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# NONAGENT BROKERAGE: REAL ESTATE AGENTS MISSING IN ACTION

PATRICIA A. WILSON\*

## *Introduction*

The term "professional" evokes the image of one who has received advance training in some particular field such that he is capable of providing competent services to others who are less knowledgeable than he. Professionalism further involves some duty for the individual to provide those services consistent with minimal standards of ethical conduct. Thus, in a perfect situation, the professional will ethically ply his skills with competence, looking out for the best interest of his client. We expect this from doctors, lawyers, and engineers. Licensing further serves to ensure that consumers are indeed protected from the unscrupulous and the incompetent.

Real estate consumers deserve that same degree of professionalism from real estate brokers. Professionalism is particularly important in residential real estate transactions where frequently the parties are relatively unsophisticated and nearly entirely dependent on the real estate broker or salesperson for assistance in consummating the real estate transaction. The real estate industry has undergone a number of changes in the recent past. Not all of them have been for the good of real estate consumers.

In the past, the seller would contact a brokerage firm about listing his real estate for sale. The seller might work directly with one licensed broker or a salesperson,<sup>1</sup> who was responsible for helping the seller determine the listing price, listing the property in the multiple listing service,<sup>2</sup> arranging for additional advertising, and assisting the seller in reaching the terms of the contract of sale. Once the seller had agreed to sell his property, the broker or salesperson would also assist the seller in complying with the contract terms and ultimately assist in closing the transaction. Although the seller worked with only one individual from a particular brokerage firm, all brokers and salespeople within a firm were legally bound to represent the seller, and all were subject to the fiduciary duty.

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1. In many jurisdictions, the licensing requirements for salespeople are less stringent than those for brokers. Salespeople, however, must work under the supervision of a licensed broker.

2. A Multiple Listing Service (MLS) is a clearinghouse of sorts. Agents who are members of a local MLS may provide data to the MLS about properties that they have listed, including the asking price, the location of the property, and the property's amenities. Other members of the MLS then have access to the data base maintained by the MLS to aid them in locating properties that satisfy the parameters established by a prospective buyer. In essence, the MLS serves as a trade exchange for buying and selling real estate.

The buyer, on the other hand, would similarly contact a broker or salesperson who would provide assistance in locating properties that met the buyer's need and assist in negotiating the contract and closing the transaction. Until relatively recently, however, the individual who worked with the buyer had no legal relationship with the buyer, and in fact, because of the concept of subagency,<sup>3</sup> was often legally bound to represent the interests of the seller and subject to the same fiduciary duty as was the broker with whom the seller had a direct relationship.

Over the past fifteen years, the practice of real estate and the laws that govern it have undergone a transition, which in many respects has benefitted consumers in general and buyers in particular. Whereas it used to be fairly common that the buyer had no agent bound to represent his interests, buyers are now regularly represented by brokers in an agency relationship. Moreover, both buyers and sellers are benefitted by statutes in the majority of states that require the broker or salesperson to disclose which party he is representing and what duty, if any, he owes to the other party.<sup>4</sup>

Those changes in law and practice that have seemingly resulted in more educated consumers are good. However, other changes in the law have arguably served to diminish the professionalism that consumers deserve from real estate brokers. Moreover, those changes have possibly added uncertainty for brokers themselves, thus potentially exposing them to liability for unwittingly violating the rules that govern that profession. Particularly with respect to residential transactions, changes in regulations appear to allow agents to provide less by way of services and to lessen the legal duties real estate professionals owe to their clients.

One of the more recent changes allows for nonagent brokerage. In this new form of brokerage, the broker is freed of the fiduciary duties typically owed to his clients. However, there are insufficient guidelines to ensure that consumers are well-served by this new form of representation. Arguably, this new kind of brokerage fails to fulfill the expectations of the parties that the real estate professional is looking out for their best interests.

This article explores the different brokerage relationships that are now available to real estate buyers and sellers, focusing principally on the nonagent brokerage option. It further makes recommendations that are directed at increasing the protection of buyers and sellers of real estate, as well as the brokers who serve them. The suggestions are aimed at improving the nonagent brokerage arrangement primarily in the residential real estate context, inasmuch as buyers and sellers of commercial real estate tend to be more sophisticated and to have readily available to them attorneys and other professionals who can protect their interests. Residential real estate buyers and sellers, on the other hand, tend to be less experienced and in need of more protection. Moreover, while the recommendations contained in this

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3. Subagency exists when an agent, appointed to represent an individual, delegates some or all of his authority as an agent to another licensee, referred to as the subagent, who is authorized to perform functions undertaken by the agent for the principal.

4. See *infra* note 14.

article are directed at improving the nonagent broker option, many could similarly be applied in the dual agency context, which is also described in this article.

*Selecting Among the Various Relationships: What are the Choices?*

Currently, sellers and buyers can choose from a number of possible relationships in most states. This is a change from a time when the seller was usually the only party represented. Each state permits some or all of the following choices:

a) *Single or exclusive agency*.<sup>5</sup> In a single or exclusive agency relationship<sup>6</sup>, the broker represents only one party to the transaction as either the seller's agent or the buyer's agent. The broker creates a relationship with the seller by way of the listing agreement; the broker's relationship with the buyer is established through a buyer's representation agreement. The broker who represents one party exclusively owes that party a fiduciary duty. As such, the agent is obligated to disclose all known material facts and to act with the utmost loyalty to his principal.<sup>7</sup> The broker is further obligated to maintain the confidentiality of information about his principal and the property, except when disclosure of such information is required by law.<sup>8</sup> The broker further must obey his principal's lawful orders and account for all monies related to the property.<sup>9</sup>

Until approximately ten years ago, almost invariably the broker represented the seller. Moreover, the listing agreement usually included a provision allowing for the property to be included in the local multiple listing service as a way of facilitating the sale of the property. In the past, by virtue of the use of the MLS and myriad court cases involving co-brokerage issues, typically brokers who listed a property in a particular MLS automatically appointed all other users of the same MLS subagents of the listing broker.<sup>10</sup> Therefore, even a broker who worked closely

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5. Single or exclusive agency includes both buyer's agents and seller's agents. It can also include agents working for landlords or tenants. This article, however, does not specifically address agents working on behalf of landlords or tenants. Rather, the focus is on sales of real property.

6. Agency is a legal concept that depends on the existence of required factual elements. The relationship of agency is created as the result of one party, the principal, manifesting that another is to act on his behalf, and another party, the agent, agreeing to do so. *See* RESTATEMENT (SECOND) OF AGENCY § 1 (1957). To constitute the relation, there must be an agreement, although not necessarily a contract. *See id.* A number of states require the agency relationship to be created in writing. *See, e.g.*, ALA. CODE § 34-27-82(b) (1997); COLO. REV. STAT. ANN. § 12-61-808(2)(b)(e) (West 1996); IDAHO CODE § 54-2063 (Supp. 1997); WYO. STAT. ANN. § 33-28-302 (Michie 1997).

7. *See* RESTATEMENT (SECOND) OF AGENCY, §§ 13, 379, 381, 382, 387, 389 (Main Vol. 1957); *see also* COLO. REV. STAT. ANN. § 12-61-804, §12-61-805 (West 1996); MINN. STAT. ANN. § 82.197(4) (West Supp. 1998).

8. State law often requires the broker to disclose to the buyer defects with the condition of the property that are actually known to the broker. *See, e.g.*, COLO. REV. STAT. ANN. § 12-61-804(3)(a) (West 1996); FLA. STAT. ANN. § 475.278(4)(b) (West Supp. 1998); IDAHO CODE § 54-2064(1)(e) (Supp. 1997); MO. ANN. STAT. § 339.730.3, 339.740.3 (West Supp. 1998); MONT. CODE ANN. § 37-51-313(3)(a) (1997); NEB. REV. STAT. ANN. § 76-2417(3)(a) (Michie 1996); TENN. CODE ANN. § 62-13-403(2) (1997).

9. *See* RESTATEMENT (SECOND) OF AGENCY, §§ 382, 385 (1957).

10. *See* Guy P. Wolf & Marianne M. Jennings, *Seller/Broker Liability in Multiple Listing Service Real Estate Sales: A Case for Disclosure*, 20 REAL EST. L.J. 22 (1991); Katherine A. Pancak et al., *Real*

with the buyer, helping the buyer to locate an acceptable property, to arrange financing, and to complete the transaction, actually represented the seller as a subagent of the listing broker. Both the listing broker and the subagent owed the seller a fiduciary duty, obligating both agents to disclose to the seller all material information about the buyer and the transaction, including the highest price the buyer would pay for the property, if the buyer had indeed disclosed such information. Both brokers were also required to maintain the seller's confidential information.<sup>11</sup>

The concept of subagency proved confusing to consumers and brokers alike.<sup>12</sup> Many a buyer never fully grasped that he should not disclose sensitive financial or pricing information to that broker because of the broker's fiduciary duty to disclose it to the seller. Moreover, the concept gave rise to many questions regarding whom the broker actually represented,<sup>13</sup> or exposed the broker to liability for failing to disclose to one party or the other that he was acting as a dual agent.<sup>14</sup>

In response to the confusion, particularly among consumers, many states reacted by enacting statutes requiring the broker or salesperson to give certain disclosures. Pursuant to these statutorily required disclosures, the agent must disclose whether he is representing the buyer or the seller or acting in some other role permitted in the jurisdiction.<sup>15</sup> Frequently the prescribed disclosure included a description of the

*Estate Agency Reform: Meeting the Needs of Buyers, Sellers, and Brokers*, 25 REAL EST. L.J. 345 (1997).

11. See RESTATEMENT (SECOND) OF AGENCY § 5 cmt. d (1957); *Garl v. Mihuta*, 361 N.E.2d 1065, 1068 (Ohio Ct. App. 1975).

12. See 1 FTC LOS ANGELES REGIONAL OFFICE, THE RESIDENTIAL REAL ESTATE BROKERAGE INDUSTRY 8 (1983). According to this survey conducted by the Federal Trade Commission, 72% of buyers thought that the selling broker represented them.

13. See, e.g., *Stortroen v. Beneficial Fin. Co.*, 736 P.2d 391, 396 (Colo. 1987) (deeming broker who worked with the buyer to be the seller's agent for the purpose of accepting the buyer's offer); *Garl*, 361 N.E.2d at 1068 (holding broker's actions were such that they could establish that he was an agent for both the buyer and the seller, and as such, the agent owed both parties a duty of utmost good faith.); *First Church of the Open Bible v. Cline J. Dunton Realty, Inc.*, 574 P.2d 1211, 1214 (Wash. Ct. App. 1978) (determining that the selling agent was in fact an agent of the listing broker, i.e., a subagent).

14. The result in *Dismuke v. Edina Realty, Inc.*, No. 92-8716, 1993 WL 327771 (Minn. Dist. Ct. 1993), was particularly surprising. In this class action suit, the broker attempted to create a dual agency arrangement and complied with the Minnesota statute that required written disclosure of agency representation. Notwithstanding the broker's compliance with the statute, the court determined that the broker's disclosures were insufficient under common law standards. Therefore, the broker forfeited the commissions that were otherwise payable because its dual agency was deemed undisclosed. *Id.* at \*7-8.

The language of some statutes makes results like *Edina* less likely. See, e.g., IDAHO CODE § 54-2066(4) (Supp. 1997) (deeming receipt of the prescribed agency disclosure brochure and signed consent to be sufficient consent).

15. Most states require the disclosure of the broker's representation at the time of the first significant contact, which may be described in a number of different ways. See, e.g., COLO. REV. STAT. ANN. § 12-61-808 (2)(b) (West 1996) (in a timely manner); FLA. STAT. ANN. § 475.276(2) (West Supp. 1998) ("notice of nonrepresentation" to be provided at first contact); GA. CODE ANN. § 10-6A-12 (Harrison 1994); GA. ADMIN. CODE 520-11.08(2) (1997) (notice to be "timely furnished", but no later than time that any party first makes an offer); IDAHO CODE § 54.2063(1) (Supp. 1997) (disclosure brochure to be given at time of "first substantial business contact"); MICH. COMP. LAWS § 339.2517 (West Supp. 1998)

duties the broker owed to the parties.

*b) Dual Agency.* In a dual agency situation, a broker represents both the seller and the buyer.<sup>16</sup> In most states in which dual agency is allowed,<sup>17</sup> it is permissible only where the agent discloses the dual agency relationship and obtains the informed consent of both the buyer and the seller.<sup>18</sup> Many of the states in which dual agency is permitted have enacted legislation that addresses the duties owed by a broker in such a situation.<sup>19</sup> Those statutes often address the information that the broker may disclose or is required to disclose.<sup>20</sup> Moreover, a number of states dictate the disclosures that the broker acting as a dual agent must provide in obtaining the consent of the parties to the transaction.

*c) Designated Agency.* The designated agent relationship exists in in-house sales, that is, when one brokerage firm represents both the seller and the buyer of real estate. Under this arrangement, the broker designates a salesperson to represent the seller to the exclusion of all other salespeople licensed under the same broker, and similarly designates a salesperson to represent the buyer.<sup>21</sup>

This relationship could properly be classified as a dual agency relationship, inasmuch as under common law agency principles, all real estate licensees affiliated

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(disclosure to be given prior to the disclosure of any confidential information specific to that party).

The disclosures related to representation are in part responsible for the rise in brokers who represented the interests of the buyer. Other causes include making the MLS available to brokers who represented solely the buyer. The buyer's broker is often compensated through an arrangement that allows him to share in the commission payable by the seller to his agent pursuant to the listing agreement.

16. A dual agency situation can arise where either (1) two or more salespeople licensed under the same broker each represent a different party to the transaction; or (2) the same salesperson or broker represents both the buyer and the seller. One should consult local law to determine whether the rules related to dual agency cover one or both of these situations. For example, in Iowa a licensee must comply with the provisions related to dual agency only if a licensee *personally* represents both the buyer and the seller in a particular transaction. The Iowa statute specifically excludes from compliance with the dual agency provisions the situation where the same brokerage firm designates to the buyer and seller affiliated licensees who will serve as the appointed agents of that client to the exclusion of all other affiliated licensees within that firm. See IOWA CODE ANN. § 543B.59 (West 1997); see also ME. REV. ANN. tit. 32, § 13278 (West Supp. 1997).

17. Dual agency is specifically prohibited in Florida. See FLA. STAT. ANN. § 475.278(1) (West Supp. 1998). In other states, the statute is silent. See, e.g., TEX. REV. CIV. STAT. ANN. art. 6573a, § 15C (West Supp. 1998).

18. *But see supra* note 14. Where a state has not specifically abrogated common law or indicated that the statutory language is sufficient for obtaining informed consent, the broker may risk forfeiting his commission if a court finds that the statutory disclosure is inadequate for obtaining informed consent under common law standards. That is essentially what occurred in the *Edina* case.

19. See, e.g., GA. CODE ANN. § 10-6A-12 (Harrison 1994); 225 ILL. COMP. STAT. 455/38.45 (West 1998); NEB. REV. STAT. ANN. §76-2419 (Michie 1996). Agents serving in a dual capacity may additionally be subject to duties imposed on all licensees in a particular jurisdiction without regard to the licensee's status as a dual agent or single agent. See, e.g., ARIZ. ADMIN. CODE R4-28-1101B; 225 ILL. COMP. STAT. 455/38.25 (West 1998); IOWA CODE ANN. § 543B.56 (West 1997).

20. See, e.g., OHIO REV. CODE ANN. § 4735.72(A)(3) (Anderson 1997); IND. CODE § 25.34.1-10-12(3) (West Supp. 1998); IDAHO CODE § 54-2066(2)(a) (Supp. 1998).

21. See, e.g., 225 ILL. COMP. STAT. ANN. 445/38.50 (West 1998); IND. CODE ANN. § 25-34.1-10-12(b) (West Supp. 1998); ME. REV. STAT. ANN. tit. 32, § 13278(1) (West Supp. 1997); N.D. CENT. CODE § 43-23-12.3 (Supp. 1997).

with a particular broker as salespeople are deemed to be agents of the broker's principal. Licensees who are appointed as designated agents typically owe their respective clients the usual fiduciary duties. In some states, the brokerage firm has no obligation to obtain the consent of the parties if different licensees are appointed to communicate with and carry out the instructions of a party, despite that this arrangement arguably creates a dual agency situation.<sup>22</sup>

d) *Nonagent Broker*. This relationship goes by a number of different names, including transaction broker,<sup>23</sup> intermediary,<sup>24</sup> limited agent,<sup>25</sup> statutory broker,<sup>26</sup> and nonagent.<sup>27</sup> Regardless of the name, this brokerage relationship exists in fewer than ten states, and is relatively new, first created in Colorado in 1994. Brokers acting as nonagent brokers<sup>28</sup> have a relationship with both the buyer and the seller, but generally lack the fiduciary obligations imposed by agency law.<sup>29</sup> Rather, the idea is that the broker serves as a facilitator to assist the parties in closing the transaction without being an agent, fiduciary, or advocate for the interest of any party to the transaction.

In those states in which such a nonagent broker relationship is recognized, the broker must disclose the possibility of the relationship and, in some states, obtain the consent of both the buyer and the seller.<sup>30</sup> In other jurisdictions, a non-agency brokerage relation exists unless the parties have entered into an agreement that serves to create an agency relationship.<sup>31</sup> Moreover, similarly to the treatment of dual agents, the statute often delineates the confidentiality and disclosure respon-

22. See, e.g., ME. REV. STAT. ANN. tit. 32, § 13278 (West Supp. 1998); N.D. CENT. CODE § 43-23-12.3 (Supp. 1997); OHIO REV. CODE ANN. § 4735.71(c) (Anderson 1997).

23. See ALA. CODE § 34-27-82 (1997); COLO. REV. STAT. ANN. § 12-61-802(6) (West 1996); FLA. STAT. ANN. § 475.278(2) (West Supp. 1999).

24. See TEX. REV. CIV. STAT. ANN. art. 6573a, § 15C (West Supp. 1998); WYO. STAT. ANN. § 33-28-301 (Michie 1997).

25. See GA. CODE ANN. § 10-6A-4 (Harrison 1994).

26. See MONT. CODE ANN. § 37-51-313(6) (1997).

27. See IDAHO CODE § 54-2061 (Supp. 1997); MINN. STAT. ANN. § 82.197 (West Supp. 1998).

28. In this article, the term "nonagent broker" will be used in discussing the relationship in which the broker acts as a facilitator who owes no fiduciary duty to the parties to the transaction.

29. See, e.g., ALA. CODE § 34-27-81(8) (1997); FLA. STAT. ANN. § 475.278 (West Supp. 1998); MINN. STAT. ANN. § 82.197(4) (West Supp. 1998). In at least two states, the statute is written such that common law, including presumably the law of agency, is specifically abrogated in favor of the duties contained in the statute. See MONT. CODE ANN. § 37-51-313 (1997); TEX. REV. CIV. STAT. ANN. art. 6573a, § 15C(1) (West Supp. 1998). The Colorado statute is drafted in such a way that by defining what the transaction broker role is not, and defining in very specific terms the duties of the transaction broker, the conclusion is that common law is essentially inapplicable to the transaction broker arrangement. COLO. REV. STAT. ANN. § 12-61-807 (West 1996).

30. See, e.g., TEX. REV. CIV. STAT. ANN. art. 6573a, § 15C(h) (West Supp. 1998); MINN. STAT. ANN. § 82.197(4) (West Supp. 1998); WYO. STAT. ANN. § 33-28-302(d) (Michie 1977). In Georgia, the broker is presumed to be a nonagent broker unless a written listing agreement or buyers representation agreement is signed. See GA. CODE ANN. § 10-6A-4(c) (Harrison 1994).

31. See, e.g., ALA. CODE § 34-27-82(e) (1998); IDAHO CODE § 54-2062 (Supp. 1997). Pursuant to the Colorado statute, a "transaction broker" need only disclose to the party to be assisted that he is not acting as an agent for such party, but rather as a transaction broker. See COLO. REV. STAT. ANN. § 12-61-808(2)(a) (West 1996).

sibility the nonagent broker has to his clients, limiting the broker's ability to disclose negotiation and pricing information or other information that is declared confidential by a party.<sup>32</sup>

Arguably, exclusive agency affords the greatest protection for consumers of real estate services. When both the buyer and the seller are represented by their own brokers in an exclusive agency relationship, each party enjoys the benefit of a trained professional who is bound by law to put his principal's interest ahead of those of any other party and the agent himself.<sup>33</sup> As such, if both brokers fulfill their obligations, the terms of the transaction, as well as the process, are likely to be fair to both parties.

Moreover, an exclusive agency relationship affords the greatest protection for brokers themselves. While it subjects them to the highest duty known in the law, there is little question about the substance of that duty or to whom the broker's duty is owed. When brokers breach their duty, it is rarely from lack of understanding the duty owed and how the client's interests are best served.

Single agency is not perfect. Despite the extensive body of law on the broker's duty and the course work required in many jurisdictions as part of the licensing requirements, examples of brokers who have breached their fiduciary duty abound.<sup>34</sup> In addition, the fact that the broker's compensation often depends on closing the sale may encourage unscrupulous brokers to rush a deal through on less than favorable terms simply to earn his compensation, in spite of his fiduciary duty. Furthermore, the buyer's broker has an inherent conflict of interest inasmuch as he generally is compensated by sharing in the commission payable by the seller to his own broker, pursuant to the listing agreement. Often the commission is a percentage of the price at which the property sells. Consequently, both the listing broker and the selling broker have an incentive to close the transaction at the highest price the buyer is willing to pay.

The concept of agency also carries the risk of exposure based on vicarious liability, that concept which makes the principal liable to third parties for the wrongdoing of the agent who the principal has authorized to act on his behalf. As long as the agent is acting within the scope of his authority, the principal, more often the seller in this case, will be liable even for intentional torts.<sup>35</sup> Although some states have abrogated the concept of vicarious liability,<sup>36</sup> the fact that the

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32. See, e.g., COLO. REV. STAT. ANN. § 12-61-807(3) (West 1996); TEX. REV. CIV. STAT. ANN. art. 6573a, § 15C(j)(1), (2) (West Supp. 1998); WYO. STAT. ANN. § 33-28-305(c) (Michie 1977).

33. From a practical standpoint, few agents can completely fulfill the duty of loyalty, and many states recognize this. Consequently, many state statutes provide that the agent breaches no duty by accepting other listings of property for sale or showing other properties, even though by doing so, one potential seller's property may appear less attractive by comparison. Similarly, there is no liability for brokers who agree to represent more than one buyer. See, e.g., COLO. REV. STAT. ANN. §§ 12-61-804(3)(b), 12-61-805(3)(b) (West 1996); 225 ILL. COMP. STAT. 455/38.20(b) (West Supp. 1998); NEB. REV. STAT. ANN. §§ 76-2417(a)(3)(a), 76-2418(a)(3)(a) (Michie 1996).

34. See, e.g., *Daubman v. CBS Real Estate Co.*, 580 N.W.2d 552 (1998); *Holst v. Fireside Realty*, 948 P.2d 858 (Wash. Ct. App. 1997); *Edmonds v. John L. Scott Real Estate, Inc.*, 942 P.2d 1072 (Wash. Ct. App. 1997).

35. See, e.g., *Zell v. Superintendent of Real Estate*, 607 N.E.2d 99 (Ohio Ct. App. 1992).

36. See, e.g., MONT. CODE ANN. § 37-51-313(1) (1997) ("The provisions of this section govern [the



principal may be liable for the agent's misdeeds is a serious drawback to single agency.

Moreover, single agency may prove impractical in application. Single agency for both the buyer and the seller limits the broker's ability to complete in-house sales. A broker who is enlisted as the exclusive agent for the buyer will be prohibited from showing any properties that are listed for sale by any of the other licensees working within the same brokerage firm because to do so would result in dual agency. Consequently, the buyer's broker may show only those properties that are listed by other brokers.<sup>37</sup> Similarly, if a buyer contacted the listing broker about a particular property based on the yard sign or other advertising indicating the availability of the property, while the listing broker could show the property to the prospective buyer, he could not represent the buyer, again leaving the buyer unrepresented or opening the possibility of misunderstanding about the broker's role and exposing the seller's broker to liability.<sup>38</sup> Single agency may be particularly impractical where an area is dominated by one or two brokerage firms. In such a case, one party to the transaction, more likely the buyer, may be unrepresented in the transaction.

Another drawback to exclusive agency is the risk of injecting an adversarial air into a relationship that need not be contentious. Transactional matters, unlike litigation, present the classic situation for noncombative interaction with the common goal of reaching a mutually acceptable deal.

It seems clear that there must be a reasonable alternative to single agency. If one accepts the idea that both parties to the residential real estate transaction ought to have available assistance from a real estate agent, and if one further accepts the practical limitations that inhere in single agency, then the question to be addressed is which alternative will address those concerns. Any attempt to provide an alternative to single agency must consider what will best protect the interests of the parties to the transaction, as well as the brokers themselves.

Dual agency is one possible solution to the problem. Inasmuch as the same broker (or brokerage firm) represents both parties, dual agency offers the advantage of alleviating the adversarial nature that potentially exists in a single agency arrangement. Moreover, dual agency serves to provide a buyer some form of representation that might otherwise be unavailable or difficult to obtain. An additional advantage is that dual agency provides flexibility for both the brokers and their clients, allowing a broker to engage in in-house sales, when appropriate, while providing for exclusive agency when the other party to the transaction is represented by a different broker, thus ameliorating the problems discussed earlier.

Nonetheless, dual agency is not without its own problems, legally and practically. The first issue relates to the duty a broker owes to his clients when he undertakes

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brokerage relationship] and are intended to replace the common law."); *see also* 1998 MO. LEGIS. SERV. 339.810 (West).

37. As discussed previously at *supra* notes 21-22 and accompanying text, some states allow for designated agency as a solution to this problem.

38. *See supra* notes 12-14.

to act as a dual agent. The fiduciary duty owed by the exclusive agent is clear, and there is a substantial body of law that defines that duty. However, when a broker acts as a dual agent, the traditional fiduciary duties must be modified in recognition that the broker cannot discharge the full range of fiduciary duties to both the buyer and the seller. Consequently, most states in which such relationships are possible have, either by statute or regulation, modified the duties owed in a dual agency setting.

The clearest conflicts between the interests of the parties occur with respect to the duties of disclosure and confidentiality. These related duties present an irreconcilable conflict when the broker is acting on behalf of both parties to the transaction. Normally, an agent is obligated to disclose to his principal all known information that could affect his principal's decisions.<sup>39</sup> In addition, unless otherwise required by statute to disclose certain information,<sup>40</sup> the principal can control what information is disclosed to the other party.

Consider the conflict that exists if the buyer insists on seller financing and the broker is aware that the buyer is a credit risk. There is no way that the broker can fulfill his duty to disclose such material information to the seller without breaching the confidentiality duty owed to the buyer.<sup>41</sup>

To address this concern, most states have limited the disclosure that is allowed or required for brokers acting as dual agents. Typically, the broker is statutorily required to maintain the confidentiality of the following kinds of information: 1) the willingness or ability of a seller to accept less than the asking price; 2) the willingness or ability of a buyer to pay more than the offered price; 3) the motivation of a seller for selling the property or the motivation of a buyer buying the property; and 4) the willingness of either party to accept financing terms less favorable to his own interest.<sup>42</sup> Many states permit either party to designate other information as confidential provided that the broker does not otherwise have a duty by statute or otherwise to disclose such information.<sup>43</sup>

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39. See RESTATEMENT (SECOND) OF AGENCY, §§ 13, 379, 381, 382, 387, 389 (1957).

40. See *supra* note 8.

41. A number of states require brokers to disclose to the seller any facts known to the broker that indicate that either buyer or both the buyer or the seller may be unable to perform a contract. See, e.g., NEB. REV. STAT. § 76-2417(3)(a) (Michie 1996) (recognizing duty to disclose such information is owed to both clients and other parties to the transaction to whom no fiduciary duty is otherwise owed). In other jurisdictions, the disclosure duty is stated more generally, e.g., "To disclose . . . all relevant and material information that concerns the real estate transaction" that is known to the dual agent and not subject to confidentiality from a prior or existing agency relationship. MONT. CODE ANN. § 37-51-314(6)(a)(3) (1997). Because a party's inability to perform his contract is not considered confidential information by the statute, arguably such information would need to be disclosed.

42. See, e.g., CONN. GEN. STAT. ANN. § 20-325g(3) (West Supp. 1998); 225 ILL. COMP. STAT. 455/38.45 (West 1998); S.C. CODE ANN. § 40-57-137 (Law. Co-op Supp. 1997). A few states additionally limit disclosure of information that may stigmatize the property, such as that it was the scene of a murder or suicide or that an inhabitant suffered from acquired immune deficiency syndrome (AIDS). See, e.g., MICH. COMP. LAWS ANN. § 339.2518 (West Supp. 1998); N.Y. REAL PROP. § 443-a (Consol. Supp. 1998).

43. See, e.g., MONT. CODE ANN. § 37-51-314(6)(f)(8)(d) (1997).

The next issue to address is what information about one party can or must be disclosed to the other. According to the Restatement of Agency, dual agents are obligated to disclose facts known to the agent *or that should be known*, that would affect the judgment of each party.<sup>44</sup> There is, however, no duty to disclose confidential information such as the price a party is willing to pay.<sup>45</sup>

Notwithstanding the broad disclosure obligation outlined in the Restatement, many states have narrowed the disclosure obligation when the broker is a dual agent. In addition to limiting the disclosure to only that information that the broker actually knows,<sup>46</sup> some states further narrow the disclosure requirement to defects actually known by the broker that cannot be discovered by the party conducting an inspection.<sup>47</sup>

Whether the broker must disclose information unrelated to the property condition is a matter of some variation. For many buyers, it would be materially important to know if there were anticipated changes in zoning ordinances or school districting, or for that matter, whether a convicted sex offender lived nearby.<sup>48</sup> Neither the statutes nor case law addresses this disclosure issue, however, except that some statutes do address the disclosure duty related to sex offenders.<sup>49</sup>

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44. See RESTATEMENT (SECOND) OF AGENCY § 392 (1957).

45. See *id.*

46. See, e.g., IDAHO CODE §§ 54-2065, 54-2066 (Supp. 1997); MONT. CODE ANN. § 37-51-313(7)(a) (1997). A number of statutes further state that the broker is not obligated to conduct an independent investigation of the property condition, thus protecting the broker from liability for failing to disclose defects. See, e.g., ALA. CODE § 34-27-85(a)(2) (1997).

In California, brokers and salespeople are required by statute to conduct a "reasonably competent and diligent visual inspection" of residential real estate offered for sale, and to disclose to the prospective buyer all facts that materially affect the value or desirability of the property. CAL. CIV. CODE § 2079 (West Supp. 1998). For further discussion of the California statute, see *Loken v. Century 21-Award Properties*, 42 Cal. Rptr. 2d 683, 686-90 (1995).

The requirement to disclose known defects of the property generally applies even when a licensee serves as a sole agent, consistent with the trend towards providing consumers more information to aid in purchasing real estate as well as other goods.

47. See, e.g., 225 ILL. COMP. STAT. ANN. 455/38.25 (West 1998); IOWA CODE ANN. § 543B.56 (West 1997).

48. For example, consistent with the *Restatement* standard, brokers in Montana, acting as dual agents, are required to disclose "any adverse material facts that are known to the dual agent," unless the information is subject to confidentiality arising from a prior or existing agency relationship. MONT. CODE ANN. § 37-51-313(7)(a) (1997). On the other hand, dual agents in Nebraska *may* disclose to one client any information that they gain from another client if the information is relevant to the transaction or the client. See NEB. REV. STAT. ANN. § 76-2419 (Michie 1996). Arguably, this would include information about the buyer's ability to complete the transaction or the parties' motivation for entering into the transaction. However, there is no mandatory obligation to disclose this information. The Idaho statute subjects dual agents to the same duties owed by exclusive agents, to the extent those duties do not unreasonably conflict with the duties and obligations owed to the other client. See IDAHO CODE §§ 54-2066, 54-2065 (Supp. 1998). This would seem to breed uncertainty in that the broker is left to determine for himself what constitutes an unreasonable conflict. Can the broker disclose to the buyer the proximity of the sex offender? Does it conflict with the duty of confidentiality owed to the buyer if the agent discloses the identity of a prospective buyer who wants to remain anonymous?

49. See, e.g., NEV. REV. STAT. § 40.770 (1997).

Loyalty is another duty that can prove problematic when a broker is acting as a dual agent. Agency law obligates the broker to act in the best interest of the principal, to the exclusion of all others.<sup>50</sup> Of course, when a broker has a relationship with both parties to the transaction, loyalty in the traditional sense is impossible. The most a broker can do is to acknowledge that he cannot fully discharge his duty of loyalty and to disclose this fact to both the buyer and the seller. Some states have included this as a part of the disclosures required to obtain consent for dual agency.<sup>51</sup> The New York statute requires real estate agents to explain the possible effects of dual representation, including that the buyer and the seller are giving up their right to undivided loyalty.<sup>52</sup>

The Oregon statute takes a different approach. It addresses the issue of loyalty by indicating that in dual agency situations, the agent has an affirmative obligation of loyalty to both parties.<sup>53</sup> Other than limiting the disclosures that a broker can make, it provides no other guidance on how the agent can fulfill that obligation.

Some of the issues related to confidentiality and disclosure are solved by designated agency. Inasmuch as the goal of designated agency is to allow in-house transaction while closely mirroring an exclusive agency arrangement, some of the problems are lessened. Designated agents, however, may still be allowed to share confidential information with the broker for whom they work.<sup>54</sup> Consequently, the broker is obligated to maintain the confidentiality of the information that cannot be disclosed to either party.

Moreover, in a designated agency situation, there still exists the conflict of interest which may work to the disadvantage of the buyer. As long as the commission is a percentage of the final purchase price, the licensee assigned to the buyer must choose between closing a deal on terms that are in the best interest of his firm or closing a deal on terms that are in the best interest of his client, the

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50. See RESTATEMENT (SECOND) OF AGENCY §§ 13, 387 (1958); ALA. CODE §§ 34-27-84, 34-27-85 (1997). The Alabama statute obligates licensees to "[l]oyally represent the best interests of the client by placing the interests of the client ahead of the interests of any other party, unless loyalty to a client violates the duties of the licensee to other parties under Section 34-27-84, or is otherwise prohibited by law." *Id.* §34-27-85(a)(1).

51. See, e.g., IDAHO CODE § 54-2066 (1),(2)(a) (Supp. 1998); MICH. COMP. LAWS ANN. § 339.2517 (West Supp. 1998); N.Y. REAL PROP. LAW 443(4) (Consol. Supp. 1998); OHIO REV. CODE ANN. § 4735.73 (Anderson 1997).

52. See N.Y. REAL PROP. LAW § 443 (Consol. Supp. 1998). The New York statute would seem to put the agents dangerously close to practicing law without a license. At a minimum, it calls on the agents to provide an explanation, which if done clearly, would be contrary to the agent's own economic interest.

53. See OR. REV. STAT. §§ 696.815; 696.830 (Supp. 1996). These provisions further impose the affirmative obligations of obedience, disclosure, confidentiality, and accounting in dealings with both the buyer and the seller. See *id.*; see also ALA. CODE § 34-27-85 (1997) (obligating the broker who represents more than one party to a transaction to the duty of loyalty, as well as other duties outlined in the statute, "except where the duties to one client will violate the fiduciary duties of the licensee to other clients").

54. See GA. CODE ANN. § 10-6A-12 (Harrison 1994); IND. CODE ANN. § 25-34.1-10-12 (Michie 1995). But see OHIO REV. CODE ANN. § 4735.73 (Anderson 1997) (conditioning designated agency on the brokerage firm's establishment of a Chinese wall to ensure that licensees who represent one client will not have access to confidential information about another client involved in a dual agency).

buyer, which may mean aggressively representing the buyer's interests against a broker or salesperson with whom he works on a daily basis.

The disclosures necessary for the broker to obtain consent for dual agency are the source of additional complications. The possibility of dual agency, and the modifications of the duty owed by such an agent, give rise to the need for disclosure to real estate clients so that they can make an informed choice from the available options. The challenge is to write the disclosures in such a way to inform consumers without confusing them. Typically, most states require two disclosures: (1) a disclosure of the party or parties represented by the licensee;<sup>55</sup> and (2) the disclosure required in order to obtain consent for the broker to serve as a dual agent or nonagent broker.

The substance of the disclosure of representation can be fairly simple, and in some states, can be made orally.<sup>56</sup> More difficult are the disclosures that attempt to explain the different brokerage relationships that are possible and to provide sufficient information so that the consumer can make an informed choice, while maintaining a certain simplicity so that the disclosures are understandable to laypeople. The disclosure must fully apprise the consumer of what to expect in the dual agency situation, but not be so complex as to become unusable.<sup>57</sup> Some states arguably have failed to require disclosure with sufficient clarity that a layperson can fully understand those differences.

In New York, for example, the statute imposes a burden on the broker acting as a dual agent to explain the possible effects of dual representation, including that the parties give up the right to undivided loyalty. Beyond the fact that the statute leaves it to the broker to determine how best to explain the lack of undivided loyalty, the agent has little incentive to explain clearly the implications of dual agency. There is always the risk that a client, who fully understands the implications of divided loyalty, will limit the broker's ability to complete an in-house sale for this client or will choose another broker for his business.

To the extent a state has provided the disclosure that is aimed at obtaining informed consent to the dual agency, those disclosures may raise as many questions as they answer, assuming of course that the consumer reads the disclosures and attempts to make sense of them.<sup>58</sup> The broker is the most logical person from whom a client can seek clarification. However, experience counsels against putting licensees in a position of explaining subtle distinctions to laypeople,<sup>59</sup> not to

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55. See *supra* note 15.

56. See, e.g., TEX. REV. CIV. STAT. ANN. art. 6573a, § 15C(b) (West Supp. 1999).

57. Consider the lengthy and complex disclosures required by the federal Truth-in-Lending Act. 15 U.S.C.A. §§ 1601-1607 (West 1998). Congress is expected to simplify this Act very soon, based on recommendations from the Department of Housing and Urban Development and the Federal Reserve Board. See Board of Governors of the Fed. Reserve Sys. & Dep't of Housing & Urban Dev., Joint Report to the Congress Concerning Reform to the Truth in Lending Act and the Real Estate Settlement Procedures Act (July 1998).

58. As in any setting in which there are a number of multi-paged, legalistic documents to be signed, there is always the risk that consumers will sign without reading the documents carefully.

59. During the era when most brokers represented the seller, many brokers themselves failed to

mention that the broker has an economic interest in encouraging the client to opt for dual agency over single agency. Moreover, should the broker respond to anything more than the most simple questions, he risks liability for practicing law without a license.

Perhaps most troubling is that few of the statutory disclosures clearly explain the ramifications of agreeing to dual agency, specifically that the client loses the services of a real estate professional who can fully advise the client on the various decisions to be made regarding the transaction.<sup>60</sup> Many parties rely on their real estate professionals to help them determine which terms of the transaction to offer or accept. Yet, when the time comes to determine what concession to seek or agree to, the person who likely has the most knowledge, and presumably the most negotiating prowess, is relegated to the sidelines, unable to help either side without the risk of violating the agent's duty of loyalty.

If a consumer understands the practical implications of compromised loyalty, there is no problem. On the other hand, those who do not comprehend the complications at the time they consent to the dual agency may not realize until it is too late that they will be left to their own resources to formulate their offers or responses.

In a dual agency situation, the principals also lose the benefit of an agent who knows what questions to ask to unearth material information. Typically, even if a party is not required by law to disclose certain information, the law requires that a party respond truthfully to questions that are specifically posed.<sup>61</sup> In a single agency situation, potentially the broker will seek certain information specifically so that it can be used to the benefit of the buyer or seller. Of course, with dual agents, the same opportunity may not exist.

#### *A Closer Look at Nonagent Brokerage*

The problems with dual agency have been well documented in a variety of articles.<sup>62</sup> A number of commentators have suggested that a system that allows for nonagent brokers is a solution to the problems raised by dual agency.<sup>63</sup> Most

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fulfill their fiduciary duty to the seller, forgetting that a close relationship with the buyer did not determine the nature of their legal relationship.

60. The Ohio dual agent disclosure statement includes an admonition that the dual agent may be unable to advocate on behalf of the client with the same skill and energy as if the agent represented only one client, in addition to the statement that the dual agent represents two agents whose interests may be adverse. See OHIO REV. CODE ANN. § 4735.73(D) (Anderson 1997). Few other states are as clear in explaining the implications of dual agency.

61. Misrepresentations may subject a party to liability for common law fraud or to liability under consumer protection statutes, such as the Texas Deceptive Trade Practices Act. TEX. BUS. & COM. CODE ANN. §17.46 (West Supp. 1998).

62. See, e.g., Robert E. Kroll, Comment, *Dual Agency in Residential Real Estate Brokerage: Conflict of Interest and Interests in Conflict*, 12 GOLDEN GATE U. L. REV. 379 (1982); J. Clark Pendergrass, *The Real Estate Consumer's Agency and Disclosure Act: The Case Against Dual Agency*, 48 ALA. L. REV. 277 (1996).

63. See, e.g., Ronald Benton Brown et al., *Real Estate Brokerage: Recent Changes in Relationships and a Proposed Cure*, 29 CREIGHTON L. REV. 25 (1995); Pancak et al., *supra* note 10.

would agree that there must be developed a viable alternative to exclusive agency. As the law stands currently in most of the states that have adopted nonagent brokerage, this choice is only marginally better than dual agency.

Any legislature that permits a choice other than single agency must address the following considerations:

- (1) the disclosures necessary to obtain consent to nonagent brokerage services;
- (2) the broker's disclosure obligation to both parties to the transaction;
- (3) the broker's duty regarding confidentiality; and
- (4) precisely what the consumer receives as services from the nonagent broker and the standard of care owed to the parties. It is not sufficient simply to change the name of the role played by the broker from dual agent to nonagent broker and remove the common law fiduciary duties.<sup>64</sup>

Before turning to a consideration of the specific recommendations related to nonagent brokerage, the matter of how consumers purchase other high-dollar items, such as automobiles, merits review. In recent years, the way consumers purchase new cars has changed, moving from a process where the buyer was at an extreme bargaining disadvantage because of his lack of information to the current situation where often the buyer and the car salesman operate with near equal information about the car to be purchased. It was common knowledge that the sticker price was normally not the actual price needed to purchase the car, but rather the starting point for the negotiation. The negotiation tended to generate a great deal of stress for the car buyer, and the buyer could never be entirely sure that he had paid a fair price for the automobile he drove home.

More recently, car dealers have tried a new strategy referred to as "no-haggle selling" or one-price selling in which the dealer set the price at which he would sell the car, and that price stayed firm, regardless of any attempts by the buyer to negotiate. This method had the benefit of eliminating the high pressure cajoling that often occurred in traditional sales and tended to reduce the stress to consumers.

Despite the reduction in stress, one-price selling has enjoyed only moderate success. According to J.D. Power & Associates, the marketing information firm, approximately half of car buyers dislike haggling with the car dealers, but armed with sufficient information, consumers feel empowered to engage in the necessary negotiation to obtain a good price.<sup>65</sup> Most consumers have easy access to the dealer's actual cost for the new car from a variety of sources, including credit unions, warehouse clubs, and the internet. Information regarding a car's safety

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64. The Texas legislature, in 1995, added new provisions related to "intermediaries," the name used in Texas for nonagent brokers, and abrogated common law to the extent it conflicted with the newly added provisions. See TEX. REV. CIV. STAT. ANN. art. 6573a, § 15C(m)(2) (West Supp. 1998). The new provisions replaced administrative regulations that previously provided for dual agency. See 22 TEX. ADMIN. CODE § 535.164 (1995) (which adopted Agency Disclosure form 3). Except for the abrogation of common law, the new legislation is not substantively different from the administrative regulations it replaced.

65. See David Welch, *A Hard Sell: Huizenga Could Find it Tough to Sell One-Price Method to Auto Dealers*, FORT WORTH STAR-TELEGRAM, May 13, 1998 (quoting Loretta Seymour with J. D. Power & Associates).

features, repair experience, mechanical features, and amenities is similarly readily available. Key to customer satisfaction in new car purchases is dealer communication with the buyer to make the process easier.<sup>66</sup> Essentially, with sufficient information and assistance to make their choices, new car buyers are prepared to make informed decisions and to negotiate with those for whom negotiating is a business.

The *Consumer Reports* phenomenon is further evidence of the advantages of an informed consumer. Many people look to this magazine as well as other third party sources of consumer information prior to making major purchases to determine quality and price of the different options.<sup>67</sup>

Of course the purchase of cars and other goods versus real estate sales is sufficiently different that the concepts applicable in one context do not necessarily apply perfectly in the other. Unlike prices for consumer goods, pricing real estate is much more subjective. It involves more than simply calculating the cost of the materials, labor, overhead, and other expenses incurred in manufacturing the item and adding a sufficient profit. Real estate appraisal is, without a doubt, more an art than a science, relying on recent comparable sales and estimates of the value of certain amenities. Moreover, there is a subjective element, which requires one to speculate about how a particular floor plan, color scheme, or location may affect the value. Identical cars can be expected to sell for near identical prices. Identical properties are rare in real estate, if for no other reason than location can affect the value.<sup>68</sup>

Furthermore, the nature of real estate purchases differs from that of automobile purchases. Over the course of a lifetime, most individuals will likely engage in numerous transactions involving automobile purchases and other big-dollar items, providing an opportunity to increase one's skill in making such purchases and to learn from past mistakes. Few people will purchase more than two or three residences during their lifetimes, and these are widely separated in time.

Nonetheless, lessons can be learned from the way consumers purchase other big-ticket items. This is true from a legal standpoint as well as a consumer satisfaction standpoint.

The idea behind nonagent brokers is to provide an option whereby the broker can facilitate the transaction and complete in-house sales without the risk of exposure for breaching the duties owed pursuant to agency law. Thus, the statutes and

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66. See *Sales Satisfaction Improves for Dealers Across The Board: Communication, Convenience and Confidence are Illustrative of Top Performers*, J.D. Power & Associates (visited Mar. 25, 1999) <<http://www.jdpower.com/jdpower/releases/70S21car.html>>.

67. See Sharon E. Beatty & Scott M. Smith, *External Search Effort: An Investigation Across Several Product Categories*, 14 J. CONSUMER RES. 83, 90-93 (1987) (citing findings which showed that people tended to use neutral sources, such as *Consumer Reports*, for more expensive purchases); see also Mimi Bluestone, *When Consumer Reports Talks, Buyers Listen — And So Do Companies*, BUS. WK., June 8, 1987, at 135 ("Whether they're buying automobiles or life insurance . . . or practically anything else — millions of shoppers won't plunk down their money until they consult *Consumer Reports*.").

68. Specific performance long has been an available remedy when the seller breaches the contract of sale, in recognition of the uniqueness of property.



regulations promulgated must provide guidelines to ensure that facilitation indeed occurs, and in such a way that the parties' interests are protected and their expectations about the agent's services are fulfilled.

Under both dual agency and nonagent brokerage arrangements, the broker is limited in the services that he can provide to his clients. Nonagent brokerage goes one step further in freeing the broker from the demands of agency law. What interest, then, does the broker have when the buyer and seller agree to nonagency brokerage? Arguably, the broker's sole interest is closing the transaction, ideally in a way that satisfies both clients. As the statutes are written, however, the nonagent broker has little duty to either client unless the client is sufficiently sophisticated to insist that such duties be included in the listing agreement or the buyer's representation agreement.<sup>69</sup> The use of pre-printed forms may suggest to consumers that the terms stated therein are non-negotiable, and those forms rarely address anything more than the broker's legal duties related to confidentiality and disclosure; they typically include very few affirmative service obligations on the part of the broker.

The goal must then be to draft the statutes in such a way that the broker in a nonagent brokerage situation truly serves as a facilitator. The following suggestions are made to effectuate that goal.

#### *Establish Guidelines Aimed at Full Disclosure*

From the start, one must acknowledge that, when the broker has a relationship with both the buyer and the seller to the transaction, either as a dual agent or nonagent broker, the broker is limited in the assistance that he can provide in reaching the terms of the sale.<sup>70</sup> Each party must either retain other professionals that can provide assistance or fend for himself. The idea behind this suggestion is to facilitate providing each party sufficient information to make informed decisions and to negotiate on his own behalf with the other party.<sup>71</sup> As discussed above,

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69. A number of the statutes impose a duty on the broker to treat the parties honestly and in good faith or fairly. See, e.g., ALA. CODE § 34-27-84(a)(1) (1997); FLA. STAT. ANN. § 475.278(2)(a)(1) (West Supp. 1999); IDAHO CODE 54-2064(b) (Supp. 1998); TEX. REV. CIV. STAT. ANN. art. 6573a, § 15C(j)(4) (West Supp. 1999). No guidance is given as to whether this duty differs from the duty of good faith and fair dealing in other contexts. Moreover, the Montana and Texas statutes specifically abrogate common law, breeding uncertainty as to the legal implications of this duty. See MONT. CODE ANN. § 37-51-313(1) (1997); TEX. REV. CIV. STAT. ANN. art. 6537a, § 15(l) (West Supp. 1999). As such, it may be safer to avoid providing services other than the commonplace administrative activities, e.g., prequalifying prospective buyers, assisting the parties with completing the form contract after the parties have reached terms, coordinating inspections/appraisals, etc. To do more risks exposing the broker to liability.

70. Of the states allowing for nonagent brokerage, Texas is the only one which specifically provides for the appointment of different licensees to the buyer and the seller to provide advice and opinions to the party to whom the nonagent broker has been assigned. See TEX. REV. CIV. STAT. ANN. art. 6573a, § 15C(k) (West Supp. 1999). The Texas statute, however, is unclear on how far this appointed salesperson can go in advocating his client's position.

71. Most formal studies of bargaining conclude that self-interested parties generally fail to realize the full potential gains from the exchange when information is imperfect or communication is costly. See Avery Katz, *The Strategic Structure of Offer and Acceptance: Game Theory and the Law of Contract Formation*, 89 MICH. L. REV. 215, 219 (1990). Communication in residential real estate contracts is

parties who are armed with information feel empowered to act on their own behalf or to work with other professionals in completing the transaction.<sup>72</sup>

The statutes that allow for nonagent brokerage should specifically obligate the broker (or designated salesperson) to provide both the buyer and the seller identical information that they can use to help determine the final terms, particularly the price. Whether that information comes in the form of comparable sales, current listings and asking prices, or tax appraisal data, the parties should receive identical information presented in such a way that the data is not distorted or biased toward one party or the other.<sup>73</sup> Additionally, the broker should provide information on how characteristics of the particular property may affect the fair market value. For example, both parties should be educated on how a swimming pool typically affects the value of the property.<sup>74</sup> A nonagent broker cannot assist one party in any way that favors that party over the other. However, there is no reason that he could not give both parties identical information to provide a common basis for their negotiations.<sup>75</sup>

Ideally, the broker would meet jointly with both parties, once the buyer became interested enough in the property to consider making an offer, to assist them in making sense of the data he has provided or will provide.<sup>76</sup> As long as the broker

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relatively inexpensive. The sufficiency of information is what proves more problematic.

72. See *supra* notes 65-67 and accompanying text. The research findings are consistent with the model suggested by Professors Roger Fisher and William Ury. ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (2d ed. 1991). One of the strategies suggested in the book is to use objective criteria to evaluate options. *Id.* at 81-94. The other strategies include (1) separating people from the problem; (2) distinguishing between interpersonal and substantive negotiation issues; (3) focusing on interests rather than positions; and (4) creating options for mutual gain. *Id.* at 15-94.

73. To ensure fairness to both parties, if a broker limits the number of comparable sales that are given to both sides, which is likely unless there are so few sales that all sales during a particular time period can be easily provided, the broker should avoid selecting those sales for which unusual circumstances might have elevated or depressed the selling price, or otherwise impacted the terms of the sale, unless those unusual circumstances are fully disclosed to both parties.

74. For example, in Central Texas, a gunnite swimming pool typically adds \$4000 to \$6000 in value to a single family residential property.

75. Either the buyer or seller, or both, would be free to undertake any additional information gathering each chose. While cooperation in the manner suggested has its benefits, in some respects it diminishes the bargaining advantage that can occur when one party has superior information or is a better negotiator. See F.H. Buckley, *Three Theories of Substantive Fairness*, 19 HOFSTRA L. REV. 33, 58 (1990). Any party who independently obtains an appraisal or other information should not be required to share it with the broker or the other party. If the party with such information opts to share it with the broker, to ensure that the broker remains neutral, the broker should also disclose it to the other party. The disclosure the broker uses to obtain the parties' consent to nonagency brokerage should clearly state both that either party is free to retain the services of other professionals, and that the nonagent broker will remain neutral.

76. If the parties chose, they could retain a licensed appraiser, jointly selected and compensated, who would provide his professional assessment of the property. He could also meet jointly with the parties to respond to any questions or concerns about his professional opinion of the value of the property. Practically, however, retaining an appraiser is problematic. Neither party is likely to incur the expense of an appraiser as simply a means to aid a negotiation that may or may not result in a contract. Although the parties could provide for how they proceed in light of various contingencies, to develop the necessary

provides identical information to both sides, there can be no claim that he has treated one side unfairly.<sup>77</sup>

Essentially, the nonagent broker would act very much like a mediator who assists the parties in reaching acceptable terms for their transaction,<sup>78</sup> and this seems to be the concept that underlies nonagency brokerage. Consequently, this proposal is directed toward encouraging this true intermediary role. The nonagent broker has little incentive to offer such services without a request from one party or the other. Rather than placing the impetus on the parties to seek such assistance, ideally this would become a standard part of the nonagent brokerage relationship, as defined by statute, thus making it clear to the parties that this is a component of the service the nonagent broker provides.

Consistent with the idea of providing the parties the necessary information to allow them to look out for their own interests, a well-drafted statute will obligate the broker to disclose all known material facts that may affect the value of the property — positively or negatively — as well as any facts regarding the parties' ability to perform their duties under the contract. The Idaho statute provides a model of the appropriate disclosure obligation. It requires that brokers disclose to customers<sup>79</sup> all adverse material facts which are known actually or which reasonably should have been known by the broker.<sup>80</sup> An "adverse material fact" is one that would significantly affect the desirability of value of the property to a reasonable person or which establishes a reasonable belief that a party to the transaction is not able to or does not intend to complete the party's obligations under a real estate transaction.<sup>81</sup> Arguably, under the Idaho statute, a broker would need to disclose to the parties not only defects in the property's physical condition, but also, any knowledge the broker has about, for example, zoning changes or commercial or residential development planned in the area that may impact the market value or livability of the property.

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contingencies and draft an appropriate agreement would result in more complexity than most residential real estate parties desire or are prepared to contend with.

77. The broker's assistance in this manner could potentially subject the broker to liability. Protection for the broker who provides such aid is discussed at *infra* note 96 and accompanying text.

78. "Mediation" is defined as the process by which the parties, assisted by a neutral third person, "attempt to systematically isolate parts of agreement, explore alternative solutions, and consider compromise for the purpose of reaching consensual settlement" of their issues. JOHN S. MURRAY ET AL., PROCESSES OF DISPUTE RESOLUTION 300 (1996).

79. A "customer" is defined as a "buyer or seller who is not represented in an agency relationship in a regulated real estate transaction." IDAHO CODE § 54-2061 (Supp. 1998).

80. *See id.*

81. *See id.* Colorado similarly holds brokers to a broad disclosure duty, obligating transaction brokers to disclose any adverse material facts actually known by the broker, including, but not limited to, facts pertaining to the title, property condition, environmental hazards, the buyer's financial ability to perform the contract and the buyer's intent to occupy the property. *See* COLO. REV. STAT. ANN. § 12-61-807 (West 1996).

It is insufficient to allow brokers *permissively* to disclose information.<sup>82</sup> Nor is it sufficient to limit the disclosure duty to those facts that are not readily observable,<sup>83</sup> or that could not be discovered by a reasonably diligent inspection.<sup>84</sup> Permissive or qualified disclosures provide the opportunity for the broker's own interest in closing the sale to take precedence over the interests of one or both parties. The broker has little inducement to disclose to either party facts that may reduce the probability of the parties executing a contract or reduce his commission, if the commission is based on the sale price, unless he is obligated to do so by law.

Moreover, a standard which requires disclosure of only those facts that are not discoverable cultivates uncertainty. The safest course of action is for the broker to disclose all known defects with the property, rather than risk liability for failing to do so. As such, there may be little difference from an unqualified duty to disclose the material facts. Nonetheless, the idea is to provide a clear line of what must be disclosed and to broaden disclosure beyond defects with the physical property or the title.<sup>85</sup>

In addition, broadening the disclosure requirement is consistent with the trend in laws related to consumer protection. The inroads on the concept of caveat emptor continue,<sup>86</sup> and there is little reason not to require brokers to disclose that which they actually know or should know related to the property or the transaction. It is furthermore consistent with the disclosure obligation outlined by Restatement of Agency.<sup>87</sup> Granted, the idea behind nonagency brokerage is to free the agent of those fiduciary duties. As discussed above, however, there is a solid justification for holding the nonagent broker to this duty.

Nothing about this suggestion is intended to eliminate the limited confidentiality provided by most statutes. While it would be helpful to each party to know the

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82. See, e.g., ALA. CODE §§ 34-27-82(c), 34-27-84(b) (1997). "A license may provide requested information which affects a transaction to any party who requests the information, unless disclosure of the information is prohibited by law or in this article." *Id.* § 34-27-84(b).

83. See, e.g., FLA. STAT. ANN. § 475.278(2)(a)(4) (West Supp. 1999).

84. See, e.g., GA. CODE ANN. § 10-6A-5 (Harrison 1994). The Georgia statute does not provide for nonagent brokers. Dual agents, as well as the agent representing the buyer, are required to disclose certain information which could not be discovered by a reasonably diligent inspection of the property by the buyer.

85. Arguably, such a disclosure requirement obligates the broker to more disclosure than either the buyer or the seller has. Typically, the buyer has no disclosure obligation and the seller's disclosure is limited to defects in the physical condition of the property. Nonetheless, everyone recognizes that the buyer and the seller are acting in their own best interests. The nonagent broker, however, has undertaken a neutral stance. Certainly one could argue that silence is just as neutral as disclosure — the only difference is which party ultimately benefits. However, silence would then be little different than if the parties had opted not to use a broker at all. Moreover, as a general rule, more information is better than less. See *supra* notes 66, 72. Given that in a nonagent situation neither party has an advocate specifically looking out for that party's interests, and the nonagent broker will be compensated for his services, he ought to be obligated to provide the information for each party to look after his own interests.

86. Seller disclosure forms on which the seller identifies known problems with the property and which are required in many states, are one of the more recent encroachments on the concept. See, e.g., TEX. PROP. CODE ANN. § 5.008 (West Supp. 1998).

87. See *supra* notes 44-45 and accompanying text.

other's reservation price or motivation for entering the transaction, such factors that are entirely subjective to the buyer or seller ought not be disclosed without consent of the party.<sup>88</sup>

*Remove the Nonagent Broker's Financial Interest*

The broker's compensation is usually calculated as a percentage of the sale price.<sup>89</sup> The idea behind nonagent brokers serving as unaffiliated transaction facilitators cannot fully be realized as long as the broker is compensated in this manner because it creates an inherent conflict of interest, which tends to favor the seller.<sup>90</sup> No one would doubt that a conflict of interest existed if a mediator, retained by two disputing parties to assist them in resolving their dispute, received as his compensation a percentage of the settlement reached by the two parties. Except for the fact that the parties to a real estate transaction are not adversaries, the role played by the nonagent broker is intended to be very much that of a neutral third party. Yet, none of the states that permit nonagent brokers have eliminated the broker's financial incentive.

Of course, the same conflict of interest can arise when a broker serves as a buyer's exclusive agent. The buyer's broker usually shares in the commission payable to the listing agent as a percentage of the sale price, thus creating an incentive for the buyer's broker to steer the buyer towards higher priced properties and to encourage the buyer to consummate the transaction at a higher purchase price. Nonetheless, in that situation, legal safeguards, in the form of fiduciary obligations, temper the potential conflict of interest. In addition, the practical reality also serves to lessen the risk to the buyer inasmuch as the buyer's broker has the opportunity to form a personal relationship with the buyer that will likely be to the buyer's benefit.

Moreover, there are few alternatives to the commission sharing arrangement that exists between the seller's exclusive agent and the buyer's exclusive agent. Buyers have traditionally shown reluctance to paying their brokers a separate fee, given that there were available buyers' brokers who would provide the same service and accept compensation through the fee-splitting arrangement. Furthermore, if the buyer paid his own broker a separate fee in lieu of the broker sharing in the commission paid

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88. The Montana statute does not obligate nonagent brokers to even the limited confidentiality duty. Although the statute limits dual agents from disclosing that the buyer will pay more or the seller will accept less, as well as other information deemed confidential by a party, the provisions applicable to transaction brokers contain no similar obligation. *See* MONT. CODE ANN § 37-51-313(6), (7) (1997).

89. A total of 6% to 7% is typical.

90. Under the American Bar Association Model Rules of Professional Conduct, which have been adopted by more than 40 states as well as the District of Columbia, attorneys must consider how their representation of a client might be impacted when the attorney has a financial interest in the client's business beyond simply the client's fee for legal services. *See* MODEL RULES OF PROF. CONDUCT Rule 1.7, 1.8. If the attorney determines that his representation will not be adversely affected, representation can occur only after the attorney explains how representation could be impacted and obtains the client's informed consent. Where nonagency brokerage and dual agency are allowed, none of the statutes require the broker to consider whether representation of both the buyer and the seller should in fact be declined.

by the seller, such an arrangement benefitted the seller's agent who would then earn the full commission ostensibly paid by the seller, but which, of course, can directly impact the buyer's purchase price. Essentially, the buyer ended up paying twice for the same service, and any benefit that the buyer might have enjoyed as a result of retaining his own broker was offset by the higher brokerage fees. Thus, from a practical standpoint, a split in the commission appears to be the only practical way to compensate the buyer's broker.

On the other hand, there is a feasible alternative in the nonagent broker situation, as well as the necessary leverage to effect a change. States clearly can and do regulate real estate brokers. The state would be well justified in conditioning the availability of this option on the broker's acceptance of compensation in some manner other than a price-based commission.

The most obvious alternative to a price-based commission is a flat fee commission, still payable by the seller out of the sale proceeds. Nonetheless, any method of compensation that would result in reducing the broker's financial interest would be preferable to a price-based commission.

Whatever the commission arrangement, the amount and source of all compensation related to this particular transaction should be disclosed to both parties. For example, if there is a bonus to be paid for a quick closing, then both the buyer and the seller should be so advised inasmuch as such compensation may influence the way a broker handles the particular transaction. Anything else that could affect the terms of the deal should also be disclosed to both parties.

#### *Clarify the Disclosure Necessary for Nonagent Brokerage*

Similar to the disclosures for dual agency, the disclosures for nonagent brokerage tend to be confusing, relying on terms and legal concepts that are unfamiliar to most laypeople, which may put the broker in the position of giving legal advice.<sup>91</sup> In the interest of full disclosure to consumers of real estate services such that they can give informed consent, the disclosure should clearly spell out the differences in single agency and dual agency. Specifically, the disclosure should state that the broker cannot assist the client in negotiating the terms of the transaction nor provide assistance to the client in determining what terms to offer or to accept. Moreover, the disclosure should specifically advise clients that they may want to consider retaining the services of other professionals, such as lawyers, appraisers, accountants, etc., to assist them with the transaction.

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91. For example, the Texas disclosure reads, "A broker can assist you in locating a property, preparing a contract or lease, or obtaining financing without representing you." TEX. REV. CIV. STAT. ANN. art. 6573a, § 15C(d) (West Supp. 1998). The subtle distinction between assistance and representation is clear to attorneys and real estate professionals, but query whether the typical residential real estate buyer or seller would comprehend that distinction. In describing the nonagent broker, referred to as an "intermediary" in Texas, the statute states, "A broker may act as an intermediary between the parties if the broker complies with the Texas Real Estate License Act . . . . The broker is required to treat each party honestly and fairly and to comply with The Texas Real Estate License Act." *Id.* A party who reads such language closely surely must question what the Real Estate License Act requires, but the prescribed disclosure itself provides no guidance.

A clear and complete description of what nonagent brokerage involves will also serve to protect the broker. Although some of the statutes allowing for nonagent brokerage provide that consent will be presumed if the broker provides the prescribed disclosure,<sup>92</sup> or the statute abrogates common law,<sup>93</sup> a number of states provide no such protection, leaving open the possibility that a court, when presented with the issue, will deem that the disclosure is inadequate.<sup>94</sup>

Beyond clearly explaining the difference between nonagent brokerage and the traditional agency relationship, the disclosure should clearly state what the nonagent broker can do for his client. The statutes that allow for nonagent brokerage at best obligate the nonagent broker to general duties stated in the statute related to confidentiality, disclosure, and the standard of care, and allow the parties to obligate the broker to further duties.<sup>95</sup> Essentially, the client must determine what additional tasks to seek from the broker, for there is no incentive for the agent to include such tasks in the form agreements used by brokers.

Examples of what could be included in the disclosure as well as any forms promulgated by the state include listing the property in the MLS, advertising in other sources in addition to the MLS, hosting an agreed upon number of open houses, and providing the data on comparable sales and other pricing information that is available. Other tasks include qualifying the buyers prior to negotiations beginning, assisting the buyer in arranging third party financing, assisting the parties with arranging for inspections, and assisting the parties in completing the forms related to their transaction.

The goal is simply to write the disclosure and any state-promulgated contracts in such a way that the client has an opportunity to understand fully the advantages and disadvantages of nonagent brokerage as compared to single agency or the other choices available in a particular jurisdiction, and in such a way that the parties know what services to expect from the broker.

#### *Provide Adequate Protection for Brokers*

Returning for a moment to the concept of mediation, the mediator's role is, in part, to assist the parties in creative problem-solving. Real estate transactions present the classic situation for integrative bargaining. Integrative bargaining, sometimes referred to as non-zero sum bargaining, involves gains the parties share through negotiation.<sup>96</sup> Integrative bargaining recognizes that while the parties may

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92. See, e.g., MINN. STAT. ANN. § 82.197(3) (West Supp. 1998).

93. See, e.g., TEX. REV. CIV. STAT. ANN. art. 6573a, § 15(c)(1) (West Supp. 1998).

94. The court found the disclosure inadequate in *Edina*. See *supra* note 14.

95. The Colorado statute goes the furthest in specifying the duty owed by the "transaction broker." The statute obligates the transaction broker to advise the parties regarding the transaction and to keep the parties fully informed regarding the transaction. See COLO. REV. STAT. ANN. § 12-61-807(b)(II), (IV) (West 1998). The statute provides no guidance as to what specifically the transaction broker must do, and no cases provide meaning for these statutory provisions.

96. At the other end of the spectrum from integrative bargaining is distributive or zero-sum bargaining, in which there are no gains to be shared jointly. Rather, any proposed solution results in an increase over the initial position for one party and decreases the position of the other. Real estate

have conflicting positions, the importance or priority that one party places on an issue may be different than the other party's priority. It allows a party to trade something he deems of lower priority for something of higher priority. For example, the seller may be willing to agree to a lower price in return for a quick closing.

The key to successful bargaining is coming up with creative solutions and options for the parties' consideration. That is the role the nonagent broker is best able to fulfill. As the player who is likely to be most knowledgeable about the various terms and points for negotiation, and to have had the most experience with different alternatives, the broker is in the best position to suggest ideas the parties may want to consider.

Again, this kind of assistance seems to be the idea behind placing the agent in the role of facilitator. Nonetheless, the fact that the statutes do not clearly state the standard by which the agent's behavior is to be judged nor the rules that govern this relationship potentially hampers the willingness of the brokers fully to assist the parties in this manner. The statutes should be drafted so that it is clear that no liability arises simply because the broker actively assists the parties in addressing their differences. As long as the agent again refrains from making suggestions to one party only, there should be no question that this is indeed fair to both parties. Clearly stating those activities that are deemed neutral should provide the broker the necessary protection for the broker to engage actively in assisting the parties.

Moreover, should nonagent brokers be obligated to disclose all information that is known or that should be known, the agent must be protected from liability. Anytime an individual is obligated to provide certain information, the risk of incompleteness or inaccuracy inheres. Therefore, the statute must specifically provide protection for brokers who fail to fulfill their duty as long as they have acted in good faith. No cause of action should lie for negligence or breach of contract in this situation.

### *Conclusion*

There is little doubt that one broker can provide services to both the buyer and the seller at the initial stages of the real estate transaction. Few conflicts arise when the broker is simply showing properties to a prospective buyer or helping the seller to prepare his home for sale. In a nonagent brokerage situation, if the broker is to be freed from those fiduciary obligations that would otherwise exist, or to have those duties otherwise modified, there must be some alternative way for the broker to provide that assistance. The proposals included in this article are aimed at ensuring that consumers get the services they deserve and that the brokers are adequately protected.

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transactions share some elements of distributive bargaining, if one focuses solely on the price. However, when viewed as whole, the numerous terms to be negotiated provide a good setting for integrative bargaining.



