

## Department of State Provides Clarity

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Two recent opinions issued by the New York State Department of State (“DOS”) have provided clarity about important issues. The first opinion addresses “substantive contact” for purposes of compliance with Real Property Law Section 443 and the delivery of the Agency Relationship Disclosure Forms. The second provides clarification regarding a Declaratory Ruling issued by the DOS on August 27, 1991 (See *In re Matter of Janet S. Kaplan*, #91-34) which has been consistently misinterpreted and which has now been effectively reversed by the recent opinion.

### Substantive Contact

New York’s Real Property Law Sections 443(3)(b) and 443(3)(c) provide as follows:

**“b. A seller’s agent or landlord’s agent shall provide the disclosure form... to a buyer, buyer’s agent, tenant or tenant’s agent at the time of the first substantive contact with the buyer or tenant....”**

**c. ...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....”**

It is now commonplace for buyers to be represented by buyer’s agents. Some persons interpreting this section of the Real Property Law, and even some DOS investigators, were insisting that brokers were required to present Agency Relationship Disclosure Forms to every purchaser who is accompanied to a property by the prospective purchaser’s own buyer’s agent.

In response to an inquiry regarding what constitutes “substantive contact” when a buyer is accompanied by a buyer’s agent, the DOS has now stated clearly that the legislative intent must be used to give the words in the statute their “natural, ordinary and obvious meanings.”

The opinion notes that “substantive contact” is not defined by the statute and that the word “substantive” (according to Merriam-Webster.com) is defined in part as being “considerable in amount or numbers”, or “having substance: involving matters of major or practical importance to all concerned.”

The Department of State’s position on this now is that “...a broker does not have substantive contact with a party when that party is in the presence of his or her own broker.” The reasoning behind this interpretation is that anything that is substantive will take place in a dialogue between the brokers and not the consumer. Accordingly, a real estate broker is not required to provide the Agency Relationship Disclosure Form when either the buyer or seller is accompanied by his or her own real estate broker. If, on the other hand, the party is unrepresented, and there is “substantive contact” between the broker or agent and the consumer, the Section 443 Disclosure Form must be provided.

The opinion goes on to point out that even though an agent need not submit an Agency Relationship Disclosure Form to a consumer represented by his or her own broker, the agent involved must still comply with Regulation 175.7 by identifying the party the agent is representing in the transaction. Given the continuing obligation under Regulation 175.7, the opinion also suggests that even when an Agency Relationship Disclosure Form need not be obtained because the consumer is accompanied by his or her own broker, a broker should consider presenting one to a represented party in order to ensure that the agent is not thereafter accused of failing to reveal who the agent is representing in the transaction.

### **Whose Listings Are They?**

The 1991 Declaratory Ruling issued in the Matter of Janet S. Kaplan (#91-34) has been interpreted by some agents as creating “an absolute right for a real estate salesperson or associate broker to take listings with them upon leaving the broker for whom the listing was obtained.”

As a result of an inquiry from New York State Association of Realtors Director of Legal Services, S. Anthony Gatto, Esq., the Department of State has recently issued an Opinion (dated October 18, 2011) affirming the provisions of Regulation 175.14 which mandates that “on termination of an association with a sponsoring broker, an associate broker or salesperson must “...forthwith turn over to the (sponsoring)...broker any and all listing information obtained during (the associate broker/salesperson’s) association...’ with the sponsoring broker.” The Opinion further points out that “[i]f an associate broker or salesperson were to enter into a new listing agreement with a seller knowing that said seller was already bound by an agency agreement with the associate broker/salesperson’s former brokerage, the Department of State could institute disciplinary proceedings against the licensee pursuant to Real Property Law Section 441-c.” In addition, the new broker could also face disciplinary proceedings.

The circumstances in the Matter of Janet S. Kaplan related to a close personal relationship between the agent and the owner of property. The owner of the property wanted to shift brokers when the salesperson changed affiliation to another firm. DOS has now clarified that the Declaratory Ruling in the Matter of Janet S. Kaplan is one which should be limited to very unique circumstances such as a familial relationship but was never intended to give a salesperson the right to violate the DOS regulations by having the salesperson take listings to a new brokerage affiliation.

The October 18, 2011 Opinion from the Department of State points out two (2) dangers of such an action by a salesperson or broker associate who changes affiliation:

1. The salesperson or associate broker who seeks to convert the listing to the affiliation with the new broker can potentially violate Regulation 175.8 which prohibits a licensee from negotiating “the sale, exchange or lease of any property directly with an owner or lessor if he knows that such owner, or lessor, has an existing written contract granting exclusive authority in connection with such property with another broker.”
2. A seller or buyer always has the right to cancel an agency contract. That right, however, is subject to the terms of the listing agreement or the representation agreement entered into by the consumer. The Opinion points out that “[i]f a seller or buyer terminates the

agency in breach of his or her contract with the broker, the broker who had the contractual agreement has the legal right to maintain suit (Restatement (Second) of Agency, section 455, comment c).”

### **Conclusion**

These two recent opinions provide a firm footing for the industry so that salespersons and broker associates, who are dealing with consumers or who have changed firm affiliations, have an understanding about their specific duties under the described circumstances.

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