

**S B**

**425**

SENATE COMMITTEE REPORT  
FIRST COMMITTEE OF REFERRAL

DATE: 1/31/90

FURTHER:

Date of 5-Day Notice: 2/15/90  
(in accordance with Uniform Rule 23)

DATE TURNED INTO OFFICE: 2/22/90

Labor and Commerce Committee considered SB 425

"An Act relating to disclosure of agency by holders of real estate licenses; and providing for an effective date."

and recommended:

- replace with \_\_\_\_\_ CS SB 425  same title
- attached amendment(s)  new title
- \_\_\_\_\_ letter of intent adopted

- do pass
- do not pass
- no recommendation
- individual recommendations
- further referral to \_\_\_\_\_

ATTACHES NEW FISCAL NOTE(S):

Department(s)/Date:

Department(s)/Date:

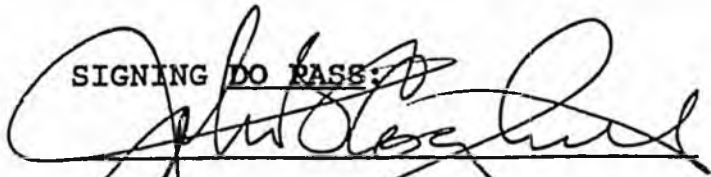
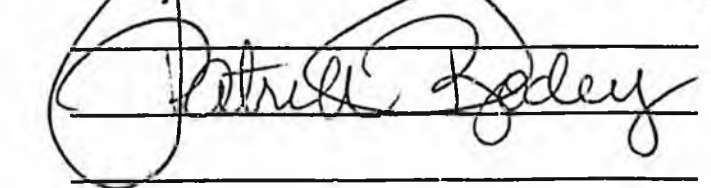
fiscal note(s) \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

zero fiscal note(s) Dept of Commerce 2/7/90  
\_\_\_\_\_  
\_\_\_\_\_

appropriation-no fiscal note

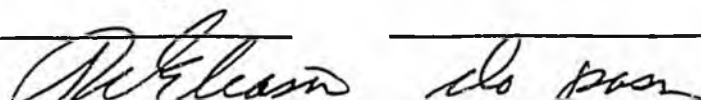
Governor's bill w/fiscal note

SIGNING DO PASS:

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

OTHER RECOMMENDATIONS:

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

  
Chair: Signature and Recommendation

## FISCAL NOTE

**REQUEST:**

Revision Date: \_\_\_\_\_ Agency Affected: Commerce & Economic Dev.  
 Title: An Act relating to disclosure of BRU: Occupational Licensing  
agency by holders of real estate licenses;  
 Sponsor: Sen. Sturgulewski Components: \_\_\_\_\_  
 Requestor: Senate Labor & Commerce

**EXPENDITURES/REVENUES:** (Thousands of Dollars)

OPERATING	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>	0	0	0	0	0	0

CAPITAL	0	0	0	0	0	0
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REVENUE	0	0	0	0	0	0
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**FUNDING:** (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
<b>TOTAL</b>	0	0	0	0	0	0

**POSITIONS:**

FULL-TIME	0	0	0	0	0	0
PART-TIME						
TEMPORARY						

**ANALYSIS :** (Attach a separate page if necessary)

The bill requires real estate licensees to disclose the licensee's agency relationship with the seller to each prospective buyer; and when a licensee acts as an agent for a prospective buyer, to disclose the relationship with the buyer to a prospective seller of real estate. New funds are not required to implement this bill.

Prepared by: Jennifer Strickler, Administrative Officer Phone: 465-2144  
 Division: Occupational Licensing Date: 2/2/90

Approved by Commissioner: Larry Mercurieff Date: 2/7/90  
 Agency: Department of Commerce & Economic Development

**Distribution (by preparer):**

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

SB 425: "An Act relating to disclosure of agency by holders of real estate licenses; and providing for an effective date."

### Background

When a real estate broker consents to market a property for a seller, the relationship established between the seller (also known as the principal) and the broker is called an "agency" relationship because the broker becomes an agent for the seller. The agent (broker) is authorized by the principal (seller) to act on the principal's behalf, subject to the principal's control.

Because the relationship is a fiduciary one, the agent owes his principal the following:

1. good faith and fidelity;
2. exercise of reasonable care, skill, and judgment in securing the best price and terms possible for the principal;
3. avoidance of representing any interest contrary to that of the principal without the express written consent of the principal; and
4. full, fair, and timely disclosure to the principal of all facts which are/may be material to the principal's interest or which may influence his/her actions.

In the real world of real estate practice, this basic agency relationship has traditionally been between a seller and the broker who has a listing contract to market his property (commonly known as the "listing broker"). All of the sales associates in the listing broker's office, and sales associates affiliated with any other broker who works in cooperation with the listing broker are "subagents" for the same principal (seller). As subagents, they have the same level of fiduciary responsibilities to the principal as the agent (listing broker).

### Problem

When one of these subagents introduces the property to a prospective buyer, prepares an offer to purchase, helps to negotiate a "good buy" for the buyer, assists the prospective buyer in obtaining financing, and serves as the conduit for information between the buyer and the seller, the buyer may think that the subagent is acting as a buyer's agent. This is NOT the case; the only duty to represent that has been established thus far is with the seller via the listing broker. However, if the buyer continues to believe the "subagent" is his agent and looking out for his interests as a buyer, that buyer is likely to feel he has been deceived or betrayed if and when he is finally informed that the seller was the one really being represented throughout the transaction.

It is not uncommon for lawsuits charging misrepresentation to follow. The Courts have ruled that the actions of an agent which imply that the agent was working on behalf of the buyer, representing the buyer's interests to the seller, are, in fact, sufficient to create that relationship. If this happens, a buyer becomes a principal and the real estate licensee is a "dual agent" with fiduciary responsibilities to both the buyer and the seller. Dual agency is recognized as valid only if both principals are informed and agree to it in writing. Failure to obtain this consent can result in transactions negotiated under such circumstances being rescinded by the Court.

This is not an isolated problem. In the 1980's, a Federal Trade Commission survey reported that 80% of the consumers in real estate transactions did not realize that real estate salespersons were actually agents of the seller in most cases. Both the National Association of Realtors (NAR) and the National Association of Real Estate License Law Officials (NARELLO) created task forces to study this issue and suggest solutions. In addition to the general lack of understanding of "agency" by consumers and the potential for inadvertent dual agency, the task forces also recognized that there were increasing industry efforts by brokers to represent a buyer's interest in a real estate transaction by executing an agency contract between a buyer and a broker in addition to the usual seller/broker relationship.

#### Recommended Solution

Since 1986, both NAR and NARELLO have supported the introduction and passage of agency disclosure laws as the most effective means of addressing this issue. By the beginning of 1988, twenty-six (26) states had enacted agency disclosure laws; legislation was pending in seven (7) more states. A one-line summary of the agency disclosure requirements in these states is attached. These were compiled by the NARELLO Agency Subcommittee in 1987 and published in the 1988 NARELLO DIGEST. No updates were published in 1989.

In 1988, the Alaska Real Estate Commission created its own task force to study the issue. The task force recommended the addition of an agency disclosure requirement to Alaska's real estate license law; the recommendation was endorsed by the full commission.

#### SB 425

The proposed language in SB 425 recognizes that an agency relationship can be established by a broker with either the buyer or the seller. Either is workable, but all parties involved in a real estate transaction should know exactly what these relationships are. SB 425, by requiring real estate agents to make written disclosures of the nature of these relationships to all parties of a real estate transaction, will minimize any misconceptions as to who is representing whom.

Through this disclosure, buyers will be advised of what the agents representing a seller must do for their principal, and what service they can still provide to a prospective buyer. Likewise, sellers will be put on notice that, when an agent is representing a buyer, he will be negotiating with the buyer's best interests in mind and that agent's fiduciary responsibilities will be to the buyer.

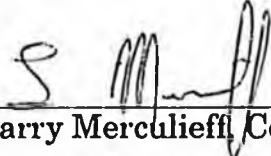
The states which have already implemented agency disclosure laws are finding that buyers generally welcome the early explanation of how this process works. Discussion by the agent of the agency issue early in a working relationship is a key factor in its acceptance by both buyers and sellers. Hence, section (a) of SB 425 would require that written disclosure of an agent's relationship to a seller be made as soon as that agent begins to provide specific services to a prospective buyer (i.e. locating properties to show which meet that buyer's specific criteria). However, it would not, for instance, require a written disclosure for every person stopping by an open house while out for a Sunday drive.

Section (b) of SB 425 specifies that an agent representing a buyer would be required to disclose the agency relationship with the buyer to a seller or his listing agent at the time of the initial request to show a property. This section also provides that any agency relationship which a seller may have established be recognized, and that any arrangements for compensation for the services of the buyer's agent are clearly understood by all parties.

Section (c) of SB 425 allows an agent to act in a dual role, representing both the buyer and the seller, provided both are informed and agree in writing to the agent's doing so.

Section (d) of SB 425 provides that, if the agency relationship is altered during the course of a transaction, all parties be apprised of the change as soon as possible after it becomes effective.

It is the position of the department, on behalf of the Real Estate Commission, that the establishment of mandatory disclosure laws, as proposed in SB 425, would decrease litigation and significantly increase both agent and consumer understanding of the agency relationship. We, therefore, urge passage of SB 425.

  
\_\_\_\_\_  
Larry Mercurieff, Commissioner  
Date: 2/12/90

LM/LW/dgl6289D  
2990a  
Attachments

STATE OF ALASKA  
THE LEGISLATURE

POUCH Y STATE CAPITOL  
JUNEAU, ALASKA 99811  
907 465 3800

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

February 1, 1990

SUBJECT: Sectional analysis of SB 425  
TO: Senator Arliss Sturgulewski  
FROM: John B. Gaguine JBG  
Legislative Counsel

At your request, here is a sectional analysis of SB 425, for an act relating to disclosure of agency by holders of real estate licenses.

Section 1 would enact a new section, AS 08.88.396, imposing a duty to disclose agency relationship on the holders of real estate licenses (brokers, associate brokers and salespersons). Subsection (a) would require a licensee acting as the agent for a seller of real estate to disclose that fact to a prospective buyer when the licensee begins to provide assistance to the buyer, and would require the licensee to obtain from the buyer written acknowledgement that the buyer is aware of the relationship. Subsection (b) would require a licensee acting as the agent for a real estate buyer to disclose that fact to a prospective seller, to present offers only through the seller's agent if there is an unexpired exclusive listing contract, and obtain the written consent of all parties to a transaction if the licensee's compensation is being paid by anyone other than the buyer. Subsection (c) would forbid a licensee from acting as agent for both buyer and seller unless the licensee has written consent from both. Subsection (d) would require a licensee to update prior written disclosures if there are changes in the licensee's agency status during a transaction.

Section 2 would make it a class A misdemeanor for a licensee to violate a provision of AS 08.88.396, enacted by section 1. Violation of certain other provisions of the real estate licensing chapter is already a class A misdemeanor.

Section 3 establishes an effective date for this act of January 1, 1991.

JBG:pl  
WKP1/081

AGENCY DISCLOSURE LAWS - 10/87

CALIFORNIA Effective January 1, 1988, broker must provide seller and buyer with a prescribed disclosure form "as soon as practicable" and confirm agency relationship on the contract. Mandates 3-hour course on agency.

COLORADO Regulations E-31 - E-35 require oral and written disclosure to sellers and buyers.

FLORIDA Law requires disclosure in sales contract that selling broker is agent of, and will be paid by, seller if such is the fact.

GEORGIA Written disclosure of who broker represents and who will pay the broker; made at time of or before written offer.

GUAM Violation to act for more than one party without knowledge or consent.

HAWAII Law and regulations requiring oral or written disclosure at least once prior to contract, and confirmation on the contract.

IDAHO Pending regulations requiring oral or written disclosure as early as possible, confirmation on contract and re-affirmation at closing.

MAINE Written disclosure to buyer prior to showing; if buyer's agent, notice to seller at initial contact.

MINNESOTA Written disclosure in contract prior to offer being made or accepted by buyer.

MISSISSIPPI Every contract must reflect whom the broker represents by a statement over the parties' signatures.

MISSOURI Presumed to be seller's agent unless written agreement to the contrary. New rules are pending.

NEBRASKA Written disclosure that licensee represents seller unless a contract with buyer and notice to seller of buyer agency.

NEW YORK Broker shall make it clear for which party acting.

NORTH DAKOTA Rules and regulations pending.

OHIO Statute that licensee is agent of owner unless agreement to contrary disclosed to all.

OREGON Pending agency disclosure bill combining oral and written disclosure.

PENNSYLVANIA Law requires broker to disclose that broker is agent of seller, not buyer.

SOUTH CAROLINA Licensee must disclose on mandatory disclosure form for which party he is acting.

TEXAS Must make clear for which party broker is acting; new rules and approved form.

UTAH Rule requiring early disclosure of agency relationship, at least once prior to confirmation on contract.

VERMONT Licensee must disclose to buyer, no later than offer, that licensee represents seller, unless there is a buyer agency agreement.

WASHINGTON Oral or written disclosure at least once prior to contract, with confirmation on contract.

WISCONSIN Pending rules requiring the agent of one party to make written disclosure at the first meeting.

WYOMING Violation to act for more than one party without knowledge of all parties.

AGENCY DISCLOSURE

Seller's Agent

\_\_\_\_\_ has disclosed that he/she as  
(Name of Licensee)

(Check one) \_\_\_\_\_ the listing broker  
\_\_\_\_\_ licensee in listing broker's office  
\_\_\_\_\_ sub-agent through cooperating broker  
is an agent of the seller. The seller is the only principal  
for this agent.

\_\_\_\_\_  
Date Acknowledgement of Seller

\_\_\_\_\_  
Date Acknowledgement of Prospective Buyer  
\*\*\*\*\*

Buyer's Agent

\_\_\_\_\_ has disclosed that he/she is  
(Name of Licensee)

working as an agent of the buyer. The buyer is the only  
principal for this agent.

\_\_\_\_\_  
Date (Acknowledgement of Seller)

\_\_\_\_\_  
Date (Acknowledgement of Prospective Buyer)  
\*\*\*\*\*

REVISED DISCLOSURE STATEMENT

The disclosure dated \_\_\_\_\_ is revised to  
disclose that \_\_\_\_\_ is now  
(Name of Licensee)

(Check one) \_\_\_\_\_ a seller's agent, exclusively.  
\_\_\_\_\_ a buyer's agent, exclusively.  
\_\_\_\_\_ an agent for both the buyer and the seller.  
(Acknowledgement by both principals below  
constitutes express written consent as  
required for dual agency representation.)

\_\_\_\_\_  
Date (Acknowledgement by Seller)

\_\_\_\_\_  
Date (Acknowledgement by Prospective Buyer)

\_\_\_\_\_  
Date (Acknowledgement of revised status  
by Broker of Named Licensee)

## AGENCY DISCLOSURE

All licensees have affirmative obligations to both parties of a transaction which include:

1. Diligent exercise of reasonable skill and care in performance of the agent's duties.
2. A duty of honesty, fair dealing and good faith.
3. A duty to be both truthful and informed whenever he/she undertakes to make a representation.

When entering into an agency relationship, both buyers and sellers have a responsibility to carefully read all agreements and understand the type of representation they are to receive.

### AGENT'S DUTY TO A PRINCIPAL

The duties that an agent and subagent owe to a principal are:

1. Good faith and fidelity.
2. To exercise reasonable care, skill and judgment in securing the best price and terms possible for the principal.
3. To avoid representing any interest contrary to that of the principal without the express written consent of the principal.
4. To make full, fair, and timely disclosure to the principal of all facts which are or may be material to his/her interest or influence his/her actions.

Under a listing agreement with a seller (principal) an agency relationship is created with the seller. Other licensees in the same office or in a cooperating broker's office are subagents of the seller with all of the duties listed above.

A licensee can agree to act as an agent for the buyer only. In this instance, the agent owes the same duties to the buyer as his principal. When acting in this capacity, the agent is not the seller's agent even if all parties agree that the compensation for services rendered is to be paid from the seller's proceeds of sale.

Any offers to purchase a currently listed property will be presented through the listing agent.

### DUAL AGENCY

An agent can legally be the agent of both the seller and the buyer in a transaction, BUT ONLY WITH THE KNOWLEDGE AND CONSENT OF BOTH PRINCIPALS. The agent then owes all of the above listed duties to both buyer and seller, and both are principals for the agent. Both parties must be informed and consent to any compensation paid to the agent by the other party.



**Agency/Subagency Committee Report**



Submitted by David W. Johnson, Chairman

RESPONSES TO AGENCY/SUBAGENCY QUESTIONNAIRE  
LAST REVISED SEPTEMBER 14, 1987

1. STATES WITH NO SPECIFIC AGENCY DISCLOSURE LAWS AND NONE PENDING:

Alabama	Kentucky	Oklahoma
Alaska	Louisiana	Ontario
Alberta	Maryland	Quebec
Arizona	Michigan	South Dakota
Arkansas	Montana	Tennessee
British Columbia	Nevada	Virginia
Connecticut	New Jersey	West Virginia
Illinois	New Mexico	
Kansas	North Carolina	

2. STATES WITH STATUTES OR RULES PENDING ON AGENCY DISCLOSURE:

North Dakota - A committee will be meeting in August to draft an administrative rule on agency disclosure. Plans to have the rule in effect by January 1, 1988.

Wisconsin - Is ready to begin the formal rulemaking process with disclosure rule.

Iowa - A proposed bill supported by Iowa Association of Realtors died in Committee. This bill will probably be reintroduced at the next legislative session.

Rhode Island - Real Estate Commission will be reviewing a proposal on September 17, 1987.

Delaware - Delaware Association of Realtors is looking at a standardized disclosure form for all of its membership. The New Castle County Board of Realtors have already adopted a form for use in agency disclosure. The Delaware Real Estate Commission will be looking at this issue at its next meeting in October - 1987.

Idaho - Is in the process of rulemaking. Anticipate effective date of new rule to be 1-1-88 or 7-1-88.

Oregon - Has proposed legislation for introduction in the 1989 Legislative Session.

3. STATES WITH AGENCY DISCLOSURE LAWS:

California	Minnesota	Saskatchewan*
Colorado	Mississippi	South Carolina
District of Columbia*	Missouri	Texas**
Florida	Nebraska	Utah
Georgia	New Brunswick*	Vermont
Guam*	New Hampshire	Washington
Hawaii	New York	Wyoming*
Indiana	Ohio	Massachusetts*
Maine	Pennsylvania	

*\*NOTE: The statutes in these states/provinces do not have specific agency disclosure language. However, they do provide that it is a licensing violation to represent more than one party in a real estate transaction without the knowledge and consent of the other party. Accordingly, agency disclosure is an implicit obligation of that provision.*

*\*\*NOTE: Texas has deferred (as of September 14, 1987) final action on its proposed rules for another 120 days to further evaluate industry input.*

4. ENFORCEMENT OF AGENCY DISCLOSURE LAW:

The overwhelming majority of states are enforcing or anticipate enforcement through two basic approaches: (1) include compliance with agency disclosure rule as an element of a routine audit of broker records; and (2) look for agency disclosure as an issue when reviewing all consumer complaints.

5. OBSERVATIONS FOR IMPLEMENTING NEW AGENCY DISCLOSURE LAW:

Colorado - (Comments quoted directly from Michael B. Gorham, Director, Colorado Real Estate Commission) - (1) Did not give sufficient enough lead time before implementing agency disclosure rule. The rule went into effect before most licensees were aware of it, consequently, there was a need for a Declaratory Order implementing the rule. Suggest any jurisdiction considering such a rule give a six-month or one-year period for education; (2) Even though the rule provides for both oral and written disclosure, Colorado feels that many agents do not make the oral disclosure and instead rely on preprinted contract disclosure. This, however, is