

# \*NEW FORM\* – DESIGNATED AGENCY DISCLOSURE AND AGREEMENT

## Comments from membership: April – May 2021

For use during 5/20/21 SFC meeting ATTACHMENT H

1.		Don't forget to add the release date at the top. It is blank. Should this form have a Reference date and the drop down box for To the _____ so it can be added to listing contracts, purchase contracts, etc?
2.		On #A-4 last sentence, should "Principal Broker and/Or BIC be added there to read: The Brokerage Firm and the Principal Broker and/or Brokers-In-Charge shall remain neutral...
3.		<p>(04/04/21 from Survey)</p> <p>How could this suddenly be appearing out of nowhere, with no recent discussion I am aware of since the entire concept was pushed aside for Hawaii several years ago? Designated Agency is totally wrong and immoral, and offers no benefit to any consumer, or to anyone else other than large companies (and their agents) who want to facilitate their ability to pretend to be acting ethically while ensuring that they can retain all the commission in a transaction. Hasn't "Designated Agency" always been deemed illegal and unethical in Hawaii - as it should be? How can anyone possibly rely on every (or any) Brokerage Firm to remain "neutral," while one of its agents purports to represent the buyer and another purports to represent the seller? Agents are not qualified or licensed to represent anyone, except when acting under the supervision of their broker. Wouldn't it be more appropriate to say that in a Designated Agency situation, the Brokerage Firm will represent no one, only its own interests? What if one of the Designated Agents was licensed yesterday, and the other is a 40-year veteran broker? In the information provided to us, there appears to be extreme confusion (and this is just the beginning, and from people who can be relied upon to know what they are talking about) as to whether "The Designated Agency Disclosure and Agreement form was created to provide real estate firms with an alternative way to practice dual agency in our industry" - or should be perceived as something totally different which can easily be explained away as "Oh no, this is not that scary DUAL agency, this is something wholesome and wonderful and totally devoid of any nasty conflicts, so you have nothing to worry about"?</p> <p>(04/05/21 from Survey)</p> <p>Pursuant to information provided at today's 4/5/21 Standard Forms webinar, I learned that I was mistaken in my understanding that there is anything unethical, illegal, inappropriate or new in the "practice" known as Designated Agency or Designated Dual Agency in Hawaii. Please therefore disregard my comments submitted yesterday.</p> <p>(04/27/21 Emailed additional)</p> <p>To Standard Forms</p> <p>PB/BIC Feedback: Proposed Designated Agency Form</p> <p>The request for feedback is repeatedly sent out, but, after responding to the survey once, clicking on it again does not allow additional comments to be made, and this message is displayed:</p> <p>"You have already taken this survey"</p> <p>Even if the buyer and the seller have already signed this form, there still MUST be "a separate Dual Agency Consent Addendum" to the Purchase Contract in any transaction where the buyer and the seller are being represented by the same Brokerage Firm - as A-2(c) currently specifically requires and SHOULD (even if amended to reflect the possibility of DESIGNATED Dual Agency) continue to specifically require.</p> <p>Even if the seller has already signed this form (and agreed to Dual Agency in the listing Contract), there still MUST be "a separate Dual Agency Consent Addendum" to the Purchase Contract in any transaction where the buyer and the seller are being represented by the same Brokerage Firm - as A-1(c) currently specifically requires and SHOULD (even even if amended to reflect the possibility of DESIGNATED Dual Agency) continue to specifically require.</p>

4.		<p>1. Agency relationships in real estate in Hawaii are governed by Hawaii laws.</p> <p>2. As the 5/21 version of the Dual Agency Disclosure and Consent states in paragraph A-5: "[I]n a dual agency relationship, where both parties are represented by the same Brokerage Firm, services which can be provided by the Brokerage Firm and its licensees, under Hawaii law, are limited."</p> <p>3. For agency purposes under Hawaii law, the relevant entity is the Brokerage Firm, not the licensee. The licensee is an agent of the Brokerage Firm, but the Brokerage Firm is always the agent of the client, no matter how many branches or licensees the Brokerage Firm may have.</p> <p>4. In some jurisdictions, legislatures have recognized "designated agency" relationships. In essence, this is a hybrid form of agency in which the Brokerage Firm is a dual agent, but designated licensees within the Brokerage Firm (under special supervision) are not required to remain neutral and can advocate for their designated client. This is a creation by statute. The Hawaii legislature, through statute or administrative rule, has not recognized "designated agency".</p> <p>5. For years, the Hawaii Real Estate Commission studied "designated agency" in a broader study about dual agency and other forms of representation, and decided not to go forward with designated agency".</p> <p>6. In the absence of statutory or regulatory authorization, "designated agency" does not exist in Hawaii and cannot be created by contract or a standard form.</p> <p>7. If the Hawaii Association of REALTORS has a legal opinion recognizing "designated agency" as contemplated by the Designated Agency Disclosure and Agreement proposed form, in the absence of statutory or regulatory authority, please have the legal opinion published as a White Paper for the all the members.</p> <p>8. Before use, the Designated Agency Disclosure and Agreement proposed form should be reviewed and approved by the Hawaii Real Estate Commission.</p> <p>9. Thank you for your hard work on the Standard Forms Committee.</p>
5.		<p>This form may cause confusion for brokerage firms who may not have the resources and size to use this form. I would guess that only 10% of brokerage firms or less are equipped with the number of brokers. If the wrong form is used (dual agency vs. Designated) what would be the risk to that agency? What would be the risk to HAR if the firm lost a case and the firm turned around and sued HAR.</p> <p>(04/30/21 Emailed additional)</p> <p>A-2 – last line. Does entering into a dual agency relationship address the conflict? Maybe it should be that one way to address the conflict is to consent in writing?</p> <p>-A-4 – Can a brokerage firm remain neutral if the designated agents are not?</p> <p>-A-5 the opening line implies that if the designation wasn't made the list below is not available to the client. Seems like a misrepresentation or puffing because many of those listed are done anyway. The opening line may need to be adjusted to eliminate that implied misrepresentation.</p>
6.		<p>The note at the end of para A-7 is not clear. How can a licensee be designated to Unknown buyers &amp; sellers? I don't have a fix to recommend because the intent is not clear to me either.</p>
7.		<p>The maniniest of points...I'd change the word "signatories" in A-7 first sentence to the more plain language "signers" and insert a comma after the clause "By signing below,"</p>
8.		<p>This is in response to your request for comments concerning the proposed draft, "Designated Agency Disclosure and Agreement" standard form. By way of background, I will first discuss dual agency, transactional brokerage and designated agency models and then offer a specific comment concerning the draft form itself.</p> <p><b>Agency in Hawaii</b></p> <p>Regarding real estate transactions and broker/client relationships, Hawaii is a common-law jurisdiction. This is to say that whenever consumers retain a real estate brokerage firm, the principal broker, brokers-in-charge and all associated sales licensees are deemed to be fiduciaries of the consumer (client) and owe strict duties of obedience, loyalty, disclosure, confidentiality, accounting</p>

and due care. As a result, the default position in Hawaii is that real estate brokers must promote the interests of their client above all others.

Currently, the industry practice in dual agency is to serve as neutral facilitators and not provide advice as to price, terms and conditions, negotiation strategy and the like without the consent of both parties.

Unfortunately, the current dual agency regime exposes brokers and consumers alike to risks because attempts to waive the dual agency conflict of interest as often as not result in confusion and uncertainty. Brokers can find themselves caught between a rock and a hard place because client demands can push them to exceed the scope of services than are allowed in our current dual agency consent form.

### **Is There a Better Way?**

Many jurisdictions recognize the "no win" nature of dual agency and have decided to either eliminate dual agency altogether or modify agency law statutorily to provide a comprehensive solution to the problem.

Currently, eight states ban dual agency outright. Four allow designated agency (Alaska, Colorado, Maryland and Texas), three allow transaction brokerage (Florida, Kansas and Oklahoma), and three allow both (Alaska, Colorado and Texas).

For example, in 1994 the state of Colorado adopted a new statute entitled the, "Brokerage Relationships in Real Estate Act" and seems to have the most experience with both transaction brokerage and designated brokerage amongst the various jurisdictions that have sought to address the problems posed by dual agency. Let's examine the Colorado approach.

### **Colorado Designated Brokerage**

To the extent a consumer does not want a mere neutral facilitator, Colorado consumers may choose to enter into a Designated-Brokerage relationship. Under statutory Designated-Brokerage, the principal broker may specifically designate a licensee to work with a party. A brokerage relationship exists only with the individual so assigned. The duties, obligations and responsibilities of this relationship do not extend to the employing broker, brokerage firm or to any other brokers associated with the brokerage firm.

Accordingly, in Colorado a single firm may designate different associated licensees to represent a seller and a buyer without creating a, "dual agency" conflict of interest because the firm does not represent the opposing parties as a legal matter.

### **What About Hawaii?**

Unlike Colorado, Hawaii has not adopted an enabling statute providing for designated agency or brokerage and no appellate decision has affirmed this form of representation. The most that can be said is that there is no express prohibition against so-called "designated agency." To be clear, the lack of an express prohibition, however, is not the legal equivalent of specific enabling statute or legal holding in an appellate case. Accordingly, brokers who choose to practice "designated agency" assume legal risks that are difficult to measure until the matter is reviewed by our courts.

I note that HAR led an effort to adopt an enabling statute expressly providing for "designated agency" some 15 years ago that unfortunately failed. Had the Legislature adopted an enabling "designated agency" statute then the path forward would be straight-forward. Practitioners would merely follow the statutory provisions and enjoy a reasonable level of comfort provided they followed the law.

### **The Draft Designated Agency Disclosure and Agreement Form**

Of course, we all know that the brokerage firm rather than the individual agent represents the client. Agency relationships in real estate are between the company and the client. Therefore, paragraph A-4 seems to present a conflict and contradiction in terms.

The last two sentences of paragraph A-4 state, "The licensees that have been so designated are not required to remain neutral and may advocate for and advise the client they have been designated to

		<p>work with. The Brokerage Firm will remain neutral as to all parties represented by the Brokerage Firm.”</p> <p>It is difficult to see legally how both statements can be true because the company and <u>all</u> its agents represent the client and advocacy by one agent can and often does conflict with the interests of the other client represented by another agent in the same firm. This conflict illustrates precisely why an enabling statute providing for an advocacy-neutral legal regime would be helpful.</p>
<p>9.</p>		<p>I do not believe that Designated Agency (DA) is permitted in Hawaii without enabling legislation. I see a reference to HAR 16-99 in the proposed form, which I believe does not expressly authorize a DA.</p> <p>Hawaii law permits dual agency per HAR 16-99 and HRS 467, but does not specifically permit DA. The law of agency can be very complex, so best to be sure there is expressed authorization for a DA before offering it. DA is permitted in states that specifically allow DA.</p> <p>Note the definitions under HAR, 16-99-3.1 regarding disclosure of agency:</p> <ul style="list-style-type: none"> <li>• "Buyer's agent" means a real estate <b>broker</b> who acts as the agent of the buyer.</li> <li>• "Selling <b>brokerage firm</b>" means a real estate <b>brokerage firm</b> that acts in cooperation with a listing broker and finds and obtains a buyer in a transaction.</li> <li>• "Listing <b>brokerage firm</b>" means the real estate <b>brokerage firm</b> that obtains a listing of real estate for sale, lease, exchange (residential, time share, industrial, or commercial) or for an interest in a residential cooperative housing corporation.</li> </ul> <p>These agency provisions focus on the “broker” or “brokerage firm”, and not on licensees.</p> <p>Aligning with these regulatory provisions, HAR’s Purchase Contract and Dual Agency Addendum forms both refer to the “brokerage firm” and all its licensees or agents that represent either seller or buyer, or both with proper disclosure and consent. Under current law and these other existing HAR forms, the DA is completely inconsistent within this framework.</p> <p>I understand firms are using some form of DA. Nevertheless, the DA form is a slippery slide without enabling laws like other states.</p> <p>I should have also mentioned that the Code of Ethics provides guidance on dual agency but not designated agency, and the two are not the same.</p>
<p>10.</p>		<ol style="list-style-type: none"> <li>1. Add an 'okina in "Hawaii" in the title below "To the ____ dated ____" to keep the spelling consistent throughout the form.</li> <li>2. Add a comma before "which may be used only by real estate licensees who are members of NAR..."</li> <li>3. Please consider removing the requirement for broker signatures prior to submission. Most of us are professional REALTORS who have gone through extensive training. If any of us need help preparing an addendum/amendment, we would contact our brokers for additional training prior to writing a contract.</li> <li>4. Remove "Reference" and just keep "Property Address."</li> <li>5. In AZ, we do distinguish which party originated the form (i.e. buyer or seller) at the top of the page.</li> <li>6. Below the signature line, it would be helpful to know who each party is (e.g. check marks to indicate, buyer/tenant or seller/landlord).</li> <li>7. Perhaps rephrase with "The undersigned parties hereby agree to include the following terms and conditions as part of the Contract for the above property."</li> <li>8. Add an 'okina in "Hawaii" at the bottom of the page. Mahalo for all of your hard work with this!! I know it takes a lot of time and you'll always have crazy people like me who care too much and give way too much input! =) Please let me know if I can help with any more forms. I've been doing this a while in multiple states and would love to help tackle the Hawai'i purchase contract!!</li> </ol>

11.		<p>A-2 using an example of "a firm has a large number of clients"... is not wrong but there are many other examples. Such as an agent</p> <p>who has a long standing following of loyal clients. The info in () under A-7 sounds sassy and bragging. Why would i sign something</p> <p>with UNKNOWN in it? Needs better explanation if thats going to happen.</p>
12.		<p>RE: the new Agency Disclosure - Sections A6 and A7</p> <p>I believe the wording of "client" is misleading and incorrect - It should say Customer and or Client and spell out the difference</p>
13.		<p>For item A-5 2 I think it would be better worded to say Suggest strategies aimed at obtaining.....rather than to suggest that all</p> <p>strategies suggested will obtain the desired outcome which the current wording could suggest.</p>
14.		<p>This seems like it's going to create a lot of confusion, both among realtors and their clients. If we're going to go this route, why not ban large brokerages altogether? I've mentioned this previously to people on the forms committee: why not just follow Calif's lead and use a form that all clients sign -- "disclosure and consent for representation of more than one buyer or seller"? This is getting way too complicated.</p>
15.		<p>About time!!! Lol. Love this. Finally we can pound the table for our clients when both parties are represented by the same brokerage.</p> <p>Love it!!!</p>
16.		<p>Fine...though I question the legality of creating an "Agency Wall" within a company with fiduciary duties separated.</p>
17.		<p>Historically, this has been unacceptable, so surprised that DCCA is fine with this. I can appreciate a company keeping each agent assisting clients with strict confidentiality about each party. FOrM is fine in structure.</p>
18.		<p>Why not one form dual agency/designated agency? Or is that the intent of this form. Also aren't the do's and don't's how transactions should be handled in a non dual agency/non designated agency transaction?</p>
19.		<p>I really like the idea of Designated Agency, however, the form itself creates confusion. There are a few places where there appears to be a contradiction. It states the licensees are not required to remain neutral, but the firm will remain neutral. How is that supposed to happen? And is this designated agency a form of dual agency or does it terminate dual agency? Because the paragraph of the definition of dual agency states all agents are required to remain neutral.</p>
20.		<p>I don't know how much this would protect agents and brokers if the parties decided to get litigious. The agents are under the supervision of the same broker and going to the same broker for guidance when things get challenging. The broker sees both sides of it, and the broker is ultimately responsible. At least with dual agency the overriding goal is neutrality. With designated agency you have the broker ostensibly neutral while the agents under him or her have opposing loyalties, which is an ethically thorny position to take.</p> <p>Even with a form like this new designated agency disclosure, it still puts the broker in an especially awkward spot.</p>

21.		<p>I applaud the addition of this for , if for no other reason, it opens the door to more education on agency. We have a lot of new agents and it would now be appropriate for the Real Estate Commission to include this form in the next required CE core module. Thanks</p> <p>Kimo and crew for the hard work and the insight that allows this to come forward.</p>
22.		<p>Do we have to use both "Designated Agency Disclosure &amp; Agreement" form together with the "Dual Agency Disclosure &amp; Consent" form? Or will one form suffice? Why can't we have one form and combine the duplicated info from these 2 forms into ONE form? It is confusing, and I'm sure many agents will elect to only use one form. However, the Disclosure &amp; Consent form can be included in the "Designated Agency Disclosure Agreement". Similar to the M-1 form that is acknowledged and later approved by buyer.</p>
23.		<p>Finally! Long overdue. This is a positive step forward to assisting our clients in the best way possible.</p>
24.		<p>This is great. It never made sense the way it was done. With PBs having hundreds of agents in their firm, it's the right move!</p>
25.		<p>It is a MUST have form for all agents so they can take the dual agency more carefully.</p>
26.		<p>It's good</p>
27.		<p>LOVE this form! Thank you!</p>
28.		<p>I like the revisions</p>