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Real Estate Brokerage: Recent Changes in Relationships and a Proposed Cure

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REAL ESTATE BROKERAGE:
RECENT CHANGES IN RELATIONSHIPS AND A PROPOSED CURE

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I. INTRODUCTION

The law of real estate brokers slowly evolved over the last hundred years, but recently experienced an upheaval. The longstanding practice of brokers theoretically representing sellers while actively dealing with buyers was the catalyst for this upheaval. Encouraged by the National Association of Realtors ("NAR") and local broker organizations, many state legislatures enacted statutes requiring written disclosure of the broker-client relationship. Some states now recog-

1. Real estate brokerage began in the United States in the nineteenth century with the westward expansion and population of the western states. D. Barlow Burke, Jr., LAW OF REAL ESTATE BROKERS, § 1.1 at 1:1 (2d ed. 1992) [hereinafter Burke]. Syndicates started to purchase large tracts of land from the government for later sale. Id. There was little organization in this practice early on, with most agents engaging in the practice as a part-time job. Id. Some individuals formed land development companies whose members included homesteaders, speculators and other investors from the eastern states and foreign countries. Id. at 1:2. Yet others served as land locators for settlers moving west. Id. Because the maximum holdings allotted to each homesteader by the homestead laws were often too small for efficient farming, early land brokers also had a market in resales of relinquished and abandoned properties. Id.

The real estate broker as a specialist is a more recent phenomenon, originating since the latter portion of the nineteenth century. Id. at 1:3. Real estate firms arose during the turn of the century, and the first state licensure laws came after World War I. Id. Since then, real estate brokers have steadily become more common, creating for themselves a livelihood in the practice of putting buyers and sellers in contact with each other. Id. Services have expanded to include property management, inspection, and investment counseling. Id. In the 1980s, over three million existing dwellings were sold each year, and one half to three quarters of a million additional new dwellings were sold per year. Id. at 1:3-4. With most commissions based on the steadily appreciating price of homes, the brokerage industry has been able to stay ahead of inflation. Id. at 1:4. The numbers peaked in the late 1980s, with National Association of Realtors ("NAR") membership at 810,000. Id. Today, there are over 100,000 real estate firms with about 125,000 offices. Id. at 1:5. These firms are usually small, closely held corporations. Id. Some firms such as Coldwell Banker, a division of Sears, Roebuck & Company; Century 21, owned by Metropolitan Life Insurance Company; and ReMax are examples of franchised mega firms. Id. § 1.2 at 1:8. Most firms are affiliated with the 50 statewide boards of realtors and the 1,760 local boards and most participate in Multiple Listing Services ("MLS"). Id. § 1.1 at 1:5. These transactions listed on the MLS account for an estimated 80 to 90 percent of broker sales. Id. at 1:6.


3. One hundred twenty brokers founded the NAR in Chicago, Illinois in 1908. Burke, supra note 1, § 1.3 at 1:11. It is recognized as the trade association representing the real estate brokerage industry. NAR membership approximates one third of all licensed brokers and salespersons. Id. The NAR adopted standards for the industry in 1971. Id. at 1:14. The standards govern industry practices, brokers' professional conduct, and their use of MLS systems. Id. Members who comply with the standards are entitled to use the copyrighted trademark "realtor," NAR-sponsored errors and omissions insurance, and NAR litigation support. Id.
nize the concept of buyers' brokers. Other states condone a dual agency relationship where the broker simultaneously enters into an agency relationship with both the buyer and seller in the same transaction. Despite new statutes which require disclosure and define the brokers' permissible relationships and duties, in most instances, state legislatures left the common law of agency in effect.

Common law agency imposes a greater fiduciary duty on brokers than current statutory law. This was forcefully brought to the attention of brokers by two Minnesota cases involving Edina Realty Corporation ("Edina Realty"), the fourth largest real estate brokerage firm in the United States. Despite Edina Realty's compliance with Minnesota's agency disclosure laws, the court found that Edina Realty breached the more stringent common law fiduciary duty. At issue were damages approximating $210 million in commissions Edina Realty earned between 1986 and 1992. Although ultimately settled for a mere $19.9 million, the Edina Realty litigation caused an uproar among brokers who, as a consequence of the litigation, were as uncertain as ever on how to proceed without liability.

During its 1993 annual convention, NAR reacted by requesting state legislatures to enact "statutory agency" in order to preempt common law agency. The NAR proposal addressed the following issues:

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7. Scott Carlson, Plaintiffs Win Cash in Agency Case, CHI. TRIB., Feb. 12, 1995, at 7V. The settlements included an award of attorney's fees to the plaintiffs' lawyers of approximately $4.4 million. See Gendler, supra note 6, at 3D.

See Willard Woods, Burnet Realty Inc. Lists Change in Policy: Agents From Other Brokers Can't Represent Burnet Sellers, Move Formally Ends Firm's Participation In Decades-Old System, MINNEAPOLIS STAR TRIBUNE, May 8, 1993 at 1D (discussing one large Minnesota real estate firm's reaction to the Edina Realty decisions). The firm decided to discontinue offering sub-agency to outside selling brokers; instead, the firm will be the only agent of the seller in its listings, and will deal only with buyer's brokers. Id. This approach resembles the proposal discussed in Part VII.A. See infra notes 293-98 and accompanying text for a discussion of realistic solutions. See also Willard Woods, Ruling May Cost Edina Realty Millions: 30,000 Sellers Could Get Refunds, MINNEAPOLIS STAR TRIBUNE, June 23, 1993, at 1A (discussing broker reactions to the Edina decisions).

8. See Terry Sheridan, Realtors To Be Advised: Represent Someone, MIAMI HERALD, Oct. 31, 1993, at 1G [hereinafter Sheridan] (quoting Sharon Millett, vice chairman of the facilitator advisory group of NAR, who explained:
1) protecting the consumer from liability for the acts of agents; 2) delineating the duties owed by brokers to their clients when acting as buyer's brokers, seller's brokers, dual agents, and limited agents; 3) determining an agent's obligations when the relationship ends; 4) determining what property conditions must be disclosed; 5) clarifying a real estate agency relationship versus other agency relationships, including the creation of a presumption of limited agency unless the parties bargain for more; and 6) recommending that new legislation dealing with real estate agency supersede all previous case law. In 1992, NAR announced that it would drop its requirement that selling agents using Multiple Listing Services (“MLS”) become subagents of the seller. This change lessened the incidence of dual agency and allowed the emerging trend of buyer's agents to grow.

Many brokers have further demanded freedom to practice as “facilitators,” also known as independent contractors or transaction brokers. In this capacity, brokers represent the deal and not the parties, thereby avoiding fiduciary duties to either the buyer or the seller. NAR has not endorsed the “facilitator” concept. Despite NAR's resistance, however, some states have provided for facilitator status in their new statutes. Notably, it does not seem that facilitators lower their commissions even though brokers acting only as facilitators relieve themselves of a major source of potential liability. The supporters of this approach argue that the use of facilitators will reduce litigation. Furthermore, proponents argue that new statutes requiring full written disclosure of broker relationships, permitting independent contractor status, and allowing avoidance of common law

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9. Sheridan, supra note 8, at 1G.
11. See Judy Stark, A Scorecard on Agents: Whose Side Are They On?, ST. PETERSBURG TIMES, Nov. 21, 1993, at 3 At Home (discussing NAR's decision not to endorse the facilitator concept, referring to an NAR survey of home sellers which found that 76 percent felt "it was very important that their agent represent them exclusively; [60] percent of buyers said it was very important that the agent owe fiduciary duties to them").
12. See infra notes 138-280 and accompanying text for a discussion of state legislation defining permissible relationships and mandating disclosure.
agency will better serve consumers.\textsuperscript{13} However, the facilitator approach creates new problems and does not completely solve the current ones.\textsuperscript{14}

First, many of the new disclosure laws require brokers to define and explain to their clients the legal relationship into which they are entering. Giving this type of advice requires a trained lawyer. Performed by a broker, these disclosure explanations would probably constitute an unauthorized practice of law. If the broker provides disclosure information in written form only, consumer confusion will occur regarding the distinction between a facilitator, agent, or dual agent. Few consumers would heed a broker’s warning to seek advice from a lawyer before entering the relationship.

Second, conflicts of interest occur when the brokers must explain their limited responsibility under facilitator or dual agency representation while at the same time trying to “land” the client. It is unrealistic to expect that, at the moment a broker is trying to win the business of a potential customer, the broker will successfully explain the limited responsibility owed to the client as a dual agent or facilitator. This is particularly true when the broker is competing for the business with brokers who are willing to enter into a traditional agency relationship. Moreover, in today’s consumer market, real estate brokers must provide more service to their clients, not less. If brokers want to continue commanding their current commission rates and insist that their calling is a profession, facilitator/independent contractor status is not the solution.

Third, the current system is impractical in its application. A broker may have a different relationship with each client.\textsuperscript{15} In fact, it is possible that a broker’s relationship with a client may differ depending on which property is involved. To further complicate matters, the current system confuses customers about what to expect from their broker. This confusion leads to unfulfilled expectations and disillusionment, though perhaps unjustified, with the brokerage profession. Brokers need a simple and consistent set of guidelines in order to practice their profession safely and prosperously. This article pro-

\textsuperscript{13} See Lehman, supra note 8, at e1 (quoting NAR’s general counsel, who stated “I cannot identify any benefit or any rights being taken away by this proposal”).

\textsuperscript{14} See Richard Kindleberger, The Middlemen Get Put in the Middle, BOSTON GLOBE, Dec. 12, 1992, at 37 Real Estate (reporting on reactions to the facilitator concept, including comments by the president of the Massachusetts Association of Buyer Agents, stating that “at a time when Realtors are trying to increase their professional stature . . . it is a mistake to offer a diminished service that won’t give customers the benefit of the advice, research, confidentiality and advocacy that consumers are entitled to from buyer and seller agents”).

poses a simple statutory scheme which will eliminate the problems and satisfy the needs of all the participants in a real estate sale.

Part II of this article discusses the traditional approach to real estate agency. Part III discusses the major modifications to the traditional approach; namely, the use of buyer's brokers and the concept of facilitators/independent contractors in real estate sales. Part IV surveys some of the more significant cases involving issues of real estate broker agency and disclosure, particularly in the context of dual agency situations. Part V surveys the reactions by NAR and state legislatures that have resulted in various new statutes defining the permissible brokerage relationships and prescribing disclosure. Part VI analyzes the various legislative approaches and identifies several problems the approaches have in common. Part VII discusses the proposed solution. The Appendices include a table comparing the statutes' features and examples of the new disclosure forms.

II. TRADITIONAL REAL ESTATE AGENCY — BROKERS REPRESENT THE SELLER

A. Listing Broker as Agent of the Seller; Selling Broker Subagency

The traditional real estate brokerage practice consists of a broker undertaking representation of a seller of real property. The seller-broker relationship is one of principal and agent.16 "Agency" is defined as a "fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act."17 Whether an agency relationship exists "is a question of fact, unless the facts can be interpreted in only one way."18 An agency relationship may be created by oral or written contract or by conduct.19 The agency relationship between the broker and the seller is easy to identify, because it is expressly created through the execution of a listing agreement which

16. Restatement (Second) of Agency § 1(2) (1957) (defining "principal" as "the one for whom action is to be taken"). The Restatements define "[agent] as "[t]he one who is to act." Id. § 1(3). See George Lefcoe, Real Estate Transactions, ch. 2 (1993) (hereinafter Lefcoe).

17. Restatement (Second) of Agency § 1(1) (1957).


usually authorizes the broker to act as the seller's exclusive agent. The broker is the seller's agent, and the broker owes the seller the fiduciary duties of good faith and loyalty, reasonable care and diligence, disclosure, and accounting. A broker who breaches the fiduciary

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20. Lefcoe, supra n.16, at 28-30 (explaining the types of listing arrangements).

21. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, 845 (1976) (defining fiduciary relation as "the relation existing where one person justifiably reposes confidence, faith, and reliance in another whose aid, advice, or protection is sought in some matter"). See Burke, supra note 1, § 7.2 at 7.2. These duties are often mentioned but seldom defined. Id. The duty of good faith and loyalty is usually understood to mean that unless the principal agrees otherwise, an agent must act exclusively for the benefit of the principal in all matters connected with the agency. RESTATMENT (SECOND) OF AGENCY § 387 (1957). See Meinhard v. Salmon, 164 N.E. 545 (N.Y. 1928). In Meinhard, Judge Cardozo defined loyalty as "[n]ot honesty alone, but the punctilio of an honor the most sensitive." Meinhard, 164 N.E. at 546.

The Florida Real Estate Commission, in its Handbook, explains the duty in simpler and more conventional terms:

Loyalty of the agent is a must. A broker must always place the interests of the principal above the interests of anyone else. The fiduciary relationship prevents a broker from revealing any information that may harm the principal. For example, a broker may not reveal such information as the principal's financial condition, the fact that the principal will accept a lower price than the listing price for the property, or any similar facts that may damage or alter the principal's financial bargaining position. The duty of loyalty also requires the broker to obtain the most favorable price and terms for the principal. A broker cannot withhold information from the principal. If the broker learns any harmful information about the principal, the broker cannot disclose or otherwise use such information — even after the transaction is completed and the fiduciary relationship is dissolved. While the fiduciary relationship generally ends when the broker and principal have fulfilled their duties to one another, the broker's obligation to keep information confidential remains.

FLORIDA REAL ESTATE COMMISSION HANDBOOK, Ch. 2 § 2(a)(4) at 2-16-17 (1993). RESTATMENT (SECOND) OF AGENCY § 379(1) (1957) (defining the duty of reasonable care and diligence as "to act with standard care and with the skill which is standard in the locality for the kind of work which [the agent] is employed to perform and, in addition, to exercise any special skill that [the agent] has"). See also MICHAEL L. CLOSEN & GARY S. ROBIN, AGENCY & PARTNERSHIP, 137 (1992); FLORIDA REAL ESTATE COMMISSION HANDBOOK, Ch. 2 § 2(a)(4) at 2-14 (1993). The Florida Real Estate Commission Handbook states in relevant part:

As professionals, brokers must maintain a standard of care that requires, among other things, they understand matters concerning the land, title, and physical characteristics of the property they have listed. They need not be attorneys, but to qualify for state licenses, brokers must know and understand the real estate license law. Brokers should also know and be able to explain to clients in simple terms the practical effects of common financing terms, contingency clauses, restrictions and limitations, and routine contract provisions. A broker, therefore, should use reasonable care in the following:

1) [d]etermining a listing price and advising the client as to a reasonable offer; 2) [u]ncovering material facts and informing the client of these facts; 3) [l]earning all the facts relevant to the sale, such as whether any physical defects exist; 4) [p]reparing and explaining key portions of listing and sales contracts as well as any other legal documents related to the transaction; 5) [s]uggesting the seller seek other expert advice when appropriate; 6) [a]dhering to deadlines [and] closing dates; and 7) [m]aking a reasonable effort to fulfill the obligations of the employment contract; this includes holding open houses, advertising, and listing in multiple listing service. . . .

Id.
ary duty of loyalty forfeits his commission. Unless bad faith is shown, a broker who breaches duties other than the duty of loyalty is liable only for the damages the broker causes. These damages may be less than the broker's commission.

After executing the listing agreement, the seller's property is placed on the broker's list of properties available for sale. In most instances, the broker will also register the seller's property with the local multiple listing service ("MLS"), thereby providing other brokers with easy access to information about the seller's property. The seller, by placing the property on a broker's list and gaining access to the MLS, hopes to obtain wider exposure and advertising than the seller would through a newspaper advertisement or by placing a "For Sale By Owner" sign outside the property. Through the MLS, the seller hopes to benefit from the salesmanship of not only the listing broker, but also other brokers participating in the MLS. This should translate into a faster sale at the best possible price. By employing a broker, the seller also hopes to receive the services of an expert in the sales transaction process who will shepherd the parties to closing. This aspect of a broker's service is extremely helpful to sellers who are unfamiliar with sale transaction requirements.

The duty of disclosure is often combined with the duty of loyalty in the context of real estate agency. If the client is the seller, this duty includes disclosure of all offers, reasonable and unreasonable. If the client is the buyer, this duty includes presenting all offers and disclosing all material facts. These material facts include facts relating to the condition of the property, the terms of the transaction, and now, the type of agency relationships available and chosen. Section 381 of the Restatement (Second) of Agency states:

Unless otherwise agreed, an agent is subject to a duty to use reasonable efforts to give his principal information which is relevant to affairs entrusted to him and which, as the agent has notice, the principal would desire to have and which can be communicated without violating a superior duty to a third person.

The duty of accounting, in the specific context of real estate agency, usually relates to statutes and regulations concerning broker receipt of deposits and management of escrow accounts. The Florida Real Estate Commission explains:

The broker must be able to report the status of any and all funds entrusted to him/her by the principal or by a prospective buyer. . . . Commingling of monies received by a broker into a personal account, a form of conversion, is illegal and grounds for license suspension. . . . In all transactions, a broker is required to see that the principal receives a final accounting and any intermediate accountings as agreed upon or reasonably demanded by the principal. In an ordinary sale the final accounting is called a closing statement.


22. Restatement (Second) Agency § 469 (1957) (stating "an agent is entitled to no compensation for conduct which is disobedient or which is a breach of his duty of loyalty").

23. Burke, supra note 1, § 7:6 at 7:53 (applying tort-style actual damages where broker breached duty other than loyalty and acted negligently instead of in bad faith) (citing Veach v. Meyeres Real Estate, Inc., 599 P.2d 746, 749 (Alaska 1979)).
In exchange for these services, the seller agrees to pay the broker a commission based on a percentage of the actual sales price obtained for the property. The seller also authorizes the broker to procure potential purchasers, cooperate with other brokers through the MLS, show the property, and act as the seller's representative in the negotiations. This process screens out buyers who are not qualified or serious about purchasing. When the listing broker, either alone or through the cooperation of another broker participating in the MLS, produces a buyer who is ready, willing, and able to purchase the seller's property, the listing broker becomes entitled to the commission.\textsuperscript{24}

Those brokers who do not have a direct relationship with the seller based on a written agreement are called selling brokers. Selling brokers earn a commission by selling, not listing, the seller's property. In the usual case involving a selling broker who is not the listing broker, the listing broker agrees to share the commission with the selling broker. These selling brokers who market the seller's property through access to the MLS are deemed subagents of the seller under the traditional approach.\textsuperscript{25} The subagency approach makes collecting a share of the commission easier for the selling broker and usually leads to greater cooperation with the seller and the listing agent.\textsuperscript{26}

In order to market the seller's property, either the listing broker or the MLS-participating selling broker must deal actively with both the seller and the buyer. The buyer often perceives, because of the broker's friendly and helpful salesmanship, that the broker is working for the buyer, or at least on the buyer's behalf. Under the traditional approach, the buyer is unrepresented unless the buyer expressly contracts with a broker for representation. The traditional approach recognizes that the broker's legal relationship and loyalties are to the seller. Additionally, if the buyer does contract with the listing broker for representation, the listing broker becomes a dual agent with divided loyalties.\textsuperscript{27}

As the foregoing discussion indicates, the traditional relationship between the buyer and the broker is not usually considered an agency relationship. However, if principles of agency are used to analyze the

\textsuperscript{24} Burne, supra note 1, § 3.2 at 3:3.
\textsuperscript{25} Lefcoe, supra note 16, at 42-44. See Restatement (Second) of Agency § 5(1) (1957) (defining a "subagent" as "a person appointed by an agent empowered to do so, to perform functions undertaken by the agent for the principal, but for whose conduct the agent agrees with the principal to be primarily responsible").
\textsuperscript{26} For example, subagency makes it easier and less risky to use lockboxes for access to unoccupied properties listed for sale. See Matthew M. Collette, Sub-Agency In Residential Real Estate Brokerage: A Proposal To End the Struggle With Reality, 61 S. Cal. L. Rev. 399, 445 (1988).
\textsuperscript{27} See infra notes 49-54 and accompanying text for a discussion of dual agency.
typical interactions between buyers and brokers, an agency relationship arguably does exist.\textsuperscript{28} Under agency law, the parties may create an agency relationship by contract or by conduct. Although the buyer usually does not enter into a written agreement with the broker, an agency relationship may arise "where one person manifests his intention that another shall act on his behalf, the other person consents to such, and the party for whom the other acts has the right to control the ultimate direction of the cooperative effort."\textsuperscript{29} If such manifestations exist, then the consequences of an agency relationship may attach even though neither the principal nor the agent receives consideration.\textsuperscript{30} Thus, analysis of buyer and broker conduct under objective standards reasonably infers the existence of an agency relationship.

Buyers typically initiate the relationship with a selling broker either through a phone call or a visit to the broker’s office. The buyer may inquire about a specific property advertised by the broker or may seek the broker’s assistance in general pursuit of a home purchase. The buyer usually expresses a desire to have the broker obtain information about prospective properties, such as: fair market value, repair needs, homeowners’ association, homeowners’ association fees and regulations, property tax and insurance costs, prevailing financing rates, and assumability of mortgages. Usually, the buyer relies on the broker to arrange for inspections, title examination, financing, and closing. This conduct, combined with the conversations that typically follow, may be reasonably interpreted as the buyer’s manifestation of his intent to have the broker act on his behalf.\textsuperscript{31} When the broker prequalifies the buyer, shows the buyer properties, submits offers to

\textsuperscript{28} See Joseph M. Grohman, \textit{A Reassessment of the Selling Real Estate Broker’s Agency Relationship with the Purchaser}, 61 St. John’s L. Rev. 560, 567-70 (1987) (discussing the necessary elements for establishing an agency relationship, and finding them to exist in the typical interactions between buyers and brokers).

\textsuperscript{29} Grohman, 61 St. John’s L. Rev. at 567.

\textsuperscript{30} Id. at 569; see Roy T. Black, \textit{Proposed Alternatives to Traditional Real Property Agency: Restructuring the Brokerage Relationship}, 22 Real Est. L.J. 201, 205 (1994) (discussing the creation of “accidental agency”) (citing Hale v. Wolfsen, 276 Cal. App. 2d 285 (1968); Gray v. Fox, 151 Cal. App. 3d 482 (1984)). It can be argued that both the buyer and the broker receive consideration through their relationship. The buyer does pay for the broker’s services indirectly, however, by purchasing the property. No broker earns a commission unless the buyer purchases, and it is from the sales proceeds that the listing broker receives his commission, which he in turn shares with the selling broker. Therefore, the broker does receive consideration. Similarly, the buyer receives consideration in the form of the broker’s services and ultimately in finding a satisfactory property.

\textsuperscript{31} In fact, state of the art real estate marketing includes brokers visiting the prospective buyer’s home and using online services to provide assistance to buyers “on their turf.” Such shop at home services only increase the buyer’s perception that the broker is their agent.
sellers, and negotiates on the buyer's behalf, the buyer may reason-
ably interpret the broker's conduct as the broker's manifestation of
consent to act on the buyer's behalf.\textsuperscript{32} In addition, further manifesta-
tions of the broker's consent occur when the broker assists in arrang-
ing financing, property inspections, insurance coverage, title
examination, and closing for the buyer.

The only other requirement for an agency relationship is the prin-
cipal's right to control the agent. The principal may exercise the right
to control before or during the time in which the agent acts; the prin-
cipal may even choose not to exercise his right to control.\textsuperscript{33} All that the
principal must establish is the right to control, not the act of control.\textsuperscript{34}
This right to control requirement is arguably satisfied by the very na-
ture of the relationship: the buyer decides on which properties to
make offers, and the buyer has the final decision regarding the terms
of any offer submitted or counteroffer accepted.\textsuperscript{35} One further indica-
tor of the buyer's right to control is the right to terminate the relation-
ship and seek the services of another broker. Thus, in the typical real
estate transaction, agency law does not support the traditional view
that the buyer and the selling broker have not entered into an agency
relationship.\textsuperscript{36}

If application of the law of agency arguably indicates that an
agency relationship between the buyer and the broker does exist even
though not supported by contract, then the selling broker would owe
the buyer full fiduciary duties. However, the selling broker's simulta-
neous subagency and attendant fiduciary duties to the seller creates a
dual agency situation. In order to avoid this problem, courts in most

\textsuperscript{32} Grohman, 61 St. John's L. Rev. at 568 (stating that:
no specific words are necessary to find such an acceptance. Where one finds
that the principal communicated to the purported agent his desire that the
agent act on his behalf and the agent proceeded to act as requested without
communicating to the principal by words or action that he did not intend to act
on the principal's behalf, the principal may reasonably infer from the agent's
performance that he performed on the principal's behalf).

\textsuperscript{33} Id. (citing \textit{RESTATEMENT (SECOND) OF AGENCY} § 14 cmt. a).

\textsuperscript{34} Id.

\textsuperscript{35} Id.

\textsuperscript{36} Grohman, 61 St. John's L. Rev. at 589-90; see Duffy v. Setchel, 347 N.E.2d
218, 219-22 (Ill. App. Ct. 1976) (holding that a selling broker was the agent of the buyer,
relying on the following factors: 1) the purchaser initiated the contact with the broker;
2) the purchaser asked the broker to make an offer to the sellers; 3) the broker had no
prior relationship with the sellers regarding the property; 4) the buyer considered the
broker to be her agent; 5) the broker did in fact submit the buyer's offer to the sellers;
and 6) the broker negotiated the terms of the sale until agreement was reached).
cases prefer to apply the presumption of a selling broker subagency to the seller and will not apply the above analysis to infer an agency relationship between buyers and selling brokers. As discussed in Part II. B. below, NAR and local real estate boards have made this presumption a requirement for participation in MLS systems. Thus, under traditional subagency relationships, selling brokers owe purchasers no fiduciary duties. Injured buyers, however, may sue in tort for negligence or misrepresentation. The alternative, which would comport with the parties' expectations and the law of agency, would be to eliminate the presumption of the selling broker's subagency to the seller. This alternative was recently implemented and does not create a presumption of the selling broker's agency to the buyer.

B. THE MULTIPLE LISTING SERVICES REINFORCE THE TRADITIONAL APPROACH

A multiple listing service ("MLS") offers brokers in a given locale the opportunity to pool their listings in order to maximize the exposure of properties for sale. In exchange for such cooperation, brokers agree to share their commissions. Brokers who are members of the MLS submit listings with data sheets describing the property to an appraisal committee. The appraisal committee then determines whether the sales price is reasonable. The MLS compiles the pooled listings into a book or computer data base. The MLS also provides a gauge of the current market; brokers are required to notify the service of sales of listed properties and the price obtained. Through the increased market exposure to member brokers, the MLS is intended to produce quicker sales at higher sales prices for vendors.

To participate in the service, brokers must first execute a listing agreement with the seller/owner of a property. The usual agreement provides the broker with an exclusive right to sell the property, making the listing broker the agent of the seller. The listing entitles

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38. Burke, supra note 1, § 8.3 at 8:39.
39. Id. § 1.4 at 1:12.
40. Id. Because access to the service is restricted to member brokers, the service has been the subject of antitrust litigation, including actions against MLS listing brokers for paying referral fees rather than split commissions when dealing with buyers' brokers. See Market Force, Inc. v. Wauwatosa Realty Co., 706 F. Supp. 1387 (E.D. Wis. 1989), aff'd, 906 F.2d 1167 (7th Cir. 1990) (addressing antitrust issues in a real estate transaction).
41. Burke, supra note 1, § 1.4 at 1:13-14.
42. Id.
43. Consumers are not allowed direct access to multiple listing services, and must use a broker who is a member of the local service in order to have their properties advertised on MLS.
the listing broker to a commission when the property is sold or when any broker produces a buyer who is ready, willing, and able to purchase. If a broker other than the listing broker uses the MLS and procures the buyer, that broker is called the selling broker.

Until recently, the MLS rules required members to make an offer of subagency to the other non-listing brokers when submitting a listing. Procurement of a ready, willing, and able buyer constituted substantial performance and, thus, acceptance of the listing broker’s offer. The selling broker received consideration from the listing broker in the form of a share of the listing broker’s commission. The selling broker, therefore, usually became a subagent of the listing broker who, in turn, was the agent of the seller.

Although the seller was not the principal of the selling broker, the seller could be held liable for the selling broker’s actions. If the seller was held liable as the principal for wrongful actions by the subagent/selling broker, the seller had a remedy against the listing broker. Even though the law of agency allows the listing broker to employ subagents, such as the selling broker in this situation, agency law does not allow the listing broker to delegate duties that the listing broker owes the seller.44 Thus, subagency creates additional potential liability for the listing broker, who might not be aware of the selling broker’s conduct when dealing with a buyer.

Although the MLS presumption of subagency became the favored approach, the selling and listing broker could also, legally, be considered joint venturers, partners, or independent contractors.45 In addition, because of the presumption of subagency, the use of the MLS still left the buyer unrepresented. Since the selling broker is not often the listing broker, the selling broker tends to have much more contact with the buyer than with the seller. Arguably, therefore, the MLS adds to the buyer’s misconception that the broker with whom the buyer is dealing works for the buyer.

Most jurisdictions removed the requirement of an offer of subagency as a condition for participation in the MLS. NAR recommended this change in 1992 and replaced the mandatory offer of subagency with an elective offer of “cooperation and compensation” to brokers who assist the listing broker in selling a property.46 This change seems to be a move away from agency law to contract law,

44. Burke, supra note 1, § 1.5 at 1:18.
45. Id. at 1:17.
46. National Association of Realtors, Handbook on Multiple Listing Policy - Residential, at § 1.2 (1993). This new approach could create new problems. A selling agent who is not a buyer’s broker may have trouble collecting a share of the sales commission paid to the listing broker if the selling broker is no longer automatically a subagent. Although quantum meruit comes to mind as a possible remedy, litigation
allowing brokers to create working relationships according to their own terms.47

An exception to this rule is usually made for in-house sales — sub-agency is still mandatory when the listing and selling brokers work for the same firm. Once the listing broker places the property on the MLS, this exception automatically applies, regardless of whether another in-house broker actually uses the MLS. This exception attempts to reduce the incidence of dual agency arising when one firm represents both sides of one transaction. The removal of the presumption of subagency has allowed the practice of buyer agency to grow and should also lessen the potential liability of the listing broker for the acts of selling brokers.

Despite NAR's recommended change, subagency still seems to be the most common approach used by brokers. NAR's main purpose behind the new approach apparently was to recognize buyer's brokers. However, because selling broker subagency is still required for in-house sales, buyers may believe that the selling broker works for them.

C. MISCONCEPTIONS AMONG CONSUMERS AND PRACTITIONERS

As identified above, the common problem in the traditional real estate agency relationship occurs when the selling broker acts as the subagent of the listing broker. As a subagent of the listing broker, the selling broker works for the seller, not the buyer. However, in typical transactions, the selling broker deals mostly with the buyer, showing properties and probably discussing things that the buyer assumes the broker will not reveal to the seller. The selling broker often has contact with the seller only when showing the seller's property or submitting offers. Because of the selling agent's subagency to the listing broker, the selling agent is legally obligated to work in the seller's best interests, which would require the disclosure of the discussions with the buyer. The actual legal relationship between the parties is the opposite of what the buyer believes. Furthermore, this relationship makes the listing broker liable for the actions of the selling broker with respect to both the buyer and the seller.

If, as now permitted under the new MLS rules, the selling broker is the agent of the buyer, then the selling broker would owe the buyer fiduciary duties such as loyalty, disclosure, and diligence. Because of

may be necessary for selling brokers to protect themselves with contracts spelling out the terms of "cooperation and compensation."

47. See Black, 22 REAL EST. L.J. 201 (1994) (discussing confusion caused by removal of mandatory subagency). These working relationships may rise to the level of subagency.
this, the selling broker must disclose to the buyer any knowledge of adverse facts the selling broker acquires from the listing broker or the seller.\(^{48}\) Even if not disclosed, the information would be imputed to the buyer, resulting in the buyer losing causes of action such as rescission and restitution against the seller.

The problems increase when the broker acts as a dual agent. Dual agency is the situation that arises when a broker represents both the buyer and the seller in one transaction.\(^{49}\) A dual agency can arise when a buyer's broker shows a buyer one of the broker's own listings, when a listing broker contracts to represent the buyer as well as the seller in the same transaction, and in transactions involving a listing broker and a buyer's broker who work for the same firm.\(^{50}\) Dual agency does not usually arise until at least one party in a transaction contracts for representation. The law permits dual agency, provided the broker discloses his or her dual representation to all parties in the transaction and the parties consent in writing. Failing to disclose and obtain consent may have dire consequences, including loss of the broker's commission and even avoidance of the sale.\(^{51}\)

\(^{48}\) Most states already impose a duty on brokers to inspect the seller's property and disclose facts relating to the condition of the seller's property, such as whether the property is "psychologically impacted" from past incidents such as murders. This duty is imposed regardless of whether or not the broker has an agency relationship with the buyer, and represents a departure from the traditional rule of caveat emptor. See, e.g., Constance Frisby Fain, An Overview of Real Estate Agent or Broker Liability, 23 REAL EST. L.J. 257 (1995) (discussing cases where brokers have been held liable for failing to disclose to purchasers facts relating to the condition of the seller's property); Note, Imposing Tort Liability on Real Estate Brokers Selling Defective Housing, 99 HARV. L. REV. 1861 (1986) (advocating a system of broker liability in instances involving defective housing sales). In some states, this duty has been codified. See, e.g., CAL. CIV. CODE § 2079.3 (West Supp. 1995) (requiring disclosure of all material facts affecting the value of the property which a reasonable visual inspection would reveal).

\(^{49}\) The Restatement (Second) of Agency provides: "Unless otherwise agreed, an agent is subject to a duty to his principal not to act on behalf of an adverse party in a transaction connected with his agency without the principal's knowledge." RESTATEMENT (SECOND) OF AGENCY § 391 (1957).

\(^{50}\) One other dual agency situation which is seldom discussed is that which arises when a broker represents more than one potential purchaser at the same time with regard to one property. See Burke, supra note 1, § 7.5.1 at 7:38-39 (citing Stefani v. Baird & Warner, Inc., 510 N.E.2d 65, 69 (Ill. App. Ct. 1987) (holding that, when a broker acts as a the agent of one buyer, if he arranges a sale to another buyer for a higher price, his undisclosed dual representation is a breach of fiduciary duty)). This problem does not arise with multiple representation of sellers because each of the sellers' properties is unique. Therefore there are distinguishable reasons beyond the broker's control that account for one seller's property being sold more quickly.

\(^{51}\) See Taborsky v. Mathews, 121 So.2d 61, 62 (Fla. 2d. Dist. Ct. App. 1960) (holding that because the real estate broker failed to disclose his dual agency, the buyers were entitled to avoid the sale and purchase money mortgage which was being foreclosed in the action). The court stated:

In our jurisprudence it is well established that an agent for one party to a transaction cannot act for the other party without the consent of both principals. Where an agent assumes to act in such a dual capacity without such
Brokers often inserted into the fine print of their listing agreements a clause permitting dual agency. By doing so, a broker could obtain a seller's signature on a listing agreement by claiming that he represented the seller. At the time the listing agreement was executed, the broker would indeed only represent the seller and would probably possess confidential information about the seller and the property. The broker may already be representing potential buyers, having executed agreements with them which also permit dual agency. The broker would probably also possess confidential information about these potential buyers. Dual agency would still not exist, because, even though the broker represents buyers and sellers, the broker is not representing buyers and sellers in the same transaction. However, once the broker brings the parties together by showing the seller's property to the buyer, dual agency exists. At this point, the broker possesses confidential information about both parties and could also receive payment from both parties. In a dual agency situation, the broker cannot disclose to either party the confidential information the broker possesses. If the broker maintains these confidences, the broker does not have complete loyalty to either party.

More likely, however, the broker discloses whatever the broker can get away with in order to close the sale. Even if the broker does not disclose the information the broker possesses, he or she is faced with the inherent, and arguably unconsentable, conflict of interest of trying to obtain the best price for both parties. The buyer expects to obtain the lowest possible price, while the seller expects to obtain the highest possible price. Clearly, this is not possible, and this is why

assent, the transaction is voidable as a matter of public policy . . . . 'No principle is better settled than that a man cannot be the agent of both the seller and the buyer in the same transaction, without the intelligent consent of both. Loyalty to his trust is the most important duty which the agent owes to his principal. Reliance upon his integrity, fidelity, and ability is the main consideration in the selection of agents; and so careful is the law in guarding his fiduciary relation that it will not allow an agent to act for himself and his principal, nor to act for two principals on opposite sides in the same transaction. In such cases the amount of consideration, the absence of undue advantage, and other like features are wholly immaterial. Nothing will defeat the principal's right of remedy, except his own confirmation, after full knowledge of all the facts. Actual injury is not the principle upon which the law holds such transactions voidable. The chief object of the principle is not to compel restitution where actual fraud has been committed, or unjust advantage gained, but it is to prevent the agent from putting himself in a position in which to be honest must be a strain on him, and to elevate him to a position where he cannot be tempted to betray his principal.'

Taborsky, 121 So. 2d at 62.

dual agency has been called an oxymoron. One party will probably feel less satisfied than the other. 53

In an attempt to rid themselves of fiduciary duties, brokers avoid entering into agency relationships and instead act as finders, facilitators, independent contractors, or transaction brokers. 54 By acting in these capacities, brokers merely bring the parties together but do not participate in negotiations and are not considered agents of either party.

III. MODIFICATIONS TO THE TRADITIONAL APPROACH

A. BUYERS' BROKERS

The trend of representing buyers began primarily on the west coast in the mid-1980's when states enacted the first agency disclosure laws making the practice viable. The practice was already common in the commercial real estate setting with large businesses hiring brokers to find suitable properties and brokers seeking to maximize their business volume by earning commissions from either side of the transaction. Buyers' brokerage has expanded from commercial to residential real estate transactions, with several aggressive brokers offering representation to buyers.

Statistics show that "[t]oday, as many as 50,000 real estate agents have been trained as home buyers' brokers — about 2,000 represent buyers exclusively." 55 A 1993 survey conducted by NAR revealed that thirty percent of buyers used a buyers' broker. 56 In addition, many large firms have become involved in buyers' brokerage. One such firm, Buyer No. 1, in Austin, Texas, claimed in 1993 to have represented buyers in over 300 transactions since 1988. 57 One Colorado firm, Buyer's Resource, established a national franchise that represents only buyers. 58 Another example is DeWolfe, New England, which in 1993 became the first real estate firm in New England to represent buyers. Vowing to put consumers first, Mr. DeWolfe has been called "DeWolfe in sheep's clothing" by a representative of the Massachu-

53. See generally Joe Catalano, The Homestretch: A Survival Guide to Buyers, Sellers, Owners, Renters and Landlords-A Closer Look-Sellers Say, 'No Fair' Say Some Brokers Pressure Them to Set Low Prices, NEWSDAY, Aug. 31, 1991 at 37 (discussing the tactic of brokers agreeing to list properties at the seller's price, then negotiating the seller down to a price for which the property could arguably be sold without the "aid" of a broker).
54. See infra notes 55-72 and accompanying text.
57. Marino, supra note 55, at 2R.
58. Id.
BUYERS' BROKERS

setts Home Buyer's Club. Even lenders are beginning to get involved. First Portland Mortgage Corporation of Maine reported in 1993 that it has begun offering, not only financing, but also buyer representation in real estate transactions. Real estate schools are beginning to offer courses in the area of buyers' brokerage, and those who take enough of their courses receive the new title of Certified Buyer Broker.

Many practitioners accustomed to the traditional approach view the emerging trend of buyers' brokers as a new "scam." These practitioners point to the risks of liability for undisclosed dual agency arising from the use of buyers' brokerage as a means of increasing income by earning commissions from both sides of a deal. However, consumer advocates support the practice of buyers' brokerage. Consumer watchdogs such as Ralph Nader of The Center for Responsive Law and Stephen Brobeck of the Consumer Federation of America spoke out in support of buyers' brokerage as a positive step toward changing the "cartel that caters to sellers' interests while slighting the buyer." Nader joined forces with other prominent consumer advocates such as Jerilyn Coates, a frequent NAR lecturer, to recommend that consumers confront brokers with a "loyalty pledge" expressly stating the broker's fiduciary duties in brokerage agreements.

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60. Lew Sichelman, Lender Takes On Role of Buyer's Realty Agent, Chi. Trib., Sept. 25, 1993 at 17 Home Guide. The lender claimed the practice would protect consumers by eliminating brokers as middlemen who collect kickbacks for referring clients to lenders. Id. Loan officers prequalify their customers so they will not shop beyond their means. Id. Then, the same loan officers take the customers househunting. Id. The loan officers are paid a commission just as real estate brokers, and they actively negotiate the deal. Id. This does not seem to be a very prudent move, however, when one thinks of all the additional liability it could potentially create.
61. See Neal Gendler, Dual Agency in Home Sales: Some Say It Isn't a Problem, MINNEAPOLIS STAR TRIBUNE, Mar. 18, 1995 at 5H.
62. See Terry Sheridan, Buyers Byte Into Multiple Listing Service, THE MIAMI HERALD, June 27, 1993 at 1G (discussing the mostly negative reactions of various Miami brokers to the practice of buyers' brokering).
65. The agency contract Nader advocates would include express promises that the agent will:
   1) Be on your side and negotiate the best possible price and terms for you[.]
   2) Never represent both the buyer and the seller (or the landlord and the tenant) in the same transaction[.]
   3) Never accept any type of kickback, fee, gift or profit individually from any mortgage provider, title insurance company . . . or other real estate service provider that is involved in your transaction.
home buyers to lobby legislators to enact consumer protection real estate laws. 66

As discussed previously, MLS rules have been changed throughout the nation so that these rules usually specify that the selling agent is not necessarily a subagent of the listing agent. This measure allows for the existence and operation of buyers' brokers. Selling brokers must now specify whether they will work with buyers' brokers and what commission the selling broker will pay. Even if the seller is the actual source of the commission, buyers' brokers owe their fiduciary duties to the buyer; the typical rationalization is that the buyer indirectly pays the commission as part of the sales price. Buyers' brokers sometimes want the buyer to sign exclusive agency contracts and ask for retainers. Others are paid a percentage commission by the buyer, such as two to three percent of the buyer's target price or a split of the listing agent's commission. 67 Some prefer the buyer to pay an hourly rate, usually in the range of sixty to one hundred dollars per hour, for their services. 68

For these fees, the buyers' brokers claim that they obtain for their clients reductions in sales prices from four to seven percent. 69 A survey conducted by U.S. Sprint substantiates this claim. The survey reported that 232 relocating employees who hired buyers' brokers paid on average 91% of a home's list price, while those using traditional agents paid 96.5% of the list price. 70 With such documented results, the concept of buyers' brokerage has gained acceptance by the real estate industry. 71 Because the relationship conforms to the buyer's expectation that the broker is the buyer's loyal representative working to protect the buyer's best interests, it is a rational approach. However, the practice can lead to dual agency when the buyer is interested in one of the broker's own listings. As noted previously, most MLS rules still require selling broker subagency to the listing broker in an in-house sale.

B. INDEPENDENT CONTRACTORS/TRANSACTION BROKERS/FACILITATORS

Brokers have lobbied for independent contractor status with increasing success in recent years. Basically, this form of brokerage is

Frank Cook, Advocates Say Real Estate Agents Should Vow 'Loyalty,' MIAMI HERALD, Aug. 22, 1993 at 4G.
66. Id.
67. Id. supra note 55, at 2R.
68. Id.
69. Id.
70. Id.
non-representative. Brokers act as finders, putting buyers and sellers in contact and facilitating the progress of the deal. Neither party controls the independent contractor whose only responsibility is to produce a closed transaction. Independent contractors cannot bind either party or make any decisions on either party's behalf. While this eliminates liability of the principal (either the buyer or seller) for the agent's acts, it also eliminates remedies available under agency law. Most statutes that allow independent contractor status require that the broker act reasonably and in good faith; some statutes have a list of specific limited duties. This independent contractor status seems to add to the confusion. The traditional seller agency approach contradicts the buyer's expectations; the independent contractor approach contradicts the expectations of both the buyer and the seller who expect loyalty in exchange for commissions. It is also uncertain to what degree brokers will dispel the parties' perception of loyalty when attempting to obtain business.72

IV. SIGNIFICANT LITIGATION INVOLVING REAL ESTATE BROKER AGENCY AND DISCLOSURE

A. DISMUKE v. EDINA REALTY, INC.73

_Dismuke v. Edina Realty, Inc._ involved sellers who sued the realty company for representing both the sellers and the buyers without adequately disclosing the realty company's dual agency.74 Edina Realty disclosed the dual agency status using one of its own forms, signed by all of the parties.75 The sellers sued for breach of fiduciary duty because Edina Realty did not adequately explain the dual agency to the sellers.76 Although the disclosure form complied with statutory requirements, the form did not fulfill common law requirements of undivided loyalty and complete disclosure.77 The court subsequently certified the case as a class action involving approximately 22,000 sell-

72. One Florida real estate firm, The Keyes Company, purports to operate exclusively as a transaction brokerage. However, The Keyes Company recently distributed promotional advertisements stating that the Company is acting as the "exclusive agent" of two sellers in the author's neighborhood. This is a clear example of the misunderstanding which exists between real estate agents and real estate brokers, and their legal advisors. The agents who deal directly with the consuming public continue to create a perception which is the opposite of what the broker/executives claim.


75. _Dismuke_, 1993 WL 327771 at *1.

76. _Id._

77. _Id._ at *3.
The court held that the common law fiduciary duty was inflexible, that Edina Realty had breached the common law duty, and that the plaintiffs need not prove actual injury or intentional fraud. The court found that "nothing will defeat the principal's right or remedy except his own prior consent or ratification after full disclosure of all the facts." Edina Realty lost its commissions. The parties ultimately reached a settlement in the amount of $5.9 million, partially in cash and partially in the form of transferable coupons for one hundred dollar discounts on future real estate transactions. The settlement was given final court approval in February, 1995.

B. Bokusky v. Edina Realty, Inc.

This class action was brought by buyers and sellers under six theories: breach of a state statute, breach of a real estate regulation, fraud, breach of fiduciary duty, breach of contract, and noncompliance with the Racketeer Influenced and Corrupt Organizations Act ("RICO"). These complaints resulted from allegations based upon a conflict of interest due to dual agency. Again, Edina Realty relied on its own disclosure form to explain the dual agency relationship. Edina Realty sought dismissal of the RICO claim and moved to stay, abstain, and/or dismiss the federal court action, but the court denied Edina Realty's motion. The court also certified this case as a class action. In February, 1995, Edina Realty reached a settlement with the plaintiff class members in the aggregate amount of $12.3 million.

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80. Id.
82. Carlson, see supra note 81, at 7V.
86. Id.
87. Id.
88. Id. at *11.
89. See Carlson, supra note 81 at 7V. The remaining $1.7 million covers damages in a related suit involving two affiliates of Edina Realty. Id.
C. **Huijers v. DeMarrais**

In this action, the buyers sought specific performance of the purchase contract, and the sellers cross-claimed against the buyers and the real estate agent for fraud, misrepresentation, breach of fiduciary duty, rescission, and declaratory relief. The lower court held for the buyers. The Court of Appeal, Second District, Division 6, however, ruled that the sellers did not have to pay the real estate commission even though the agent provided the sellers with an agency disclosure form at the time the purchase contract was signed. The California statute at issue required that the listing agent make the agency disclosure when the seller signed the listing agreement. Because of the improper timing of the agency disclosure, the court "reversed for further findings on whether under the circumstances the misstatement constituted grounds for revision [of the purchase contract]." The court construed the disclosure statute as adding to, rather than removing, common law duties of disclosure. Consequently, disclosure alone was not enough; disclosure must also be timely and fully explained. This arguably requires a lawyer, not a broker.

D. **L. Byron Culver & Assoc. v. Jaoudi Indus. & Trading Corp.**

L. Byron, a real estate firm, lost its sales commission in a land sale for failing to disclose its dual agency relationship. The real estate firm acted as the buyers' broker. When the firm found a suitable property for the buyers, a broker for the firm contacted the property owner and entered into a listing agreement with the owner. The broker never made formal disclosure of the dual representation. In support of its holding affirming the real estate firm's forfeiture of its commission, the court quoted a 1917 case stating:

The reason for the rule [requiring written disclosure of dual agency or the loss of the commission] is that [the agent]
thereby puts himself in a position where his duty to one conflicts with his duty to the other, where his own interests tempt him to be unfaithful to both principals, a position which is against sound public policy and good morals. His contract for compensation being thus tainted, the law will not permit him to enforce it against either party. It is no answer to this objection to say that he did, in the particular case, act fairly and honorably to both. The infirmity of his contract does not arise from his actual conduct in the given case, but from the policy of the law, which will not allow a man to gain anything from a relation so conducive to bad faith and double dealing.\textsuperscript{102}

\textbf{E. Moser v. Bertram\textsuperscript{103}}

This case involved a prospective buyer suing a listing agent for breach of fiduciary duty.\textsuperscript{104} The buyer claimed that the property's listing agent owed the buyer a fiduciary duty because both the buyer's broker and the listing agent worked for the same brokerage firm.\textsuperscript{105} Having gone out of business, the brokerage firm under which both the listing and buyer's agent worked was never effectively served with process.\textsuperscript{106} This seems to explain why the plaintiff-buyer did not seek relief against the firm for undisclosed dual agency and instead attempted to hold the listing agent liable. The employer/broker should be liable in such a case because the broker receives a percentage of whatever sales the broker's agents produce.\textsuperscript{107} The brokerage firm is, in effect, a dual agent for both parties, even if the listing agent and buyer's agent claim allegiance only to the seller and buyer respectively. However, the court stated that "this case does not involve an issue of dual agency."\textsuperscript{108} The buyer claimed that because the buyer's agent worked for the same firm as the listing agent, the buyer's agent's fiduciary duty applied to all members of the firm.\textsuperscript{109} The court disagreed, holding that the listing agent could not be charged with the buyer's agent's fiduciary duties or liability resulting from the breach of those duties.\textsuperscript{110} The only action for which the listing agent could be

\textsuperscript{102} Id. at 682-83 (quoting Glenn v. Rice 162 P. 1020, 1021 (Cal. 1917)).

\textsuperscript{103} 858 P.2d 854 (N.M. 1993).


\textsuperscript{105} Id.

\textsuperscript{106} Id. at 855 n.1.

\textsuperscript{107} See Fraioli v. Bobby Byrd Real Estate, Inc., 630 So. 2d 1131, 1132 (Fla. Dist. Ct. App. 1993) (holding that a real estate broker is liable for any misrepresentation by his real estate agent regardless of agent's actual or apparent authority, where the broker received a substantial commission from the seller based on the agent's actions).

\textsuperscript{108} Moser, 858 P.2d at 856.

\textsuperscript{109} Id.

\textsuperscript{110} Id.
liable is for fault in appointing, supervising, or cooperating with the buyer's agent (i.e. no vicarious liability).111

F. **INLAND COMMERCIAL PROP. SALES v. ATLANTIC ASSOCs., INC.**112

Inland, the broker, sued to recover its commission from the buyer, Atlantic, which had contracted with Inland to acquire commercial property.113 Inland acted as a dual agent, representing Atlantic as well as the sellers, and claimed to have made adequate disclosure.114 Atlantic argued that it had not consented to dual agency.115 Each party filed affidavits in support of motions for summary judgment.116 The court denied the motions, holding that there existed a genuine issue of material fact as to Atlantic's consent to dual agency.117 The Illinois real estate statute at issue in this case required written disclosure of dual agency.118 Atlantic relied on the statute, but the court ruled that the statute did not provide a private cause of action.119 This ruling effectively eviscerated the statute, preventing its application where it was most needed, enforcing written disclosure. Illinois has since enacted statutes requiring written disclosure.120

G. **MARKET FORCE, INC. v. WAUWATOSA REALTY CO.**121

This case discusses another aspect of the buyers' broker movement. Market Force, Inc., a buyers' brokerage, firm sued Wauwatosa Realty Co., another realty company, in an antitrust action.122 Market Force claimed that, by paying only a referral fee and not a regular commission, Wauwatosa and other Milwaukee firms were guilty of antitrust conspiracy.123 Market Force operated exclusively as a buyers' broker, pledging complete loyalty to buyers, though not charging a commission. The listing brokers compensated Market Force through a

111. *Id.*
114. *Inland Commercial Property Sales*, 1991 WL 278311 at *1 (mem.).
115. *Id.* (mem.).
116. *Id.* (mem.).
117. *Id.* at *2 (mem.).
118. *Id.* at *1 n.3 (mem.) (citing ILL. ANN. STAT. ch. 111 para. 5818.2 (Smith-Hurd Supp. 1991)).
119. *Id.* (mem.).
120. See infra notes 184-93 and accompanying text for a discussion of the recently enacted Real Estate License Act in Illinois.
121. 706 F. Supp. 1387 (E.D. Wis. 1989), aff'd, 906 F.2d 1167 (7th Cir. 1990).
split commission. Many real estate brokers operating under the traditional subagency approach decided not to share their commissions with Market Force, instead paying the buyers' broker a much smaller referral fee. The court held that Market Force failed to show that the hostile firms had acted together in conspiring to hold down commissions paid to buyers' brokers. The court found Wauwatosa gave adequate reasons for its practice: 1) Wauwatosa might have to pay a selling agent a commission in addition to that of the buyer's broker, as can occur when the selling agent holds an open house and the buyer's agent brings his client; 2) buyers' brokers do not list on MLS and therefore have lower expenses; and 3) Wauwatosa paid out-of-state brokers the same referral fee. This case is important in that it discusses many of the issues which arise in real estate agency transactions, including: the conflict created by the MLS presumption of subagency; the question of who really pays the commission — the seller, from the sales proceeds, or the buyer, as part of the purchase price; and whether identification of the recipient of fiduciary duties should be based on who pays the commission.

H. Gillmore v. Morelli

In this case, a real estate broker sued the seller to recover his commission. The seller countersued to collect attorneys' fees the seller incurred in defending against an action for specific performance brought by the prospective purchaser. The court ruled in favor of the seller, denying the broker his commission and entering a judgment against the broker for the seller's attorneys' fees in the prior action. The court found that the purchase agreement the broker executed while acting as the listing broker for the seller was so favorable to the purchaser and unfavorable to the seller as to constitute a breach of fiduciary duty. The evidence also showed that the broker actively assisted the buyer in negotiating the purchase terms.

124. Id. at 1389.
125. Id. at 1390.
126. Id. at 1395-96.
127. Id. at 1390-91.
130. Gillmore, 472 N.W.2d at 739.
131. Id. at 741.
132. Id. at 740-41.
133. Id.
V. REACTIONS

A. THE NATIONAL ASSOCIATION OF REALTORS' NEW POLICY

On November 15, 1993, the National Association of Realtors ("NAR") met in Miami Beach, Florida, to decide what position to promote regarding the growing trend of buyers' brokers, dual agents, and facilitators (also known as transaction brokers, independent contractors, or finders). NAR voted to ask each state legislature to enact "statutory agency" to preempt the traditional common law agency rules. This was undoubtedly in response to the large judgment entered in the then recently decided Edina Realty cases. NAR also decided not to endorse the facilitator concept, which allows brokers to act as dealmakers and charge commissions without owing clients any fiduciary duties.

NAR formulated this policy based on the recommendations that its Presidential Advisory Group on Agency listed in its March, 1992, report. These recommendations resulted from a study finding that most real estate agents do not understand the common law agency rules. A NAR task force, created in 1985 in response to complaints by consumer groups, conducted the study. This study also produced an important change in MLS policies — as of July 1, 1993, an offer of subagency by listing brokers using the service was no longer mandatory. Instead, listing brokers can now offer "cooperation and compensation" to either subagents, buyers' agents, or both.

Additionally, NAR revised its Code of Ethics and Standards of Practice to recognize buyer agency with fiduciary duties owed to the buyer, not the seller. Brokers can act exclusively as selling/listing agents or as buyers' agents. Brokers may combine the two, resulting in a disclosed dual agency which is permitted for in-house sales.


135. Id. A new problem arises with this optional MLS arrangement: What is the status of a selling broker who has no buyer's broker agreement, and who is not offered subagency by the listing broker? See supra notes 121-27 and accompanying text.

136. See, e.g., NATIONAL ASSOCIATION OF REALTORS, CODE OF ETHICS AND STANDARDS OR PRACTICE (1994) (discussing Standard 7-1(c), which imposes a duty upon buyers' brokers to submit all offers by the buyer; Standard 7-2, which provides that "[r]ealtors, when seeking to become a buyer/tenant representative, shall not mislead buyers or tenants as to savings or other benefits that might be realized through use of the [r]ealtor's services;" Standard 21-12, which states that "[r]ealtors, acting as agents of buyers or tenants, shall disclose that relationship to the seller/landlord's agent at first contact and shall provide written confirmation of that disclosure to the seller/landlord's agent not later than execution of a purchase agreement or lease").

137. NATIONAL ASSOCIATION OF REALTORS, CODE OF ETHICS AND STANDARDS OF PRACTICE (1994). Standard 9-10(b) provides in relevant part: "When entering into contracts to represent buyers/tenants, [r]ealtors must advise potential clients of: 1) the [r]ealtor's general company policies regarding cooperation with other firms; and 2) any potential
B. STATE LEGISLATION DEFINING PERMISSIBLE RELATIONSHIPS & MANDATING DISCLOSURE

In response to the changes in real estate brokerage relationships and the resulting problems, many states enacted laws requiring the broker to disclose in writing who the broker represents. Generally, these laws require the broker to provide the disclosure to all parties involved in a transaction. However, a concerted effort has not been made to address the need for uniformity in this area of the law.

Some states have very detailed laws defining the permissible capacities in which brokers may act as well as prescribing the items to be included in the disclosure forms; some state statutes even include approved disclosure forms that brokers must use. Other states just have a vague requirement of disclosure that could constitute the unauthorized practice of law. Many states require the broker to make the required disclosures only before submitting an offer, which may be too late in the relationship to be effective. Some states have abrogated the common law of agency as applied to real estate brokers, while most preserve the traditional agency presumption. The majority of states have not taken any recent legislative action regarding real estate brokers. Most of the new laws are recently enacted; some just became effective in 1995. What follows is a survey of the salient provisions of these new laws.


   a. California

   The first state to enact comprehensive statutes defining agency relationships in real property transactions and mandating disclosure was California. The relevant sections took effect January 1, for the buyer/tenant representative to act as a disclosed dual agent, e.g., listing broker, subagent, landlord's agent, etc." Id. 138. See CAL. CIV. CODE §§ 2373-82 (West Supp. 1995). The stated legislative purpose of the California act is as follows:

   (a) Further the education of consumers on the existence of various types of agency relationships which may occur in residential real property transactions covered by this act.

   (b) Require disclosure to the parties by the agent or agents of the various types of agency relationships which may occur in residential real property transactions covered by this act in a manner which explains in simple, comprehensible, and nontechnical terms, the elements of these relationships.

   (c) Afford protection to consumers involved in residential real property transactions covered by this act by requiring the disclosure set forth in this act.

   (d) Require uniformity of this disclosure as a means of clarifying consumer understanding of these terms, usages, and relationships.

   (e) Make clear that associate real estate licensees act as agents of brokers under whom they are licensed and who, in turn, are agents of buyers, sellers, or buyers and sellers in residential real property transactions covered by this act. However, by this enactment, the Legislature does not intend to diminish any
As previously noted, the concept of buyers' brokers began to take hold first during the mid to late eighties in the western states, primarily in California. Section 2373 of the California Civil Code is an extensive definitions section, providing definitions for "dual agent," "buyer," "listing agent," and "selling agent," among others. Section 2374 requires that listing and selling agents provide the seller and buyer in a residential real property transaction with a copy of a disclosure form and obtain a signed acknowledgment of receipt from each party. The listing agent must provide the disclosure in its prescribed form to the seller prior to entering into the listing agreement. The selling agent must do the same "as soon as practicable prior to presenting the seller with an offer to purchase," unless the selling agent is also the listing agent. The selling agent must provide disclosure to the buyer:

as soon as practicable prior to execution of the buyer's offer to purchase, except that if the offer to purchase is not prepared by the selling agent, the selling agent shall present the disclo-

liability to buyers and sellers which may exist for tortious conduct in connection with these real property transactions.

(f) Provide an explicit basis for maintaining the confidentiality of price information provided by the consumer to a dual agent in a residential real property transaction covered by this act and an explicit method for modifying that confidentiality, while at the same time retaining without change the existing law with respect to confidentiality of other information.

(g) Delay the requirements of this act until January 1, 1988, in order to provide sufficient time to familiarize consumers and agents with the provisions of this act.

Id. at Historical Note.


140. "Dual agent" is defined as "an agent acting, either directly or through an associate licensee, as agent for both the seller and the buyer in a real property transaction." Cal. Civ. Code § 2373 (d) (West Supp. 1995).

"Buyer" is defined as a transferee in a real property transaction, and includes a person who executes an offer to purchase real property from a seller through an agent, or who seeks the services of an agent in more than a casual, transitory, or preliminary manner, with the object of entering into a real property transaction. 'Buyer' includes vendee or lessee.


"Listing agent" is defined as "a person who has obtained a listing of real property to act as an agent for compensation." Cal. Civ. Code § 2373(f) (West Supp. 1995).

"Selling agent" is defined as a listing agent who acts alone, or an agent who acts in cooperation with a listing agent, and who sells or finds and obtains a buyer for the real property, or an agent who locates property for a buyer or who finds a buyer for a property for which no listing exists and presents an offer to purchase to the seller.


141. Id. § 2374.

142. Id. § 2374(a).

143. Id. § 2374(b).
sure form to the buyer not later than the next business day after the selling agent receives the offer to purchase from the buyer.144

Section 2375 provides the statutory disclosure form which must be used.145 The prescribed language defines and lists the duties owed by the “seller’s agent,” “buyer’s agent,” and “agent representing both seller and buyer” and admonishes the consumer not to sign the disclosure form without first having carefully read and understood the relationship being created.146

An additional disclosure is required by section 2375.5: the real estate agent must confirm the relationship “in the contract to purchase and sell real property or in a separate writing executed or acknowledged by the seller, the buyer, and the selling agent prior to or coincident with execution of that contract.”147 Section 2377 expressly provides that the payment of compensation to an agent by either the seller or buyer is “not necessarily determinative of a particular agency relationship between an agent and the seller or buyer.”148 Similarly, the sharing of a commission between the listing and selling agent does not necessarily imply any subagency relationship.149 Section 2376 states what seems obvious: namely, that “[n]o selling agent in a real property transaction may act as an agent for the buyer only, when the selling agent is also acting as the listing agent in the transaction.”150 Additionally, listing agents can still act as selling agents, and this dual role will not by itself create a dual agency.151 The main prohibition imposed on dual agents is against disclosing one party’s price negotiating limit to the other party.152 The relationship may be modified “at any time before the performance of the act which is the object of the agency with the written consent of the parties to the agency relationship.”153 The “object of the agency relationship” is arguably to sell the property. Therefore, under the vague statement in the statute, the parties seem able to alter their relationship up until the contract is executed and possibly until closing.

Finally, the new disclosure requirements do not diminish the common law duties of disclosure and fiduciary duties owed by agents,

144. Id. § 2374(d).
145. Id. § 2375.
146. Id. The statutory disclosure language is included in the Appendices to this Article. See Appendix B(1).
147. Id. § 2375.5(a).
148. Id. § 2377.
149. Id.
150. Id. § 2376.
151. Id. § 2380.
152. Id. § 2379.
153. Id. § 2381.
nor are the common law remedies limited by the new laws.\textsuperscript{154} Escrow agents are not deemed agents for purposes of these disclosure requirements.\textsuperscript{155} California also requires real estate licensees to take a three hour course in agency relationships and duties, "including instruction in the disclosures to be made and the confidences to be kept in the various agency relationships."\textsuperscript{156} Because the California State Legislature did not expressly abrogate common law fiduciary duties, the same situation exists for potential \textit{Edina Realty} type litigation. Furthermore, the point at which the broker must disclose, "before executing an offer," may be too late in the relationship. As this Article notes, other states impose the duty to disclose much earlier — "at the first substantive contact."

b. Colorado

In 1993, Colorado made comprehensive changes to its real estate brokerage laws, complete with new specifically defined brokerage capacities.\textsuperscript{157} Colorado also added specific sections dealing with each

\begin{itemize}
\item \textsuperscript{154} Id. § 2382.
\item \textsuperscript{155} Id. § 1102.11.
\item \textsuperscript{156} \textit{Cal. Bus. \\ & Prof. Code} § 10170.5(a)(2) (West Supp. 1995).
\item \textsuperscript{157} \textit{See Colo. Rev. Stat.} §§ 12-61-801-811 (Supp. 1994). Section 12-61-802 provides the new brokerage capacities definitions as follows:
\begin{enumerate}
\item “Broker” shall have the same meaning as set forth in subsection (2) or (3) of section 12-61-101, except as otherwise specified in this part 8. For purposes of this part 8, "broker" may include a "salesperson" as defined in section 12-61-101(3).
\item “Dual agent” means a broker who, with the written informed consent of all parties to a contemplated real estate transaction, is engaged as a limited agent for both the seller and buyer or both the landlord and tenant.
\item “Limited agent” means an agent whose duties and obligations to a principal are only those set forth in section 12-61-804, 12-61-805, or 12-61-806, with any additional duties and obligations agreed to pursuant to section 12-61-803(5).
\item “Single agent” means a broker who is engaged by and represents only one party in a real estate transaction. A single agent includes the following:
\begin{enumerate}
\item “Buyer’s agent”, which means a broker who is engaged by and represents the buyer in a real estate transaction;
\item “Landlord’s agent”, which means a broker who is engaged by and represents the landlord in a leasing transaction;
\item “Seller’s agent”, which means a broker who is engaged by and represents the seller in a real estate transaction; and
\item “Tenant’s agent”, which means a broker who is engaged by and represents the tenant in a leasing transaction.
\end{enumerate}
\item “Subagent” means a broker engaged to act for another broker in performing brokerage tasks for a principal. The subagent owes the same obligations and responsibilities to the principal as does the principal’s broker.
\item “Transaction-broker” means a broker who assists one or more parties throughout a contemplated real estate transaction with communication, interposition, advisement, negotiation, contract terms, and the closing of such real estate transaction without being an agent or advocate for the interests of any party to such transaction. Upon agreement in writing pursuant to section 12-\hspace{5mm}61-808(2)(a) or a written disclosure pursuant to section 12-61-808(2)(d), a transaction-broker may become a single agent, subagent, or dual agent.
\end{enumerate}
type of brokerage relationship and a section providing that the source of compensation does not determine agency. Under the new law, a broker may act as a single agent for either the buyer or seller, sub-agent, dual agent, or transaction broker. Unless otherwise specified, the Colorado statutory scheme considers brokers to be transaction brokers. The statute lists each type of brokerage relationship and implies an abrogation of common law agency and its fiducial duties and obligations:

(a) To perform the terms of any written or oral agreement made with any party to the transaction;
(b) To exercise reasonable skill and care as a transaction-broker, including, but not limited to:
(I) Presenting all offers and counteroffers in a timely manner regardless of whether the property is subject to a contract for sale or lease or letter of intent;
(II) Advising the parties regarding the transaction and suggesting that such parties obtain expert advice as to material matters about which the transaction-broker knows but the specifics of which are beyond the expertise of such broker;
(III) Accounting in a timely manner for all money and property received;
(IV) Keeping the parties fully informed regarding the transaction;
(V) Assisting the parties in complying with the terms and conditions of any contract including closing the transaction;
(VI) Disclosing to all prospective buyers or tenants any adverse material facts actually known by the broker including but not limited to adverse material facts pertaining to the title, the physical condition of the property, any defects in the property, and any environmental hazards affecting the property required by law to be disclosed;
(VII) Disclosing to any prospective seller or landlord all adverse material facts actually known by the broker including but not limited to adverse material facts pertaining to the buyer's or tenant's financial ability to perform the terms of the transaction and the buyer's intent to occupy the property as a principal residence; and
(VIII) Informing the parties that as seller and buyer or as landlord and tenant they shall not be vicariously liable for any acts of the transaction-broker;
(c) To comply with all requirements of this article and any rules promulgated pursuant to this article; and
(d) To comply with any applicable federal, state, or local laws, rules, regulations, or ordinances including fair housing and civil rights statutes or regulations.

(3) The following information shall not be disclosed by a transaction-broker without the informed consent of all parties:
(a) That a buyer or tenant is willing to pay more than the purchase price or lease rate offered for the property;
(b) That a seller or landlord is willing to accept less than the asking price or lease rate for the property;
(c) What the motivating factors are for any party buying, selling, or leasing the property;
(d) That a seller, buyer, landlord, or tenant will agree to financing terms other than those offered;
(e) Any facts or suspicions regarding circumstances which may psychologically impact or stigmatize any real property pursuant to section 38-35.5-101, C.R.S.; or
(f) Any material information about the other party unless disclosure is required by law or failure to disclose such information would constitute fraud or dishonest dealing.

(4) A transaction-broker has no duty to conduct an independent inspection of the property for the benefit of the buyer or tenant and has no duty to independently verify the accuracy or completeness of statements made by the seller, landlord, or independent inspectors.

(5) A transaction-broker has no duty to conduct an independent investigation of the buyer's or tenant's financial condition or to verify the accuracy or completeness of any statement made by the buyer or tenant.

(6) A transaction-broker may do the following without breaching any obligation or responsibility:
   (a) Show alternative properties not owned by the seller or landlord to a prospective buyer or tenant;
   (b) List competing properties for sale or lease;
   (c) Show properties in which the buyer or tenant is interested to other prospective buyers or tenants; and
   (d) Serve as a single agent, subagent, or dual agent for the same or for different parties in other real estate transactions.

(7) There shall be no imputation of knowledge or information between any party and the transaction-broker or among persons within an entity engaged as a transaction-broker.

(8) A transaction-broker may cooperate with other brokers but shall not engage any subagents.


161. Id. § 12-61-804. Section 12-61-804 provides that single agents engaged by the seller have the following duties and obligations:
   (a) To perform the terms of the written agreement made with the [party represented];
   (b) To exercise reasonable skill and care for the [party represented];
   (c) To promote the interests of the [party represented] with the utmost good faith, loyalty, and fidelity, including, but not limited to:
      (I) Seeking a price and terms which are acceptable to the [party represented]; except that the broker shall not be obligated to seek additional offers to purchase the property while the property is subject to a contract for sale or to seek additional offers to lease the property while the property is subject to a lease or letter of intent to lease;
      (II) Presenting all offers to and from the [party represented] in a timely manner regardless of whether the property is subject to a contract for sale or a lease or letter of intent to lease;
      (III) Disclosing to the [party represented] adverse material facts actually known by the broker;
      (IV) Counseling the [party represented] as to any material benefits or risks of a transaction which are actually known by the broker;
      (V) Advising the [party represented] to obtain expert advice as to material matters about which the broker knows but the specifics of which are beyond the expertise of such broker;
      (VI) Accounting in a timely manner for all money and property received; and
      (VII) Informing the [party represented] that such [party] may be vicariously liable for the acts of such [party's] agent or any subagent when the broker is acting within the scope of the agency relationship;
   (d) To comply with all requirements of this article and any rules promulgated pursuant to this article; and
   (e) To comply with any applicable federal, state, or local laws, rules, regulations, or ordinances including fair housing and civil rights statutes or regulations.

(2) The following information shall not be disclosed by a broker acting as a [party's] agent without the informed consent of the [party represented]:
The state real estate commission is to provide the specific disclosure forms the broker must use.\textsuperscript{162} The statute also preserves freedom of contract by allowing the parties to make agreements providing for additional duties.\textsuperscript{163} Brokers must advise the parties that the disclosure has legal consequences and urge them to consult legal counsel before

\begin{itemize}
  \item[(a)] That [the party represented] is willing to accept less than the asking price or lease rate for the property;
  \item[(b)] What the motivating factors are for the party [in] the property;
  \item[(c)] That the [party represented] will agree to financing terms other than those offered;
  \item[(d)] Any material information about the [party represented] unless disclosure is required by law or failure to disclose such information would constitute fraud or dishonest dealing; or
  \item[(e)] Any facts or suspicions regarding circumstances which may psychologically impact or stigmatize any real property pursuant to section 38-35.5-101, C.R.S. (3)(a) A broker acting as a [party's] agent owes no duty or obligation to the [party not represented]; except that a broker shall, subject to the limitations of section 38-35.5-101, C.R.S., concerning psychologically impacted property, disclose to any prospective [party] all adverse material facts actually known by such broker. Such adverse material facts may include but shall not be limited to adverse material facts pertaining to the title and the physical condition of the property, any material defects in the property, and any environmental hazards affecting the property which are required by law to be disclosed.
  \item[(b)] A [party's] agent owes no duty to conduct an independent inspection of the property for the benefit of the [party not represented] and owes no duty to independently verify the accuracy or completeness of any statement made by [the party represented] or any independent inspector.
  \item[(4)] A seller's or landlord's agent may show properties not owned by such seller or landlord to prospective buyers or tenants and may list competing properties for sale or lease and not be deemed to have breached any duty or obligation to such seller or landlord.
  \item[(5)(a)] A seller or landlord may agree in writing with a seller's or landlord's agent that other brokers may be retained and compensated as subagents.
  \item[(b)] Any broker acting as a subagent on the seller's or landlord's behalf shall be a limited agent with the obligations and responsibilities set forth in subsections (1), (2), (3), and (4) of this section.
\end{itemize}

\textit{Id.} § 12-61-804. \textit{See id.} § 12-61-805 (describing a single agent's duties when engaged by the buyer).

Dual agents have the same duties as single agents, but may also disclose any information to one party that is gained from the other party if such information is relevant to the transaction or party. A dual agent must inform the parties that each may be held vicariously liable for the acts of the dual agent. \textit{See id.} § 12-61-806(1). Section 12-61-806(4) provides that dual agents may not disclose any of the following without the informed written consent of the parties:

\begin{itemize}
  \item[(a)] That a buyer or tenant is willing to pay more than the purchase price or lease rate offered for the property;
  \item[(b)] That a seller or landlord is willing to accept less than the asking price or lease rate for the property;
  \item[(c)] What the motivating factors are for any party buying, selling, or leasing the property;
  \item[(d)] That a seller, buyer, landlord, or tenant will agree to financing terms other than those offered; and
  \item[(e)] Any facts or suspicions regarding circumstances which may psychologically impact or stigmatize any real property pursuant to section 38-35.5-101, C.R.S.
\end{itemize}

\textit{Id.} § 12-61-808(4).

\textsuperscript{162} \textit{Id.} § 12-61-803(4).

\textsuperscript{163} \textit{Id.} § 12-61-803(5).
BUYERS' BROKERS

signing such forms.\textsuperscript{164} Whether consumers will actually take this advice remains to be seen. If consumers seek and rely on the broker's explanations, such actions could amount to an unauthorized practice of law.

c. Florida

Florida amended its real estate broker laws in 1994 to include new definitions for "fiduciary," "disclosed dual agent," "transaction broker," and "single agent."\textsuperscript{165} The amended statute also provides that the Florida Real Estate Commission may suspend, impose a fine upon, or issue a reprimand to any broker who fails to give written notice of the required agency disclosure to all parties involved in the transaction.\textsuperscript{166} The broker must make the disclosure to the party represented when the agreement for representation is entered into and to the party not represented at the first substantive contact.\textsuperscript{167} Florida permits dual agency if the broker obtains the informed written consent of all parties.\textsuperscript{168} By consenting to dual agency, the parties lose the right to the agent's undivided loyalty.\textsuperscript{169} Transaction brokers, who are essentially independent contractors, must also disclose their

\textsuperscript{164} Id. § 12-61-803(4).
\textsuperscript{165} See Fl. Stat. Ann. § 475.01(1)(i) (West 1991 Supp. 1995). Section 475.01(1)(i) provides the definition of "fiduciary" as "a broker in a relationship of trust and confidence between that broker as agent and the seller or buyer as principal. The duties of the broker as a fiduciary are loyalty, confidentiality, obedience, full disclosure, and accounting and the duty to use skill, care, and diligence." Id.
Section 475.01(1)(j) provides the definition of "disclosed dual agent" as a broker who works as an agent for both the buyer and the seller. The broker must obtain the informed consent in writing of all parties to the transaction to be a disclosed dual agent. The disclosed dual agent has all the duties of a fiduciary except full disclosure between the buyer and seller.

\textsuperscript{166} Id. § 475.01(1)(k).
\textsuperscript{167} Id. § 475.01(1)(k).
Section 475.01(1) provides the definition of "transaction broker" as a broker who facilitates a brokerage transaction between a buyer and a seller. The transaction broker does not affirmatively represent either the buyer or the seller as an agent, and no fiduciary duties exist except for the duty of accounting and the duty to use skill, care, and diligence. However, the transaction broker shall treat the buyer and seller with honesty and fairness and shall disclose all known facts materially affecting the value of the property in residential transactions to both the buyer and seller. The broker's role as a transaction broker must be fully disclosed in writing to the buyer and seller.

\textsuperscript{168} Id. § 475.01(1)(i). Rule 61J2-24.001 of the Florida Administrative Code, which provides disciplinary guidelines for the Florida Real Estate Commission, prescribes license suspension of up to five years as the penalty for nondisclosure. Fl. Admin. Code Ann. R. 61J2-24.001 (1994).
\textsuperscript{169} Id. § 475.25(q)(2).
role to all parties.\textsuperscript{170} The source of compensation does not determine or create agency.\textsuperscript{171} The statute does not mention any abrogation of common law agency and does not specify the disclosure form the broker must use.

d. Georgia

In 1993, Georgia passed the Brokerage Relationships in Real Estate Transactions Act ("Act").\textsuperscript{172} The Act abrogates common law agency as applied to real estate brokers and replaces it with specifically defined statutory relationships. The Act also includes a definitions section. The most notable term defined is "limited agent," which means "a broker who, acting under the authority of a brokerage engagement, solicits offers to purchase, sell, lease, or exchange real property without being subject to the control of the client except as to the result of the work."\textsuperscript{173} The Act deems a broker a limited agent "unless a different legal relationship between the broker and the person for whom the broker performs . . . is intended and is reduced to writing and signed by the parties."\textsuperscript{174}

As a limited agent, a broker owes no fiduciary duties to any party and is only responsible for exercising ordinary care in the discharge of the broker's services.\textsuperscript{175} A broker engaged by the seller must comply with all contractual provisions of the listing agreement, promote the seller's interests by seeking a sale at terms acceptable to the seller, and disclose all material facts of which the broker has actual knowledge.\textsuperscript{176} This listing or the seller's broker must treat prospective buyers honestly and must not knowingly give false information.\textsuperscript{177} The listing broker must also disclose to buyers any adverse facts pertaining to the condition of the property and may perform certain ministerial acts for the buyer such as preparing offers and conveying them to the seller; locating lenders, attorneys, and insurance agents; or performing other similar acts without violating the duty to promote the interests of the seller.\textsuperscript{178} The Act contains a reciprocal section dealing with brokers engaged by buyers.\textsuperscript{179}

\begin{itemize}
  \item \textsuperscript{170} Id. § 475.25(q)(3).
  \item \textsuperscript{171} Id. § 475.255.
  \item \textsuperscript{173} Id. § 10-6A-3. This section also contains definitions distinguishing between "customer" and "client" and "brokerage engagement" and "ministerial acts." See id.
  \item \textsuperscript{174} Id. § 10-6a-4.
  \item \textsuperscript{175} Id.
  \item \textsuperscript{176} Id. § 10-6a-5.
  \item \textsuperscript{177} Id. § 10-6a-5(b).
  \item \textsuperscript{178} Id. § 10-6a-5(b)(c).
  \item \textsuperscript{179} Id. § 10-6a-7.
\end{itemize}
Another section of the Act expressly states that payment of compensation to a broker does not determine the brokerage relationship.\textsuperscript{180} Georgia allows dual agency as long as the broker makes a complete written disclosure signed by all parties.\textsuperscript{181} Although the Act contains no actual disclosure form, the Act lists the requirements for compliance.\textsuperscript{182} Additionally, a broker's participation in the MLS does not create subagency on the part of selling agents who are not the listing agents.\textsuperscript{183}

e. Illinois

Illinois recently amended its Real Estate License Act of 1983 to include Article 4 - Brokerage Relations ("Article 4"). The amendment took effect on January 1, 1995, and supersedes common law agency.\textsuperscript{184} Article 4 allows for the use of the "designated agency" concept to avoid dual agency.\textsuperscript{185} A "designated agent" is an affiliated licensee who is named by a broker as the legal agent of the broker's client when the other party to the transaction is represented by the same broker or another affiliated licensee of the broker.\textsuperscript{186} This is the equivalent of a "chinese wall" situation in a law firm when one of the firm's attorneys

\textsuperscript{180} Id. § 10-6a-11.
\textsuperscript{181} Id. § 10-6a-12.
\textsuperscript{182} Id. Section 10-6a-12 provides in relevant part:
(a) A broker may act as a dual agent only with the written consent of all clients. Such written consent shall be presumed to have been given and to be informed as against any client who signs a writing or writings which contains the following:
1. A description of the transactions or types of transactions in which the broker will serve as a dual agent;
2. A statement that, in serving as a dual agent, the broker represents two clients whose interests are or at times could be different or even adverse;
3. A statement that a dual agent may not disclose to any client information made confidential by request or instructions from another client, except information allowed to be disclosed by this Code section or required to be disclosed by this Code section or required to be disclosed by this chapter;
4. A statement that the broker or the broker's affiliated licensees have no material relationship with either client other than that incidental to the transactions, or if the broker or the broker's affiliated licensees have such a relationship, a disclosure of the nature of such a relationship. For the purposes of this Code section, a material relationship shall mean any actually known personal, familial, or business relationship between the broker or the broker's affiliated licensees and a client which would impair the ability of the broker or affiliated licensees to exercise fair and independent judgment relative to another client;
5. A statement that the client does not have to consent to the dual agency; and
6. A statement that the consent of the client has been given voluntarily and that the engagement has been read and understood.
\textsuperscript{183} Id. § 10-6a-12(a).
\textsuperscript{184} Id. § 10-6a-13.
\textsuperscript{185} ILL. ANN. STAT. ch. 225, para. 455, § 38.5(a) (Smith-Hurd Supp. 1995).
\textsuperscript{186} See id. §§ 38.15, 38.50.
represents a party whose interests are adverse to those of another client the firm represents. Article 4 creates a presumption that a real estate licensee is the designated agent of the party for whom the licensee is working, unless the broker and the consumer enter into a written agreement to the contrary or the licensee performs only ministerial acts on behalf of the customer.\textsuperscript{187}

As with other states, the source of compensation does not determine agency.\textsuperscript{188} Article 4 specifically lists the broker's duties and states that a broker representing the buyer will not be presumed to have breached a duty by accepting from the seller a commission based on the selling price.\textsuperscript{189} Furthermore, participation in the MLS does not create subagency.\textsuperscript{190} Article 4 also provides that there is no vicarious liability on the part of clients for the acts of the licensees.\textsuperscript{191}

One potential problem in the Illinois approach lies with its disclosure requirements. No form is provided, and brokers are required only to "advise" consumers.\textsuperscript{192} Article 4 requires a broker to make a written disclosure to those whom the broker is not representing, "at a time intended to prevent disclosure of confidential information" and no later than the time when an offer is prepared.\textsuperscript{193} Article 4's mandate that brokers "advise" clients about agency law rather than requiring brokers to complete a prescribed disclosure form arguably constitutes an unauthorized practice of law.

f. Indiana

The Indiana statute distinguishes between a "client" and a "customer" and further provides that a broker owes fiduciary duties only to "clients."\textsuperscript{194} Indiana allows for real estate brokers/agents to act as traditional sellers' agents, as buyers' brokers, or as limited agents. The statute defines a "limited agent" as a dual agent with express limited and divided duties owed to the buyer and seller.\textsuperscript{195} By listing

\textsuperscript{187} Id. § 38.15.
\textsuperscript{188} Id. § 38.40.
\textsuperscript{189} Id. §§ 38.20, 38.25, 38.45 (discussing a licensees duty to the customer, the licensee's relationship with the client, and dual agency, respectively). Id. § 38.20 (c). This is, of course, an attempt to deny reality by statute.
\textsuperscript{190} Id. § 38.55.
\textsuperscript{191} Id. § 38.60.
\textsuperscript{192} Id. § 38.35.
\textsuperscript{193} Id. § 38.35(b). But see id. § 38.45 (allowing for the creation of dual agency and prescribing the specific written disclosures the broker must make prior to entering the dual agency relationship).
\textsuperscript{194} IND. CODE ANN. §§ 25-34.1-10-4, 25-34.1-10-5, 25-34.1-10.6 (Burns 1995) (defining "brokerage relationship," "client," and "customer," respectively).
\textsuperscript{195} Id. § 25-34.1-10-7. Section 25-34.1-10-12 provides in relevant part:
(a) A broker may act as a limited agent only with the written consent of all parties to a real estate transaction. The written consent is presumed to have
each of the duties and disclosures required of each type of agent, the Indiana statute attempts to deal with the issue of divided loyalties by abrogating the common law and creating statutory agency. Similar to the other states which have enacted comprehensive statutes, compensation does not determine agency. The statute also requires brokers to develop and implement a written office policy which identifies and describes the types of brokerage relationships in which the office will engage with its clients.

g. Maine

Maine requires “a meaningful, written real estate brokerage agency relationship disclosure form as defined and mandated by rules...
adopted by the [state real estate] commission."\textsuperscript{199} The duties of seller agents, buyer agents, and disclosed dual agents are listed in separate sections.\textsuperscript{200} Maine codifies the common law fiduciary duties, and the parties may create a different relationship through contractual agreement.\textsuperscript{201} Furthermore, brokers may perform "ministerial acts such as preparing offers and conveying offers" without creating a formal relationship.\textsuperscript{202} A listing broker may avoid dual agency by appointing specific salespersons affiliated with the broker's firm to act as the agents of the client to the exclusion of all other affiliated licensees.\textsuperscript{203} This is similar to the Illinois "designated agent" approach discussed earlier in this Article. By so doing, the broker and the appointed agents are only responsible for the actual knowledge and information each possesses. Maine further provides that there is no "imputation of knowledge or information by operation of law" merely because the appointed agent representing one party is affiliated with the broker representing the other party.\textsuperscript{204}

h. Maryland

Maryland amended its disclosure law, effective January 1, 1995.\textsuperscript{205} The new statute combines definitions and disclosure requirements into one section. The definition provision does not mention "transaction brokers" or "independent contractors."\textsuperscript{206} The required disclosure must occur no later than the "first scheduled face-to-face contact with the seller or lessor or the buyer or lessee."\textsuperscript{207} The statute does not include a disclosure form but does provide the information such forms must include.\textsuperscript{208} The disclosure provisions apply only in residential real estate transactions involving one, two, three, or four single-family units.\textsuperscript{209}

\begin{itemize}
\item \textsuperscript{200} See \textit{id.} §§ 13273-75.
\item \textsuperscript{201} \textit{id.} § 13272.
\item \textsuperscript{202} \textit{id.} § 13273 (2) (C).
\item \textsuperscript{203} \textit{id.} § 13278.
\item \textsuperscript{204} \textit{id.} § 13278(3).
\item \textsuperscript{206} See \textit{id.} § 17-528(a).
\item \textsuperscript{207} \textit{id.} § 17-528(b)(2).
\item \textsuperscript{208} \textit{id.} § 17-528(b)(5). The disclosure must explain the following differences between a buyer's agent, seller's agent, dual agent, and cooperating agent; the duties of the broker to exercise reasonable care, diligence, and confidentiality; a presumption that a seller agency exists absent an agreement to the contrary; that regardless of agency, a broker must act honestly, fairly and in good faith; that the broker is not qualified to advise on tax and legal matters; that all agreements, duties, and manner of compensation need to be in writing; that dual agency could possibly arise later; that the client may refer complaints to the real estate commission. \textit{id.}
\item \textsuperscript{209} \textit{id.} § 17-528(g).
\end{itemize}
i. Michigan

Michigan's statute took effect on January 1, 1994, and requires the broker to make disclosure of the agency relationship and the duties owed to the buyer or seller. Brokers must tailor their disclosure forms to conform to the prescribed details. The statute permits dual agency "without the full range of fiduciary duties owed by a buyer's agent and a seller's agent." Michigan also allows brokers to act as "transaction coordinators" who are not agents for either party.

j. Minnesota

Minnesota preserves common law agency but also establishes minimum standards governing broker duties. Minnesota courts addressed this apparent discrepancy in the Edina Realty cases where the court found Edina Realty breached the more stringent common law duties. To clarify the Edina Realty decisions, the Minnesota Legislature, effective April 14, 1994, added a statement to its disclosure statute, providing that disclosures complying with the statute are sufficient to meet common law disclosure requirements. This still preserves the common law but attempts to prevent further litigation similar to Edina Realty.

Minnesota permits a broker to act as a buyer's broker or dual agent provided the broker discloses the relationship to the parties in the prescribed form. If a party refuses to consent to dual agency, the refusing party may not participate in a sales transaction involving the other represented party. The disclosure form advises clients to keep to themselves all information they do not want revealed.

k. Nebraska

Nebraska enacted a comprehensive act defining the agency relationships created by real estate brokerage, operative July 1, 1995. After finding that "the application of the common law of agency to the relationships between real estate brokers or salespersons and persons..."
who are sellers, landlords, buyers, or tenants of rights and interests in real property has resulted in misunderstandings and consequences that are contrary to the best interests of the public[,]" the legislature then concluded that "it is in the best interests of the public to codify in statute the relationships."220

The legislature began by redefining the brokerage relationship as a "limited agency" and then specified the duties of the limited agent for each situation.221 A broker representing only a seller, landlord, buyer, or tenant is a “single agent.”222 Unless a dual agency relationship occurs, the statute implies that the selling broker may be considered the subagent of the listing broker.223 Absent an agreement to the contrary, the broker is a limited agent of the buyer or tenant.224

The statute requires the broker to disclose the duties and obligations which arise from this limited agency relationship.225 Other duties of disclosure and confidentiality depend on the party for whom the broker is the “limited agent.” Where the broker is acting as the seller’s or landlord’s agent, the broker must disclose to the client all facts which materially affect the value of the property and may not disclose any of the client's confidential information.226 The seller’s broker has no duty to the buyer, except to reveal adverse information that the broker actually knows.227 The buyer’s broker must disclose to the buyer any material adverse information about the property that the broker actually knows and must not reveal any of the buyer's confidential information.228 A dual agent may not reveal prescribed information regarding the buyer to the seller and about the seller to the buyer as well as any confidential information.229 In addition, a listing broker or a subagent of the listing broker must disclose in writing to any prospective buyer or tenant the type of relationship the broker

220. Id. § 76-2401(1), (3).
221. Id. §§ 76-2417(1), 76-2418(1), 76-2419(2) (identifying the broker as a limited agent and defining the limited agents duties when acting as a seller's broker, buyer broker's or dual agent).
222. Id. § 76-2414.
223. Id. § 76-2415, 76-2419.
224. Id. § 76-2416(2).
225. Id. § 76-2416(1).
226. Id. §§ 76-2417(1)(c)(iii), 76-2417(2).
227. Id. § 76-2417(3).
228. Id. §§ 76-2418(1)(c)(iii), 76-2418(2).
229. Id. §§ 2419(4), 2419(5)(a). Section 2419(4) provides that a dual agent must not disclose:

without the informed written consent of the client to whom the information pertains: (a) That a buyer or tenant is willing to pay more than the purchase price or lease rate offered for the property; (b) That a seller or landlord is willing to accept less than the asking price or lease rate for the property; (c) What the motivating factors are for any client buying, selling, or leasing the property; and (d) That a client will agree to financing terms other than those offered.

Id. § 2419(4).
has with the seller or landlord and, consequently, the possible relationship the broker could offer that prospective buyer or tenant.\textsuperscript{230}

l. New York

New York's agency disclosure statute has been in effect since 1991.\textsuperscript{231} The statute provides definitions for buyer's and seller's agents, but not for dual agents.\textsuperscript{232} The statute does not mention transaction brokers.\textsuperscript{233} The prescribed disclosure forms permit and explain dual agency.\textsuperscript{234} The disclosure form is very user friendly and leaves little for consumers to ask their lawyers. All agents assisting in the transaction must provide the form to the parties.\textsuperscript{235} This requirement means that the parties will likely see and sign the form more than once in a transaction. The last subsection of the statute states that it does not "limit or alter the application of the common law of agency with respect to residential real estate transactions."\textsuperscript{236}

m. Oregon

Oregon's approach is similar to New York's. Specifically, Oregon preserves common law duties and remedies.\textsuperscript{237} The statute provides a definition section that does not mention transaction brokers or dual agents, but dual agency is permissible.\textsuperscript{238} Single agents owe their principal the common law fiduciary duties of loyalty, obedience, disclosure, confidentiality, reasonable care and diligence, and accounting in dealings.\textsuperscript{239} Single agents also owe the party not represented by them an affirmative obligation of honest dealing and disclosure.\textsuperscript{240} The broker must make the required disclosure using the prescribed form at the "first-substantive contact," which essentially means the first point of communication.\textsuperscript{241} The broker must confirm the disclosure again in writing at the time a purchase contract is executed.\textsuperscript{242} Agency is not determined by source of compensation.\textsuperscript{243}

\textsuperscript{230} Id. § 76-2421(1)(b).
\textsuperscript{231} N.Y. REAL PROP. § 443 (McKinney Supp. 1995).
\textsuperscript{232} Id. § 443(1).
\textsuperscript{233} Id.
\textsuperscript{234} Id. § 443(4). Part B(3) of the Appendices to this Article includes the prescribed form. See Appendix B(3).
\textsuperscript{235} Id. § 443(3).
\textsuperscript{236} Id. § 443(6).
\textsuperscript{237} OR. REV. STAT. § 696.855 (1993).
\textsuperscript{238} Id. §§ 696.800, 696.815.
\textsuperscript{239} Id. §§ 696.805, 696.810.
\textsuperscript{240} Id.
\textsuperscript{241} Id. § 696.820. Part B(4) of the Appendices to this Article includes Oregon's prescribed disclosure form. See Appendix B(4).
\textsuperscript{242} Id. § 696.845.
\textsuperscript{243} Id. § 696.840.
n. Rhode Island

Rhode Island enacted its disclosure statute in 1989 and included a definitions section and a section preserving common law agency.\(^{244}\) Rhode Island allows independent contractor status through a written contract conforming to the exemption requirements under the Internal Revenue Code.\(^{245}\) All agents involved must disclose their status to all parties involved in the transaction.\(^{246}\) The broker must make the required disclosure to the buyers “as soon as practical, such as prior to qualifying a buyer or showing property by appointment, and in all cases prior to submission of a written offer to purchase.”\(^{247}\) A signed copy of the prescribed form must be provided to the listing agent when the property is shown.\(^{248}\) Each purchase contract must include a confirmation of the agency relationships.\(^{249}\) A broker may act as a dual agent, provided additional disclosure forms are signed.\(^{250}\)

o. Wisconsin

Wisconsin’s disclosure laws took effect on October 1, 1994.\(^{251}\) The approach taken by Wisconsin consists of abrogating common law fiduciary duties and replacing them with statutory duties.\(^{252}\) In addition to the specific statutory duties, brokers may agree to other duties and obligations to meet the requirements of their clients. The statute requires brokers to “maintain the confidentiality of all information given to [them] in confidence and of all information obtained by the broker that he or she knows a reasonable party would want to be kept confidential, unless the information is required to be disclosed by law.”\(^{253}\) The client may make a list of specific information the client wants to remain confidential.\(^{254}\) By abrogating the common law principal/agent relationship, clients are no longer vicariously liable for the acts of the broker.\(^{255}\) Wisconsin does not provide an approved disclosure form, but the form must state the name of the party or parties represented, the broker’s duties, and a prescribed statement of confidential-

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\(^{244}\) R.I. Gen. Laws § 5-20.6-1-2 (Supp. 1994).

\(^{245}\) Id. § 5-20.6-2 (d). The statute does not specify to which section of the Internal Revenue Code it is referring.

\(^{246}\) Id. § 5-20.6-7.

\(^{247}\) Id. § 5-20.6-4.

\(^{248}\) Id.

\(^{249}\) Id. § 5-20.6-7.

\(^{250}\) Id. § 5-20.6-8.


\(^{252}\) Id. § 452.139.

\(^{253}\) Id. § 452.135 (d). Section 452.135(d) provides that the information required by law is: “material adverse facts . . . [and] any facts known by the broker that contradict any information included in a written inspection report on the property.” Id.


\(^{255}\) Id. § 452.139(2).
ity. Dual agency is permitted with the broker owing the same duties to each party.

2. **Minimal Provisions**

a. **Alabama**

   Alabama added a disclosure provision to its statutes dealing with the state's real estate commission, applicable to offers to purchase prepared after April 6, 1989. This disclosure is nothing more than a clause stating who the listing and the selling agent represents. The broker may insert the clause into the offers in handwriting and need only obtain the initials of the buyer and seller. One potential problem with the wording of the Alabama statute is that the statute does not require the broker to include the agency disclosure clause in the executed contract. The statute requires disclosure only for offers. The importance of this distinction has not been raised in any reported cases, but it seems to present a statute of frauds/merger problem. Additionally, the statute does not require an explanation to accompany the insertion of the disclosure statement.

b. **Arkansas**

   Effective January 1, 1994, licensees must “clearly disclose to all parties . . . which party he or she is representing.” The Arkansas statute empowers the state real estate commission to establish the details of the disclosure form and penalties. The statute does not state whether clear disclosure includes an explanation of what is meant by “representing” nor does the statute state the duties the agent owes to the principal. This implicates the potential unauthorized practice of law by brokers.

c. **Delaware**

   Section 2929A requires written disclosure to all parties “who the licensee does not represent but with whom the licensee has substantive contact, such as prospective sellers, lessors, buyers, and lessees.” The disclosure must be made “at the first substantive contact.”

References:

256. *Id.* §§ 452.133, 452.135.
257. *Id.* § 452.137.
258. **ALA. CODE** § 34-27-8(c) (Supp. 1994).
260. *Id.* § 17-35-108(b).
261. **DEL. CODE ANN. tit. 24** § 2929A(a) (Supp. 1994).
262. *Id.* § 2929A(b).
d. Louisiana

Continuing its legislative tradition of resisting new trends, Louisiana is at the opposite extreme of the spectrum in its approach to real estate agency relationships and the move toward increased disclosure. Section 37.1467 of the Louisiana Revised Statutes provides, in its entirety:

A. Notwithstanding the provision of Civil Code Arts. 2985 through 3034 or any other provisions of law, a licensee engaged in any real estate transaction is the agent or subagent of the seller unless there is a written agreement to the contrary and that agreement is disclosed to all parties.

B. Licensees shall provide the parties to a real estate transaction with an agency disclosure form.

C. The commission may prescribe such forms as it deems necessary for the enforcement of this Section.\(^2\)\(^6\)3

The Louisiana approach is a model of simplicity and preserves the traditional common law agency and subagency presumption while adding a disclosure requirement.

e. South Dakota

South Dakota, like Louisiana, presumes that a real estate licensee is always an agent of the owner/seller, unless all parties agree otherwise in writing.\(^2\)\(^6\)4 The disclosure must be given to the party who is not being represented (usually the buyer) before showing the property.\(^2\)\(^6\)5

f. Other States

The majority of states have not enacted comprehensive new provisions dealing with real estate agency disclosure. Instead, these states have minimal provisions similar to those above, usually outlined in the state's administrative code sections addressing real estate commissions. In most instances, a statutory written disclosure requirement is briefly mentioned in provisions dealing with the various grounds for revocation or suspension of brokers' licenses. The statutes do not provide new definitions for terms such as "transaction broker," "buyer's broker," or "dual agent," and the form of disclosure is usually left to the state's real estate commission to prescribe. Furthermore, the common law of agency is left intact. These states include: Arizona, Hawaii, Kansas, Kentucky, Massachusetts, Mississippi, Mis-

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265. Id.
souri, Nevada, New Hampshire, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, Utah, Vermont, West Virginia, and Wyoming, and this is also the approach of the District of Columbia. Washington does not have a provision expressly dealing with disclosure of agency, but the state statute includes a provision requiring disclosure when a broker charges or accepts compensation from more than one party in a transaction.

New Mexico's statute does not specifically mention agency disclosure, but, arguably, agency disclosure is covered by provisions dealing with "substantial misrepresentation" or "any other conduct . . . that constitutes or demonstrates bad faith, incompetency, untrustworthiness, improper purpose, fraud, dishonesty, negligence[,] or any unlawful act." The same may be said of Idaho and Montana. Connecticut


Brokers in New Jersey have been using a wide variety of disclosure forms under which buyers waive fiduciary duties. The New Jersey Real Estate Commission established a task force in 1994 to study the use and validity of such waiver forms and whether or not they are understood by consumers. The Commission proposed an amendment to the New Jersey Administrative Code to include an approved disclosure form with definitions of four forms of agency: seller's agent, buyer's agent, dual agent, and nonagent. See Pryor, supra note 56, at 35. Additionally, section 11:5-1.23(a) and (b) of the New Jersey Administrative Code already requires real estate licensees who represent buyers to disclose to the seller and the seller's broker that they are acting as a "buyer-broker" early in the transaction, and in any event no later than when the purchase contract is executed. N.J. Admin. Code tit. 11, § 5-1.23 (1994). Section 5-1.38(a), which was enacted on June 1, 1992, permits disclosed dual agency for in-house sales, but prohibits receipt of compensation from both the buyer and the seller. Id. § 5-1.38(a).


Idaho Code § 54-2040 (i) (1994 Supp. 1995) (allowing the state's real estate commission to revoke or suspend a broker's license for "any conduct . . . which constitutes dishonest or dishonorable dealings"); Mont. Code Ann. § 37-51-321 (c) (1993) (allowing revocation or suspension of a broker's license for "misrepresentation or making false promises").
enacted a specific statutory section requiring disclosure, effective January 1, 1995. 270

In 1990, Alaska enacted a similar provision requiring written disclosure at the time the agent begins "to provide specific assistance." 271 A broker must obtain a signed acknowledgement from the purchaser, and the agency disclosure must be reiterated in the purchase agreement. 272 Buyers' brokers must provide the same disclosure to the seller and must also disclose to all parties whether any part of the commission is to be paid by any source other than the buyer. 273 Dual agency is permitted only if both parties consent in writing. 274 If any changes in agency occur, the broker must make new disclosures and obtain written acknowledgements from all parties. 275

Tennessee enacted a statute in 1994 requiring that real estate licensees inform the party represented (either seller or buyer) of the party's "rights and obligations" and specifically states that no further duty is imposed; Virginia enacted a similar statute. 276 Iowa added a section to its statutes requiring that the state's real estate commission "adopt rules requiring that each real estate broker or salesperson in a real estate transaction disclose in writing the broker's or salesperson's agency relationship with the buyer or seller in the transaction." 277 Texas enacted a penalty section applicable when a licensee fails to properly disclose which party the licensee represents or from whom the licensee will receive the commission. 278 A broker may act as a dual agent provided the broker makes the prescribed disclosure which includes the broker's duties and obligations when acting as a dual agent. 279 Pennsylvania requires disclosure of agency at the initial interview. 280

VI. CRITICISMS OF THE VARIOUS LEGISLATIVE SOLUTIONS

The new laws attempt to clarify the actual broker-client relationship at least in part by requiring that brokers disclose the nature of

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272. Id. § 08.88.396(a)(2).
273. Id. § 08.88.396(b).
274. Id. § 08.88.396(c).
275. Id. § 08.88.396(d).
276. TENN. CODE. ANN. § 66-5-206 (Supp. 1994). Again, informing a person about his legal rights and obligations is within the scope of a lawyer's duties, making such explanations by brokers an unauthorized practice of law. See VA. CODE ANN. § 55-523 (Michie 1994).
279. Id. § 15C.
the relationship. However, disclosing this information presents new problems and does not effectively resolve old ones. Initial disclosure may provide momentary illumination for buyers and sellers, but, to be fully effective, brokers will need to remind consumers of the consumers' status throughout the transaction, especially when the broker massages them with friendliness and salesmanship. Additionally, although brokers are allowed to perform certain legal tasks incident to their business without incurring liability for the unauthorized practice of law, the new disclosure requirements arguably exceed the scope of brokers' permissible conduct.

A. MISCONCEPTIONS WILL EXIST DESPITE DISCLOSURE

The traditional relationship of a selling agent as a subagent of the listing broker contradicts a buyer's reasonable expectation. A selling agent may comply with the new laws by disclosing to prospective buyers at the outset that the selling agent's loyalties, under a traditional subagency, are with the seller. It is impossible, however, for a selling agent to deal effectively with buyers without asking the buyer for sensitive personal information. The very nature of this situation leads the buyer to feel that a close personal relationship is being created. The buyer does not expect that the broker will disclose such personal information to his or her adversary, the seller.

Brokers have legitimate reasons for seeking this personal information. Brokers do not want to waste their time and efforts, nor the

281. The new disclosure laws have created uncertainty not only on the part of consumers, but also on the part of real estate brokers. John Sable, a lawyer who represents Connecticut Prudential Real Estate, commented: "In purely theoretical terms, [the new disclosure requirements are] a great thing... But in practice, it is very difficult to do... Early disclosure will 'only expose brokers to more claims of undisclosed dual agency, because the probability of dual agency is so high." William Hathaway, New Law Seeks To End Confusion Over Status of Real Estate Agents: Who's the Boss?, THE HARTFORD COURANT, Dec. 11, 1994, at J1 (hereinafter Hathaway) (discussing concerns among real estate brokers regarding their duties under the new disclosure law). See Terry Sheridan, Law to Clarify Real Estate Agents' Roles Muddies the Waters, THE DAILY BUSINESS REVIEW-BROWARD COUNTY FLORIDA, April 28, 1995, at A6.

282. An often cited 1983 Federal Trade Commission survey revealed that seventy-two percent of home buyers believed that the selling/cooperating broker they dealt with in a purchase transaction was their agent. See Pryor, supra note 56, at 35. Even in transactions where the buyers dealt directly with the listing agent, thirty-one percent believed that the listing agent was working for them. Id. Although the new disclosure laws helped to alleviate this confusion, a 1993 Gallup Poll revealed that a sizeable number of consumers were still confused about whom a broker represented: thirty-five percent of the home buyers surveyed either did not understand or were not advised of whom the agent they dealt with represented. Id.

283. One example of a legal task incident to a broker's business is the filling in the blanks in form sales contracts.
time and efforts of the buyers or sellers, by showing properties to a person who is unable or unlikely to buy. In order to avoid this situation, brokers prequalify buyers; that is, brokers interview buyers about their finances, their family situation, their needs, their desires, their proposed timetable, and their likes and dislikes. If the buyer reveals this information, the selling agent, who is a subagent, is obligated to inform the listing agent and the seller. The seller may then use this information in both pre- and post-contract negotiations. The disclosure laws, which require selling agents to advise the prospective buyers of this consequence, would make buyers resist revealing such information. This disclosure would likely prevent the buyer from trusting the selling agent and thus would present difficulties for the selling agent in effectuating a sale. Disclosure does not provide effective protection to the parties and has the potential to significantly interfere with current marketing procedures.

Giving a potential customer a disclosure form prepared by a lawyer or by a government agency is ineffective. Probably only a few customers will read the form, and, of those, fewer will understand it. Most recipients will ask: "What's this?" or "What does it mean?" Because these statutes incorporate the concept of agency, a good answer would provide a short course in agency law. But how can state legislatures expect brokers to teach an agency course to members of the general public in a short interview while trying to win the business of the questioner? They cannot. Legislatures that mandate broker disclosure of the agency relationships ignore reality. If brokers attempt disclosure, customers will probably just ignore the information, regarding the disclosure as one more meaningless formality, similar to suggestions that the customer seek legal advice before signing anything. Customers may develop a distrust of brokers who seem to be trying to protect themselves, and, thus, the effectiveness of the broker is undermined. However, requiring brokers to hand a disclosure document to customers while refusing to explain the document would be worse. Aggravated customers will feel like they have fallen down the rabbit hole if they are handed a page that the broker cannot or will not explain. The broker's act of disclosure has not accomplished anything positive.

A broker who attempts to disclose that the broker is acting as a dual agent must overcome an even greater obstacle. The broker must disclose to both parties that the broker's loyalties to each are limited. It will be very difficult for the parties to understand or emotionally accept that the person with whom they have worked so closely owes

284. In effect, agency disclosure will become meaningless paperwork, in a league with Truth-in-Lending or Real Estate Settlement Procedure Act disclosures.
loyalties to the other side in the transaction. This will be particularly
difficult for the seller who is, at least facially, paying the entire com-
mission. Dual agent representation also undermines the broker's jus-
tification in asking for the same amount of commission as is received
by a broker who owes full loyalty to the seller. Dual agency creates
an inherent conflict of interest that should not be waivable through
disclosure. By analogy, some conflicts of interest encountered by at-
torneys may not be waived by consent and require the attorney to
withdraw from representation. The legal profession's ethical rules
would require the attorney to withdraw under conflict situations simi-
lar to those posed by dual agency. The ethical standards require with-
drawal despite the attorney's training and ability to fully explain
conflicts of interest and their consequences. No justification exists
to permit brokers to undertake dual agency when these brokers are
not qualified to explain or understand the legal ramifications of con-
flicts of interest.

The "designated agent" approach used by Illinois, Maine, and
other jurisdictions attempts to solve the problem by creating the ap-
pearance that the buyer and seller are represented by different bro-
kers. When a listing broker finds a potential buyer who wants to bid
on the broker's own listing, another broker in the office is then desig-
nated to work with the buyer. This designation comes too late. The
listing broker already has acquired confidential information and has
developed a relationship with the buyer. A buyer who is shunted off to
the listing broker's associate is very likely to feel abused because the
buyer now sees one who was formerly the buyer's confidante and advi-
sor on the other side of the transaction. Conversely, the seller will feel
short-changed because the listing broker cannot fully advise the seller
during negotiations due to the previously received confidential infor-
mation. After all, the seller is still paying the full commission. If the
transaction goes sour for any reason, both buyer and seller are likely
to focus their anger and disappointment on the "disloyal" broker even

285. See Hathaway, supra note 281, at J1 (discussing the impact of Connecticut's
new disclosure law). The article raises the issue of how long sellers will continue to pay
six percent commissions for selling their houses if they receive less representation. Id.
286. See, e.g., Baldasarre v. Butler, 625 A.2d 458, 467 (N.J. 1993) (holding that a
lawyer may not represent both the buyer and the seller in a "complex commercial real
estate transaction" even if both the buyer and the seller give their "informed consent").
Although the case may be distinguished because it involved a commercial real estate
transaction, the decision is notable because the New Jersey Supreme Court held that
even a lawyer who is competent and qualified to explain the legal implications of dual
agency cannot undertake such representation. Baldasarre, 625 A.2d at 467. Regardless
of whether the transaction involves residential or commercial property, the "disclosed
dual agency" practiced by real estate brokers should be even less permissible. Most
brokers generally possess only a high school diploma and most are only required to
attend a short real estate course.
if that person is entirely innocent of wrongdoing. The "designated agent" concept is an unrealistic attempt to avoid dual agency, because the listing broker has been compromised and thereafter has at least some responsibility to both parties. Moreover, the minimal separation between the brokers would probably not pass muster under legal professional responsibility analysis.287

Brokers who act as facilitators or independent contractors and disclose this relationship to both parties will have an even tougher time convincing the parties that the broker's services merit a full commission. If the party understands the difference, neither party will want to pay the same commission for a broker who owes them no loyalty when, for the same cost, they can hire a broker to act as their fiduciary. The mere fact that brokers acting as independent contractors have been able to obtain business is a sign that consumers do not know what they are entitled to in exchange for paying a commission. Consumer groups should educate the public in this area so that people receive the most for their money. The market forces created by educated consumers would probably cause the extinction of the "independent contractor" concept by exposing this concept as an attempt by brokers to short-change their clients.

In many states, the new disclosure laws do not mention any abrogation of common law agency with its accompanying fiduciary duties. As evidenced by the two *Edina Realty* cases, this flaw provides consumers with potential remedies when they feel dissatisfied with a broker's representation. Even in the few states which abrogated common law agency as applied to brokers, the brokers might not fully complete the statutory disclosure requirements or the broker might complete the disclosure in a manner which has no meaningful effect on the buyers' or sellers' expectations. Where the initial disclosure was sufficient, the relationship may change later in the transaction due to the type of property, the involvement of other parties, the addition of new parties or brokers, or the relationships of others involved. These changes may necessitate further disclosures to modify the customers' expectations and satisfy the law. Brokers could be held liable for failing to make further disclosures when changes occur.288 These modifi-

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287. Rules of imputed disqualification of other firm members would likely apply to such a situation. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10(a) (1983).

288. An attorney for a major real estate firm in Connecticut provided the following example:

An agent for, say, [X firm], agrees to represent a buyer as a buyer agent. As soon as that buyer is shown a[n] [X firm] listing, that relationship must change to what is known as "dual agency," in which certain information such as negotiating position can be withheld from both buyer and seller. The listing company must get both the seller and buyer to agree in writing to the new relationship
ocations have complicated business for brokers and have exposed them to unreasonable potential risks.

B. Disclosure May Constitute Unauthorized Practice of Law

Disclosure requirements that essentially mandate defining the legal relationships created as well as the consequences that follow may force brokers into committing the unauthorized practice of law. The purpose of the rule against unauthorized practice is to protect the public. Brokers, however, are permitted to execute purchase contracts by using forms approved by their state's bar. The traditional rationale allowing brokers this ability is that "[l]egal consequences become irrevocable and binding at the time a real estate transaction is closed, as distinguished from the execution of the contract of sale by the parties." The real reason for permitting brokers to perform this essentially legal function is probably that the practice has been accepted for too long to change in the face of consumer demand.
The traditional rationale, however, does not justify the new brokers' disclosure laws. These disclosures are intended to fix and define the legal rights of the parties. Article 17 of NAR's Code of Ethics and Standards of Practice states that "[r]ealtors shall not engage in activities that constitute the unauthorized practice of law and shall recommend that legal counsel be obtained when the interest of any party to the transaction requires it." Additionally, Statement of Principles propounded jointly by the American Bar Association and NAR state that:

[t]he Realtor shall not practice law or give legal advice directly or indirectly; he shall not act as a public conveyancer, nor give advice or opinions as to the legal effect of legal instruments, nor give opinions concerning the validity of title to real estate, and he shall not prevent or discourage any party to a real estate transaction from employing the services of a lawyer. . . . The Realtor shall not undertake to draw or prepare documents fixing and defining the legal rights of parties to a transaction.

As far as contract preparation, brokers and attorneys reached a compromise whereby the form contracts brokers use are drafted and approved by the bar. However, the issue with regard to agency disclosures is not so simple. While brokers should not be held liable for performing a statutory mandate, the prohibition against the unauthorized practice of law exists to protect the public. Even if the respective states' bars permit the use of lawyer-prepared disclosure forms, the broker may not accompany the disclosure with a competent explanation to the parties of their rights and duties without legal training.

Many of the jurisdictions include a provision in their disclosure statutes requiring brokers to advise consumers that they should seek the advice of a lawyer. This requirement may be sufficient to protect the public, but it is sincerely doubted. Perhaps expanding broker education to provide significant background in agency law would be sufficient to prepare brokers for this task. However, it should be noted this disclosure requirement places a tremendous burden on brokers without producing any public benefit because of the subject matter of the disclosure. Statutes that focus on disclosing legal relationships require an understanding of the relationships and their ramifications which the public does not possess. The proposal in the next section changes the focus to simple concepts which the public will be able to understand.

VII. THE REALISTIC SOLUTION: A STATUTORY BROKERAGE RELATIONSHIP

This proposal is designed to facilitate the real estate brokerage business by imposing simple, easy to understand duties on the broker while giving sellers and buyers the service they have a reasonable right to expect. Sellers want their property marketed to the widest audience. Brokers reach potential buyers primarily through the MLS network. Sellers do not want to waste the time and effort involved in showing the property to those who are unlikely or unable to buy. Brokers satisfy this need by screening and prequalifying buyers before showing properties. The proposed statute responds by requiring the listing broker to make a reasonable good faith effort to help the seller market the property. Questions of whether certain efforts meet the standard could be answered by custom in the trade, case law, and/or rules promulgated by the appropriate agency.

Buyers want to find and buy a suitable property with minimum time and effort but at the best price and terms. Buyers often need assistance in obtaining financing and in having the property inspected. The inspection process insures that the condition of the property is sound and that any problems, defects, and repair needs are discovered, disclosed, and resolved before buying. Buyers often rely on the broker to help find the appropriate professional, including a lawyer, to handle the closing. Buyers want to know about the market trends in the area, the characteristics of the neighborhood in which a property is located, and current loan, tax, insurance, and community association rates. The buyer usually requires more services from a broker than the seller, and yet current agency law deems the broker to represent the seller. This proposal responds to these needs by requiring brokers to make a reasonable good faith effort to locate appropriate properties and service providers for potential buyers.

The brokers' interests are simple. The broker wants to earn a commission by selling property. Brokers want to make as many sales as possible, at good commission rates, without incurring liability. Brokers want to provide professional service in order to satisfy customers, increase referrals, improve their reputation, and attract clients. The brokers sell their ability to facilitate the transaction by utilizing their expertise, their knowledge of the real estate market, their marketing talents, and their professional contacts.293

293. Brokers do have a very legitimate function and area of expertise. Talents within their province include the following: sales of all types of residential, commercial, industrial, income-producing, agricultural and other types of real property; property management, a growing business in Florida, with its large number of condominiums and community associations; market analysis and property valuation; facilitation of fi-
As seen above, the agency characterizations and recent statutory reactions to the common law's inadequacies do not satisfy the sellers', buyers', or brokers' needs or expectations. The current variations merely confuse everyone. The solution lies in designing a statute that, in simple terms, mandates a role for real estate brokers. The statute should simply specify what the broker must and must not do in terms that are both consistent with the realistic expectations of the parties and allow the real estate business to proceed with as little disruption as possible. The statute should provide that real estate brokers will:

1. act in good faith at all times;
2. make reasonable efforts to help sellers market properties listed with them;
3. make reasonable efforts to locate appropriate properties and service providers for potential buyers with whom they are working;
4. disclose to both sellers and potential buyers all information concerning the property that the broker has or should have; and
5. prohibit disclosure of personal information about the sellers or potential buyers to any person unless given specific authorization by the subject of the information.

Violation of these rules should expressly become both a statutory tort, giving rise to a private cause of action for damages suffered, and a basis for discipline by the brokers' licensing authority.

These rules should supersede all previous inconsistent law, including common law and earlier statutes and may not be varied by agreement. These rules should apply uniformly to listing agent, selling agent, or buyer's agent. These rules do not vary when the listing agent has also produced the buyer, and they do not prevent brokers from entering into a variety of different relationships with buyers and/or sellers to the extent those relationships are inconsistent with the rules.

This solution satisfies the reasonable needs and expectations of each party. Sellers want a sale at the best price to obtain the maximum return on their investment and usually want a quick sale. Sell-
ers expect the broker will help find buyers, obtain a signed contract, and close the transaction. The broker has the expertise to provide marketing advice, a listing price, and what inexpensive fix-ups would help most in producing a quick sale.

Requiring the full disclosure of all information concerning the property is a logical expansion of the current trend that requires the seller to make full disclosure. Requiring the broker to reveal any information that the broker has, or should have, would allow the parties to receive maximum benefit from the broker's real estate expertise. This "requirement" provides significant relief for the broker because it relieves the broker of any responsibility to keep certain information secret. It also simplifies things for the broker because there is only one simple standard to apply. When it comes to information about the property, disclose everything to the interested parties. This standard also has tremendous advantages for the buyer and the seller. Each will be dealing from a position of knowledge about the property. The standard will eliminate subsequent surprises resulting in the elimination of most causes of buyer's or seller's remorse. Full disclosure will create a relaxed atmosphere where the parties will emerge satisfied with the transaction. Neither the buyer nor the seller will have to fear that they might later discover that they have been treated unfairly.

On the other hand, brokers should have a professional duty not to reveal personal matters about one party to another. This prohibition should apply to any broker, regardless of whether the broker is characterized as a listing broker, a "seller's broker," a cooperating broker, or any other "broker" category. This prohibition performs a function similar to requiring full disclosure about the property; it creates an atmosphere in which neither party will feel used. This creates a clear line that a broker may not cross without express permission, making it easy for brokers and principals alike to understand what topics are off limits. Questions about the other party's motivations or levels of desperation would simply be off limits. In this way, the parties can deal with each other in light of the information regarding the property.

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295. An interesting question is whether "all information about the property" should include the substance of all offers or counter offers which are currently before the seller. Certainly, a broker should have a duty to deliver any offer received to the seller. But should the broker reveal to other potential buyers that a certain offer is currently before the seller? That certainly would be helpful information to the potential buyer in deciding whether to make an offer and at what terms. Likewise, such openness might stimulate competition resulting in sales at better prices and, perhaps, at greater speed. See Robert M. Washburn, Residential Real Estate Condition Disclosure Legislation, 44 DePaul L. Rev. 381 (1995).

296. Such knowledge would include the property's value, condition or defects, and suitability for a particular use.
rather than the positions of those involved. Negotiations would center on the property and its value, not on the relative strengths and weaknesses of the parties.\textsuperscript{297} This would mean brokers might have to give up some traditional sales tools, including "Desperate Seller" or "Motivated Seller" signs or announcements. This is a minimal loss because the tool is not necessarily lost completely. The prohibition does not prevent a broker from delivering communications that one party wants delivered to the other. The prohibition merely prohibits the broker from becoming an unauthorized source of personal information that becomes a factor in the transaction. The prohibition against revealing personal information would elevate the brokerage profession and the real estate sales process by eliminating some of the distasteful gamesmanship often utilized.\textsuperscript{298}

By focusing on the services and information a broker provides, this proposal clarifies the broker's role. It also eliminates the prime source of conflict of interest charges. Customers would probably be satisfied more often and, consequently, would be more willing to pay the full commission without grumbling. Moreover, life would be far simpler for brokers who have one simple set of rules to follow in every transaction, regardless of their role in the transaction. Brokers would no longer be faced with a confusing system.

This proposal empowers customers by providing them with dual remedies for any violation of these rules. Customers could sue the violators directly for any injury suffered from the violation, and they could file complaints with the governmental authority that licenses brokers. This should reduce litigation, not encourage it, because the issues would be simple: Did the broker violate the statutory duty? Did the violation cause injury? This proposal will simplify and clarify real estate brokerage law. It will protect the public and brokers by provid-

\textsuperscript{297} This should also eliminate the often perplexing questions about when a broker should reveal to a party any nonbrokerage relationship he or she has with the other party. One example, of a nonbrokerage relationship occurs when a potential buyer uses a boyfriend or girlfriend who is a broker to find a house. Under the traditional subagency scenario, the selling broker should, at the very least, promptly reveal that relationship to the listing broker and the seller. If the seller objects, the broker should probably withdraw due to the inherent conflict of interest. Even in a dual agency situation, the personal relationship which previously existed creates significant concern and certainly requires disclosure. However, under these proposed rules, that previous relationship is irrelevant unless the relationship is with the listing broker. Then the seller might have reason to suspect that the professional advice of the broker in setting the listing price may have been tainted by the plan to sell to that buyer at a reduced price. In such a case, the listing broker must communicate personal information about him or herself.

\textsuperscript{298} Perhaps this would not elevate the brokerage profession to the level of the priesthood with its sanctity of the confessional, but it certainly would improve the public's perception of brokers if it became widely known that personal information given brokers would not and could not be divulged without risking a penalty or liability.
ing simple understandable rules and remedies for rule violation while
insuring that valuable brokerage services will continue to be readily
available. This proposal will also allow continued development and
expansion of brokerage services.

VIII. CONCLUSION

The traditional formulations for the relationships that might exist
between real estate brokers, sellers, and buyers are inadequate for the
realities of modern real estate transactions. Attempts to recast these
relationships by using labels like "designated agent," "dual agent," or
"facilitator" have exacerbated the problems. The solution is to elimi-
nate the multiple possibilities and simplify the relationships by im-
posing a simple statutory list of what the broker must and must not
do. This will best protect the seller, the buyer, and the broker.
### IX. APPENDIX - A

**SALIENT ELEMENTS OF STATE REAL ESTATE BROKER AGENCY DISCLOSURE LAWS AS OF AUGUST 28, 1995**

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<thead>
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<th>STATE</th>
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<th>ELEMENTS</th>
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<td>§ 61-2-1-61-2-22</td>
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<td>tit. 26, §§ 2211-2299</td>
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<td>Wyoming</td>
<td>§§ 38-28-101-122</td>
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</table>
key

A. Contains a comprehensive definition section including a distinction between "dual agent," "buyer," and "listing agent."
B. Contains limited definitions of the various brokerage relationships.
C. Defines the broker's duties and responsibilities.
D. Allows the parties to modify by contract the duties and responsibilities of the broker.
E. Provides the means to limit the broker's fiduciary duties, such as through the creation of the designation of limited agent, etc.
F. Provides the means to avoid the creation of a dual agency.
G. Allows a broker to act as a dual agent.
H. Presumes the broker is always the agent of the owner/seller unless otherwise contracted.
I. Requires only limited, if any, disclosure of agency relationships to the parties.
J. Requires the use of separate comprehensive buyer and seller disclosure forms.
K. Prescribes use of statutory disclosure forms.
L. Disclosure provisions, if any, are prescribed by the state's real estate commission.
M. Duty to disclose arises before contract is executed.
N. Duty to disclose arises at first substantive contact.
O. Requires brokers to advise client that the disclosures have legal consequences.
P. Source of compensation does not determine or create an agency relationship.
Q. Sharing the commission does not necessarily create a sub-agency relationship.
R. Preserves the common law agency/fiduciary duties and remedies.
S. Implies an abrogation of common law fiduciary duties.
T. Abrogates common law fiduciary duties.
IX. APPENDIX - B
TYPICAL DISCLOSURE FORMS

1. California's Disclosure Form

DISCLOSURE REGARDING REAL ESTATE AGENCY RELATIONSHIP

(As required by the Civil Code)

When you enter into a discussion with a real estate agent regarding a real estate transaction, you should from the outset understand what type of agency relationship or representation you wish to have with the agent in the transaction.

SELLER'S AGENT

A Seller's agent under a listing agreement with the Seller acts as the agent for the Seller only. A Seller's agent or a sub-agent of that agent has the following affirmative obligations:

To the Seller:
(a) A fiduciary duty of utmost care, integrity, honesty, and loyalty in dealings with the Seller.

To the Buyer and the Seller:
(a) Diligent exercise of reasonable skill and care in performance of the agent's duties.
(b) A duty of honest and fair dealing and good faith.
(c) A duty to disclose all facts known to the agent materially affecting the value or desirability of the property that are not known to, or within the diligent attention and observation of, the parties. An agent is not obligated to reveal to either party any confidential information obtained from the other party which does not involve the affirmative duties set forth above.

AGENT REPRESENTING BOTH SELLER AND BUYER

A real estate agent, either acting directly or through one or more associate licensees, can legally be the agent of both the Seller and the Buyer in a transaction, but only with the knowledge and consent of both the Seller and the Buyer. In a dual agency situation, the agent has the following affirmative obligations to both the Seller and the Buyer:
(a) A fiduciary duty of utmost care, integrity, honesty and loyalty in the dealings with either Seller or the Buyer.
(b) Other duties to the Seller and the Buyer as stated above in their respective sections.

In representing both Seller and Buyer, the agent may not, without the express permission of the respective party, disclose to the other party that the Seller will accept a price less than the listing price or that the Buyer will pay a price greater than the price offered.

The above duties of the agent in a real estate transaction do not relieve a Seller or Buyer from the responsibility to protect their own interests. You should carefully read all agreements to assure that they adequately express your understanding of
the transaction. A real estate agent is a person qualified to advise about real estate. If legal or tax advice is desired, consult a competent professional.

Throughout your real property transaction you may receive more than one disclosure form, depending upon the number of agents assisting in the transaction. The law requires each agent with whom you have more than a casual relationship to present you with this disclosure form. You should read its contents each time it is presented to you, considering the relationship between you and the real estate agent in your specific transaction.

This disclosure form includes the provisions of Article 2.5 (commencing with Section 2373) of Chapter 2 of Title 9 of Part 4 of Division 3 of the Civil Code set forth on the reverse hereof. Read it carefully.

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<th>Buyer/Seller (date)</th>
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<table>
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<th>Associate Licensee (date)</th>
<th>Buyer/Seller (date)</th>
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<tr>
<td>(Signature)</td>
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</table>
2. Minnesota’s Disclosure Form

82.197. Disclosure requirements

Subdivision 1. Agency disclosure. The listing agreement or a buyer’s broker agreement must include a clear and complete explanation of how the broker will represent the interests of the seller or buyer, and, if the broker represents both sellers and buyers, state how that representation would be altered in a dual agency situation, and require the seller or buyer to choose whether to authorize the broker to initiate any transaction which would give rise to dual agency. Disclosure to a customer of a licensee’s agency relationship with other parties must be made at a time and in a manner sufficient to protect the customer’s bargaining position.

Subd. 2. Creation of dual agency. If circumstances create a dual agency situation, the broker must make full disclosure to all parties to the transaction as to the change in relationship of the parties to the broker due to dual agency. A broker, having made full disclosure, must obtain the consent of all parties to these circumstances before accepting the dual agency.

Subd. 3. Scope and effect. The requirements for disclosure of agency relationships set forth in this chapter are intended only to establish a minimum standard for regulatory purposes, and are not intended to abrogate common law.

Subd. 4. Agency disclosure forms. (a) Disclosures of agency relationships shall be made in substantially the form set forth in paragraphs (b) to (e):

(b) ADDENDUM TO LISTING AGREEMENT

...(Broker)... will be representing you as your broker in the sale of your property located at ...................... This relationship is called an agency. As your agent, ...(Broker)... owes you the duties of loyalty, obedience, disclosure, confidentiality, reasonable care and diligence, and full accounting. However, ...(Broker)... also represents buyers looking for properties. If a buyer represented by ...(Broker)... becomes interested in your property, a dual agency will be created. This means that ...(Broker)... will owe the same duties to the buyer that we owe to you. This conflict of interest will prohibit ...(Broker)... from advocating exclusively on your behalf when attempting to effect the sale of your property. Dual agency will limit the level of representation which ...(Broker)... can provide.

If a dual agency should arise, you will need to agree that confidential information about price, terms, and motivation will still be kept confidential unless you instruct ...(Broker)... in writing to disclose specific information about you or your property. All other information will be shared. Regardless of whether a dual agency occurs, ...(Broker)... must disclose to the buyer any material facts of which ...(Broker)... is aware that may adversely and significantly affect the buyer’s use or enjoyment of the property. In addition, ...(Broker)... must disclose to both parties any information of which ...(Broker)... is aware that a party will not perform in accordance with the terms of the purchase agreement or similar written agreement to convey real estate.

...(Broker)... cannot act as a dual agent unless both you and the buyer agree to the dual agency after it is disclosed to you. By agreeing to a possible dual agency, you will be giving up the right to exclusive representation in an in-house transaction. However, if you should decide not to agree to a possible dual agency, and you want ...(Broker)... to represent you, you may give up the opportunity to sell your property to buyers represented by ...(Broker)... .

SELLER’S INSTRUCTIONS TO BROKER

Having read and understood this information about dual agency, you now instruct ...(Broker)... as follows:

...(Broker)... will consider offers made by buyers represented by ...(Broker)... . 

...(Broker)... will consider offers made by buyers represented by ...(Broker)... .

________________________               _______________________
Seller                           (Broker)

________________________           _______________________
Seller                           Salesperson

Dated: ________________________
(c) ADDENDUM TO BUYER REPRESENTATION AGREEMENT

...(Broker).... will be representing you as your broker to assist you in finding and purchasing a property. This relationship is called an agency. As your agent, ...(Broker).... owes you the duties of loyalty, obedience, disclosure, confidentiality, reasonable care and diligence, and full accounting. However, ...(Broker).... also represents sellers by listing their property for sale. If you become interested in a property listed by ...(Broker)...., a dual agency will be created. This means that ...(Broker).... will owe the same duties to the seller that ...(Broker).... owes to you. This conflict of interest will prohibit ...(Broker).... from advocating exclusively on your behalf when attempting to effect the purchase of the property. Dual agency will limit the level of representation ...(Broker).... can provide.

If a dual agency should arise, you will need to agree that confidential information about price, terms, and motivation will still be kept confidential unless you instruct ...(Broker).... in writing to disclose specific information about you. All other information will be shared. Regardless of whether a dual agency occurs, ...(Broker).... must disclose to the buyer any material facts of which ...(Broker).... is aware that may adversely and significantly affect the buyer’s use or enjoyment of the property. In addition, ...(Broker).... must disclose to both parties any information of which ...(Broker).... is aware that a party will not perform in accordance with the terms of the purchase agreement or similar written agreement to convey real estate.

...(Broker).... cannot act as a dual agent unless both you and the seller agree to the dual agency after it is disclosed to you. By agreeing to a possible dual agency, you will be giving up the right to exclusive representation in an in-house transaction. However, if you should decide not to agree to a possible dual agency, and you want ...(Broker).... to represent you, you may give up the opportunity to purchase the properties listed by ...(Broker)....

BUYER’S INSTRUCTIONS TO BROKER

Having read and understood this information about dual agency, you now instruct ...(Broker).... as follows:

...(Broker).... will agree to a dual agency representation and will consider properties listed by ...(Broker)....

...(Broker).... will not agree to a dual agency representation and will not consider properties listed by ...(Broker)....

__________________________
Seller
(Broker)

__________________________
Seller
Salesperson

Dated: ____________

(d) DISCLOSURE TO CUSTOMER

Before ...(Broker).... begins to assist you in finding and purchasing a property, we must disclose to you that ...(Broker).... will be representing the seller in the transaction. ...(Broker).... will disclose to you all material facts about the property of which ...(Broker).... is aware, that could adversely and significantly affect your use or enjoyment of the property. ...(Broker).... will also assist you with the mechanics of the transaction.

When it comes to the price and terms of an offer, ...(Broker).... will ask you to make the decision as to how much to offer for any property and upon what terms and conditions. ...(Broker).... can explain your options to you, but the ultimate decision is yours. ...(Broker).... will attempt to show you properties in the price range and category you desire so that you will have information on which to base your decision. ...(Broker).... will present to the seller any written offer that you ask ...(Broker).... to present. ...(Broker).... asks you to keep to yourself any information about the price or terms of your offer, or your motivation for making an offer, that you do not want the seller to know. ...(Broker).... would be required, as the seller’s agent, to disclose this information to the seller. You should carefully consider sharing any information with ...(Broker).... that you do not want disclosed to the seller.
(e) DISCLOSURE TO BUYER AND SELLER AT TIME OF OFFER TO PURCHASE

....(Broker).... represents the seller at the property located at
....(Broker).... also represents a buyer who offered to purchase the seller's property. When ....(Broker).... represents both the buyer and the seller in a transaction, a dual agency is created. This means that ....(Broker).... and its agents owe a fiduciary duty to both buyer and seller. Because buyer and seller may have conflicting interests, ....(Broker).... and its agents are prohibited from advocating exclusively for either party.
....(Broker).... cannot represent both the buyer and seller in this transaction unless both the buyer and seller agree to this dual agency.

Buyer and seller acknowledge and agree that:
1. Confidential information communicated to ....(Broker).... which regards price, terms, or motivation to buy or sell will remain confidential unless buyer or seller instructs ....(Broker).... in writing to disclose this information about the buyer or seller. Other information will be shared.
2. ....(Broker).... and its salespersons will disclose to buyer all material facts of which they are aware which could adversely and significantly affect the buyer's use or enjoyment of the property or any intended use of the property of which ....(Broker).... or its salespersons are aware (this disclosure is required by law whether or not a dual agency is involved).
3. ....(Broker).... and its salespersons will disclose to both parties all information of which they are aware that either party will not perform in accordance with the terms of the purchase agreement or other written agreement to convey real estate (this disclosure is required by law whether or not a dual agency is involved).
4. ....(Broker).... and its salespersons will not represent the interests of either party to the detriment of the other.
5. Within the limits of dual agency, ....(Broker).... and its salespersons will work diligently to facilitate the mechanics of the sale.

With the knowledge and understanding of the explanation above, buyer and seller authorize and instruct ....(Broker).... and its salespersons to act as dual agents in this transaction.

Buyer Seller

BY: 

______  ______

Buyer Seller

Dated: ________

Subd. 5. Application. The disclosures required by subdivision 4 apply only to residential real property transactions.
3. New York's Agency Disclosure Form

s 443. Disclosure regarding real estate agency relationship; form

1. Definitions. As used in this section, the following terms shall have the following meanings:

a. "Agent" means a person who is licensed as a real estate broker or real estate sales associate under section 440-a of this article and is acting in a fiduciary capacity.

b. "Buyer" means a transferee or lessee in a residential real property transaction and includes a person who executes an offer to purchase or to lease residential real property from a seller through an agent, or who has engaged the services of an agent with the object of entering into a residential real property transaction as a transferee or lessee.

c. "Buyer's agent" means an agent who contracts to locate residential real property for a buyer or who finds a buyer for a property and presents an offer to purchase to the seller or seller's agent and negotiates on behalf of the buyer.

d. "Listing agent" means a person who has entered into a listing agreement to act as an agent of the seller for compensation.

e. "Listing agreement" means a contract between an owner or owners of residential real property and an agent, by which the agent has been authorized to sell or lease the residential real property or to find or obtain a buyer or lessee therefore.

f. "Residential real property" means real property improved by a one-to-four family dwelling used or occupied, or intended to be used or occupied, wholly or partly, as the home or residence of one or more persons, but shall not refer to (i) unimproved real property upon which such dwellings are to be constructed or (ii) condominium or cooperative apartments in a building containing more than four units.

g. "Seller" means the transferor or lessor in a residential real property transaction, and includes an owner who lists residential real property for sale or lease with an agent, whether or not a transfer or lease results, or who receives an offer to purchase or lease residential real property.

h. "Seller's agent" means a listing agent who acts alone, or an agent who acts in cooperation with a listing agent, acts as a seller's subagent or acts as a broker's agent to find or obtain a buyer for residential real property.

2. This section shall apply only to transactions involving residential real property.

3. a. A listing agent shall provide the disclosure form set forth in subdivision four of this section to a seller prior to entering into a listing agreement with the seller and shall obtain a signed acknowledgment from the seller, except as provided in paragraph f of this subdivision.

b. A seller's agent shall provide the disclosure form set forth in subdivision four of this section to a buyer or buyer's agent at the time of the first substantive contact with the buyer and shall obtain a signed acknowledgement from the buyer, except as provided in paragraph f of this subdivision.

c. A buyer's agent shall provide the disclosure form to the buyer prior to entering into an agreement to act as the buyer's agent and shall obtain a signed acknowledgement from the buyer, except as provided in paragraph f of this subdivision.

d. The parties to a contract of purchase and sale shall sign the acknowledgment of the parties to the contract. If attorneys for the buyer and seller arrange for the preparation and execution of a contract, the real estate licensees are not responsible for obtaining the acknowledgment of the parties as required by this paragraph.

e. The agent shall provide to the buyer or seller a copy of the signed acknowledgment and shall maintain a copy of the signed acknowledgment for not less than three years.

f. If the seller or buyer refuses to sign an acknowledgment of receipt pursuant to this subdivision, the agent shall set forth under oath or affirmation a written declaration of the facts of the refusal and shall maintain a copy of the declaration for not less than three years.
4. The following shall be the disclosure form:

**DISCLOSURE REGARDING REAL ESTATE AGENCY RELATIONSHIPS**

Before you enter into a discussion with a real estate agent regarding a real estate transaction, you should understand what type of agency relationship you wish to have with that agent.

New York State law requires real estate licensees who are acting as agents of buyers or sellers of property to advise the potential buyers or sellers with whom they work of the nature of their agency relationship and the rights and obligations it creates.

**SELLER'S OR LANDLORD'S AGENT**

If you are interested in selling or leasing real property, you can engage a real estate agent as a seller's agent. A seller's agent, including a listing agent under a listing agreement with the seller, acts solely on behalf of the seller. You can authorize a seller's or landlord's agent to do other things including hire subagents, broker's agents or work with other agents such as buyer's agents on a cooperative basis. A subagent, is one who has agreed to work with the seller's agent, often through a multiple listing service. A subagent may work in a different real estate office.

A seller's agent has, without limitation, the following fiduciary duties to the seller: reasonable care, undivided loyalty, confidentiality, full disclosure, obedience and a duty to account.

The obligations of a seller's agent are also subject to any specific provisions set forth in an agreement between the agent and the seller.

In dealings with the buyer, a seller's agent should (a) exercise reasonable skill and care in performance of the agent's duties; (b) deal honestly, fairly and in good faith; and (c) disclose all facts known to the agent materially affecting the value or desirability of property, except as otherwise provided by law.

**BUYER'S OR TENANTS AGENT**

If you are interested in buying or leasing real property, you can engage a real estate agent as a buyer's or tenant's agent. A buyer's agent acts solely on behalf of the buyer. You can authorize a buyer's agent to do other things including hire subagents, broker's agents or work with other agents such as seller's agents on a cooperative basis.

A buyer's agent has, without limitation, the following fiduciary duties to the buyer: reasonable care, undivided loyalty, confidentiality, full disclosure, obedience and a duty to account.

The obligations of a buyer's agent are also subject to any specific provisions set forth in an agreement between the agent and the buyer.

In dealings with the seller, a buyer's agent should (a) exercise reasonable skill and care in performance of the agent's duties; (b) deal honestly, fairly and in good faith; and (c) disclose all facts known to the agent materially affecting the buyer's ability and/or willingness to perform a contract to acquire seller's property that are not inconsistent with the agent's fiduciary duties to the buyer.

**BROKER'S AGENTS**

As part of your negotiations with a real estate agent, you may authorize your agent to engage other agents whether you are a buyer/tenant or seller/landlord. As a general rule, those agents owe fiduciary duties to your agent and to you. You are not vicariously liable for their conduct.

**AGENT REPRESENTING BOTH SELLER AND BUYER**

A real estate agent acting directly or through an associated licensee, can be the agent of both the seller/landlord and the buyer/tenant in a transaction, but only with the knowledge and informed consent, in writing, of both the seller/landlord and the buyer/tenant.

In such a dual agency situation, the agent will not be able to provide the full range of fiduciary duties to the buyer/tenant and seller/landlord.

The obligations of an agent are also subject to any specific provisions set forth in an agreement between the agent and the buyer/tenant and seller/landlord.

An agent acting as a dual agent must explain carefully to both the buyer/tenant and seller/landlord that the agent is acting for the other party as well. The agent
should also explain the possible effects of dual representation, including that by consenting to the dual agency relationship the buyer/tenant and seller/landlord are giving up their right to undivided loyalty.

A BUYER/TENANT OR SELLER/LANDLORD SHOULD CAREFULLY CONSIDER THE POSSIBLE CONSEQUENCES OF A DUAL AGENCY RELATIONSHIP BEFORE AGREEING TO SUCH REPRESENTATION.

GENERAL CONSIDERATIONS

You should carefully read all agreements to ensure that they adequately express your understanding of the transaction. A real estate agent is a person qualified to advise about real estate. If legal, tax or other advice is desired, consult a competent professional in that field.

Throughout the transaction you may receive more than one disclosure form. The law requires each agent assisting in the transaction to present you with this disclosure form. You should read its contents each time it is presented to you, considering the relationship between you and the real estate agent in your specific transaction.

ACKNOWLEDGEMENT OF PROSPECTIVE BUYER/TENANT

(1) I have received and read this disclosure notice.
(2) I understand that a seller's/landlord's agent, including a listing agent, is the agent of the seller/landlord exclusively, unless the seller/landlord and buyer/tenant otherwise agree.
(3) I understand that subagents, including subagents participating in a multiple listing service, are agents of the seller/landlord exclusively.
(4) I understand that I may engage my own agent to be my buyer's/tenant's broker.
(5) I understand that the agent presenting this form to me,

(name of licensee) of 
(name of firm)
(check applicable relationship) 
—a agent of the seller/landlord
—a my agent as a buyer's/tenant's agent

Dated: 
Buyer/tenant: 
Dated: 
Buyer/tenant: 

ACKNOWLEDGEMENT OF PROSPECTIVE SELLER/LANDLORD

(1) I have received and read this disclosure notice.
(2) I understand that a seller's/landlord's agent, including a listing agent, is the agent of the seller/landlord exclusively, unless the seller/landlord and buyer/tenant otherwise agree.
(3) I understand that subagents, including subagents participating in a multiple listing service, are agents of the seller/landlord exclusively.
(4) I understand that a buyer's/tenant's agent is the agent of the buyer/tenant exclusively.
(5) I understand that the agent presenting this form to me,

(name of licensee) of 
(name of firm)
(check applicable relationship) 
—a my agent as a seller's/landlord's
—a an agent of the buyer/tenant

Dated: 
Seller/landlord: 
Dated: 
Seller/landlord: 

1995]
ACKNOWLEDGMENT OF PROSPECTIVE BUYER/TENANT AND SELLER/LANDLORD TO DUAL AGENCY

(1) I have received and read this disclosure notice.

(2) I understand that a dual agent will be working for both the seller/landlord and buyer/tenant.

(3) I understand that I may engage my own agent as a seller’s/landlord’s agent or a buyer’s/tenant’s agent.

(4) I understand that I am giving up my right to the agent’s undivided loyalty.

(5) I have carefully considered the possible consequences of a dual agency relationship.

(6) I understand that the agent presenting this form to me,

__________
(name of licensee)
__________
(name of firm)

is a dual agent working for both the buyer/tenant and seller/landlord, acting as such with the consent of both buyer/tenant and seller/landlord and following full disclosure to the buyer/tenant and seller/landlord.

Dated: __________
Dated: __________
Buyer/tenant: ______________
Seller/landlord: ______________

ACKNOWLEDGMENT OF THE PARTIES TO THE CONTRACT

(1) I have received, read and understand this disclosure notice.

(2) I understand that

__________
(name of real estate licensee)
4. Oregon's Disclosure Form

696.830. Agency disclosure and acknowledgment forms.

(1) The disclosure form required by ORS 696.820 shall be printed or typed on the back of the form in substantially the following form:

DISCLOSURE REGARDING AGENCY RELATIONSHIP(S)
(As required by Oregon Revised Statutes Chapter 696)

An agency relationship arises whenever two persons agree that one is to act on behalf of the other and in accordance with the other's directions. The creation of an agency relationship imposes certain legal duties on the agent.

Before a seller or a buyer enters into a discussion with a real estate licensee regarding a real property transaction, the seller and the buyer should each understand what type of agency relationship or representation the buyer and the seller may have with each agent in that transaction.

SELLER'S AGENT

An agent who acts under a listing agreement with the seller acts as the agent for the seller only. A seller's agent has affirmative obligations (under ORS 696.805):

(1) To the seller: The fiduciary duties of loyalty, obedience, disclosure, confidentiality, reasonable care and diligence, and accounting in dealings with the seller.

(2) To the buyer and to the seller: Honest dealing and disclosure.

BUYER'S AGENT

A real estate licensee other than the seller's agent can agree with the buyer to act as the agent for the buyer only. In this situation, the buyer's agent is not representing the seller, even if the buyer's agent is receiving compensation for services rendered, either in full or in part, from the seller or through the seller's agent. A buyer's agent has the affirmative obligations (under ORS 696.810):

(1) To the buyer: The fiduciary duties of loyalty, obedience, disclosure, confidentiality, reasonable care and diligence, and accounting in dealings with the buyer.

(2) To the buyer and to the seller: Honest dealing and disclosure.

SELLERS AND BUYERS

None of the foregoing duties of the agent in a real estate transaction relieves a seller or a buyer from the responsibility to protect the seller's or buyer's own interests respectively. The seller and the buyer should carefully read all agreements to assure that the agreements adequately express the seller's or the buyer's understanding of the transaction.

THE ACTS OF THE AGENTS MAY CAUSE LEGAL LIABILITY TO THE PRINCIPALS. A REAL ESTATE LICENSEE IS QUALIFIED TO ADVISE ON REAL ESTATE; IF YOU DESIRE LEGAL ADVICE, CONSULT A LAWYER.

(2) The disclosure form required by ORS 696.820 shall be printed or typed on the front of the form in substantially the following form:

DISCLOSURE ACKNOWLEDGMENT

(A) INITIAL ACKNOWLEDGMENT OF SELLER

By my signature below, I acknowledge:

(1) I have received and read and understand the material set out on the back of this disclosure form.

(2) I understand that a seller's agent, including a listing real estate licensee, is the agent of the seller exclusively, unless the seller and the buyer otherwise agree.

(3) I understand that, unless otherwise disclosed in writing, all real estate licensees including real estate licensees participating in a multiple listing service are agents of the seller exclusively.

(4) I understand that a buyer's agent is the agent of the buyer exclusively.

(5) I understand that — (name of licensee) of — (name of real estate organization), the agent presenting this form to me, is (check applicable relationship):
(B) INITIAL ACKNOWLEDGMENT OF PROSPECTIVE BUYER

By my signature below, I acknowledge:

(1) I have received and read and I understand the material set out on the back of this disclosure form.

(2) I understand that a seller's agent, including a listing agent, is the agent of the seller exclusively, unless the seller and the buyer otherwise agree.

(3) I understand that, unless otherwise disclosed in writing, all real estate licensees including real estate licensees participating in a multiple listing service are agents of the seller exclusively.

(4) I understand that I may engage my own agent to be my buyer's agent.

(5) I understand that [name of licensee] of [name of real estate organization], the agent presenting this form to me, is (check applicable relationship):

   my agent as a seller's agent.
   an agent as buyer's agent.

(C) SIGNATURES

Buyer/Seller: [Initials] Dated: [Date]

Buyer/Seller: [Initials] Dated: [Date]

Buyer/Seller: [Initials] Dated: [Date]

Buyer/Seller: [Initials] Dated: [Date]

Agent to sign and date:

[Initials] Real Estate Licensee

[Initials] Real Estate Organization

(3) If the broker intends to offer “in-company” representation to buyers and sellers, then the disclosure form required by ORS 696.820 shall be printed or typed on the front of the form, in addition to the disclosure required by subsection (2) of this section, in substantially the following form:

BUYER'S LIMITED AUTHORIZATION REGARDING IN-COMPANY SALES

By my initials below, I acknowledge:

(1) A situation may arise wherein the licensee I have hired to be my agent may also be the agent for the seller of specific real property I wish to acquire.

(2) If this situation arises, I authorize my agent to act as an in-company agent for that specific real property after making a reasonably diligent effort to contact me in order to obtain my consent.

(3) I have read and understand the “In-Company Sales” section on the reverse side of this form.

(4) The following information, which has previously been disclosed by the buyer to the agent, is confidential and is not to be disclosed to the seller.

(2) In an in-company agreement, the agent acting as an in-company agent has the following affirmative obligations to both the seller and the buyer:

   (a) Loyalty, obedience, disclosure, confidentiality and accounting in dealings with both the seller and the buyer. HOWEVER, IN REPRESENTING BOTH THE SELLER AND THE BUYER, THE LICENSEE SHALL NOT, WITHOUT THE EXPRESS WRITTEN PERMISSION OF THE RESPECTIVE PERSON, DISCLOSE TO THE OTHER PERSON:

      (i) That the seller will accept a price lower than or terms less favorable than the listing price or terms; or

      (ii) That the buyer will pay a price higher than or terms more favorable than the offering price and terms; or

      (iii) Other than price and terms, confidential information specifically designated as such in writing by the buyer or seller as set out on the front of this disclosure form or attached to it.

   (b) Reasonable care and diligence.

   (c) Honest dealing.
BUYERS' BROKERS

____ ____ UNDERSTOOD AND AGREED:
____ ____ (Initials)

________________________________________

SELLER'S LIMITED AUTHORIZATION
REGARDING IN-COMPANY SALES

By my initials below, I acknowledge:

(1) A situation may arise wherein the
licensee I have hired to be my agent may
also be the agent for the buyer who wishes
to acquire my real property.

(2) If this situation arises, I authorize
my agent to act as an in-company agent
for that specific real property after mak-
ing a reasonably diligent effort to contact
me in order to obtain my consent.

(3) I have read and understand the
"In-Company Sales" section on the reverse
side of this form.

(4) The following information, which
has previously been disclosed by the seller
to the agent, is confidential and is not to
be disclosed to the buyer.

____ ____ UNDERSTOOD AND AGREED:
____ ____ (Initials)

________________________________________

SIGNATURES

• Buyer/Seller: _____ Dated: _____
• Buyer/Seller: _____ Dated: _____
• Buyer/Seller: _____ Dated: _____
• Buyer/Seller: _____ Dated: _____
• Circle applicable title.

Agent to sign and date:
____ Real Estate Licensee
____ Real Estate Organization