers contribute to home buyer and seller lack of understanding of agent representation

No Disclosure or Awareness of Disclosure

Consumer disclosures about real estate representation can be ineffective because consumers, especially buyers, either do not receive an agency disclosure from the agent or are not aware that they have received this document. In a 1997 Massachusetts Office of Consumer Affairs survey in which examiners posed as homebuyers, none received an agency disclosure

¹³ National survey undertaken by ORCI for Consumer Federation of America on the weekend of October 20, 2018 by cell phone and landline. The 1000 respondents were representative of the U.S. adult population. The margin of error was plus or minus three percentage points.

¹⁴ This point was made by Douglas Miller, executive director, Consumer Advocates in American Real Estate (CAARE), in two personal communications in 2019.

form from any of the 45 largest real estate firms in the state.¹⁵ In a more recent survey of Utah real estate agents, only 27 percent said they provided a required buyer agency disclosure that was signed at the first meeting.¹⁶ In the 2017 National Association of Realtors survey of recent home buyers, 40 percent said they did not receive the disclosure or did not know whether they had. And less than half said they received it at either the first contact (22%) or first meeting (26%).¹⁷

One real estate professional explained why consumers may not understand that they have received an agency disclosure: “Few agents make it clear to the Seller or Buyer what their obligations are related to this [agency disclosure] document. They simply tell the Buyer and the Seller it is a required document they must sign before they can assist them in a transaction. The client or consumer signs this form without the slightest idea of what they are signing or what ‘Agency’ means.”¹⁸

State Law Does Not Require Timely Disclosure

Not receiving the disclosure in a timely manner can also greatly disadvantage consumers. If during the first communication between buyer and agent, the agent fails to inform the consumer about lack of confidentiality, the consumer may disclose what they can afford or be prepared to spend on a home, and that information could be passed on to the seller. Unfortunately, a number of state agency disclosure laws do not require providing the disclosure at the first contact (see Appendix A for required timing of state disclosures).

- Many states do require this disclosure at “the first contact” (MD, OR, TX) or at the “first substantive contact” (MN, NY, NC, ND, SC) or variants thereof (ID, KS, MI, IN, ME, NJ, PA, VT).
- Other states link this disclosure to the first personal or business meeting (AZ, CT, MS, MA, NH). This disclosure may not be soon enough because discussions could already have taken place by phone, email, or text.
- Still other states link the disclosure to the signing of a service agreement between agent and consumer (GA, MT, NV, NM, UT, WA, WV), to the agent providing service (AK, DC, IA, VA, WI), or to a specific service such as listing or showing a property (FL, OH). By these times, many communications between agent and consumer usually have occurred.
- Other states require disclosures to be provided well after initial communications and much too late in the home sale process – “before signing of sale contract” (AR), “before entering an offer to purchase” (CA), “before sales contract presented” (HI),

¹⁵ June Fletcher, “New Rules: What Agents Won’t Tell You,” Wall Street Journal (March 13, 1993), B12.

¹⁶ Rodger L. Hardy, “Understanding Buyer and Seller Agency in the Beehive State,” *heraldextra.com* (May 15, 2015).

¹⁷ National Association of Realtors, 2017 Profile of Home Buyers and Sellers.

¹⁸ Drew Sargent, “Arizona Real Estate Agency Disclosure: Why Is It Important To Buyers and Sellers?” *arizonahomesbydrew.com* (2019).

“when drafting or presenting an offer” (KY), “when negotiations commence” (for subagent in MT), “before agent presents written agreement” (NM), “before sales agreement” (OK), or “before preparation of offer” for buyer agents (TN).

Complexity of Agent Roles

Even if the real estate agent gives the document to a consumer in a timely manner and tries to explain it, the consumer may have difficulty understanding the role of the agent because of the diversity of potential agent-consumer relationships, the complexity of the state laws defining these relationships, and the great variation in these laws from state to state. In most states, real estate agents are permitted to work with home sellers and buyers in several of the following ways:

- Work with and represent you as seller or buyer exclusively with total loyalty as an independent agent.
- Work with and represent you as seller or buyer exclusively with required loyalty as a designated agent.
- Work with you but represent the other party with required loyalty to them and no loyalty to you as their subagent.
- Work with you and represent the other party with total loyalty to them and no loyalty to you as a customer not a client.
- Work with both seller and buyer with partial loyalty as a dual agent.
- Work with both seller and buyer with partial loyalty as a facilitator.
- Initially represent you as seller or buyer with total loyalty, but later shift to the role of dual agent or facilitator with only partial loyalty to you.

These agent roles are complex in large part because many agents and most firms engage in both listing and buyer brokerage while some also practice transactional brokerage. How, for example, do agents represent buyers when the agents, or their firms, have listings they are obligated to promote? Or, how do agents represent sellers when the agents, or their firms, have buyers who are searching for the most desirable property for themselves? One option available is to shift the agent’s role from fiduciary to dual agent or facilitator, but how many clients really welcome this change, even if many approve it in order to complete a sale? State agency disclosure laws must take these complex relationships into account.

Complexity and Diversity of State Agency Laws Defining Agent Roles

To complicate matters further, states often use different terms to define essentially the same relationship. In a review of all 51 state and DC real estate laws, we found more than 50 terms that were used to identify relationships between agents and consumers (see Appendix B for the list). A facilitator, for example, could also be called a transaction broker, transaction

coordinator, transaction licensee, transaction agent, neutral transaction facilitator, neutral dual facilitator, neutral transaction coordinator, transaction facilitator, neutral licensee, or intermediary. Similar, a dual agent could also be called a limited consensual dual agent, dual representative, limited dual agent without assigned agents, standard dual representative, standard dual agent, dual agency-broker representing seller and buyer, broker representing both seller and buyer, or multiple representative.

The terms used to denote agent roles not only vary considerably, so too does the set of roles in individual states. As the list in Appendix C indicates, very rarely do two states have the same agent roles and the same terms to identify those roles. For instance:

- In Rhode Island, consumers can work with a “neutral transaction facilitator,” “designated client representative,” “neutral dual facilitator” or “neutral transaction coordinator.”
- In Massachusetts, they can work with a “seller’s agent,” “buyer’s agent,” “non-agent facilitator,” “designated seller’s agent,” “designated buyer’s agent,” or “dual agent.”
- In Ohio, they can work with “buyer and seller agents from different brokerages,” “buyer and seller agents from the same brokerage with separate dual agents,” “all agents from the same brokerage as dual agents,” “one agent serving as dual agent for both buyer and seller,” or “one agent representing seller or buyer with the other party unrepresented.”

The diversity of roles, terms, and combinations of both that are used to communicate about real estate agency make consumer comprehension especially challenging.

- Consumers may not immediately understand terms such as “dual agent” or “designated agent.”
- They may not understand why an “agent” does not represent (facilitators in many states), a “representative” does not have “fiduciary duties” (dual agents in most states), or a fiduciary can represent both buyer and seller (MS).
- Those who learn the terms and roles in one state likely confront an entirely different set of terms and roles in another state.
- This diversity of terms and roles makes any national effort to explain real estate agent roles difficult. One can identify general agent roles – most importantly, an agent working for your best interests, an agent working for the best interests of another party, or an agent working with both parties and representing the best interests of neither. But consumers can find it difficult to match these general roles with the specific terms used by different states.

Disclosure Forms Long, Legal, and/or Poorly Presented

In part, the complexity of agency concepts and related state laws makes it difficult to develop a disclosure form that is short, in plain language, and clearly presented. But many state disclosure forms are so long, legal, and/or poorly presented that consumers will not read them, or if they try, not fully understand them. In these instances, consumers depend entirely on agents clearly explaining the most important features of agency.

Thirty-one states have developed a disclosure form that agents are required to use – AL, AK, AR, CO, DE, ID, KS, KY, LA, ME, MD, MA, MN, MS, MO, NE, NV, NH, NY, NC, OH, OK, OR, PA, RI, NC, SD, TX, VT, WA, WV. In six of these states – AR, ID, KS, NC, OR, WA – this disclosure form represents a brochure or pamphlet. Three states – AL, LA, and SD – have both a conventional legal form and a brochure. In all but two of the remaining states and DC – GA and IN – state laws specify information that agents are required to disclose about representation. In most of these states, an affiliate of the National Association of Realtors has prepared a form for use by its members.

The consumer brochures or pamphlets are not always consumer-friendly. For example, the Washington State “pamphlet” is a one-page legal summary of the “law of real estate agency,” whose five pages are attached. The summary’s headings include “vicarious liability,” “imputed knowledge and notice,” “interpretation,” and “short sale.” The summary was clearly written by lawyers with little consideration for consumer comprehension.¹⁹

We deem the Washington State form/pamphlet to be the least consumer-friendly state form. But many others are so long, legal, poorly formatted, and/or in very small print that they are also unlikely to be read. We offer two examples – Delaware’s government disclosure form (<https://consumerfed.org/wp-content/uploads/2019/07/Delaware-Real-Estate-Agency-Disclosure-Forms.pdf>) and an industry form from Wyoming (<https://consumerfed.org/wp-content/uploads/2019/07/Wyoming-Real-Estate-Agency-Disclosure-Forms.pdf>) that contains information required by state law – to illustrate ineffective presentation, though we could have cited dozens of other forms. Both of these disclosures:

- Are long.
- Use small print.
- Contain long lists that consumers are unlikely to read.
- Use legal language and concepts, as illustrated below.

¹⁹ Law of Real Estate Agency Pamphlet – RCW 18.86.120 from Houses.Direct.

The Delaware disclosure – Consumer Information Statement (CIS) for Consumers seeking to Purchase or Sell Residential Property – cannot be easily understood by most consumers. The first two substantive paragraphs read as follows:

Presumed agency: You are a customer when you first contact a broker or salesperson who immediately owes you a duty of confidentiality as explained below. You automatically become a client and the other Statutory Duties begin upon the earlier of (i) the first scheduled appointment, (ii) the first showing of the property, (iii) making an offering, or (iv) the agent working for you, unless a CIS signed indicating there is no agency relationship which means there are no duties owed to you other than confidentiality. Under Delaware Law, it is presumed that you consent to dual agency unless you fill out this form saying you do not want dual agency. Dual agency is explained below.

Brokers and Salespersons as Statutory Agents: Under Delaware law, a real estate broker, associate broker, or salesperson is a statutory agent of yours and may be a dual agent representing both parties unless you elect in a written agreement, to enter into a common law agency relationship or to decline dual agency. A statutory agent is an independent contractor. He or she is NOT your fiduciary, but is an agent with duties specified by Delaware statutory law. Unless you say otherwise, the broker, associate broker, or salesperson also may represent both the buyer and seller with duties owed to both which is call dual agency as explained below.

Failure to Include Important Information About Agency

Whom the agent represents: The most important information not found in some agency disclosures is that in the first consumer contact with an agent, that agent does not represent the consumer. That fact and whom they represent, if anyone, should be disclosed. In existing forms, it is disclosed in two ways:

- At the beginning of the disclosure form, a very prominent statement that you (the consumer) is only a customer who is not being represented by the agent unless this representation is agreed to in writing. These disclosures can be found, for example, in the forms of Idaho, Maine, New Hampshire, South Carolina, and Vermont.
- Or the disclosure can be found in boxes to be checked whom the agent represents if anyone, usually at the bottom of the form. Around two-thirds of state disclosures utilize these boxes.

However, the disclosures of 14 states do not clearly identify whom the agent represents, if anyone. Eight of these disclosures are state forms – AL, MO, OK, OR, PA, TX, WA, and FL (as the default option, transaction brokerage does not need to be disclosed). And the remaining six disclosures are industry forms – IL, IA, NM, ND, UT, and WY.

Possible switch from single agency to dual agency or transaction brokerage: As explained earlier, this switch could be requested by either a listing broker who has found a buyer or by a buyer's agent who wants to sell one of their listings. Very few disclosure forms discuss this possibility. The state forms of Nevada, New York, and Ohio, and industry forms of Wyoming and Florida (for those represented by single agents) do so.

Acknowledgement that dual agents work with but don't represent either seller or buyer: All states allowing a shift to dual agency also require disclosure to and consent by the consumer. However, different states, in their consumer disclosures, describe dual agency in different ways, some more accurately and appropriately than others.

Many states – AR, DE, ME, MS, MO, NY OH, OR, SC, SD, WA – continue to characterize the role of the dual agent as a “representative” who represents both buyer and seller. Kentucky says a dual agent is “loyal to both parties.” Mississippi actually uses the term “fiduciary duties” but excludes full disclosure and undivided loyalty from these duties.

Other states more accurately acknowledge that dual agents cannot effectively represent the interest of both buyer and seller. Three states – LA, NE, PA – use the term “works for,” one state – NH – uses the term “acting for,” and one state – RI – uses the term “assists.” North Carolina's disclosure says that it “may be difficult to advance the interests of both buyer and seller.” Maryland's disclosure appropriately says that the dual agent “cannot give undivided loyalty” and there may be a “conflict of interest.”

Acknowledgement that assigned designated agents may face conflicts of interest: Many states allow an agent with a client to designate, through their firm, an agent representing the other party to a sale. The “other parties” must give written approval to this agent assignment. Even though both agents usually have a fiduciary duty to their clients, potential conflicts of interest exist because both agents work for the same firm, and one agent's initiative led to the appointment of the designated agent.

Most state disclosures describing designated agency – AK, DE, ID, KY, LA, MA, MO, NH, NC, PA, SC – make no mention of potential conflicts of interest. But there are exceptions. Rhode Island's disclosure indicates that “inherent conflicts of interest may exist.” And New York's disclosure says that designated agents represent the interest of their clients but “cannot provide undivided loyalty.”

Criteria for Effective Agency Disclosures

These barriers to effective disclosures suggest criteria for improving them. Given the challenges of persuading consumers to read lengthy and technical disclosures, we believe that the disclosure should emphasize only essential information – most importantly, the relationship of the agent to the consumer with whom they are communicating. Initially, this relationship will be as agent to a customer with no agent duty of loyalty. Except in the few states where agents are required to maintain confidentiality with customers, the disclosure should also emphasize that any personal information communicated to the agent may be passed on to another seller or buyer.

The disclosures should then describe the major roles of an agent in that state in terms of loyalty and working for one's best interests. These terms are understood by more consumers than are terms such as "fiduciary" or "dual agent."²⁰ And while the term "representative" connotes loyalty to customers, in some states it is used to describe dual agency. Agent roles defined by state laws should be categorized in terms of loyalty.

- **No loyalty:** Agents have no required loyalty to "customers" who have not signed an agency agreement. Similarly, subagents are not obligated to serve the best interests of their clients. In both instances, the agent is usually permitted, and may be required, to disclose confidential information to the other party to the sale.
- **Partial loyalty:** This is typically owed by a "limited agent," "dual agent," "transaction broker," or "facilitator" to both buyer and seller.²¹ These agents cannot promote the best interests of their clients but are obligated to keep confidential any personal information revealed by these clients, such as their financial condition.
- **Total loyalty:** "Single" or "exclusive" agents are fiduciaries who are obligated to promote only the best interests of their clients. That is relatively easy for the agents to do if they are part of a brokerage firm that is not representing the other party in the sale. Total loyalty to their client may be problematic, though, if agents are working in a firm that also represents the other party. For this reason, most states permitting designated agency require explicit consumer approval of being assigned a designated agent.

Sellers and buyers should also be warned at the outset that their agent may request a change from total loyalty to partial loyalty if the agent or their firm also want to work with the other party to the sale. This situation arises most frequently when a listing agent working with a seller finds a buyer with whom they also wish to work. It also often occurs when a buyer works with an agent who then finds a property that they or their firm have listed. The disclosure should

²⁰ Kleimann Communication Group, Inc. Final Report on Testing of Proposed Customer Relationship Summary Disclosures (September 10, 2018), p. 9.

²¹ We could find no differences that were material for consumers between dual agency on the one hand, and facilitatorship (transaction brokerage) on the other.

point out that the consumer is not obligated to accept this proposed change and must sign a document approving it.

In our view, these essential messages about real estate representation are the most important ones for agents to communicate in a disclosure. However, the form and timing of the disclosure are also critically important. Applying the criteria for disclosures recommended by experts, we recommend the follow principles for agency disclosures:

- **In writing:** A written document provides information to consumers that they can read or reread at their own pace. It also removes uncertainty and risk for agents who are expected or required to convey this important information.
- **Presented at first contact without distractions:** It is important that the consumer receive this disclosure at first contact, whether by phone, email, text, app, social media, some other digital vehicle, or in person. That will help ensure that the consumer does not divulge personal information – such as a desired sale price – that an agent could, or may even be obligated, to pass on to another seller or buyer. And the notice should be transmitted by itself, separate from other documents, to help ensure that it will be noticed and read.
- **Short, written in plain language with user-friendly format and type size:** The disclosure will be read and understood less frequently if it is long, contains legal language, has small print, looks cluttered, or is not logically organized. It is desirable for draft forms to be reviewed both by communications experts and by consumers.
- **Includes the agent's name and the date:** This identification helps ensure that consumers receive the disclosure and that agents can prove they sent it.
- **Should be required and written by states:** Both agents and consumers will take the notices more seriously, and there will be less ambiguity, if the notices are required and written by states. While some disclosures prepared by industry to conform to state law are relatively good, most are not and, overall, are less likely to meet the criteria above for an effective disclosure. In particular, they are less likely to use plain language and an effective format for communicating with consumers.

Which Agency Disclosures Best Meet These Criteria

Our research has revealed that no state agency disclosure meets all of our criteria for effectiveness. The forms either are not presented in a timely fashion, do not contain important information, or are long, legal, and/or poorly presented. If all three of these conditions are not met, the disclosure cannot be effective, and consumers are denied access to essential knowledge affecting their material interests.

Nevertheless, some disclosures communicate far more effectively to consumers than do others. The three disclosures that we consider to be the most effective are government forms

from South Dakota (<https://consumerfed.org/wp-content/uploads/2019/07/South-Dakota-Real-Estate-Agency-Disclosure-Forms.pdf>), New Hampshire (<https://consumerfed.org/wp-content/uploads/2019/07/New-Hampshire-Real-Estate-Agency-Disclosure-Forms.pdf>), and Vermont (<https://consumerfed.org/wp-content/uploads/2019/07/Vermont-Real-Estate-Agency-Disclosure-Forms.pdf>).

South Dakota

- + Required before agent discusses confidential buying or selling objectives
- + One page in medium-size print using plain language
- + Clear description of four agent roles with boxes to check
- + Agent and firm identified
- + Consumer signs statement that agent doesn't represent them and may represent the other party to the sale
- Disclosure should say if agent represents another party and should discuss confidentiality
- + Consumer booklet provided that, in plain language and large type, explains the home buying process including potential agent roles

New Hampshire

- = Required at time of first business meeting [should be at first contact]
- + Two pages with smaller print but good format and plain language, so readable
- + First page focuses on difference between customer and client – heading says, “Right Now You Are a Customer” with good discussion of confidentiality
- + Second page briefly describes 8 possible agent roles [allowed by state law]
- + Description of dual agency indicates agent “acting for” not “representing” client and also indicates that agent “cannot advocate on behalf of one client over another”
- No mention of potential conflict of interest with designated agency
- No mention of risks of working with a subagent
- + Agent and firm identified

Vermont

- + Required at first reasonable opportunity and before discussing confidential information
- + One page with smaller type but good format, so fairly readable
- + First heading says, “Right Now You Are Not a Client” and, in bold type, cautions, “You should not reveal any confidential information that could harm your bargaining position”
- + Description of designated agency says your agent owes you a “duty of loyalty” but other agents in your firm may represent a party “whose interests conflict with yours”
- + Agent and firm identified

Recommendations for Improving State Agency Disclosures

We urge all state regulators and their commissions/boards to revisit the issue of consumer understanding of agent roles and responsibilities. Effective disclosures represent a challenge with any product in any context but particularly in that of a home sale. Consumers have little experience dealing with real estate agents, understandably tend to focus on the sale and sale price, and are challenged to understand diverse agent relationships defined by complex law.

Most importantly, the essential information about representation should be prominently, briefly, and simply communicated by agents at first contact with customers. This information is that the agent does not represent the customer and, if the case, represents another party. Any personal information communicated by the consumer to that agent may be passed on to another party. This information should be set apart from any other information provided on the disclosure.


The remainder of the disclosure should discuss specific agent roles, and potential shift in role, in a way that consumers can easily comprehend. Degree of agent loyalty and potential conflicts of interest should be emphasized. Long lists of responsibilities for different roles, which readers must compare to understand differences, are virtually useless because few consumers are likely to take the time to make the comparison. The text should be in plain language and be large enough to read easily.

The agent and their firm should be identified. We agree, as do many states, that it is desirable for the consumer to sign the form. But we are also sensitive to the reluctance of many consumers to sign a document that they have not had time to read and understand.

Finally, a disclosure form will not be effective unless it is given by agents to customers. State regulators should take steps to ensure that this distribution is occurring.

APPENDIX A: Timing of First Written Agency Disclosure Required By State

AL	as soon as is reasonably possible
AK	when agent begins to provide specific assistance
AZ	at the initial consultation meeting
AR	before signing of sale contract
CA	before entering listing agreement (listing agent) before entering an offer to purchase (buying agent)
CO	before offering or negotiating to sell or buy
CT	at beginning of first personal meeting (buying agent)
DE	earlier of first appointment, showing of property, or offer
DC	before providing specific real estate assistance
FL	for transaction brokerage, if shift from single agent earlier of listing or rep agreement or property showing for single agent
GA	at time of agreement with agent
HI	before sales contract presented
ID	first substantial business contact
IL	initial contact with consumer
IN	before receiving confidential information
IA	when agent provides specific assistance to the client
KY	when drafting or presenting an offer
KS	at first practical opportunity
LA	when substantive contact is made
ME	when there is a substantive communication
MD	upon first contact
MA	at first personal meeting to discuss property
MI	before disclosure of confidential information
MS	at first meeting with prospective client
MT	when listing agreement executed (seller agent) when negotiations commence (subagent) when broker agreement executed (buyer agent)
MO	no later than first contact or first showing of property
NH	at first business meeting
MN	at first substantive contact
NE	at earliest practicable opportunity or following first substantive contact
NV	when an agency relationship is established
NJ	before consumer discusses motivation or desired sale price
NM	before agent presents any written agreement
NY	at first substantive contact and before agreement
NC	at first substantive contact
ND	at first substantive contact
OH	before showing property (listing agent) before discussing offer, financial info, other (buyer agent)
OK	before sales agreement
OR	on first contact
RI	earlier of first personal contact or purchase offer



PA	at initial interview (oral if not in person with written form later)
SC	at first substantive contact
SD	before agent discusses consumer's confidential objectives
TN	before preparation of offer (buyer agent)
	before execution of listing agreement (listing agent)
TX	at first contact (orally or in writing)
UT	in written agreement for brokerage services
VT	at first reasonable opportunity and before discussing confidential info
VA	before specific real estate assistance is provided
WA	before signing an agreement with broker
WV	before signing contract for representation
WI	before providing brokerage services
WY	before discussion involving sale


APPENDIX B: Terms Used By States in Consumer Disclosures to Refer to Roles of Real Estate Agents

Single agent
Owner's agent
Limited seller's agent
Seller's agent
Seller's broker
Buyer's agent
Limited buyer's agent
Buyer's limited agent
Buyer's broker
Exclusive agent
Subagent
Limited services agent
Limited representative
Limited agent
Disclosed limited agent

Dual agent
Duel agency-broker representing seller and buyer
Broker representing both seller and buyer
Limited dual agent
Limited consensual dual agent
Dual representative
Standard dual agent
Dual agent with designated sales agents
Limited dual agent without assigned agents
Standard dual representative
Disclosed dual agent
Limited dual agent with assigned agents
Multiple representative

Designated agent
Designated licensee
Designated client representative
Designated representative
In-house seller agent designate
In-house buyer agent designate
Appointed agent

Nondesignated agent
Neutral licensee
Transaction broker
Facilitator
Nonagent facilitator



Transaction coordinator
Transaction licensee
Transaction agents from two different brokerages
Transaction agents from same brokerage
Transaction agent representing both parties
Neutral transaction facilitator
Neutral dual facilitator
Neutral transaction coordinator
Transaction facilitator
Intermediary
Independent contractor
Statutory broker

APPENDIX C: Major Roles Of Real Estate Agents In States*

Alabama

Non-agent (working with customer)
Transaction broker
Single agent
 Single agent for seller
 Subagent
 Buyer's agent
Limited consensual dual agent

Alaska

Licensee (working with customer)
Representative
Neutral licensee
Designated licensee

Arizona

Buyer's broker
Seller's broker
Limited representative

Arkansas

Buyer representative
Seller representative
Dual agent

California

Seller's agent
Buyer's agent
Agent representing both seller and buyer

Colorado

Seller's agent
Buyer's agent
Transaction-broker
Non-agent/non transaction broker

Connecticut

Seller agent
Buyer agent
Dual agent

Delaware

Licensee (working with customer)
Presumed dual agent

Statutory agent
Dual agent
Designated agent

District of Columbia

Non-representative licensee
Seller representative
Sub-agent
Buyer representative
Designated agent of the buyer or seller

Florida

Transaction broker
Single agent
Licensee (working with customer)

Georgia

Seller agent
Buyer agent
Designated agent
Dual agent
Subagent

Hawaii

Seller's agent
Buyer's agent
Dual agent

Idaho

Licensee (working with customer)
Single agent
Limited dual agent
Without assigned agents
With assigned agents

Illinois

Non-agent (working with customer)
Exclusive agent
Exclusive buyer agent
Designated agent
Disclosed dual agent

Indiana

Seller's agent
Buyer's agent
Limited agent

In-house agent

Iowa

Seller agent

Subagent

Buyer's agent

Agent representing both seller and buyer

Kansas

Non-agent (working with customer)

Seller's agent

Buyer's agent

Transaction broker

Kentucky

Seller agent

Buyer agent

Designated agent

Dual agent

Louisiana

Agent

Designated agent

Dual agent

Maine

Non-agent (working with customer)

Client of:

Single agent

Appointed agent

Disclosed dual agent

Massachusetts

Seller's agent

Buyer's agent

Non-agent facilitator

Designated seller's agent

Designated buyer's agent

Dual agent

Maryland

Seller's agent

Subagent

Buyer's agent

Dual agent



Michigan

Seller's agent
Buyer's agent
Dual agent
Affiliated licensee
Limited service

Minnesota

Facilitator
Seller's broker
Buyer's broker
Dual agent-broker

Mississippi

Seller's agent
Buyer's agent
Disclosed dual agent
Non-agent (working with customer)

Missouri

Seller's limited agent
Buyer's limited agent
Sub-agent
Disclosed dual agent
Designated agent
Transaction broker

Montana

Seller agent
Buyer agent
Dual agent
Statutory broker

Nebraska

Limited seller's agent
Limited buyer's agent
Limited dual agent
Common law agent for buyer
Common law agent for seller

Nevada

Licensee acting for seller
Licensee acting for buyer
Broker assigning additional licensees from brokerage to separate parties
Licensee acting for both parties

New Hampshire

Licensee (working with customer)

Seller agent

Buyer agent

Single agent

Sub-agent

Disclosed dual agent

Designated agent

Facilitator

New Jersey

Seller's agent

Buyer's agent

Disclosed dual agent

Transaction broker

New Mexico

Exclusive agent

Buyer agent

Seller agent

Designated agent

Sub-agent

Dual agent

Transaction broker

New York

Seller's agent

Buyer's agent

Broker's agent

Dual agent

Dual agent with designated sales agents

North Carolina

Seller's agent

Dual agent

Designated agent

Buyer's agent

Subagent

North Dakota

Non-agent (working with customer)

Seller's broker

Buyer's broker

Dual agent

Appointed agent

Subagent

Ohio

Buyer and seller agents from different brokerages
Buyer and seller agents from same brokerage with separate dual agents
All agents from same brokerage as dual agents
One agent serving as dual agent for both buyer and seller
One agent representing seller or buyer with other party unrepresented

Oklahoma

Broker to seller
Broker to buyer
Broker to both seller and buyer
Broker providing fewer services

Oregon

Seller's agent
Buyer's agent
Disclosed limited agent

Pennsylvania

Seller agent
Buyer agent
Dual agent
Designated agent
Transaction licensee

Rhode Island

Neutral transaction facilitator
Designated client representative
Neutral dual facilitator
Neutral transaction coordinator

South Carolina

Non-agent (working with customer)
Transaction broker
Single agent
Dual agent
Disclosed dual agent
Designated agent

South Dakota

Single agent
Appointed agent
Limited agent
Transaction broker
Non-agent (working with customer)

Texas

Seller agent
Buyer agent
Intermediary
Subagent

Utah

Seller's agent
Buyer's agent
Agent of both buyer and seller

Vermont

Agent working with non-client
Agent working with client
 Non-designated agent
 Designated agent

Virginia

Seller agent
Buyer agent
Disclosed dual agent
Limited service agent

Washington

Buyer's agent
Dual agent
Seller's agent
Subagent

West Virginia


Listing agent
Subagent
Buyer's agent
Agent representing both seller and buyer

Wisconsin

Selling agent
Buyer agent
Multiple representation
 With designated agency
 Without designated agency

Wyoming

Seller's agent
Broker working with customer



Buyer's agent
Intermediary
Change from agent to intermediary
Designated agent

*Only those major roles in required state disclosures are identified. Some other roles, often a subset of a major role, are mentioned in state agency laws.