

September 1981

Finding the Broker's Place in the Typical Residential Real Estate Transaction

Barry A. Currier

Follow this and additional works at: <https://scholarship.law.ufl.edu/flr>



Part of the [Law Commons](#)

Recommended Citation

Barry A. Currier, *Finding the Broker's Place in the Typical Residential Real Estate Transaction*, 33 Fla. L. Rev. 655 (1981).

Available at: <https://scholarship.law.ufl.edu/flr/vol33/iss5/1>

This Article is brought to you for free and open access by UF Law Scholarship Repository. It has been accepted for inclusion in Florida Law Review by an authorized editor of UF Law Scholarship Repository. For more information, please contact kaleita@law.ufl.edu.

University of Florida Law Review

VOLUME XXXIII

FALL 1981

NUMBER 5

FINDING THE BROKER'S PLACE IN THE TYPICAL RESIDENTIAL REAL ESTATE TRANSACTION

BARRY A. CURRIER*

The real estate broker's place in the residential real estate conveyancing process is not well understood. The law most often casts the broker as the seller's legal agent. This does not always accord with the expectations of home sellers and buyers about the broker's function; indeed, brokers themselves frequently take a broader view of their role than the law of agency implies. A broker who disregards the law's proscriptions, however, and seeks to fulfill the parties' expectations risks sanction if a disappointed seller or buyer later complains. Should fear of penalty lead the broker to keep his conduct within the boundaries of agency law, the parties to a transaction, particularly the buyer, may be denied the aid and counsel they need and expect from the broker.

Disparity between the legal model imposed on brokers and the expectations of the parties creates a dilemma for brokers and prompts consumer uncertainty about the broker's role. The law governing the real estate broker's place in a residential real estate transaction and the expectations of sellers and buyers about the broker's role need reconciliation. Given our society's emphasis on homeownership,¹ it is peculiar that brokers are allowed to provide the parties

*Professor of Law, University of Florida. A.B., 1968, University of California, Los Angeles; J.D., 1971, University of Southern California.

1. The Housing Act of 1949, calling for "a decent home and suitable living environment for every American family. . . ." 42 U.S.C. §1441 (1976), reflects an underlying commitment to homeownership. Owning a home is often described as "the American dream." See, e.g., Rubinowitz & Trosman, *Affirmative Action and the American Dream: Implementing Fair Housing Policies in Federal Homeownership Programs*, 74 NW. U.L. REV. 491, 601 (1979); Sengstock & Sengstock, *Homeownership: A Goal for All Americans*, 46 J. URB. LAW-313, 317 (1969). See generally R. MONTGOMERY & D. MANDELKER, *HOUSING IN AMERICA: PROBLEMS AND PERSPECTIVES* (2d ed. 1979); Michelman, *The Advent of a Right to Housing: A Current Appraisal*, 5 HARV. C.R. — C.L. L. REV. 207, 223-25 (1970). Much of the development of the law of zoning concerns protecting and promoting homeownership, particularly in single-family neighborhoods. *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 258 (1977); cf. *Southern Burlington County NAACP v. Township of Mount Laurel*, 67 N.J. 151, 173-91, 336 A.2d 713, 724-34, *appeal dismissed*, 423 U.S. 808 (1975).

Our laws protect and encourage homeownership in a number of ways. Homestead exemptions safeguard a debtor's house from the claims of many creditors. See Maines & Maines, *Our Legal Chameleon Revisited: Florida's Homestead Exemption*, 30 U. FLA. L. REV. 227, 228-32, 264-65 (1978). Homeowners may be afforded greater protection in the mortgage foreclosure process than other borrowers. Leipziger, *Deficiency Judgments in California: The Supreme Court Tries Again*, 22 U.C.L.A. L. REV. 753 (1975). Homeownership is encouraged by the legal system in many ways, including allowing federal income tax deductions for mortgage interest payments and local property taxes. I.R.C., §§163, 164. In 1979 these deductions totalled \$5,530,000,000 and \$5,180,000,000 respectively. Surrey & McDaniel, *The Tax Expenditure Con-*

most of the guidance in the real estate conveyancing process. Surprisingly, the literature contains little scholarly writing focusing on this problem.

This article starts by examining the tension between the law and the parties' hopes in a brief description of the broker's participation in a typical residential real estate transaction. Then the discussion focuses on several hypothetical situations that explore the extent to which the broker can fulfill the parties' needs for assistance within the confines of existing law and regulation. Finally, alternative legal models that might provide a more appropriate way of regulating the broker's place in the ordinary residential real estate transaction are considered.

A PERSPECTIVE ON THE ROLE OF THE REAL ESTATE BROKER

Most persons initiate residential real estate transactions by contacting a real estate broker.² The broker generally knows the local housing market, is experienced in the conveyancing process, and can present a house to many potential buyers. Sellers may consequently seek local brokers in an effort to obtain the timely sale of their property at the maximum price, on favorable

cept: Current Developments and Emerging Issues, 20 B.C. L. REV. 225, 356 (1979). When combined, these tax expenditures are the second largest subsidy provided by the federal government to individual taxpayers. *Id.* Fair housing legislation, e.g., Civil Rights Act of 1968, 42 U.S.C. §§3601-3619, 3631 (1976), guarantees access to housing for all persons without regard to race, creed or sex.

2. "Broker" is used in this article as a generic term to describe both the real estate broker and the real estate salesperson. All fifty states require licensing as a condition to lawfully acting as either a real estate broker or real estate salesperson. P. GOLDSTEIN, *REAL ESTATE TRANSACTIONS* 29 (1980). Real estate brokering consists of a person acting for another for compensation in the negotiation or attempted negotiation of the sale, purchase, exchange or rental of any interest in real property. *See, e.g.,* FLA. STAT. §475.01(3) (1981). Although qualifications for licensing vary, typically the broker's license is more difficult to obtain than a salesperson's license. For example, in Florida a person must complete a 51-hour course and pass an examination to be licensed as a real estate salesperson. *Id.* §475.17(2). To qualify for a broker's license, a person must have twelve months experience as a licensed salesperson in the office of a registered broker, take an additional 48-hour course, and pass another examination. *Id.* Salespersons can perform most brokerage services, but they must be employed by, and act under the supervision of, a licensed broker. *Id.* §475.01(4). Nothing prohibits a person licensed as a broker from acting as a salesperson for another broker or for a business association acting as a broker. In a large real estate brokerage firm many persons may be licensed as brokers although the business may be registered only in the names of the partners or a few of the active members. It is difficult to generalize about what brokerage activities cannot be performed by salespersons. In Wisconsin, for example, a salesperson can only prepare listing agreements, residential leases and offers to purchase, not contracts for sale. Brokers can also prepare contracts of sale and other documents using certain approved forms. Rules of the Wisconsin Real Estate Examining Board 7.01(2), *reprinted in* STATE OF WISCONSIN, *WISCONSIN REAL ESTATE LAW* (1976).

Realtors are brokers who belong to the National Association of Realtors, which is the largest brokers' trade group. It has been active through local boards of realtors in operating multiple listing services and other aspects of the real estate business. Austin, *Real Estate Boards and Multiple Listing Systems as Restraints of Trade*, 70 COLUM. L. REV. 1325, 1326-28 (1970); Minard, *Real Estate — Why George Babbitt Should be Smiling in His Grave*, FORBES, Sept. 4, 1978, at 43.

terms. Brokers may thus be able to help sellers achieve their objectives in the real estate market and guard the seller from having to exert great personal effort.

Buyers enlist the aid of brokers for more complex and varied reasons. Apprehension concerning a home-buying decision leads many buyers to seek the expert help of a broker. Home ownership continues to be an important personal goal for most Americans.³ A house is often regarded as a good investment, perhaps the best one the average person can make.⁴ The location of the home, moreover, influences a person's choice of friends, the quality of the education one's children will receive, and other aspects of individual lifestyle.⁵

Potential buyers may also be concerned about purchasing a home because of the high transactional costs associated with real estate transactions.⁶ Inspecting a house for defects is often financially impossible,⁷ and the conveyancing

3. W. GRIGSBY & L. ROSENBERG, URBAN HOUSING POLICY 105-111 (1975); Sengstock & Sengstock, *supra* note 1, at 318-26.

4. A study by the Mortgage Bankers Association of America concluded that a family should buy a home rather than renting it and putting the money otherwise required for a down payment and closing costs into some other investment. After three years the purchaser of a median-price home would be almost \$35,000 wealthier than renters who invested their money in certificates of deposit yielding eight percent compounded. An annual ten percent appreciation in home values was assumed. The report further found that single family housing was the best hedge against inflation during the period from 1968-1978. [1980] 8 Hous. & Dev. REP. (BNA) 152-53. See S. SEIDEL, HOUSING COSTS AND GOVERNMENT REGULATION 9-18 (1978). Housing prices increased 17 percent from March, 1979, to March, 1980, faster than the overall price increase of 14.7 percent. [1980] 7 Hous. & Dev. REP. (BNA) 1021. Over a ten year period ending in 1978, median housing prices more than doubled. Minard, *supra* note 2, at 42.

5. Economists and other social scientists have determined that individuals will pay more to obtain housing in areas that offer convenience to work and shopping, high quality public schools, and desirable environments. See, e.g., M. DANIELSON, THE POLITICS OF EXCLUSION 1-49 (1976); J. KAIN & J. QUIGLEY, HOUSING MARKETS AND RACIAL DISCRIMINATION: A MICROECONOMIC ANALYSIS 231-55 (1975); A. KING, PROPERTY TAXES, AMENITIES, AND RESIDENTIAL LAND VALUES 54-65, 85-94 (1973); Li & Brown, *Micro-Neighborhood Externalities and Hedonic Housing Prices*, 56 LAND ECON. 125 (1980). Cf. J. Jacobs, *The Death and Life of Great American Cities* 112-140 (1961). Exclusionary zoning and no-growth plans may be grounded on the desire to protect neighborhood qualities. Judge Westenhaver recognized this over 50 years ago in his perceptive opinion in *Euclid*. "The plain truth is that the true object of the ordinance . . . is to place all the property . . . in a strait-jacket. The purpose to be accomplished is really to regulate the mode of living of persons who may hereafter inhabit it. In the last analysis, the result to be accomplished is to classify the population and segregate them according to their income or situation in life. . . . Aside from . . . furthering such class tendencies, the ordinance also has an esthetic purpose . . . to make this village develop into a city along lines now conceived by the village council to be attractive and beautiful." *Ambler Realty Co. v. Village of Euclid*, 297 F. 307, 316 (N.D. Ohio, 1924), *rev'd* 272 U.S. 365 (1926). See *Steel Hill Dev., Inc. v. Town of Sanbornton*, 469 F.2d 956, 961-62 (1st Cir. 1972).

6. Whitman, *Home Transfer Costs: An Economic and Legal Analysis*, 62 GEO. L.J. 1311 (1974).

7. This has been recognized at least with respect to new homes: "An experienced builder who has erected and sold many houses is in a far better position to determine the structural condition of a house than most buyers. Even if a buyer is sufficiently knowledgeable to evaluate a home's condition, he rarely has access to make any inspection of the underlying structural work, as distinguished from the merely cosmetic features." *Duncan v. Schuster-Graham Homes, Inc.*, 194 Colo. 441, 444, 578 P.2d 637, 638-39 (1978). Uncertainty about the

process is becoming increasingly complex.⁸ In addition, individuals participate in this market relatively infrequently during their lifetimes⁹ despite the mobility of the population¹⁰ and the high volume of real estate transactions.¹¹ The unfamiliarity of the process thus contributes to the anxiety many potential home buyers feel when entering the real estate market.

Today, brokers often are the only group to which a home buyer can turn for counsel and guidance in the home-buying process.¹² The manner in which the broker-home buyer relationship evolves tends to encourage the typical home buyer to believe that the broker can supply the counseling function.¹³ A brief sketch of how this relationship typically develops shows how the buyer can develop a reasonable reliance on the broker.

The broker-home buyer relationship often begins outside the context of the sale of a particular home. The home buyer often calls a broker recommended by a friend or business associate rather than selecting a broker from an advertisement. The relationship thus begins on a positive and personal basis as well as a professional one.¹⁴ No contract is signed which evidences the broker's loyalty and confidence to the buyer, nor does the broker discuss his legal obligations and responsibilities in the transaction. Consequently, the buyer's original

quality of materials and workmanship has led to insurance programs covering losses due to construction defects. Stanton, *Consumer Protection and National Housing Policy: The Problem of New-Home Defects*, 29 CASE W. RES. L. REV. 527 (1979). For a discussion of the availability and desirability of inspection programs for used houses, see U.S. DEPT. OF HOUSING AND URBAN DEV., *A STUDY OF HOME INSPECTION AND WARRANTY PROGRAMS* (1977).

8. See SEIDEL, *supra* note 4, at 261-77; see generally, Gresham, *The Residential Real Estate Transfer Process: A Functional Critique*, 23 EMORY L.J. 421 (1974).

9. Mobility among owners of homes is significantly less than among renters. J. KAIN & J. QUIGLEY, *supra* note 5, at 129. Despite a high rate of mobility within the general population and the fact that about 64 percent of all housing units are owner-occupied, U.S. DEPT. OF COMMERCE, BUREAU OF THE CENSUS, 1979 STATISTICAL ABSTRACT OF THE UNITED STATES 782 [hereinafter cited as STATISTICAL ABSTRACT], a family is not likely to make more than a few home purchases during its existence. *Id.* at 122; Speare, *Home Ownership, Life Cycle State and Residential Mobility*, 7 DEMOGRAPHY 449 (1970).

10. From 1975 to 1978 over one-third of the population of the United States changed housing units. STATISTICAL ABSTRACT at 40. A study of mobility in St. Louis found that 39.3 percent of households sampled had moved within the preceding three years. J. KAIN & J. QUIGLEY, *supra* note 5, at 129.

11. Approximately 4.7 million new and used homes were sold in 1978. STATISTICAL ABSTRACT at 791-92.

12. Brokers seldom resist the homeseeker's invitation to provide assistance. See Stambler & Stein, *The Real Estate Broker — Schizophrenia or Conflict of Interest*, 28 D.C. B.J. 16, 17-18 (1961). Franchising of the real estate brokerage business, see Dowling & Hines, *Here Comes the Real Estate Franchise*, 7 REAL ESTATE REV. 48 (1977), seems to have brought a significant increase in television commercials regarding broker's services. These appear to be aimed as much at buyers as sellers. For instance, one pictures the broker wrapping the home buyer in a protective blanket with the franchise symbol on it. Many of these ads suggest that buyers, as well as sellers, can get the help they want from their local broker.

13. Austin, *supra* note 2, at 1327; Owen, *Kickbacks, Specialization, Price Fixing and Efficiency in Residential Real Estate Markets*, 29 STAN. L. REV. 931, 944-45 (1977).

14. Even if the broker is selected from the telephone book or other advertisement, the home buyer usually chooses the broker, not the converse. The anxiety and lack of expertise a home buyer feels probably induce the attribution of these friendly qualities to the broker.

view may not change much as the relationship develops. The broker generally requests a considerable amount of private information about the buyer's financial position and personal tastes to develop an inventory of homes suitable for the buyer's unique needs. The intimate and helpful nature of these discussions reinforces the buyer's attitude that the broker is friendly and worthy of trust.

The broker and buyer spend a considerable amount of time together during the often lengthy home search period. Inevitably, as several houses are visited, comparisons will be made regarding floor plans, neighborhood character and the like. The shared experience of buyer and broker makes the broker the logical buyer's advisor as alternative courses are weighed and sifted. The broker's advice is influential because of his expertise.

Current conveyancing practices involve the broker with the buyer beyond the search-and-locate stage.¹⁵ A buyer may reasonably continue to rely on the broker's assistance as the offer is formulated and the final contract negotiated. The broker aids the buyer in preparing the offer that forms the basis of the land sale contract between seller and buyer.¹⁶ Although the buyer can reject the broker's aid and consult an attorney, time pressure may militate against this.¹⁷ The buyer may also feel the broker is the best person to advise him.

Both sellers and buyers contact brokers to help them achieve their differing goals in a real estate transactions. Sellers' objectives are straightforward and not as dependent on the development of a personal relationship with the broker for their success. Buyers' special needs, on the other hand, create a

15. D. BURKE, *AMERICAN CONVEYANCING PATTERNS* 21-22, 35-36 (1978). A few courts have held that the broker does not earn the commission until the transaction is closed, rather than upon procurement of a ready, willing and able seller. *E.g.*, *Thristram's Landing, Inc. v. Wait*, 367 Mass. 622, 327 N.E.2d 727 (1975); *Ellsworth Dobbs, Inc. v. Johnson*, 50 N.J. 528, 236 A.2d 843 (1967). This reflects the importance of the broker throughout the conveyancing process rather than just during the time when buyer searches for a house.

16. The significance of this document should not be discounted. A.B.A., *THE PROPER ROLE OF THE LAWYER IN RESIDENTIAL REAL ESTATE TRANSACTIONS* 5-6 (1976). Contracts for the sale of real estate are within the Statute of Frauds and must be in writing. *UNIFORM LAND TRANSACTIONS ACT* §2-201. Courts have, however, upheld the validity as contracts of very brief and sketchy writings which do not provide for many important aspects of a conveyance. In some places, these documents are titled "deposit receipt" or "binder agreement." Buyers may not fully comprehend the legal effect of this document given such a misleading heading. *See C. HAAR & L. LIEBMAN, PROPERTY AND LAW* 493-503 (1977). Forms vary among communities. Broker groups, bar associations and state agencies may work, alone or in combination, to develop a form for local use. Gresham, *supra* note 8, at 434.

17. An uneasy truce continues between brokers and lawyers. Brokers perform tasks that constitute giving legal advice, *e.g.*, *State v. Dinger*, 14 Wis.2d 193, 109 N.W.2d 685 (1961). Brokers believe their training makes them competent to handle the standard transaction. They fear delays and unnecessary complications if lawyers involve themselves to a much greater extent than they do presently. Raushenbush, *Who Helps the Home Buyer*, 1979 ARIZ. ST. L.J. 203, 205 (1979). In some states lawyers and brokers have agreed on a rough line of demarcation between legal work the broker can do and what is reserved for the attorney. Spelman, *Eight Years of "The Accord," or All is Sunshine and Light in the Land of the Broker/Lawyer*, 64 ILL. B.J. 42 (1975). For the history of the controversy, see Comment, *Conveyancing - The Roles of the Real Estate Broker and the Lawyer in Ordinary Real Estate Transactions - Wherein Lies the Public Interest*, 19 DEPAUL L. REV. 319 (1969).

reliance on brokers during the natural progression of the broker-buyer relationship.¹⁸ A broker, however experiences difficulty in performing the tasks expressly or impliedly entrusted to him by the buyer while remaining within the legal rules currently governing his conduct.

REAL ESTATE BROKERS AND THE LAW OF AGENCY

In practice both home buyers and home sellers have legitimate claims to the broker's loyalty. An analysis of agency law, however, reveals that the legal system affords more favorable treatment and greater protection to the broker-seller relationship than to that of the broker-buyer. This greater protection is derived from the legal effect of the listing agreement between the seller and broker, in which the seller promises to pay a commission to the broker thus making the broker his agent.¹⁹ Regardless of both the amount of time the broker and buyer spend together and the personal relationship that may develop between them, the broker is seldom considered the buyer's agent.²⁰

In the majority of cases, a written, exclusive right-to-sell agreement establishes the agency relationship between seller and broker. Under this contract, the seller promises to pay an agreed commission to the broker if the house sells during the listing period. The commission must be paid whether the sale results from the efforts of the listing broker, another broker, or the seller.²¹ Other forms of listing property with a broker are possible,²² but brokers promote the exclusive right to sell model, arguing that it assures the broker's best attention and effort to sell the property.²³ In theory, sellers *must* count on the listing broker's efforts under an exclusive right to sell agreement to avoid potential liability for more than one commission. In practice, however, the listing broker will agree to cooperate²⁴ with another broker and share the commission unless

18. Note, *Theories of Real Estate Broker Liability: Arizona's Emerging Malpractice Doctrine*, 20 ARIZ. L. REV. 767, 772-73 (1978).

19. Sample listing contracts can be found at A. AXELROD, C. BERGER & Q. JOHNSTONE, *LAND TRANSFER AND FINANCE* 1128-1129 (2d ed. 1978); Note, *supra* note 18 at 796.

20. See notes 39-47 and accompanying text *infra*.

21. *E.g.*, *Wade v. Austin*, 524 S.W.2d 79 (Tex. Civ. App. 1975). Many exclusive right to sell listings make the seller liable for a commission if the property is sold to someone who was introduced to the house while the listing agreement was in force. *E.g.*, Note, *supra* note 18 at 769. The seller is also liable for a commission if the property is withdrawn from sale during the listing period without the broker's consent. *Id.* See also *Blank v. Borden*, 11 Cal. 3d 963, 524 P.2d 127, 115 Cal. Rptr. 31 (1974).

22. Two common forms of listing agreements are the open listing and the exclusive agency. The seller promises to pay a commission in an open listing to a broker who procures someone ready, willing and able to buy on terms acceptable to seller. Under an exclusive agency listing, the seller owes a commission if the property is sold by any broker, but is not liable for a commission if he sells the property himself. R. LIFTON, *PRACTICAL REAL ESTATE: LEGAL, TAX AND BUSINESS STRATEGIES* 94-96 (1979); H. MILLER & M. STARR, *CURRENT LAW OF CALIFORNIA REAL ESTATE* 212-19 (1965).

23. Members of the National Association of Realtors are bound by Article 6 of the organization's Code of Ethics to urge the owner to enter an exclusive listing agreement. NATIONAL ASSOCIATION OF REALTORS, *INTERPRETATION OF THE CODE OF ETHICS* 33 (7th ed. 1976).

24. Cooperation involves the listing broker agreeing with another broker to share the commission the seller has agreed to pay in the exclusive listing agreement. This may be done

the listing broker has another offer in hand; part of a certain commission is better than the chance of a whole commission.

Cooperation among brokers is so sensible that it has become formalized in the multiple listing services (MLS)²⁵ that permeate real estate markets across the country. The MLS concept is simple — brokers agree to pool listings and split commissions.²⁶ Multiple listing services mitigate the harshness of exclusive right-to-sell listing agreements. A seller's property is included in the inventory of all MLS members by listing it with one, and the brokers' advance agreement to cooperate effectively eliminates the potential double commission problem.

Buyers as well as sellers benefit from MLS operations. One MLS member can show a house listed by any other member without having to arrange that member's cooperation in advance. Given the substantial market share of many multiple listing services,²⁷ the "one-stop shopping" method appears to be a very efficient way to canvass available housing opportunities. Another consequence of the MLS arrangement, however, is not so advantageous to buyers. The agreement to pool listings and share commissions creates ties among member brokers that make each a sub-agent of every other member broker.²⁸

Once the broker becomes the seller's agent,²⁹ the law imposes certain duties on the broker. Because of the agency relationship's fiduciary character, the broker is subject to the duties of loyalty, honesty and full disclosure to his

when the listing broker is approached by another broker who has a person interested in the property. Cases involving cooperation include *Nutter v. Bechtel*, 6 Ariz. App. 501, 433 P.2d 993 (1967); *Buckaloo v. Johnson*, 14 Cal. 3d 815, 537 P.2d 865, 122 Cal. Rptr. 745 (1975); *Cantor & Assoc., Inc. v. Devore*, 281 So. 2d 245 (Fla. 3d D.C.A. 1973).

25. Descriptions of the multiple listing service are given in Austin, *supra* note 2, at 1328-30; Comment, *Exclusion from Real Estate Multiple Listing Services as Antitrust Violations*, 14 CAL. W.L. REV. 298, 300-03 (1978).

26. How the commission will be divided varies, but the broker who procures the buyer will normally receive half or more of the commission. Multiple listing services have been attacked for alleged price-fixing in violation of antitrust laws. Austin, *supra* note 2, at 1338-39; [1980] 7 HOUS. & DEV. REP. (BNA) 683. See generally Owen, *supra* note 13, at 944-49.

27. *Fair Hous. Council of Bergen County, Inc. v. Eastern Bergen County Multiple Listing Serv., Inc.*, 422 F. Supp. 1071 (D.N.J. 1976) (one-half of all Bergen County brokerage transactions involve the use of an MLS); *Wheatly Heights Neighborhood Coalition v. Jenna Resales Co.*, 447 F. Supp. 838 (E.D.N.Y. 1978) (MLS listings for eleven months totaled 9,000 homes with sales in excess of \$400 million).

28. See, e.g., *Frisell v. Newman*, 71 Wash. 2d 520, 527-28, 429 P.2d 864, 868-69 (1967); *Hale v. Wolfson*, 276 Cal. App. 2d 285, 290-91, 81 Cal. Rptr. 23, 27 (1969); *Cooperation in Real Estate Brokerage*, 11 MAINE REAL ESTATE NEWS, March 1978, at 3. *Contra*, *Blockinger v. Schlegel*, 58 Ill. App. 3d 324, 374 N.E.2d 491 (1978).

29. Agency is a consensual relationship between two persons wherein one of them, the principal, empowers the other, the agent, to act and the agent assumes to so act. RESTATEMENT (SECOND) OF AGENCY §1 (1958); *Defosses v. Notis*, 333 A.2d 83 (Me. 1975). Generally, the broker is a special agent, as opposed to a general one. A special agent represents the principal in a discrete number of transactions without involving a continuity of service. RESTATEMENT (SECOND) OF AGENCY §3 (1958). *Ingalls v. Rice*, 511 S.W.2d 78, 80 (Tex. Civ. App. 1974); *Stenson v. Thrush*, 36 Wash. 2d 726, 728, 219 P.2d 977, 978 (1950). The authority of the broker is confined to selling a described piece of real property for a given price. See note 19 *supra*. In practice the broker does not sell the property but solicits offers and aids in negotiating a sale on terms acceptable to the seller.

principal.³⁰ These duties bind the agent because of the nature of an agency arrangement and do not depend on the listing agreement's terms.³¹ Basic principles of agency law require the broker to disclose information to the seller that would help him in the bargaining process. The broker must further refrain from disclosing information to the buyer that would harm the seller, unless failure to make the revelation amounts to fraud or misrepresentation.

The standard agency model works well for most purposes in the conveyancing process. It regulates the broker's behavior vis-a-vis the seller. For example, the broker cannot secretly profit by buying property he has agreed to sell at a bargain price and then reselling it at a profit.³² Self-dealing is not prohibited, but the broker must disclose his intentions to deal personally in the property and not take advantage of his superior knowledge to gain from the trust the seller has reposed in him.³³

Although a broker may advise a seller of his opinions concerning offers received, the law clearly states that all such decisions are the seller's. Offers must be communicated to the seller regardless of the broker's evaluation of whether they should be accepted, rejected, or countered.³⁴ A high standard of care applies to the broker's conduct regarding the accuracy and sufficiency of the advice.³⁵ Failing to meet it, the broker risks possible disciplinary proceedings and sanctions.³⁶

In contrast to the seller's legal relationship with the broker, the home buyer's position is a perilous one. Reposing confidence and trust in the broker, the buyer is potentially exposed to manipulation and exploitation. Brokers can successfully meet a buyer's complaints about alleged mistreatment with a de-

30. See, e.g., *Ellsworth Dobbs, Inc. v. Johnson*, 50 N.J. 528, 552-53, 236 A.2d 843, 856 (1967); *Zwick v. United Farm Agency, Inc.*, 556 P.2d 508 (Wyo. 1976). See Comment, *A Re-examination of the Real Estate Broker-Buyer-Seller Relationship*, 18 WAYNE L. REV. 1343, 1356-57 (1972).

31. See Comment, *supra* note 30, at 1356-57.

32. E.g., *Kline v. Pym's Suchman Real Estate Co.*, 303 So. 2d 401 (Fla. 3d D.C.A. 1974); *Mersky v. Multiple Listing Bureau of Olympia, Inc.*, 73 Wash. 2d 225, 437 P.2d 897 (1968).

33. *Id.*; CODE OF ETHICS, *supra* note 23, at 121-28.

34. E.g., *Smith v. Zak*, 20 Cal. App. 3d 785, 793, 98 Cal. Rptr. 242, 246-47 (1971); *Simone v. McKee*, 142 Cal. App. 2d 307, 312, 298 P.2d 667, 671 (1956); *Hickam v. Colorado Real Estate Comm'n*, 534 P.2d 1220, 1224-25 (Colo. Ct. App. 1975); *Bolding v. Lewis H. May Co.*, 111 Misc. 170, 174-75, 181 N.Y.S. 121, 123 (1920).

35. See, e.g., *Morley v. J. Pagel Realty & Ins.*, 27 Ariz. App. 62, 550 P.2d 1104 (1976); *Timmsen v. Forest E. Olson, Inc.*, 6 Cal. App. 3d 860, 870-72, 86 Cal. Rptr. 359, 365-67 (1970); *Ahern v. Florida Real Estate Comm'n ex rel. O'Kelley*, 149 Fla. 706, 6 So. 2d 857 (1942).

36. A broker may be denied his commission for not performing in a satisfactory manner the duties owed to the seller-principal. See, e.g., *Security Aluminum Window Mfg. Corp. v. Lehman Assocs., Inc.*, 108 N.J. Super. 137, 260 A.2d 248 (Super. Ct. App. Div. 1970) (compensatory and punitive damages assessed against broker who led principal to believe that an offer of only \$25,000 had been made when in fact a \$50,000 offer had been received). The broker's license may be suspended or revoked for violation of a duty imposed on the broker by law or contract, without regard to whether the victim of the misconduct sustained loss or damage. FLA. STAT. §475.25(1) (1981). Additionally, members of the National Association of Realtors can be penalized by their local board for violating that group's Code of Ethics. Sanctions range from a reprimand to expulsion from the local chapter. CODE OF ETHICS, *supra* note 23, at v-vii.

fense based upon the law of agency. Of course, actions in fraud³⁷ and misrepresentation³⁸ afford some protection to the buyer. The buyer may alternatively assert an express agency relationship exists between himself and the broker or that mistreatment by a broker, while not amounting to fraud or misrepresentation, breaches duties owed to him even though he is not the broker's principal.

Establishing a formal agency relationship with a real estate broker, however, will be difficult for the buyer. The seller's contractual arrangement with the broker, because of its formality and an assumption that it arose first, may preempt any relationship buyer claims with the broker. The mere fact that the listing agreement is in writing, however, should not elevate the broker-seller relationship to a superior position;³⁹ rather, the listing agreement should be considered only one of many material facts necessary to determine who the broker's principal was in a particular transaction.⁴⁰

The person whose relationship with the broker began first could assert a stronger claim to the agent's loyalty. There is an unarticulated presumption that the broker-seller relationship is the initial one. Buyers thus bear the burden of overcoming this presumption; however, the presumption itself is questionable. The home buyer and the broker may be working together prior to the time the seller's house is listed. In tight real estate markets, a land sale contract may be entered within hours or days of listing. It is unlikely that these sudden sales result from the home buyer just happening into a broker's office moments after the listing has been obtained.

A buyer's claim that the broker is his agent is weakened because the seller pays the broker's compensation. Although one can act as an agent gratuitously,⁴¹ most brokers sell real estate to earn a living. Work done in the normal transaction is expected to lead to a commission. It seems reasonable, therefore, to expect the broker to give his allegiance to the party who is paying him. While the listing agreement legally obligates the seller to pay the commission,⁴² the

37. *E.g.*, *Ward v. Taggart*, 51 Cal. 2d 736, 336 P.2d 534 (1959); *Lingsch v. Savage*, 213 Cal. App. 2d 729, 29 Cal. Rptr. 201 (1963); *Sawyer v. Tildahl*, 275 Minn. 457, 148 N.W.2d 131 (1967).

38. *E.g.*, *Carrel v. Lux*, 101 Ariz. 430, 420 P.2d 564 (1966) (misrepresentation of acreage and income from property); *Siler v. Gunn*, 117 Ga. App. 325, 160 S.E.2d 427 (1968) (misrepresentation of seller's minimum price); *Gilbey v. Cooper*, 37 Ohio Misc. 119, 310 N.E.2d 268 (1973) (willful misrepresentation by failure to disclose easements). *See Note, supra* note 18, at 780-84.

39. The listing agreement does not come under the statute of frauds because it provides for the broker's services in connection with the sale of land, not for the actual transfer of any interest in property. *E.g.*, *Jefcoat v. Singer Hous. Co.*, 619 F.2d 539, 543 (5th Cir. 1980). Some states nonetheless insist that brokerage contracts be in writing. *E.g.*, IDAHO CODE §9-508 (1979).

40. *Anderson v. Thacher*, 76 Cal. App. 2d 50, 65, 172 P.2d 533, 541 (1946) (no recovery for secret profits unless facts show broker represented seller as agent); *Swift v. White*, 256 Iowa 1013, 1020, 129 N.W.2d 748, 752 (1964) (sufficient evidence to give jury the question regarding broker acting as buyer's agent for limited purposes); *PMH Properties v. Nichols*, 263 N.W.2d 799, 802-03 (Minn. 1978) (question for jury whether broker was acting for buyer as well as seller).

41. RESTATEMENT (SECOND) OF AGENCY §378 (1957).

42. *See note 19 supra*. Land sale contracts may recognize the broker's entitlement to a commission, but do not contain a promise by the buyer to pay it. *See paragraph 19 of contract, reprinted in, C. HAAR & L. LIEBMAN, supra* note 16, at 501.

home buyer may be paying all or part of the commission indirectly. Sellers often increase the price if they employ a broker so that the sale's net proceeds equal what might have been obtained by selling privately.⁴³ The buyer thus effectively pays the commission, despite the fact that liability for the commission rests on the seller. In practice, the broker collects his commission at closing from money provided by the buyer.⁴⁴ If a transaction does not close, the buyer may pay some compensation to the broker as an element of the seller's damages in an action on the purchase and sale agreement.⁴⁵ If the superiority of the broker-seller relationship is based on the broker's compensation flowing from the seller, it is therefore undermined to the extent that the commission is buried in the sales price.

Although custom dictates that the seller pays the commission, the mere fact that the seller agrees to make this payment is not sufficient to create an agency relationship between seller and broker. Sometimes facts and circumstances demonstrate the broker was really acting for the buyer in the transaction.⁴⁶ When such a case arises, the seller's agreement does nothing more than determine how the broker is to be compensated for his efforts.⁴⁷

Nothing theoretically prohibits a buyer from hiring a broker, agreeing to pay a fee for services, and thus creating a principal-agent relationship. In practice, however, this seldom occurs. The organization and operation of the residential brokerage business discourages such arrangements. Home buyers understand that brokers will receive compensation from sellers, and they know that brokers will work with them without additional charge. Formal contracts are not solicited by buyers and brokers do not insist on them. The broker ends up a seller's agent in law, and an extension of the seller in the transaction. Despite the hours spent together and closeness of their relationship, buyer and broker become, at least in theory, adversaries in the negotiation process.

One argument remains for a buyer who feels mistreated by a broker who is the seller's agent and whose conduct does not amount to fraud. A buyer can assert the breach of certain duties brokers owe even to non-principal parties in a real estate transaction. The foundation of these duties is somewhat obscure. One source is the National Association of Realtors' Code of Ethics.⁴⁸ Under it

43. See note 106 and accompanying text *infra*.

44. See Gresham, *supra* note 8, at 437 & n.55.

45. Seller can recover incidental damages flowing from the buyer's breach of the land sale contract, including any commissions for which the seller becomes liable. See UNIFORM LAND TRANSACTION ACT 2-507(a). Land sale contracts typically let the seller keep as liquidated damages any deposit the buyer has made in lieu of, or as part of, an action for damages against a breaching buyer. A Maryland court recently held that the seller must elect between forfeiture of the deposit or an action for damages. *Blood v. Gibbons*, 288 Md. 268, 418 A.2d 213 (Md. 1980). If the seller keeps the deposit and does not seek damages, the broker usually accepts one-half the deposit (up to the amount of the commission) as compensation for services. See, e.g., paragraphs 19 and 22 of contract, *reprinted in*, C. HAAR & L. LIEBMAN, *supra* note 16, at 501-02.

46. See, e.g., *Banner v. Elm*, 251 Md. 694, 248 A.2d 452 (1968).

47. See, e.g., *Wright v. Dutch*, 140 Cal. App. 2d 891, 897-98, 296 P.2d 34, 37-38 (1956); *Sands v. Eagle Oil & Ref. Co.*, 83 Cal. App. 2d 312, 318, 188 P.2d 782, 785 (1948); *Duffy v. Setchell*, 38 Ill. App. 3d 146, 149, 347 N.E.2d 218, 221 (1976).

48. See generally CODE OF ETHICS, *supra* note 23.

member brokers must deal honestly and in good faith with all non-principals, including buyers.⁴⁹ Another source is the notion that the broker's license is a privilege conferred by the state in exchange for which the broker must act in the public interest. Dealing honestly and fairly with all members of the public is part of the broker's duty of furthering the public interest.⁵⁰

The idea that the broker must deal straightforwardly with the public adds dimension to the simple picture that emerges from strict application of agency law to the relationships among the parties in residential real estate transactions. That the brokers' professional organization has a code of conduct recognizing the needs of buyers implies that brokers believe they serve both parties to a real estate transaction and that agency law inaccurately reflects their dual role in the market place.

While the broker will thus usually be regarded as the seller's agent, the buyer's claim on the broker's loyalty cannot be discounted entirely. Considerable uncertainty is created for the broker in the typical residential real estate transaction. The problem is exacerbated by buyers who believe, for legitimate reasons, that they receive meaningful assistance from the broker. The following hypotheticals illustrate the tensions that arise because the broker-seller relationship is ill-defined.

Hypothetical #1: Seller's house has been on the market for a month at \$80,000. The buyer's budget and income indicate that the most that he can offer is \$78,000. Buyer would like to get it for less and wants guidance about an appropriately low opening bid. Seller is willing to take as little as \$76,000 for the house and is anxious to sell because the equity is needed to make the down payment on a new home.

The buyer and seller can reach an agreement in this situation because the seller's low price and the buyer's high price overlap by \$2,000; but within that range where will the price be fixed? The broker has a fiduciary responsibility as the seller's agent to push the contract price as close to \$78,000 as possible. The obligation to obtain the highest price for the seller-principal has been described as an overriding one.⁵¹ To hint that the seller might accept less or that the seller is anxious to sell probably breaches the duty of good faith and loyalty the broker owes the seller.⁵² A strict legal perspective would indicate that the broker should refuse to assist a buyer in determining a reasonable opening bid.⁵³

49. Under article 7 a realtor must treat fairly all parties to a transaction even though the primary responsibility is to the principal. *Id.* at 41.

50. *Amato v. Latter & Blum, Inc.*, 227 La. 537, 79 So. 2d 873 (1955); *Zilchin v. Dill*, 157 Fla. 96, 25 So. 2d 4 (1946). See Comment, *supra* note 30, at 1346-48.

51. *Marmis v. Solot Co.*, 117 Ariz. 499, 503, 573 P.2d 899, 903 (1977).

52. The classic case is *Haymes v. Rogers*, 70 Ariz. 257, 219 P.2d 339, *rev'd on rehearing*, 70 Ariz. 408, 222 P.2d 789 (1950) (broker hinted that property listed at \$9,500 might be acquired for \$8,500).

53. Another view holds that because property frequently sells for less than the list price, if a broker's assistance to a buyer in formulating a first bid is for the purpose of maintaining that person's interest in the property, the broker does not breach any duty toward his seller-

If the buyer makes an initial offer of \$75,000, the broker must then determine what advice, if any, to give the seller. Should broker advise the seller to reject the \$75,000 contract or reveal that the buyer will pay \$78,000? Disclosure of facts that may be material to the principal's decision on a matter within the scope of the agency is one of the agent's fiduciary responsibilities.⁵⁴ How much a buyer will pay clearly is a material fact. One case held that a broker violated his duty to the seller by agreeing to take two offers from a buyer, submit the lower one and make the higher offer only if the lower one was rejected.⁵⁵ The decision recognized that withholding knowledge of the buyer's willingness to increase his contract price was a breach of the broker's fiduciary duty.

Further evidence of problems arising from the proposition that the broker should advise the seller to hold out for the buyer's maximum bid can be found in "secret profit" cases. Courts have awarded damages to a seller when a broker secretly purchased at a price within a seller's previously expressed range and conveyed at a higher price, generating a secret profit for the broker.⁵⁶ Similarly, although the broker does not profit if he does nothing more than keep silent about a buyer's maximum bid, a business opportunity for the seller is squandered. The seller suffers the same harm as if the broker had engaged in self-dealing and secretly profited.

Despite the broker's clear duty to the seller, the buyer has credible arguments that the broker should refrain from reporting his maximum price to the seller. Depending on what questions the buyer asks, the broker must also consider whether to tell the buyer about seller's willingness to accept less than the asking price. Revealing the seller's lowest price to the buyer directly conflicts with the duty to obtain the highest possible price for the seller-principal. There is no support for the notion that the broker's duty to deal fairly and honestly with the public or a specific non-principal party includes the obligation to disclose such data.

Brokers have, however, been found in breach of the duty to deal fairly where their own interests, rather than a seller's, are at stake. For instance, in *Zilchin v. Dill*,⁵⁷ an often cited Florida case, a non-principal buyer was permitted to recover against a broker who had represented that property could not be acquired for less than \$5,500 when in fact the broker bought it for \$4,500 and resold it to buyer for a quick \$1,000 profit. Rather than finding the broker behaved improperly by self-dealing in the transaction, the court emphasized the broker's public responsibility. According to the court, in ex-

principal. *Haymes v. Rogers*, 70 Ariz. 257, 262-64, 219 P.2d 339, 342-44 (1950) (Udall, J., dissenting).

54. RESTATEMENT (SECOND) OF AGENCY §381 (1957). *E.g.*, *MacGregor v. Florida Real Estate Comm'n*, 99 So. 2d 709 (Fla. 1958) (broker should disclose identity of buyer); *Reese v. Harper*, 8 Utah 2d 119, 329 P.2d 410 (1958) (broker should fully explain terms of offer); *Monty v. Peterson*, 85 Wash. 2d 956, 540 P.2d 1377 (1975) (broker should disclose significance of covenants).

55. *Mason v. Bulleri*, 25 Ariz. App. 357, 543 P.2d 478 (1976).

56. *E.g.*, *Jay v. General Realities Co.*, 49 A.2d 752 (D.C. 1946); *Iriart v. Johnson*, 75 N.M. 745, 749-50, 411 P.2d 226, 228-29 (1966). *Cf.* *St. James Armenian Church of Los Angeles v. Kurkjian*, 47 Cal. App. 3d 547, 121 Cal. Rptr. 214 (1975).

57. 157 Fla. 96, 25 So. 2d 4 (1946).

change for "a monopoly to engage in a lucrative business,"⁵⁸ the broker must conduct himself honestly and ethically in all business activities. The court, moreover, said persons dealing with a broker may rely on the broker's adherence to this standard of conduct.⁵⁹ Despite the old rule of caveat emptor and the lack of a formal relationship between the parties, a buyer could prevail because the broker breached the duty to deal honestly and ethically with all customers.

In theory, *Zilchin* imposes a general requirement on brokers to answer truthfully specific questions about the acceptability of a certain offer. *Zilchin* should, however, be taken as an instance of self-dealing and its application should be confined to similar cases. The case ought not be read to compel a broker to volunteer information about the seller's best price. To suggest that a broker behaves unethically if he does not advise a buyer that his proposed offer is significantly more than necessary considerably undercuts the fiduciary duty of the broker to the seller. Courts are unlikely to find that *Zilchin* imposes a duty on the broker to reveal information about a seller's willingness to accept a lower selling price to an unquestioneing buyer.

Buyers might not expect the broker to reveal the seller's lowest price, but most buyers want the house at the lowest possible price and will solicit the broker's help in achieving this goal by asking general questions. The broker's conflict is obvious. Public responsibilities call on him to aid the buyer and the buyer expects his help. On the other hand, the broker's fiduciary duties to the seller as principal clearly demand that the broker work to obtain the highest possible price from the buyer. The pull from the seller's side is probably stronger and is certainly more firmly grounded in the law of agency.⁶⁰ The broker is consequently not likely to reveal the seller's lowest acceptable price.

Although the broker may not reveal anything to the buyer regarding the seller's attitude about price, the honest and ethical broker may conclude that disclosing the buyer's highest price would not be appropriate either. This decision should not be based on a belief that the broker's duties to the seller do not require such a disclosure.⁶¹ Fulfilling the agent's duty to obtain the highest price requires the broker to release to the seller all helpful information relevant to the negotiations between seller and buyer. The buyer has only revealed his highest offer to the broker because of the intimacy which developed during the time spent looking at various houses, and the buyer's perception that the broker is working for him. Given the context in which the broker obtained the information, it seems unethical and unfair for the broker to use this information against the buyer's interests by disclosing it to the seller.

The proposition that the broker can refrain from revealing the buyer's highest price to the seller is also supported by case law. From the facts of many cases it can be reasonably inferred that the broker knew much more about the buyer's top price than he revealed to the seller. For instance, in the classic case

58. *Id.* at 98, 25 So. 2d at 4.

59. *Id.* at 98, 25 So. 2d at 5.

60. See notes 51 & 52 and accompanying text *supra*.

61. See notes 53 & 54 and accompanying text *supra*.

of *Haymes v. Rogers*⁶² the dissenting judge concluded from testimony the broker's statements about the seller's willingness to accept less than the list price were made in order to keep the buyer interested in the property.⁶³ Little good could come from maintaining the buyer's interest unless the broker knew or at least firmly believed, the buyer might later be convinced to increase his bid for the house. Yet the courts do not discuss the broker's failure to disclose his knowledge or belief about the buyer's best price.

Brokers who think carefully about such situations undoubtedly feel the proper course of action is not clearly charted for them. The safest course of conduct would be to reveal nothing specific to either party about the other party's price guidelines. This solution, however, denies both parties the advice each expects from the broker.

Hypothetical #2: Buyer plans to make an offer on a house in a neighborhood where most of the houses are twelve to fifteen years old. Broker knows of several houses in the area that have had structural problems due to either faulty construction or improper compaction of the soil prior to the laying of the foundation. A visual inspection of the particular house involved discloses no cracks, separations or other indications that buyer may have a problem in the future. The house is only four years old, however, much newer than the other houses in the area.

This hypothetical concerns whether the broker has an obligation to refrain from disclosing a potential defect in the house. A seller is liable for concealment, misstatements, or failure to disclose material facts regarding property to be purchased.⁶⁴ Courts, however, have been reluctant to hold sellers liable on implied warranty or strict liability theories for defects in the fitness or quality of used homes.⁶⁵ As a result, buyers must satisfy themselves that the house is sound prior to accepting a deed.⁶⁶ The buyer may ask the seller questions to

62. 70 Ariz. 257, 219 P.2d 339 (1950).

63. *Id.* at 263-64, 219 P.2d at 343 (Udall, J., dissenting).

64. *E.g.*, *Wilhite v. Mays*, 140 Ga. App. 816, 232 S.E.2d 141 (1976), *aff'd*, 239 Ga. 31, 235 S.E.2d 532 (1977) (nondisclosure by seller of sewage disposal problem held fraudulent); *Hunter v. Wilson*, 355 So. 2d 39 (La. App. 1978) (nondisclosure of leaking roof justifies claim for reduction in purchase price). *See generally*, A AXELROD, C. BERGER & Q. JOHNSTONE, *supra* note 19, at 477-85.

65. *E.g.*, *Graham v. United States*, 441 F. Supp. 741 (N.D. Tex. 1977); *Coburn v. Lenox Homes, Inc.*, 173 Conn. 567, 378 A.2d 599 (1977).

66. A buyer can provide for inspection and condition the obligation to purchase on the house being in good condition in the land sale contract. Standard form contracts, however, do not often contain inspection clauses. *Gresham, supra* note 8, at 431-32. One recent study found that fewer than five percent of all used houses sold in 1977 were professionally inspected at the time of sale. U.S. DEPT. OF HOUSING AND URBAN DEV., I A STUDY OF HOME INSPECTION AND WARRANTY PROGRAMS 14 (1977). Reliance on a contractual provision regarding a house's condition after a deed has been given is risky because of the merger doctrine which holds that promises in the contract not contained in the deed do not survive the closing. The merger doctrine is replete with exceptions, however, and a homeseeker may be able to obtain relief for some defects after acceptance of a deed. *See Dunham, Merger by Deed - Was It Ever Automatic*, 10 GA. L. REV. 419 (1976).

discover known problems, or inspect the house between the signing of the contract for sale and the closing. Alternatively, the buyer may rely on the broker to point out any potential problems with the house.

As seller's agent, the broker is subject to the same standard of conduct and rules regarding disclosure of information that govern the seller.⁶⁷ If the seller must answer questions truthfully, so must the broker. If the seller must come forward with information unlikely to be discovered by the buyer, so must the broker. Similarly, if the situation allows the seller's silence, the broker may also remain silent. Indeed, as seller's agent, a broker should be quiet unless otherwise instructed by his principal, the seller.

In the second hypothetical, there are no apparent problems with the house, and, let us assume, the seller has told the broker that no defects have manifested themselves. Raising doubts about the house's quality may deter the buyer from offering to buy the house or cause him to discount the price because of the possible problems. Advising the buyer to proceed with caution based on suspicion alone and without a duty to disclose seems inconsistent with the proposition that the broker should secure the most favorable contract for his principal.

The broker may be under some obligation to the buyer, however, to investigate the structural condition of the house or disclose the other problems in the neighborhood under article 9 of the Code of Ethics adopted by the National Association of Realtors. This provision states: "The Realtor shall avoid exaggeration, misrepresentation, or concealment of pertinent facts. He has an affirmative obligation to discover adverse factors that a reasonably competent and diligent investigation would disclose."⁶⁸ Several of the interpretive memoranda under this article are relevant in analyzing the hypothetical. For instance, a broker was found to be in violation of article 9 for taking a seller's word and failing to independently ascertain whether the floors in a house were hardwood.⁶⁹ The buyer viewed the home, advertised as having hardwood floors, while the floors were partially covered by rugs on which the seller's furniture still sat. On taking possession, the buyer discovered that the floors were hardwood only around the edges. The seller claimed that the rugs had been down for so long that he had forgotten the hardwood floors had been eliminated during construction. The seller also attempted to minimize the defect by suggesting that the buyer would probably also use carpets. The broker was found to be liable to the buyer for accepting the seller's word without verifying the information, especially since the hardwood floors had been a feature important enough to include in advertising. The existence of hardwood floors were termed a "pertinent fact" that the broker should have verified.

Although the example differs from the hypothetical in that the broker made

67. *Snelson v. Ondulando Highlands Corp.*, 5 Cal. App. 3d 243, 251-52, 84 Cal. Rptr. 800, 803-05 (1970) (misrepresentation that land was not filled); *McGerr v. Beals*, 180 Neb. 767, 145 N.W.2d 579 (1966) (misrepresentation that basement would remain dry). Cf. *Payne, Broker's Liability for Nondisclosure of Known Defects in Sale Property — Caveat Emptor Still Applies*, 6 REAL EST. L. J. 341 (1978).

68. CODE OF ETHICS, *supra* note 23, at 65.

69. *Id.* at 72-73.

a representation rather than merely remaining silent, it illustrates the broker's duty to verify statements made by the sellers and not take them at face value. In our situation, since the broker is aware of a potential problem, professional standards may require him to do more than examine the house in a cursory manner for obvious cracks.

Another illustration under article 9 is even more to the point.⁷⁰ In it, the buyer purchased a home served by septic tank rather than sewer. Prior to purchase, the buyer had independently determined that the street on which the house was located was served by a sewer. The broker was unaware the house was not connected to the sewer, but had never represented the house as being connected. In fact, every other house for several blocks in either direction was connected to a sewer. The broker was found to have violated article 9 by failing to ascertain and reveal that the house was served by a septic tank. The absence of a sewer connection in an area where most homes are connected to a sewer is a pertinent fact which the broker should have discovered. The fact that no representations were made about the matter was not material. The structural condition of the house in our hypothetical is as significant as the absence of a sewer in this article 9 illustration. In both cases the broker was silent on the particular topic and without knowledge of the problem.

The hypothetical and these illustrations under article 9 differ because in both illustrations there was *in fact* a defect that the buyer needed to know about, while in our hypothetical there may be nothing wrong with the structural condition of the house. This distinction, however, is immaterial. Consistent with the view suggested here about the broker-buyer relationship, article 9 suggests that the broker ought to find out whether an accurate picture of the house is being conveyed. When the broker pulls up the rug to check whether the floors are hardwood as the seller has said, the floors may indeed be hardwood. If the broker similarly checks the house for structural problems and there are none, no problem exists and nothing needs to be said. The Code of Ethics intends to force brokers to satisfy themselves that information of importance to the ordinary home buyer is not concealed. This approach compels the broker to scrutinize the house or advise the buyer of the potential repair problem based on the condition of other homes in the area.

Courts, however, have seldom held a broker responsible to a buyer for not discovering and disclosing pertinent information about a house.⁷¹ Their reluctance to find liability in such situations is a reflection of basic agency law principles that require the agent to reveal only the information the principal would have to disclose. The broker's public responsibilities⁷² as well as the buyers' expectations that brokers are looking out for their interests⁷³ should nevertheless lead to decisions such as those suggested by the NAR's Code of Ethics.

There is, however, an occasional departure from the standard path. In

70. *Id.* at 74.

71. *See, e.g.,* *Cashion v. Ahmadi*, 345 So. 2d 268, 270-71 (1977) (broker representing seller need not tell buyers about water problem in basement).

72. *See* note 50 and accompanying text *supra*.

73. *See* notes 3-17 and accompanying text *supra*.

Spargnapani v. Wright,⁷⁴ a District of Columbia trial court found a broker liable to a purchaser who had bought a house with a totally useless heating system. Based on the seller's statements, the broker told the buyers that the house could be heated for "a little more than \$100 a year."⁷⁵ In fact, the heater was broken and had been patched and painted over by the seller to look new. The court held that even if the broker did not know the heater was defective he could still be liable for fraud. The court attempted to base its holding on the broker's statement that the house could be heated for less than \$100 a year when, in fact, it could not be heated at all. The court had to strain, however, to characterize the broker's statement as a representation that could support a fraud claim. The court seemed to be moving toward the concept embodied in article 9 of the Code of Ethics⁷⁶ requiring the broker to verify material facts about the house independently and advise the buyer of any discovered defects.

Establishing that the broker violated his professional responsibilities by failing to investigate the structural condition of the house and to report potential problems may be little comfort to the buyer saddled with a defective house. The buyer faces an arduous task in attempting to recover damages from the broker who fails to inspect vigorously. The broker's legal exposure to liability from any source is minimal if he remains passive and silent.⁷⁷ Just as in the first hypothetical, the buyer is not getting the service he may reasonably believe the broker is providing.

Hypothetical #3: Buyer has two school-aged children. The house that interests buyer is located in an area which has repeatedly been shifted from one school district to another in recent years. Buyer has expressed a desire to live in a quiet, family-oriented neighborhood. This house is in such an area; however, there are long-range plans to widen a nearby road from two to six lanes. Also, a number of smaller homes within a few blocks of the house have been purchased recently by investors and are occupied by renters, including groups of students attending a local college.

This final problem calls on the broker to judge whether or not his agency responsibilities to the seller demand silence about the frequent change in school districts, planned road widening and nearby rental home encroachment. This hypothetical, in contrast to the second one, focuses on aspects of housing not easily dealt with by testing, inspection and the like. The broker's proper response depends on how specifically the buyer probes for information. Buyers use brokers' services to facilitate gathering data they need in making purchase decisions. Buyers unfamiliar with a community may express hopes about a living environment but lack enough information to ask specific questions. In such a situation the broker's position is a difficult one. In deciding whether to leave the buyer on his own to gather the necessary information, the broker must

74. 110 A.2d 82 (Mun. Ct. App. C.D. 1954).

75. *Id.* at 83.

76. See text accompanying note 68 *supra*.

77. The broker must answer a question honestly and fully if his seller-principal would be obligated to so answer. See note 67 and accompanying text *supra*.

consider the possibility that the school situation has stabilized, the road will never be widened because of neighborhood opposition, and the transition of the neighborhood into rental property will cease. In the face of the strong fiduciary duty the broker owes the seller, the uncertainty of the situation would likely lead the broker to conclude that silence is the proper course of action unless a specific question is asked.

This hypothetical focuses attention on how brokers handle buyers' questions about the quality of life a house offers. The broker's silence in this context would be disappointing to many buyers. While admittedly amorphous, the environment of a neighborhood is very important to most buyers. The broker's familiarity with the community makes him the natural source of information and advice. An informed buyer may willingly assume the risk of widening, the encroachment of rental housing and instability in school districting. These would be only a few of the many factors to be weighed and sifted in making a purchase decision. The critical question is whether the broker should aid the buyer in compiling all the relevant facts rather than leaving him to guess whether all the necessary questions have been asked and all the risks identified.

Neither the legal system nor the Code of Ethics offers much support to a buyer who relies on a real estate broker for guidance with respect to the present character of a neighborhood or its likely future. In one disciplinary proceeding under article 7 of the Code of Ethics,⁷⁸ a broker who disclosed to a buyer, under contract to purchase a house, that a nearby bus stop was being moved to a location some six blocks from the house was exonerated.⁷⁹ The home's proximity to public transportation had been featured in advertisements, and the buyer, because of a physical disability, found the house desirable because of the bus stop in the front yard. The seller contended that because the new stop was only six blocks away the substance of the advertisement could still be supported. The seller argued the broker breached his fiduciary duty by revealing the change to the buyer who thereafter refused to complete the purchase. Under the circumstances, however, the broker was found to have acted ethically. The broker's duty to deal fairly required disclosure of this material fact to this buyer and overrode the duty of loyalty to his principal's interests.

This Code of Ethics illustration only marginally supports the hypothetical buyer's assertion that the broker must inform him of prospects for change in the neighborhood. The Code's example involves an actual change rather than the mere prospect of change. The difference between reporting an actual change and offering an opinion about the prospects for change may distinguish the cases, even though the hypothetical broker's opinion would have some basis in fact. The broker may also have a greater obligation to disclose to someone who entered a contract in reasonable reliance on the broker's representation than he does to someone still able to conduct an independent investigation and protect himself against uncertainties in the land sale contract. In the illustration,

78. Article 7 states: "In accepting employment as an agent, the Realtor pledges himself to protect and promote the interest of the client. This obligation of absolute fidelity to the client's interest is primary, but it does not relieve the Realtor of his obligation to treat fairly all parties to the transaction." CODE OF ETHICS, *supra* note 23, at 41.

79. *Id.* at 42-43.

the buyer had ascertained that a bus stop was located quite near the house as the advertisement had stated. Although the buyer might have checked with the transit company to see if it planned to move the route or required the protection of a condition in the contract, the buyer's assumption that the bus stop would not be moved was not unreasonable. The seller might reject an offer conditioned on the presence of a bus stop within a certain distance from the house because the location of bus stops is not within the seller's control. In light of all the circumstances, fair treatment of the buyer allowed the broker to tell the buyer of the change. Of course, the broker's exoneration does not affect the buyer's liability for breach of the land sale contract.⁸⁰ The illustration mentions that the broker "insisted" the seller refund the buyer's deposit.⁸¹ This may not be required, however, if the contract was not conditioned on the bus stop's existence and contains an integration clause.

The buyer in this hypothetical need not make an offer on the house until satisfied that it meets his need for a quiet, family-oriented neighborhood. The road widening is contained in plans available to the buyer at some local government office. The instability of school districting could be discovered through conversation with school officials. The influx of renters may be harder to uncover, but modest effort should bring it to the buyer's attention. The reliance on facts supplied by the broker distinguishes the bus stop illustration from the third hypothetical. A broker would probably not be exonerated for advising buyers about neighborhood conditions like those in the hypothetical, even though the Code of Ethics directs brokers to deal fairly with all parties to a real estate transaction.

Case law helps our third buyer even less than the Code of Ethics does. The agent's duties of loyalty and good faith⁸² restrain the broker from delivering the advice and counsel the buyer wants. The seller need not volunteer this type of information to a prospective purchaser. The seller, of course, could do so and could direct the broker to do so. Absent such authorization, however, the broker's duty to obtain the highest possible price for the seller deters him from offering general advice because the prospective buyer might lose interest in the house or reduce the offering price. The broker's safest course of action again is silence, and once more the buyer's expectation of guidance is frustrated.

RESOLVING THE DISPARITY BETWEEN THEORY AND PRACTICE

The hypothetical cases in the preceding section support the assumption that the parties to a residential real estate transaction are not likely to get the aid they want and, in fact, believe they are receiving from the real estate broker. A buyer might suffer by relying on a broker who remains silent in an effort to

80. There is probably nothing in the contract that would permit the buyer to cancel due to the change in location of the bus stop. The seller would probably not have expressly warranted such a fact. Although material to the buyer, the shifting of the bus stop was not so material that the contract could be rescinded on the basis of mistake or breach of implied warranty.

81. CODE OF ETHICS, *supra* note 23, at 43.

82. See Note, *supra* note 18, at 776-77.

comply strictly with the principles of agency law. A seller who expects passivity may be hurt by a broker who frankly discusses options with a homeseeker, pursuant to the call by the Code of Ethics to deal honestly and fairly with all persons. The broker attempting to fulfill his duties to both buyers and sellers confronts a seemingly unresolvable dilemma. The obligation to hold the interest of his principal above all others conflicts with his public responsibility to deal fairly with nonprincipals in real estate transactions. Although most transactions are concluded without complaint from either party, the thoughtful broker should realize that only the rare conveyance does not involve at least a technical violation of law or regulation.

Given the reasonable expectations both sellers and buyers harbor concerning the broker's loyalty, alternative ways of handling the legal relationships among the parties must be evaluated. Legal theory must be brought closer to the operation of the residential real estate market. Perhaps the tangled web of conflicting rights and duties could be clarified by only slight changes in the law. The viability of any alteration must be assessed in the context of the present structure of the real estate market. An examination of the advantages and problems with a number of possible reforms is necessary.

Dual Agency

Recognizing a principal-agent relationship between broker and buyer along with the broker's traditional duties to the seller would provide legal support for the buyer's expectations regarding the broker's role as an advisor and give the broker a solid foundation upon which to engage in counseling activity. The duality of fiduciary responsibilities to parties who are often adversaries, however, conflicts with the agent's duty to serve the principal's interests above all others. The inherent shortcomings of dual agency considerably undercut its usefulness in coping with the problems considered here.

For dual agency to be helpful to home buyers, the broker-buyer agency relationship should come into existence early in the home selection process. Buyers who want guidance about neighborhoods, prices and the quality of homes could logically receive it from brokers during the search process. If the broker withholds counsel and advice throughout the search period because of his uncertainty concerning the agency relationship between himself and the buyer, little purpose is served by the concept of dual agency. Dual agency will become an issue only in after-the-fact disputes where harm has already been suffered by the buyer. The objective is to find a legal construct for the broker's role that reflects the legitimate expectations of the parties involved. Dual agency is thus a helpful solution only if the broker becomes a dual agent at the outset of the broker-homeseeker relationship.

Before the broker can act as a dual agent, the knowledge and consent of both principals must be obtained.⁸³ Achieving such consent in the current market structure might be difficult. No agreement is executed in the typical

83. See, e.g., *Warren v. Magels Realty*, 23 Ariz. App. 318, 321, 533 P.2d 78, 81 (1975); *Duffy v. Setchell*, 38 Ill. App. 3d 146, 149-50, 347 N.E.2d 218, 221 (1976); *Brandt v. Koepnick*, 2 Wash. App. 671, 674, 469 P.2d 189, 190-91 (1970).

residential transaction whereby the broker undertakes to locate the buyer a suitable house.⁸⁴ The broker-buyer agency relationship may not require a written document, especially since compensation will be arranged between seller and broker.

There appears no obvious point at which to establish the agency relationship between buyer and broker. Perhaps the sharing of a certain quantity or quality of information could be the test. The buyer would have to show some event or reason for believing the broker acted on his behalf and that the broker undertook to do so.⁸⁵ The buyer must, however, have the broker's loyalty from the beginning, in order to openly discuss the characteristics of the house he wants in order to make the search process efficient.

The broker also needs a clear demarcation of the agency relationship's commencement to permit him to decide what duties are owed to the buyer. Consider, for instance, under what circumstances the broker should express his concern about the structural condition of the house in our second hypothetical. The buyer's need to know is not determined by whether it is the first or twenty-first house shown him by the broker. The broker, on the other hand, has a duty to state his concern to a buyer who is his principal, but arguably should remain silent if the relationship has not evolved to the point of agency. If the buyer shows continuing interest in the house and broker subsequently reveals his concern after enough has happened to create the agency, the buyer may wonder why the broker failed to communicate his concern earlier. The buyer may also become suspicious that the broker has withheld other information. This lack of trust and confidence destroys the very quality the agency concept should bring to the broker-buyer relationship.

Obtaining the seller's consent to a dual agency arrangement is another problem.⁸⁶ Optimally, a seller would consent to his broker acting as dual agent with respect to all buyers working with the broker so that separate consent would not need to be obtained for each client. If the agency relationship with the buyer commences at or near the outset of the broker's contact with each prospect, the seller's consent to the dual agency should be contained in the listing agreement.⁸⁷ A seller who understands the implications of buyer-broker agency might be deterred from fully explaining his hopes and expectations about the sale to the broker. This would interfere with the broker's satisfactory servicing of seller's needs. Sellers might, therefore, resist dual agency.

Absent these procedural problems, the dual agency model seems attractive. Once the broker becomes a dual agent he would owe the full range of fiduciary

84. See text accompanying note 14 *supra*.

85. The finding of an agency relationship between the buyer and broker is a question of fact. For a discussion of facts of significance see *Cashion v. Ahmadi*, 345 So. 2d 268 (Ala. 1977). This case is discussed in Payne, *supra* note 67.

86. The dual agency does not become effective, thereby affording protection to the broker and benefit to the buyer, until the consent of both parties is given. *Mallory v. Watt*, 100 Idaho 119, 122, 594 P.2d 629, 632 (1979); *Shepley v. Green*, 243 S.W.2d 772, 777 (Mo. App. 1951).

87. A simple clause acknowledging and accepting the broker's undertaking to act for potential buyers could easily be inserted in the listing agreement and should be sufficient consent to the broker acting as a dual agent.

duties to both parties.⁸⁸ This concept may be only superficially appealing, however. The shortcomings of dual agency are illustrated by returning to the first hypothetical. The agent has the duty to disclose all known facts that would be material to the principal's decision. As a dual agent, the broker must consider whether he must reveal the buyer's highest price to the seller and the seller's lowest price to the buyer. Comments to the RESTATEMENT OF AGENCY state that the dual agent does not violate a duty to one principal by fully disclosing all relevant facts to the other; however, when confidential information, such as statement about price, is given to the agent by the principal, the agent's duty compels his silence.⁸⁹

Dual agency may help the buyer in hypotheticals two and three because the broker's advice does not derive from conversations with the seller. On the important matter of price, however, the agent cannot assist the buyer. The seller also loses the benefit of the broker's counsel on price. Quite clearly the broker should not reveal buyer's high price, or recommend the buyer's offer be rejected after entering into a principal-agent relationship with the buyer and receiving information concerning his maximum offering price. Limiting the duality of the agency to non-confidential matters makes both agencies incomplete. This may improve the buyer's situation, because he would not otherwise be entitled to the broker's advice; but, approaches should be explored that give the buyer all the services he expects and needs from the broker.

Another approach, related to dual agency, would permit a broker to represent the buyer's interests if another broker listed the house.⁹⁰ Throughout this article the assumption has been that only one broker works on a sale, dealing with both buyer and seller. In the context of multiple listing services, however, the most suitable homes are likely to have been listed by someone other than the broker working with the buyer. In such a situation, a natural division of labor may result, serving the legitimate needs of each party — the listing broker can act as seller's agent, and the broker, who has established a relationship with the buyer and who shows him the house (the selling broker) can act as the buyer's agent. The parties may be comfortable with this arrangement, but it does not square with the legal framework which applies to the typical transaction. Legally the selling broker is the seller's agent because of the multiple listing agreement signed by member brokers which provides for splitting the commission between the brokers who participate in a conveyance.⁹¹ Courts have not been reluctant to hold the selling broker responsible to the

88. RESTATEMENT (SECOND) OF AGENCY §392 (1957); *Galyen v. Voyager Inn, Inc.*, 328 F. Supp. 1299, 1302-03 (W.D. Okla. 1971); *Martin v. Hiekin*, 340 S.W.2d 161, 165 (Mo. App. 1960).

89. Comment (b) to RESTATEMENT (SECOND) OF AGENCY §392 (1957) states: "The agent . . . is under no duty to disclose, and has a duty not to disclose to one principal, confidential information given to him by the other, *such as the price he is willing to pay*. If the information is of such a nature that he cannot fairly give advice to one without disclosing it, he cannot properly continue to act as adviser." (emphasis added).

90. See Comment, *supra* note 80, at 1353.

91. *Frisell v. Newman*, 71 Wash. 2d 520, 527-29, 429 P.2d 864, 868-69 (1967). See notes 25-26 and accompanying text *supra*.

seller, even though the two have no express agreement.⁹² To work for the buyer under the current legal framework, therefore the selling broker would have to become a dual agent. In such a role, the selling broker confronts the same problems that exist in a one-broker dual agency situation.

Perhaps the rule that makes the selling broker the agent of the seller through the multiple listing agreement bears reconsideration. Sellers may desire the added exposure their house receives through multiple listing, but they may not expect any broker other than their own to work vigorously to obtain the most favorable deal for them. If so, they suffer no harm if the sub-agency of the selling broker is eliminated. The selling broker-buyer relationship would have to be established by facts other than a written agreement in most cases, but this is not an insurmountable hurdle.

Like the one-broker dual agency situation, however, this approach falls short. It fails to protect those buyers interested in houses listed by their own brokers. It creates, moreover, new gray areas that place the broker in conflict of interest situations where he will almost unavoidably breach a duty owed to someone. For example, in our third hypothetical, the buyer may have narrowed his choice to two houses — the one described in the example and another, more expensive home in a more suburban area. The latter home is free from the concerns the buyer might have about the neighborhood's quietness and stability. If the broker listed the first house but not the second one, helping the buyer compare the two becomes a problem. If, as the buyer's agent, the broker points out the risks of the first house and favors the suburban one, he has violated the duty of loyalty owed to the owner of the first house. If as the seller's broker he remains silent about these risks, the buyer, unaware of the potential problems, may choose the first home because it is equivalent in his mind to the suburban one, but cheaper. If the road is later widened or the school districts changed, the buyer will be greatly distressed and may argue that the broker improperly advised him during the home selection process. Either course of action could leave the broker liable for a claim of unprofessional conduct.

Dual agency may shelter brokers from actions by sellers who allege too much assistance was given to buyers resulting in lower prices for sellers' homes. The concept gives some legal recognition to the directive of the Code of Ethics requiring brokers to deal honestly and fairly with all persons; however, dual agency, in any of the forms considered here, is not a panacea.

Disclosure

The confusion about the broker's role in the conveyancing process can be viewed as a consumer protection problem. Attention has been focused recently on the frequent abuses consumers suffer in the property conveyancing process. These abuses relate primarily to expenses for obtaining financing and transferring title.⁹³ Mandatory disclosure has become a significant consumer protec-

92. See, e.g., *Hale v. Wolfsen*, 276 Cal. App. 2d 285, 81 Cal. Rptr. 23 (1969); *Frisell v. Newman*, 71 Wash. 2d 520, 429 P.2d 864 (1967).

93. See generally *Stoppello, Federal Regulation of Home Mortgage Settlement Costs: RESPA and its Alternatives*, 63 MINN. L. REV. 367 (1979); *Whitman, supra* note 6.

tion method. The seller or creditor must disclose pertinent information, including statements about the consumer's legal rights and the concomitant duties of the retailers, lenders and others with whom they deal.⁹⁴

Federal legislation applies the disclosure model to the real estate conveyancing process. The Real Estate Settlement Procedures Act of 1974 (RESPA)⁹⁵ called for a standard form statement of closing costs to be given to buyers sufficiently in advance of closing⁹⁶ to permit shopping for the best terms or cost comparison as a means of coping with what Congress believed were excessive closing costs.⁹⁷ Criticisms of RESPA, however, led within a year to amendments which eliminated many of the sanctions for violating the act and somewhat altered the disclosure requirements.⁹⁸

Another legislative scheme calling for disclosure in the real estate context is truth-in-lending.⁹⁹ This was one of the earliest pieces of consumer legislation adopting the disclosure concept. It attempts to promote the informed use of consumer credit by forcing disclosure of the actual cost of credit in dollars and as a percentage rate to consumers.¹⁰⁰ Doubt remains about whether the law has achieved its objectives.¹⁰¹ Such doubt seems particularly justified in the real estate area.¹⁰²

94. See generally Whitford, *The Functions of Disclosure Regulation in Consumer Transactions*, 1973 Wis. L. Rev. 400 (1973). Cf. Davis, *Protecting Consumers from Overdisclosure and Gobbledygook: An Empirical Look at the Simplification of Consumer-Credit Contracts*, 63 VA. L. REV. 841 (1977).

95. Real Estate Settlement Procedures Act of 1974, Pub. L. No. 93-533, 88 Stat. 1724 (codified at 12 U.S.C. §§2601-2617 (1976)).

96. Closing costs had to be disclosed at least 12 days prior to closing. 12 U.S.C. §2605 (repealed by Act of Jan. 2, 1976, Pub. L. No. 94-205, §5, 89 Stat. 1157, 1158).

97. 12 U.S.C. §2601 (1976). This understanding was partially based on a 1972 government study. See DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT AND VETERANS' ADMINISTRATION, REPORT ON MORTGAGE SETTLEMENT COSTS (1972). For a good description of the events leading to the passage of RESPA see D. BURKE, *supra* note 15, at 133-53.

98. Act of Jan. 2, 1976, Pub. L. No. 94-205, 89 Stat. 1157. For a discussion of the amendments, their substance and effect, see H.R. REP. NO. 94-667, 94th Cong., 1st Sess. (1975); D. BURKE, *supra* note 15, at 170-77.

99. 15 U.S.C. §§1601-1671 (1976).

100. These disclosures for credit sales not under an open-ended credit plan are required by 15 U.S.C. §1638(6)(7) (1976). These same disclosures are central to truth-in-lending under the Truth in Lending Simplification and Reform Act which becomes effective in March, 1982. Act of March 31, 1980, Pub. L. No. 96-221, Title VI, §614(a), 94 Stat. 178.

101. Landers & Chandler, *The Truth In Lending Act and Variable-Rate Mortgages and Balloon Notes*, 1976 A.B.F. RES. J. 35, 63-66 (1976); Stoppello, *supra* note 93, at 451-52.

102. Real estate lenders are not subject to the full strength of truth in lending. One important remedy for consumers under truth in lending, the right to rescind a credit transaction under certain circumstances, does not apply in first mortgage loan transactions. 15 U.S.C. §1635(e) (1976). Lenders making loans secured by a first lien on a dwelling for the purpose of financing the purchase of that dwelling need not disclose the total finance charge the borrower will pay over the life of the loan. Reg. Z, 12 C.F.R. §226.8(d)(3) (1978). Lenders may not be anxious to reveal this amount to borrowers because it will likely be several times the principal amount borrowed. The Truth in Lending Simplification and Reform Act discontinues this benefit for real estate lenders. See Act of March 31, 1980, Pub. L. 96-221, Title VI, §614(a), 94 Stat. 178. Finally, Regulation Z only requires that the disclosures be made before the transaction is consummated. 12 C.F.R. §226.8(a) (1978). It is not customary to make

The principle of disclosure could nevertheless be applied to the real estate brokerage industry. Brokers could be required by law or regulation to inform buyers of the agency relationship the broker has directly with some sellers, through listing agreements, and indirectly with others, through multiple listing arrangements. The broker would have to explain that he may not volunteer more information than the owner of the home would have to disclose nor give advice about the appropriate price or subjective qualities of the houses inspected. If a dual agency approach is adopted, statements could be formulated for presentation to both parties at the outset of the broker's dealings with each of them.

Disclosure would reveal to buyers the constraints agency law places on the broker's actions and disabuse them of the belief that the broker is working for them. In the absence of a viable comprehensive solution to the problems considered here, disclosure in some form would aid buyers. Brokers and those who regulate them should give serious attention to the best form of disclosure and the best time for it. Disclosure, however, cannot solve the more fundamental problem of providing counsel to buyers. Disclosure helps but it is no cure for the lack of advice and guidance buyers expect.

Middleman

A broker may act as a middleman in a real estate¹⁰³ conveyance. This characterization emphasizes the broker's independent objective to earn a commission in the transaction. As a middleman, the broker is limited to bringing the parties together and may not take an active part in the negotiations for either party. The middleman posture limits the broker to doing less than either party expects.¹⁰⁴ Such a constrained role makes the usual commission the broker receives seem exorbitant. Casting the broker as a middleman may cure the conflict of interest problems, but it is overkill, eliminating the substance of the broker's participation in the conveyancing process.

Buyer's Agent

If buyers require the services and counsel of agents with expertise in real

the truth in lending statement available for inspection more than a day or so prior to closing. See generally Stoppello, *supra* note 93, at 452-55. There is little a borrower could do in response to the information at such a late date. Refusing the loan would likely put the buyer in default of the land sale contract and result in the deposit being lost. Truth in lending thus does not appear to provide meaningful assistance to buyers seeking a mortgage loan.

103. A broker may claim middleman status to avoid the charge that he acted as agent for both parties without their consent to a dual agency. *Harry M. Fine Realty Co. v. Stiers*, 326 S.W.2d 392, 398 (Mo. App. 1959). Because dual agencies can be created, the broker need not reduce his participation to that of middleman. *Mallory v. Watt*, 100 Idaho 119, 122, 594 P.2d 629, 632 (1979). An excellent conception of the middleman's role is provided by an early North Dakota case: "A broker is simply a middleman . . . when he has no duty to perform but to bring the parties together, leaving them to negotiate and to come to an agreement themselves without any aide from him. If he takes . . . any part in the negotiations, however, he cannot be regarded as a mere middleman, no matter how slight a part it may be." *Jensen v. Bowen*, 37 N.D. 352, 358, 164 N.W. 4, 5 (1917).

104. See *Stambler & Stein*, *supra* note 12.

estate, a direct and obvious way to meet the demand is for some brokers to work exclusively for buyers. Nothing in the law of agency or real estate brokerage bars such an activity. Indeed, many cases holding brokers responsible to buyers involve agents employed to find property for buyers rather than to sell for owners.¹⁰⁵

Because buyer's agents would be a new development in residential real estate transactions, changes in the manner of conducting business would be required. A major difficulty would be determining the compensation of the buyer's agent. To make this agent's duties of loyalty and disclosure clear, his compensation ought to come solely from the buyer-principal.

If buyers have to pay the same price for a house plus a fee to secure the loyalty of the broker, they might avoid entering into such agency agreements, despite the benefits such an arrangement might offer. Obviously, buyer reception of the idea depends on the fee. In the multiple broker situation the selling broker usually gets the larger share of the commission. For this new concept to work, therefore, more than an incidental amount will need to be paid by the buyer because the broker must forego the customary selling broker's percentage of the commission.

A buyer may pay less for a house if he employs an agent to negotiate directly with the seller and the listing broker, however. A commonly held assumption is that the commission is buried in the sale price and, practically speaking, paid by the purchaser when a broker is involved in a transaction. Some buyers explore "for sale by owner" listings expecting to pay less for a house.¹⁰⁶ If the selling broker's share of the commission were not subtracted from the proceeds the seller received at closing because the purchaser paid for these services directly, the seller should accept a lower price for his house. The price of the house would, therefore, be lower by an amount approaching or equal to the fee paid by the buyer to employ the broker at the outset of the search process. Costs, therefore, should not inhibit the introduction of a buyer's agent into the conveyancing process.

Another question to consider is whether enough brokers would undertake such an activity to make it viable. If a broker could somehow be a buyer's agent for some clients and continue to list property, the industry might not resist this change.¹⁰⁷ Even if buyers' agents were prohibited from listing property the concept might still work. So many people hold real estate sales and brokerage licenses¹⁰⁸ that one could expect a significant number to become buyers' agents

105. *E.g.*, *Quinn v. Phipps*, 93 Fla. 805, 113 So. 419 (1927); *Emily v. Bayne*, 371 S.W.2d 663, 679-71 (Mo. App. 1963); *Degner v. Moncel*, 6 Wis. 2d 163, 93 N.W.2d 857 (1959).

106. There is an apparent lack of empirical verification of whether buyers save all or part of the commission by purchasing directly from the seller without the aid of a broker. Brokers hint that the commission is buried in the price. The National Association of Realtors gives as a reason for owners to list their homes that: "[I]n a Sale by Owner, the Realtor's commission is always deducted by the buyer and the seller is left to do all the work for nothing." NATIONAL ASSOCIATION OF REALTORS, SALES HANDBOOK 71 (1975).

107. If both roles could be assumed, however, it would be hard to avoid the inherent problems that were encountered with dual agency in satisfactorily servicing the needs of both parties.

108. In California more than 178,000 persons were active in real estate brokerage in 1976

to capture revenues such activity would generate. Certainly, many details and questions would have to be carefully thought out before the implementing of such a radical change in the way residential real estate sales are presently transacted. Given a problem as pervasive as this one, however, imagination and experimentation are necessary.

CONCLUSION

Home buying and selling are important events in the personal lives of most Americans. Counsel and aid ought to be available for those who want it. Although most real estate brokers understand the significance of their responsibilities and treat both buyer and seller with consideration, the law defining the broker's role in the conveyancing process is vague and inconsistent with the understanding of the parties involved. For the sake of brokers, sellers, and buyers, brokers' duties should be clarified. If possible, the duties should be defined in a way that meets the reasonable expectations of the parties.

The buyer's agent concept provides a useful basis for reform. Without doubt the broker should also be required to explain clearly to both parties what his role is in the transaction. Disclosing of the limits of the broker's role should occur early enough in his relationship with each party to permit either one to seek additional aid and to decide what to tell the broker and what information to withhold based on a clear understanding of the broker's duties.

To insure that changes in law and practice are wise, a clearer understanding of consumers' perceptions of real estate brokers, and brokers' perceptions of their roles and responsibilities is needed. With such information, intelligent decisions can be made to solve the persistent problems associated with buying and selling homes through real estate brokers.

and another 71,000 persons on inactive status. In San Francisco there were a phenomenal 186 licensees per square mile. Owen, *supra* note 13, at 945.