

# ARTICLE

## REDEFINING REALTOR RELATIONSHIPS AND RESPONSIBILITIES: THE FAILURE OF STATE REGULATORY RESPONSES

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*For much of the twentieth century, residential real estate transactions conformed to a “traditional” model—the seller engaged a broker, who listed the home in a multiple listing service, where it was noticed and purchased by a buyer, with a commission paid to the broker by the seller from the sale proceeds. While the listing/selling broker model endured for decades, it was laden with problems—it left the buyer unrepresented, created agency relationships that were counterintuitive to the parties, and often left both the consumer and realtor unsure of the precise nature of their legal relationship. Over the last fifteen years, state legislatures have set out to address these ills, enacting legislation to increase disclosure requirements, create new realtor roles, and redefine existing ones. While these reforms have added consumer choice and flexibility to the marketplace, they have not done enough to alleviate consumer confusion. After providing a comprehensive survey of state reforms, this Article argues that new laws must focus on imposing concrete duties upon licensees—most notably, other-party duties—in order to provide meaningful consumer protection. Indeed, rather than relying on increased disclosure requirements and broader consumer choice, states must enact laws that proactively protect buyers and sellers in order to eliminate the confusion produced by both the traditional model and a diverse and complicated set of reforms.*

### I. INTRODUCTION

Today’s real estate brokers and salespeople play an integral role in an exceedingly common business transaction: the purchase and sale of residential real estate. In 2001, over 72 million families owned homes, reflecting the highest American homeownership rate ever, 67.8%.<sup>1</sup> Also in 2001, more than 6.2 million single-family homes were sold, and nearly four out of five consumers used real estate brokers to assist them with either their purchase or sale or both.<sup>2</sup>

For much of the twentieth century, residential real estate transactions tended to conform to a specific “traditional” model—the seller engaged a

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<sup>1</sup> KEVIN J. THORPE, 2002 NATIONAL ASSOCIATION OF REALTORS® PROFILE OF HOME BUYERS AND SELLERS 2 (Kate Anderson ed., 2002).

<sup>2</sup> *Id.* at 2, 5.

real estate broker, the “listing broker,” who listed the home in a multiple listing service, where it was noticed by a “cooperating” or “selling” broker, shown to prospective purchasers, and ultimately purchased by one of them, with a commission paid to the brokers by the seller from the sale proceeds.<sup>3</sup> In this classic setting, the selling broker was a subagent of the seller through the multiple listing contract and an agreement to split the commission.<sup>4</sup> This traditional listing/selling broker model—where the buyer typically went unrepresented in the transaction—was the norm.<sup>5</sup>

As the form and substance of the industry expanded, and realtors became more central to the real estate transaction, their precise duties and loyalties became less clear. Commentators have for some time agreed that the traditional listing/selling broker model creates agency relationships that are counterintuitive to the parties and that, all too often, neither consumer nor realtor seems to know exactly what is expected or required within the context of the legal relationship.<sup>6</sup> The agent that works with the buyer is, in fact, often a seller’s subagent.<sup>7</sup> This could easily be overlooked by the seller (who could be held vicariously liable for the licensee’s conduct), misunderstood by the buyer (who may believe that the agent working with her actually represents her), and sometimes even confused by the subagent or licensee (who may also erroneously see her role as “representing” the buyer).

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<sup>3</sup> L.A. REG’L OFF., FED. TRADE COMM’N, RESIDENTIAL REAL ESTATE BROKERAGE INDUSTRY 7, 9 (Dec. 1983) [hereinafter “FTC REPORT”]. For example, in the period from 1978 to 1981, 81% of sellers of single-family homes engaged brokers to assist them in selling their homes, 92% of sellers using brokers had their homes listed in multiple listing services, and 66% of sales involved cooperating brokers. *Id.* at 8 fig. I-1.

<sup>4</sup> *Id.* at 18, 142, 176, 180.

<sup>5</sup> *Id.* at 7, 22–24.

<sup>6</sup> See, e.g., Robert S. Hulett, *New Real Estate Legislation Includes Sweeping Changes*, IND. LAW., June 23, 1999, at 13 (discussing discomfort and confusion experienced by agents and buyers regarding duties under subagency practice); J. Clark Pendergrass, Note, *The Real Estate Consumer’s Agency and Disclosure Act: The Case Against Dual Agency*, 48 ALA. L. REV. 277, 277 (1996) (“Confusion among home buyers and sellers as to the real estate broker’s role in residential real estate transactions is a problem common to Alabama and the nation.”); Roy T. Black, *Proposed Alternatives to Traditional Real Property Agency: Restructuring the Brokerage Relationship*, 22 REAL EST. L.J. 201, 205 (1994) (coining the term “accidental agency” for the situation where unwitting seller’s agents or subagents are deemed by the buyer and/or the court to be the buyer’s agent); Guy P. Wolf & Marianne M. Jennings, *Seller/Broker Liability in Multiple Listing Service Real Estate Sales: A Case for Uniform Disclosure*, 20 REAL EST. L.J. 22, 31 (1991) (“even experienced real estate brokers are not fully aware of the agency relationships created in real estate transactions . . . nor can they be certain of the extent of their duties and liabilities.”); Matthew M. Collette, Note, *Subagency in Residential Real Estate Brokerage: A Proposal to End the Struggle with Reality*, 61 S. CAL. L. REV. 399, 403 (1988) (describing the traditional subagency relationship as “counterintuitive in light of actual experience.”); Joseph M. Grohman, *A Reassessment of the Selling Broker’s Agency Relationship with the Purchaser*, 61 ST. JOHN’S L. REV. 560, 581–84 (1987); Paula C. Murray, *The Real Estate Broker and the Buyer: Negligence and the Duty to Investigate*, 32 VILL. L. REV. 939, 947–48 (1987); FTC REPORT, *supra* note 3 at 22–24, 69.

<sup>7</sup> See generally FTC REPORT, *supra* note 3.

Contributing to the confusion, there is very little standardization in licensing laws and agency rules regulating realtors.<sup>8</sup> Moreover, judicial decisions regarding realtor liability are far from uniform; the case law in this area was and continues to be in a state of disarray in many jurisdictions.

These problems have not gone unnoticed. Beginning more than a decade ago, state legislators enacted a variety of new initiatives to address many of the ills created by the traditional model. Most focused on requiring disclosure of the realtor's agency relationship to the consumer; others went much further, redefining the role of the real estate licensee, thereby ostensibly benefiting both licensees and consumers.<sup>9</sup> Beginning in the mid-1990s, many state legislatures and administrative agencies began to limit realtor liability by creating statutory safe harbors and by explicitly defining realtors' duties to both clients and non-clients. Forms of representation beyond the traditional model began to surface and gain legal recognition. Among them is the "buyer's broker," who is engaged and paid by the buyer, and whose fiduciary duties run exclusively to the buyer.<sup>10</sup> Most recently, a number of states have passed laws that clear the way for real estate brokers to act in a "non-agent" capacity, essentially as agents of the transaction rather than of either of the parties, owing reduced fiduciary obligations, if any.<sup>11</sup>

Very little has been written about these new forms of realtor "representation," or "non-representation," in part due to their novelty and the resulting dearth of court analysis.<sup>12</sup> Nonetheless, a growing number of real estate licensees can now operate as statutorily limited real estate agents, sheltered from the decade-old explosion of realtor liability lawsuits.<sup>13</sup> In evaluating the efficacy of this wave of reform, regulators should examine what role the new real estate licensee plays and ask whether there is sound public policy behind the statutorily created "non-

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<sup>8</sup> See *infra* Part IV.

<sup>9</sup> See Natasha Washington, 'Broker Bill' Intended to Inform Consumers, DAILY OKLAHOMAN, June 6, 1999, at Real Estate 3; Kenneth R. Harney, *Study Faults Most State Agent-Disclosure Laws*, WASH. POST, July 4, 1992, at E1; Ruth Ryon, *New State Laws Assist, Confuse Professionals*, L.A. TIMES, Dec. 20, 1987, at Real Estate 20. California was one of the first states to pass disclosure legislation. See *infra* note 250.

<sup>10</sup> Katherine A. Pancak et al., *Real Estate Agency Reform: Meeting the Needs of Buyers, Sellers, and Brokers*, 25 REAL EST. L.J. 345 (1997).

<sup>11</sup> See *infra* notes 128–144 and accompanying text.

<sup>12</sup> Several earlier articles generally describe these new forms of real estate agency representation and non-representation. See generally Patricia A. Wilson, *NonAgent Brokerage: Real Estate Agents Missing in Action*, 52 OKLA. L. REV. 85 (1999); Pancak, *supra* note 10; Ronald Benton Brown et al., *Real Estate Brokerage: Recent Changes in Relationships and a Proposed Cure*, 29 CREIGHTON L. REV. 25 (1995); Black, *supra* note 6.

<sup>13</sup> See Ann Morales Olazábal & René Sacasas, *Real Estate Agent as "Superbroker": Defining and Bridging the Gap Between Residential Realtors' Abilities and Liabilities in the New Millennium*, 30 REAL EST. L.J. 173 (Winter 2001–2002) (noting that the number of reported decisions involving real estate salesperson or broker defendants for the years 1987–2000, as compared with the previous ten years, signals an "explosion" of realtor liability litigation.)

agent.” It is also important to consider whether these reforms are serving realtor interests at the expense of consumers, whether consumers are properly educated regarding the new realtor liability limitations, and whether the existing disclosure statutes are sufficient.

Appeals for reform of the real estate agency system, at least in the residential context, have been made on numerous occasions over the past decade and a half.<sup>14</sup> Rather than calling for widespread reform of a largely entrenched, highly political system,<sup>15</sup> this Article examines the recent changes to real estate licensing laws, analyzing the various state systems and, in so doing, provides the reader with a framework for comparing the individual state statutes and regulatory schemes. The Article also identifies those practices and procedures in place that appear to be best suited to this complicated setting, and it points out state statutes that are clearly deficient.

The author reviewed all fifty states’ licensing laws and relevant administrative code provisions. The Article thus analyzes all existing state legislation and regulation of real estate licensees, as well as a number of germane judicial opinions. As a backdrop, Part II more fully develops the history of real estate agency representation. Part III looks at the problems associated with the traditional listing/selling broker model. Part IV follows with a classification of the fifty states’ current statutory models for agency representation, by number and type of realtor roles available, reviewing each of the various options available in today’s marketplace. Part V considers the default level of representation that is automatically afforded to an unrepresented party, concluding that, despite attempts at reform, the vast majority of state regulatory schemes still encourage the traditional model. Part VI quantifies the level of consumer protection provided by state statutes by categorizing each state according to the number and weight of duties owed by licensees to parties other than their clients, or to their clients when the agent is acting other than in a true agency capacity.

After all fifty regulatory settings have been viewed through these filters, Part VII considers current real estate agency disclosure statutes, reviewing the various approaches taken to consumer education about new “agency” relationships and specific client representations of individual licensees. This Part concludes that, regardless of type, required disclo-

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<sup>14</sup> See, e.g., Wilson, *supra* note 12, at 100–07; Brown, *supra* note 12, at 79–83; Michael K. Braswell & Stephen L. Poe, *Residential Real Estate Brokerage Industry: A Proposal for Reform*, 30 AM. BUS. L. J. 271, 326–33 (1992); Collette, *supra* note 6, at 449–57.

<sup>15</sup> The larger the profession, the more likely that the state will regulate it, and that such regulation will be in the interests of the regulated occupation. See, e.g., KENNETH J. MEIER, REGULATION: POLITICS, BUREAUCRACY, AND ECONOMICS 175–201 (1985). For the proposition that “majority rule combined with problems of organizing change implies that some policy changes will occur rarely,” see Thomas Romer & Howard Rosenthal, *Modern Political Economy and the Study of Regulation*, in PUBLIC REGULATION: NEW PERSPECTIVES ON INSTITUTIONS AND POLICIES 93 (Elizabeth E. Bailey ed., 1987).

asures likely do not suffice to adequately alert consumers to their new options nor to warn them of the inherent limitations of liability and other concerns. Part VIII then examines the counterintuitive relationships and consumer confusion that remain and concludes that these are unlikely to be resolved by disclosure requirements and consumer education. The Article thus concludes that disclosure should not be viewed as a viable alternative to providing substantive statutory protections for unrepresented parties in the form of substantial other-party-duties. Instead, states should concentrate on further bolstering licensee duties.

## II. HISTORICAL UNDERPINNINGS

The real estate men<sup>16</sup> of the late nineteenth century tended to function mostly as speculators who purchased property from the seller and then sold it at a profit directly to buyers, as auctioneers or as mere middlemen bringing buyers and sellers together through early exchanges modeled after the then-primitive stock exchanges.<sup>17</sup> At the turn of the century, real estate dealers organized and eventually agreed that contractual listing arrangements and cooperative selling via local multiple listing boards or exchanges would best serve the fledgling profession.<sup>18</sup> Thus, beginning in that period, the principle of exclusive agency arrangements for the listing of real estate for sale was generally deemed “correct,”<sup>19</sup> and from 1912 forward, the National Association of Real Estate Boards (“NAREB”)<sup>20</sup> encouraged universal adoption of the exclusive seller agency relationship.<sup>21</sup> In addition, it adopted the practice of written listing (seller agency) agreements, allowing brokers to participate in the first

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<sup>16</sup> PEARL JANET DAVIES, *REAL ESTATE IN AMERICAN HISTORY* ix (1958).

<sup>17</sup> *Id.* at 17–23, 55, 101–03. As early as the 1860s, real estate firms specializing in property management had also surfaced. *See id.* at 32.

<sup>18</sup> *Id.* at 98–99, 114–15. One practitioner of the time warned that “the curse of the business were [sic] brokers who offer property without authority, not knowing whether they can deliver.” *Id.* at 114.

<sup>19</sup> *Id.* at 114.

<sup>20</sup> The first association of real estate dealers was the National Association of Real Estate Exchanges, formed in Chicago in 1908. FTC REPORT, *supra* note 3, at 85. This group later became known as NAREB. The name was changed again in 1972 to the National Association of REALTORS® (“NAR”). *Id.* NAR is currently the nation’s largest professional association consisting in 2001 of more than 760,000 real estate professionals. Kevin A. Roth, 2001 MEMBER PROFILE: DEMOGRAPHIC, ECONOMIC, AND PROFESSIONAL CHARACTERISTICS OF REALTORS® (2001) [hereinafter NAR MEMBER PROFILE].

<sup>21</sup> DAVIES, *supra* note 16, at 114. As a matter of fact, the exclusive listing contract favored by NAR was not the predominant form of listing agreement until sometime after 1950. FTC REPORT, *supra* note 3, at 109. By the late 1970s, an average of ninety-three percent of real estate brokerage firms were members of the Multiple Listing Service (“MLS”), which does not accept open listings and can also exclude “exclusive agency” listings. *Id.* at 109, 131. MLS’s preferred form of listing is the “exclusive right to sell,” which requires the seller to pay a commission to the broker if the property is sold during the listing period, even if the seller finds the buyer on her own. *Id.* at 17, 131. For a more complete exposition of the history of MLS and its requirements, see generally *id.* at 107–42.

multiple listing systems.<sup>22</sup> By 1910, many local real estate boards had embraced the written listing agreement with exclusive seller agency and cooperative selling, as well as commonly accepted rules on commission splitting between listing and selling brokers.<sup>23</sup>

In the period from 1910 to 1919, NAREB promoted state licensing laws<sup>24</sup> and promulgated a national code of ethics,<sup>25</sup> both of which were originally designed to exclude deceptive or incompetent practitioners.<sup>26</sup> At or about that same time, the designation “Realtor®”<sup>27</sup> was coined to designate those real estate men who were members of NAREB and who had adopted its code of ethics.<sup>28</sup> Subsequently in the 1920s through the 1940s, NAREB, the regional and local boards, and individual realtors were instrumental in a host of state and national projects that improved the position of the middle class homeowner.<sup>29</sup> These reforms also insured realtors’ long-term success by creating perpetual demand for residential realty services in the marketplace.

The initial push towards establishing regulatory licensing laws also came in the 1920s, and by the late 1950s all states except Rhode Island and New Hampshire had such statutes.<sup>30</sup> By the end of the 1970s, every state had a licensing statute or regulatory scheme addressing qualifications for obtaining the necessary real estate salesperson’s or broker’s license, and regulations governing realtors’ activities and conduct.<sup>31</sup> These statutes typi-

<sup>22</sup> DAVIES, *supra* note 16, at 114.

<sup>23</sup> *Id.* at 115.

<sup>24</sup> S. DAVID YOUNG, *RULE OF EXPERTS* 14 (1987) (citing 1 DANIEL B. HOGAN, *THE REGULATION OF PSYCHOTHERAPISTS* 228 (1979)) (“110 statutes licensing 24 occupations were enacted between 1911 and 1915 alone”).

<sup>25</sup> DAVIES, *supra* note 16, at 100. NAREB’s 1913 code of ethics enumerated “The Dut[ies] of Real Estate Men Toward Their Clients” and “The Dut[ies] of a Real Estate Man to Other Real Estate Men.” *Id.*

<sup>26</sup> *Id.* at 101 (stating that the primary objective of ethics code was “enforcement of good practice”). For the proposition that any industry group with political power will seek to control entry via regulation, including occupational licensing, see generally George J. Stigler, *Theory of Economic Regulation*, 2 *BELL J. ECON. & MANAG. SCI.* 3, 5, 13 (1971).

<sup>27</sup> The appellation “REALTOR®” is a registered membership mark that identifies and may be used only by real estate salespersons, brokers, and appraisers who are members of NAR and who subscribe to its code of ethics. The generic legal term “realtor,” as used in the case law and in other legal commentary, is used throughout this Article to refer to any real estate licensee, whether or not that realtor is a REALTOR® member of NAR.

<sup>28</sup> DAVIES, *supra* note 16, at 110–14.

<sup>29</sup> These major initiatives included modernizing and establishing limitations on real estate taxation, creating federally funded home mortgage insurance, creating a stable long term mortgage money supply, inventing and federally approving of mortgages with longer terms than five years, and reducing the required down payment from one-third to twenty percent. *Id.* at 142, 169–72, 174–79, 207. See also FLA. ASS’N OF REALTORS®, *HISTORY OF THE FLORIDA ASSOCIATION OF REALTORS®* 5 (1987).

<sup>30</sup> DAVIES, *supra* note 16, at 104, 164 (citing the Supreme Court’s ruling in *Bratton v. Chandler*, 260 U.S. 110 (1922) as the impetus for instituting state licensing laws governing real estate personnel).

<sup>31</sup> FTC REPORT, *supra* note 3, at 101 (stating that all states and the District of Columbia have state licensure laws that include “requirements and proscriptions concerning the business practices of real estate licensees”).

cally listed those activities that were prohibited, on penalty of disciplinary action, rather than by affirmatively dictating realtors' duties to the public.<sup>32</sup> By implication, they only recognized the historical listing/cooperating broker model.

State licensing statutes did not, however, dictate the form of agency representation then prevalent. Instead, the entrenchment of the listing/cooperating or "traditional" agency representation model was a direct result of the multiple listing systems in use nationwide.<sup>33</sup> For years, these dominant real estate exchanges had permitted cooperating or selling agents (those working with buyers) to split the commission to be paid by the seller only if the cooperating agent agreed to be a subagent of the seller.<sup>34</sup> Under this system, neither buyer nor seller had to have cash in hand to pay for the services of the realtor(s) with whom they worked; rather, all real estate agents were paid out of the proceeds at closing, if and when a willing buyer and seller had been matched. This encouraged homeownership, furthering the American Dream by facilitating real estate sales to people of all income levels.<sup>35</sup> It had a dark side, however: the listing/selling agency model by definition left the buyer unrepresented.<sup>36</sup> It also created unintended potential liabilities for sellers and a lack of clarity for licensees in determining to whom their fiduciary obligations ran.<sup>37</sup> These problems, inherent in the seller subagency model, are discussed below.

### III. THE DARK SIDE OF SELLER SUBAGENCY PRACTICE

The difficulties associated with the traditional seller subagency representational model arise from its failure to conform to the practical reality of the relationships between licensees and the consumers with whom they work.<sup>38</sup> It is generally acknowledged that the three primary problems engendered by subagency practice are: (1) buyers are unfairly left unrepresented in the transaction, usually without realizing it; (2) sellers are in

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<sup>32</sup> In 1978, licensing statutes typically regulated realtors' conduct by establishing grounds for revocation or suspension of their licenses. *See, e.g.*, FLA STAT. ch. 475.25 (1977); 63 PA. CONS. STAT. § 440 (1978).

<sup>33</sup> FTC REPORT, *supra* note 3, at 15, 84, 142.

<sup>34</sup> The offer of subagency was originally express. In 1976, the California Supreme Court ruled that NAR could no longer restrict MLS access to REALTORS®. *Marin County Bd. of Realtors v. Palsson*, 549 P.2d 833, 845 (Cal. 1976). Thereafter in 1980, the NAR changed the MLS concept to a "blanket unilateral offer of subagency." Collette, *supra* note 6, at 431. *See also* Douglas C. Kaplan, *Phoenix*, 69 FLA. BAR J. 77, 77 (1995) (calling the offer "compulsory").

<sup>35</sup> *See generally* Murray, *supra* note 6, at 956 (noting that payment of the brokerage fee is the crucial element in establishing a broker/buyer relationship and discussing cash flow problems faced by buyers in the context of engaging realtors).

<sup>36</sup> *See* Grohman, *supra* note 6, at 563 ("[T]he purchaser, without an attorney, is the least protected and most vulnerable party in a real estate transaction.").

<sup>37</sup> *See infra* notes 49–57 and accompanying text.

<sup>38</sup> *See* Collette, *supra* note 6, at 403–04.

peril of being held vicariously liable for unknown agents' conduct; and (3) licensees may be at risk of owing fiduciary duties to two principals whose positions are adversarial, due in large part to imprecise, dynamic common law obligations as well as the possibility that unintended and undisclosed dual agency may be imposed judicially after-the-fact.<sup>39</sup> Each of these issues is discussed in more detail in the subsections that follow.

#### A. *The Problem of the Unrepresented Buyer*

Historically, in most jurisdictions where two real estate licensees ostensibly "represented" the parties in a residential real estate transaction, both licensees' fiduciary obligations ran to the seller only.<sup>40</sup> Both realtors—including the one that "worked with" the buyer—had an obligation to obtain the best price for the seller.<sup>41</sup> Buyers were owed no duties of loyalty, confidentiality, or disclosure of material facts about the transaction or the property.<sup>42</sup> Compounding the unfairness of this lopsided contractual setting, the buyer typically was unaware that he was unrepresented. To the contrary, in most cases the unrepresented buyer believed that the licensee with whom he worked—the selling or cooperating agent he had "engaged" and who had found the property for him—was actually his agent. Indeed, seventy-four percent of buyers surveyed in the early 1980s believed the cooperating broker represented them and not the seller.<sup>43</sup> Not remarkably given the practical setting, more than seventy percent of sellers held the same erroneous belief.<sup>44</sup>

Probably the most common and unfortunate consequence of this situation was that buyers whose interests were not being protected freely revealed vital confidential information, unintentionally compromising the integrity of the negotiation and the fairness of its result. For example, seventy-three percent of buyers surveyed in the 1980s reported telling the cooperating broker the highest price they were willing to pay for a home.<sup>45</sup> There is some indication that not all cooperating brokers actually followed through with their fiduciary obligation to divulge this critical piece of information to the seller during negotiations.<sup>46</sup> Nonetheless, the

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<sup>39</sup> See Pancak, *supra* note 10, at 345; Collette, *supra* note 6, at 404, 434–35.

<sup>40</sup> See, e.g., Pancak, *supra* note 10, at 349. It is noteworthy that a minority of jurisdictions have for some time adopted the view that the broker engaged by and working with the buyer is the buyer's agent from a legal standpoint. See Collette, *supra* note 6, at 415. See also *infra* note 172 (referring to Arizona's common law practice consistent with this idea). The unrepresented buyer, then, is not a problem associated with traditional sub-agency practice in these states.

<sup>41</sup> See Collette, *supra* note 6, at 424.

<sup>42</sup> *Id.* at 448.

<sup>43</sup> FTC REPORT, *supra* note 3, at 69. See also Collette, *supra* note 6, at 99.

<sup>44</sup> FTC REPORT, *supra* note 3, at 191.

<sup>45</sup> *Id.* at 3, 27.

<sup>46</sup> Some commentators have opined that from time to time cooperating brokers, also confused by the counterintuitive nature of the actual agency relationship, may have acted

inherent conflict of interest posed by the cooperating broker working with the buyer but being legally obligated as a seller subagent created a real economic hazard—particularly for the buyer who was not represented but who mistakenly believed he was.<sup>47</sup> Making matters worse, with no fiduciary duties running in their favor, buyers generally ended up with no legal recourse when details of the transaction were negligently misrepresented, or when their best interests were simply left unattended.<sup>48</sup>

### B. Problems for Sellers

The chief predicament subagency practice created for sellers was vicarious liability for subagent conduct. In those jurisdictions that did provide some legal recourse for the buyer, the possibility of a seller being held liable for the misrepresentations or omissions of a subagent who worked exclusively with the buyer—and whom the seller may never have met—could become a costly shock.<sup>49</sup>

The root of this evil was the use of “form listing agreements,” which typically included an express grant of authority to the listing agent to appoint subagents to assist the listing agent in procuring a buyer.<sup>50</sup> Through the Multiple Listing Service (“MLS”), then, the cooperating broker who found a buyer automatically became the seller’s subagent.<sup>51</sup> The seller’s so-called “consent” to appointment of a subagent was part and parcel of a form listing agreement containing many other provisions of greater interest to seller and broker alike (such as the amount of commission and proposed listing price). As a result, the buyer’s consent to subagency may well have been an automatic consequence of signing a listing agreement rather than a common subject of discussion between broker and agent. This is evident from the fact that surveyed sellers generally were unaware of the legal relationship with and concomitant vicarious liability for cooperating brokers who were their subagents.<sup>52</sup> Therefore, this same subagency practice that was detrimental to buyers also had its negative consequences for sellers, albeit for different reasons

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in the buyer’s best interest. *See, e.g.,* Collette, *supra* note 6, at 418–19.

<sup>47</sup> The cooperating broker (seller’s subagent) was actually caught in a classic “catch 22” because she was also at risk for being sued by the seller for breach of fiduciary duty, either for failure to divulge the buyer’s confidential information or for divulging the seller’s lowest selling price. *Id.* at 405.

<sup>48</sup> *See infra* note 207 and accompanying text; *Speigner v. Howard*, 502 So. 2d 367, 371 (Ala. 1987).

<sup>49</sup> *See, e.g.,* *McCarty v. Lincoln Green, Inc.*, 620 P.2d 1221, 1224 (Mont. 1980) (holding vendor vicariously liable for misrepresentations of seller’s agent working with buyers); *Dyer v. Johnson*, 757 P.2d 178, 181 (Colo. Ct. App. 1988) (holding sellers vicariously liable to buyers for dual agent’s misrepresentations); *Denlinger v. Mudgett*, 559 A.2d 661, 662 (Vt. 1989) (holding vendors vicariously liable for misrepresentations of their agent).

<sup>50</sup> *See* *Braswell*, *supra* note 14, at 275; *Collette*, *supra* note 6, at 406.

<sup>51</sup> *Collette*, *supra* note 6, at 406.

<sup>52</sup> *See, e.g.,* *Collette*, *supra* note 6, at 446 (citing FTC REPORT, *supra* note 3, at 191).

and perhaps in different jurisdictions, depending on the state of the common law.<sup>53</sup>

### C. Problems for Brokers

A third interrelated problem that arose out of seller subagency practice was the fact that courts actually began to hold cooperating brokers liable to buyers.<sup>54</sup> This is true despite the fact that the cooperating licensee was by contract an agent of the seller, and the judicial creation of a fiduciary duty in favor of the buyer put this licensee in the untenable and legally impermissible position of acting as an undisclosed dual agent.<sup>55</sup>

In addition to a small but growing body of case law stretching to hold seller's subagents liable to buyers, in a few instances even a seller's exclusive agent, the listing agent, was held liable to a buyer.<sup>56</sup> Consistent with the nature of a precedent-based jurisprudential system, and in light of the apparently growing propensity of both sellers and buyers to sue, case law relevant to real estate agents' duties was expanding quickly in a very piecemeal fashion.<sup>57</sup>

The inevitable result was growing uncertainty on the part of realtors as to the precise obligations they owed, to whom, and under what conditions.<sup>58</sup> Thus, subagency practice was not only unfair to buyers and occasionally problematic for sellers, but it had downsides for licensees as well. Eventually, something had to change.

## IV. FROM TRADITIONAL AGENCY AND SUBAGENCY TO NON-AGENCY FORMS OF REPRESENTATION<sup>59</sup>

In the early 1990s, under increasing pressure from consumer protection organizations and entrepreneurial brokers who conceived of an "exclusive buyer's agent" market niche for themselves, the National Association of Realtors ("NAR") studied agency alternatives. In 1992, the group

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<sup>53</sup> Compare cases cited *supra* note 49, with *Harben v. Hutton*, 739 S.W.2d 602 (Tenn. Ct. App. 1987) (indicating that licensee working with buyers had no contact with sellers, so sellers were not liable for his misrepresentation of extent of renovations).

<sup>54</sup> See *infra* note 82.

<sup>55</sup> For a complete discussion of the negative aspects of subagency practice, see Collette, *supra* note 6, at 435-36.

<sup>56</sup> See, e.g., *Svendson v. Stock*, 979 P.2d 476, 502 (Wash. Ct. App. 1999); *Lawyers Title Ins. Corp. v. Vella*, 570 So. 2d 578, 584-85 (Ala. 1990); *Reda v. Sincaban*, 426 N.W.2d 100, 103 (Wis. Ct. App. 1988); *Ernestine v. Baker*, 515 So.2d 826, 827-28 (La. Ct. App. 1987).

<sup>57</sup> See Olazábal & Sacasas, *supra* note 13.

<sup>58</sup> One commentator pointed out that decisions relating to subagency had put California case law into a "state of abject confusion." Collette, *supra* note 6, at 412. As California's basic agency law and system of seller subagency was no different than what was in place across the nation, this state of affairs was not an isolated problem.

<sup>59</sup> For a listing of each state by realtor role, default position, and other-party duties, see *infra* Appendix.

agreed to eliminate seller-subagency as a condition of participation in a regional or local multiple listing service.<sup>60</sup> This very practical deregulation paved the way for the new forms of agency representation that are discussed below.<sup>61</sup>

State licensing statutes now contemplate a variety of agency relationships between licensees and prospective buyers and sellers. Some states employ a quasi-traditional agency model that differs very little from the historically used listing/cooperating broker representation model. These states, referred to as Type I states, generally recognize and permit only four kinds of agency relationships: listing brokers representing sellers, subagents representing buyers, buyer's brokers, and disclosed dual agents. Type I states occupy one end of the spectrum of consumer choice and are in the minority.

A larger number of states, designated Type II states, have added to the foregoing forms of representation a hybrid realtor-client relationship called "designated agency."<sup>62</sup> This practice is similar to the disclosed dual agency that is practiced in Type I states, but rather than a single broker or licensee representing both parties to the transaction, different licensees affiliated with the same broker are assigned or designated to "separately" represent the buyer and seller in so-called "intra-company" or "in-house" sales. Designated agency, while somewhat flawed by definition and certainly not as protective as exclusive buyer agency, may provide the buyer with better representation than he would have had with simple subagency or even disclosed dual agency.

Type III states have taken an altogether different approach to realtor representation. Rather than focus on the realtor's role and attendant du-

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<sup>60</sup> Pancak, *supra* note 10, at 352 (citing NAR HANDBOOK ON MULTIPLE LISTING POLICY—RESIDENTIAL §1.2 (1993)). Accordingly, since 1992, NAR's policy with respect to MLS has been "Cooperation and Compensation" with and for selling brokers. *Id.*

<sup>61</sup> In 1992 NAR appointed an advisory group to study non-agency as an option. The report ultimately issued by that group recommended a number of reforms to be promoted and lobbied for in the individual states. These included creating a "statutory agency" relationship with express well-defined duties along with supersession of the common law of agency, providing clearer guidance on disclosed dual agency practice and expressly allowing designated agency, and promulgating agency disclosure forms and rules. NAT'L ASS'N OF REALTORS®, REPORT OF THE PRESIDENTIAL ADVISORY GROUP ON THE FACILITATOR/NON-AGENCY CONCEPT (1993), *cited in* Pancak, *supra* note 10, at 352.

<sup>62</sup> The agency relationships available in each of the categories tend to be only somewhat cumulative. Many Type IV statutes also incorporate dual agency and/or designated agency practice. *See, e.g.*, GA. CODE ANN. § 10-6A-3 (2000) (defining customers and clients, also providing for sellers' agents, buyers' agents, dual agency, designated agency, and transaction brokerage); N.M. ADMIN. CODE tit. 16, § 61.1.7 (2001) (defining clients and customers and providing for exclusive agents, dual agents/facilitators, designated agents, and nonagency options). But not all do. *See, e.g.*, FLA. STAT. ch. 475.278 (2000) (no dual or designated agency); KAN. STAT. ANN. § 58-30,103 (2001) (designated but no dual agency); MINN. STAT. § 82.197(4) (2001) (no designated agency); N.J. ADMIN. CODE tit. 11, § 5-6.9 (2002) (no provision for designated agency); MD. CODE ANN., BUS. OCC. & PROF. § 17-530(a)(4) (2002) ("intra-company agent" is not designated but dual agent); OKL. STAT. tit. 59, §§ 858-351 to -355 (2000) (no dual or designated agency).

ties, Type III states' laws divide residential realty consumers into "customers" and "clients" who are afforded different levels of service and legal duties. Realtors are no longer true agents; instead their duties and obligations—as well as those areas in which they have no responsibilities at all—are set forth in state statutes and regulations. Clients in some Type III states are owed more numerous and specific duties than they would have been under the common law of agency, but in a number of Type III states, customers—those not represented—end up worse off than they would have been even under the confused state of the common law before legislative or administrative intervention.

Finally, on the other end of the choice spectrum, a full half of states have ventured into somewhat uncharted territory by sanctioning various other limited forms of agency that do not qualify as fiduciary relationships under the common law, including "transaction brokers," "facilitators," and "non-agents." These states are denominated Type IV. While in some states these new forms of representation have served to ameliorate the subagency problem, in others the focus of the new "limited agency" relationship appears to be on reducing realtor liability rather than improving the lot of the consumer.

The various forms of agency representation permitted by the fifty states' statutes and regulations governing real estate licensees, as well as related issues, are addressed in more detail below.

*A. Type I: Quasi-Traditional Representation Model Incorporating Buyer Agency and Statutorily Recognized Disclosed Dual Agency*

Type I states, while still allowing and, in fact, encouraging traditional seller subagency, have legislated so as to permit parties to the residential real estate transaction to select from two new options. These are the buyer's broker and disclosed dual agency.

*1. Exclusive Agents Represent Buyers and Sellers Separately*

Today, no state statutory or regulatory scheme retains only the traditional listing/selling model in which all agents always represent the seller. Instead, every state's code has recognized the existence of the buyer's agent<sup>63</sup> in either express or implied terms.<sup>64</sup> Realtors who act as

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<sup>63</sup> This change in the historical representation model did not come about without a struggle. See, e.g., John Curley, *Bill French Smoothed Out a Bumpy Life After Becoming Sold on the Buyer*, ST. LOUIS POST-DISPATCH, Mar. 4, 2001, at E1 (quoting Buyer's Agent, Incorporated founder Tom Hathaway, as saying "when I started, the Board of Realtors threatened to run me out of town."); *Velarde v. Osborn*, No. 37789-2-I, 1997 Wash. App. LEXIS 1404 (Aug. 25, 1997) (evaluating a defamation suit between realtors over opinions regarding legality of "nonagency options"); FTC REPORT, *supra* note 3, at 20–22 (discussing travails of "alternative brokers").

<sup>64</sup> Some states' licensing statutes expressly provide for buyer agency in addition to

fiduciaries for either a buyer or a seller—but not both—in a residential real property transaction are sometimes called “single agents” or “exclusive agents.”<sup>65</sup>

California’s statute provides a good example of a Type I jurisdiction that has simply added buyers’ brokers to the existing, traditional listing/selling agency scheme.<sup>66</sup> California contemplates that realtors working with buyers will represent sellers in a traditional cooperating broker role, absent an agreement to the contrary with the buyer.<sup>67</sup> The statute defines “selling agent” in terms reminiscent of the traditional model:

“Selling agent” means a listing agent who acts alone, or an agent who acts in cooperation with a listing agent, and who sells or finds and obtains a buyer for the real property, or an agent who locates property for a buyer or who finds a buyer for a property for which no listing exists and presents an offer to purchase to the seller.<sup>68</sup>

Though the term “buyer’s agent” or “buyer’s broker” is left undefined in the state’s licensing statute, the statute does provide that the selling agent

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seller agency. *See, e.g.*, HAW. ADMIN. R. 16-99-3.1(a) (2001) (“real estate broker who acts as the agent of the buyer”); KAN. STAT. ANN. § 58-30,102(f) (2001) (similar); OR. REV. STAT. § 696.800(1)(a)(B) (2001) (defining agent as, *inter alia*, a licensee with a “service contract with a buyer to represent the buyer”). Other states’ statutes or regulations refer to buyer agency or the buyer’s agent only by implication or only in required or approved forms. *See, e.g.*, LA. REV. STAT. ANN. §§ 9:3891 to -99 (West 2002) (implying that buyers may also enter into agency relationships with licensees); MASS. BD. OF REGISTRATION OF REAL EST. BROKERS & SALESPERSONS, MANDATORY AGENCY DISCLOSURE—AGENCY RELATIONSHIP (copy on file with author) (describing “buyer’s agent”); MASS. GEN. LAWS ch. 112 §§ 87PP-87DDD1/2 (Law. Co-op. 2002); MASS. REGS. CODE tit. 254, §§ 2.00–7.00 (2002); UTAH ADMIN. CODE 162-6.1.11.2 (2002) (referring to “buyer’s agent” without defining or otherwise establishing the role statutorily).

<sup>65</sup> *See, e.g.*, MISS. REAL EST. COMM’N R. & REGS. IV(E)(2)(i) (2001) (defining “single agency”); NEB. REV. STAT. § 76-2414 (2001) (defining “single agent”); N.M. ADMIN. CODE tit. 16, § 7.20 (2001) (defining “exclusive agency”). New Mexico is not a Type I state.

<sup>66</sup> CAL. CIV. CODE § 2079. Alaska’s statute is similar, in that it contemplates seller’s agents, buyer’s agents, and disclosed dual agents only. *See* ALASKA STAT. § 08.88.396 (Michie 2001). *See also* ARK. CODE ANN. § 17-42-108 (Michie 2001); DEL. ADMIN. CODE tit. 24, ch. 2900 REC Rule 10.3.1 (2001) (silent as to dual agency); HAW. ADMIN. R. § 16-99-3.1 (2001); MASS. REGS. CODE tit. 254, § 3.00 (2001); MISS. REAL EST. COMM’N R. & REGS., § IV (October 2001); NEB. REV. STAT. § 76-2401 (2001); N.Y. REAL PROP. LAW § 443(4) (McKinney 2001); R.I. GEN. LAWS § 5-20.6-1 (2001); S.C. CODE ANN. § 40-57-137(A) (Law. Co-op. 2000); UTAH ADMIN. CODE 162-6.1.11.1 (2001); VT. REAL EST. COMM’N R. 1.8 (2001); W.V. REAL EST. COMM’N, NOTICE OF AGENCY RELATIONSHIP (on file with author); *infra* note 172 (discussing Arizona’s unique approach to seller and buyer agency).

<sup>67</sup> CAL. CIV. CODE §§ 2079.13–.24 (Deering 2001). *See also infra* Part V. California’s statute provides that nothing therein precludes an agent from selecting some other form of agency relationship that is not expressly excluded by section 2079, as long as it is disclosed and confirmed as required by the statutory scheme. *See* CAL. CIV. CODE § 2079.20 (Deering 2001).

<sup>68</sup> *Id.* § 2079.13(n). *See also* MD. CODE ANN., BUS. OCC. & PROF. § 17-530(a)(3) (2001).

may “with a Buyer’s consent, agree to act as agent for the Buyer only,” thereby becoming a “buyer’s agent.”<sup>69</sup> Thus, according to the express statutory language, if the buyer fails to “consent” or the licensee fails to “agree” to a buyer’s agency relationship, the licensee working with a buyer will presumably act as a subagent of the seller, just as she had in the traditional agency setting.<sup>70</sup>

California’s licensing statute, like most of the other quasi-traditional Type I statutory schemes, does little to ensure that buyers are represented in a residential realty transaction.<sup>71</sup> California’s Civil Code prohibits a selling agent who is also the listing agent from becoming a buyer’s exclusive agent,<sup>72</sup> and it provides that a listing agent is *not* precluded from also being a selling agent (i.e., working with the prospective buyer) without becoming a dual agent.<sup>73</sup> These provisions ensure that a seller who lists her property with a realtor will be represented by an agent in the transaction, but they also have the effect of leaving the buyer unrepresented.<sup>74</sup>

Other Type I states are less explicit than California in ensuring that a seller will be represented by a realtor. As a practical matter, however, because most sellers list their properties for sale, they will have entered into an agency relationship with a real estate broker.<sup>75</sup> Therefore, express statutory protection of the seller is not critical. Like California, the other Type I states recognize the possibility of the buyer’s broker but do nothing to promote buyer representation.<sup>76</sup> As a result, in Type I states, chances are quite good that a buyer will still work with a seller’s subagent.

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<sup>69</sup> CAL. CIV. CODE § 2079.16 (Deering 2001).

<sup>70</sup> See *Schmidt & Co. v. Berry*, 228 Cal. Rptr. 689 (Ct. App. 1986) (citing 1 MILLER & STARR, CURRENT LAW OF CALIFORNIA REAL ESTATE § 4:18 (1985 Supp.)) (stating that there is an agency relationship between the cooperating broker and the seller).

<sup>71</sup> That said, all parties are now given at least constructive notice of the existence of any agency relationships so that any unrepresented party can either seek representation or proceed unrepresented with caution. CAL. CIV. CODE § 2079.16 (Deering 2001). See *infra* Part VII for a discussion of agency relationship disclosures.

<sup>72</sup> CAL. CIV. CODE § 2079.18 (West 2001).

<sup>73</sup> *Id.* § 2079.22.

<sup>74</sup> California’s licensing statute permits the formation of other agency relationships not otherwise prohibited. See CAL. CIV. CODE § 2079.20 (Deering 2001). Presumably then, a seller could negotiate a listing agreement with a realtor that provides for something other than a (fiduciary) agency relationship.

<sup>75</sup> Eighty percent of home sellers use the services of a realtor. KEVIN A. ROTH, THE 2000 NAT’L ASS’N OF REALTORS® PROFILE OF BUYERS AND SELLERS 50 (2000) [hereinafter BUYERS AND SELLERS PROFILE]. Of the remaining sellers, four percent sell to a relative or friend, and sixteen percent sell to a stranger without the assistance of a real estate licensee. *Id.* Sellers who do not engage a realtor to market their properties, but who instead choose to sell “by owner,” may be unrepresented as well. Undoubtedly, some buyers and sellers who are not “represented” by realtors have engaged the services of an attorney instead.

<sup>76</sup> The other Type I states are Alaska, Arkansas, Arizona, Delaware, Hawaii, Massachusetts, Mississippi, Nebraska, New York, Rhode Island, South Carolina, Utah, Vermont, and West Virginia.

## 2. Disclosed Dual Agency

In addition to permitting subagency practice and authorizing exclusive buyer agency, Type I states (and nearly all other states) now also expressly allow some form of disclosed dual agency.<sup>77</sup> Dual agency can occur where (1) a single licensee represents both buyer and seller in the transaction, or (2) a brokerage firm represents both buyer and seller in the transaction, though different licensees might have brought the buyer and seller to the firm.<sup>78</sup> In a characteristic scenario, the prospective buyer “engages” a licensee to help her find a home.<sup>79</sup> As is commonplace, the licensee begins by showing the buyer properties listed by the licensee, so as to avoid splitting the commission if the buyer chooses one of these properties.<sup>80</sup> If the buyer selects a property listed by the licensee, a dual agency can result<sup>81</sup> if either the buyer has engaged the licensee as an exclusive buyer’s broker, or a court imposes an implied agency relationship between the selling agent (seller’s subagent) and the buyer *ex post facto*.<sup>82</sup>

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<sup>77</sup> Florida, which is a Type IV state, has expressly abolished the dual agent, disclosed or otherwise. FLA. STAT. ch. 475.01 (2001). Other states are silent on the topic of dual agency. *See, e.g.*, DEL. CODE ANN. tit. 24, § 2931 (2001); DEL REAL EST. COMM’N R. § 10.0 (2001) (Type I state).

<sup>78</sup> A majority of states expressly recognize and permit what they call the “in-house” or “intra-company” sale. This is also called “designated agency.” *See infra* Part IV.B. Maryland’s statute provides for intra-company agents but considers these licensees to be dual agents. MD. CODE ANN., BUS. OCC. & PROF. § 17-530(4) (2001).

<sup>79</sup> The use of the term “engage” in this Article is intended to be ambiguous. It is possible that the buyer will engage the licensee as a buyer’s broker. It is more likely, however, that the buyer will seek the assistance of the licensee, who will share a commission out of the proceeds of the sale and will act either as a seller’s subagent or a transaction broker or other type of non-agent. At least one state denominates a written client representation agreement a “brokerage engagement.” GA. CODE ANN. § 10-6A-3(4) (2002).

Likewise, the term “represent” as used in these statutes is also vague and perhaps confusing. *See infra* note 301.

<sup>80</sup> Richard Kindleberger, *The Middlemen Get Put in the Middle*, BOSTON GLOBE, Dec. 12, 1992, at 37 (noting that “if a firm steers a buyer to one of its listings, it does not have to split the fee, typically 6 percent of the sale price”). *See also* FTC REPORT, *supra* note 3, at 7 (stating that a “broker commonly will inform a prospective buyer of the broker’s own listings first”).

<sup>81</sup> *See, e.g.*, R.I. GEN. LAWS § 5-20.6-8 (2001). Other results are possible as well. Recall that the seller is nearly always represented by a licensee in an agency capacity as a consequence of the listing agreement. If the licensee assisting the buyer has not entered into an exclusive agency agreement with him, the licensee may continue to work with the buyer while actually representing only the seller in a fiduciary capacity. This is the traditional setting.

<sup>82</sup> *See, e.g.*, Van Dusen v. Snead, 441 S.E.2d 207 (Va. 1994) (finding that a seller’s agent was actually a “purchasers’ agent” where buyers alleged they “engaged” the agent, and finding dual agency legally impossible); Runde v. Vigus Realty, Inc., 617 N.E.2d 572, 576 (Ind. App. 1993) (holding claim by buyers based on gratuitous agency was permitted to proceed against seller’s agent); Lewis v. Long & Foster Real Est., Inc., 584 A.2d 1325, 1330 (Md. 1991) (explaining rationale for holding selling agents liable to buyers); Stefani v. Baird & Warner, 510 N.E.2d 65, 68 (Ill. App. Ct. 1987) (holding, where selling agent is engaged by buyer with respect to a particular property, she is deemed buyer’s agent).

Other relatively recent cases have held sellers’ agents liable to buyers on non-agency theories as well. *See, e.g.*, Carter v. Gugliuzzi, 716 A.2d 17, 21 (Vt. 1998) (affirming judgment

Type I states, like most other states, now expressly permit dual agency, provided that it is disclosed to the parties, and they consent to it in writing.<sup>83</sup> Statutes that recognize disclosed dual agency generally attempt to address the multiple master problem by creating a limited form of agency between a licensee and her clients, who have divergent interests.<sup>84</sup> In the disclosed dual agent setting, the licensee may owe some fiduciary obligations to both parties.<sup>85</sup> Typical statutes require the licensee to forewarn a buyer and seller who use the same agent that their interests conflict and that the licensee will not afford the same degree of loyalty or level of confidentiality as she would in the exclusive agency representation setting.<sup>86</sup> Dual agency provisions also often require the licensee to expressly advise the clients that they are not obligated to consent to dual agency.<sup>87</sup>

In reality, the dual agent disclosure requirement just codifies the common law rule prohibiting dual agency without consent of both principals.<sup>88</sup> Therefore, as Type I states have only added this option (in addi-

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for buyer against listing broker based on Consumer Fraud Act); *Dawson v. Hummer*, 649 N.E.2d 653, 662 (Ind. Ct. App. 1995) (stating that denying summary judgment for listing agent was proper where claim by buyers was based on constructive fraud); *Ernestine v. Baker*, 515 So.2d 826, 827–28 (La. Ct. App. 1987) (holding listing agent liable to buyers based on negligent misrepresentation theory). *Cf.* *Lee Hawkins Realty, Inc., v. Moss*, 724 So.2d 1116, 1121 (Miss. Ct. App. 1998) (holding selling agent liable to buyer). For a discussion of cases holding to the contrary, see *infra* note 172 and accompanying text. For scholarly literature on this subject, see generally Constance Frisby Fain, *An Overview of Real Estate Agent or Broker Liability*, 23 REAL EST. L.J. 257 (1995) (discussing cases in which realtors have been held liable for failure to disclose property defects); Diane M. Allen, Annotation, *Real-Estate Broker's Liability to Purchaser for Misrepresentation or Nondisclosure of Physical Defects in Property Sold*, 46 A.L.R. 4th 546 (1986) (discussing numerous older property defect cases in which licensees were both held liable and not held liable).

<sup>83</sup> See, e.g., OHIO REV. CODE ANN. § 4735.71 (West 2002); TEX. REV. CIV. STAT. ANN. art. 6573a, § 15C(h) (Vernon 2001).

<sup>84</sup> See, e.g., OR. REV. STAT. § 696.815 (2001) (establishing parameters of “disclosed limited agency”); COLO. REV. STAT. 12-61-806(1) (2001) (establishing that dual agent is limited agent for buyer and seller and has only statutorily enumerated duties); IND. CODE ANN. § 25-34.1-10-7 (West 2001) (declaring disclosed dual agent, known as “limited agent,” has only those duties set forth in statute). *Cf.* MISS. REAL EST. COMM’N R. & REGS. IV(E2)(f) (2001) (expressly retaining “demanding common law standards of disclosed dual agency”); N.Y. REAL PROP. LAW § 443(4), (6) (McKinney 2001) (expressly recognizing licensees’ representation of both seller and buyer in a given transaction if consented to in writing, and providing that the common law of agency shall apply thereto).

<sup>85</sup> See, e.g., IDAHO CODE § 54-2088(2) (Michie 2002); OR. REV. STAT. § 696.815(2) (2001).

<sup>86</sup> See, e.g., IDAHO CODE § 54-2088(2) (Michie 2002); N.Y. REAL PROP. LAW § 443(4) (McKinney 2002); VT. REAL EST. COMM’N R. § 4.4(c) (2001).

<sup>87</sup> See, e.g., GA. CODE ANN. § 10-6A-12(a)(5) (2002); IND. CODE ANN. § 25-34.1-10-12(a)(5) (2002); NEV. REV. STAT. § 645.252(1)(d)(4) (2001). In addition, some statutes expressly provide that if a buyer working with a licensee chooses a property listed by the licensee or an affiliated licensee, and the buyer refuses to agree to a disclosed dual agency at that point, the licensee is released from any further obligation to the buyer. See, e.g., MINN. STAT. ANN. § 82.197(4) n.3 (2001); R.I. GEN. LAWS § 5-20.6-8(c) (2001); VA. CODE ANN. § 54.1-2139 (Michie 2002).

<sup>88</sup> See, e.g., Pendergrass, *supra* note 6, at 287 (explaining that Alabama’s Real Estate Consumer’s Agency and Disclosure Act, in creating “limited consensual dual agency”

tion to buyer's brokers), they have not changed the available legal relationships much for most consumers. Nevertheless, the articulation of specific realtor duties owed by the licensee and the heightened level of prescribed disclosure to the multiple masters are new features of the statutorily adopted disclosed dual agency phenomenon. Both of these serve to protect the realtor while also benefiting the clients, who presumably will be better-informed of the pitfalls involved.<sup>89</sup>

### B. Type II: "Designated Agency"<sup>90</sup> Is Added

A sizable group of states has gone further than to just recognize exclusive buyers' and sellers' agents and disclosed dual agency. Type II states provide for so-called "designated agency"<sup>91</sup> as well. In a typical case, a prospective buyer engages a "licensee" to find him a home. The realtor begins by showing properties she has listed. If the buyer is not interested in any of these, he might be shown or might ask to see other properties listed by the licensee's brokerage firm. If the buyer ultimately seeks to buy a property listed by a different licensee affiliated with the same brokerage firm, the broker may "designate" the individual licensees involved to act as quasi-exclusive representatives of the seller and buyer. This is known as the "intra-company" or "in-house" sale.<sup>92</sup>

Designated agency practice appears to have come about as a logical response to the inherent conflict of interests posed by dual agency. Rather than deem a licensee's broker and all licensees associated with that broker also to be agents of the client,<sup>93</sup> Type II statutes regularly provide for

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status for realtors, "merely codifies the general rule under Alabama common law").

<sup>89</sup> See *infra* Part VII.B.5.

<sup>90</sup> The use of this term may be confused by the practice in some states of calling licensees with different kinds of licenses "designated brokers" or "designated agents" regardless of whether they have been designated in the manner described in this Part so as to avoid common law dual agency. See, e.g., N.D. CENT. CODE §§ 43-23-06.1(1), (4) (2001) (defining "appointed agent" and "designated broker," respectively); MO. REV. STAT. § 339.710(12) (2002) (defining "designated broker" as the broker designated by each real estate firm to act on its behalf).

<sup>91</sup> See, e.g., CONN. GEN. STAT. § 20-325i (2002) ("designated buyer agents and seller agents"); IND. CODE ANN. § 25-34.1-10-12.5 (West 2002); ME. REV. STAT. ANN. tit. 32, § 13271(2) (West 2001) ("appointed agent"); NEV. REV. STAT. § 645.253 (2002); N.C. REAL EST. COMM'N, WORKING WITH REAL ESTATE AGENTS (describing "designated agency"), N.D. ADMIN. CODE § 70-02-03-17 (2002) ("appointed agents"); OHIO REV. CODE ANN. § 4735.72(B) (West 2002) (in-company dual agency); OR. REV. STAT. § 696.815(4) (2001) (in-company representation); TEX. REV. CIV. STAT. ANN. art. 6573a, § 15C(k) (Vernon 2001) ("appointed licensee"); WASH. REV. CODE ANN § 18.86.020(2) (West 2002); VA. CODE ANN. § 54.1-2139(E) (Michie 2002) ("designated representative").

<sup>92</sup> See, e.g., OR. REV. STAT. § 696.800(4) (2001) (defining "in-company transaction"). Affiliated licensees who are designated to work with different parties to the same transaction in North Dakota and Iowa are called "appointed agents." N.D. ADMIN. CODE § 70-02-03-17 (2002); IOWA CODE § 543B.5(3) (2002). In Montana, this type of realtor role would be called "in-house buyer [or seller] agent designate." MONT. CODE ANN. § 37-51-102 (12)-(13) (2001).

<sup>93</sup> Under the common law, every principal (whether seller or buyer) has as his agents

the affiliated individual licensees to act as exclusive agents of the individual party to the transaction with whom they are working.<sup>94</sup> Each designated or appointed agent owes her client the same duties that would be owed by exclusive or single agents to their clients, including a limited duty of confidentiality.<sup>95</sup>

Indiana's statute is illustrative. It defines a designated agency or "in-house agency relationship" as "an agency relationship involving . . . clients who are represented by different licensees within the same real estate firm."<sup>96</sup> It further provides, in pertinent part:

(a) An individual licensee affiliated with a principal broker represents only the client with which [sic] the licensee is working in an in-house agency relationship. A client represented by an individual licensee affiliated with a principal broker is represented only by that licensee to the exclusion of all other licensees . . . .

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(c) A licensee representing a client in an in-house agency relationship owes the client duties and obligations set forth in this chapter . . . .<sup>97</sup>

One of the downfalls to designated agency is that there is a greater chance for breach of confidentiality when the agents involved in a transaction are housed in the same office.<sup>98</sup> Because of the unique confidentiality

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the broker and all licensees in a firm. Robert E. Kroll, Comment, *Dual Agency in Residential Real Estate Brokerage: Conflict of Interest and Interests in Conflict*, 12 GOLDEN GATE U. L. REV. 379, 388 (1982) ("where buyer and seller are represented by two sales agents of a single broker or brokerage firm, the situation is the same as if the broker himself were representing both principals").

<sup>94</sup> State statutes differ in their treatment of the broker in an "in-house" sale. In some states, the broker is still considered a dual agent, while the individual salespeople working with the clients are considered single agents for the clients they represent. See, e.g., OR. REV. STAT. § 696.815(4) (2001). A variation is where the broker represents neither party. See, e.g., IND. CODE ANN. § 25-34.1-10-12.5(a) (West 2002). Other states' statutes and regulations are silent with respect to the broker's role. See, e.g., CONN. GEN. STAT. § 20-325(I) (2002); NEV. REV. STAT. § 645.253 (2002).

<sup>95</sup> See *infra* note 99.

<sup>96</sup> IND. CODE § 25-34.1-10-6.5 (2002). Accord CONN. GEN. STAT. § 20-311(6) (2002). For the other state statutes that are considered Type II "designated agency" provisions, see ME. REV. STAT. ANN. tit. 32, § 13271(2) (West 2002); NEV. REV. STAT. § 645.253 (2002); N.C. REAL EST. COMM'N, WORKING WITH REAL ESTATE AGENTS (on file with author); N.D. CENT. CODE § 43-23-06.1(1) (2001); OHIO REV. CODE ANN. § 4735.51(I) (West 2002); OR. REV. STAT. § 696.815(4) (2002); TEX. REV. CIV. STAT. ANN. art. 6573a, § 15C(k) (Vernon 2001); VA. CODE ANN. § 54.1-2139 (Mitchie 2001); WASH. REV. CODE ANN. § 18.86.020(2) (2002).

<sup>97</sup> IND. CODE ANN. § 25-34.1-10-12.5 (West 2002).

<sup>98</sup> See, e.g., Joe Blundo, *Change in Real Estate Law Adds New Wrinkle to Home Buying*, COLUMBUS DISPATCH, Dec. 8, 1996, at 1J ("How can two agents who work in an office with an obvious financial interest in getting a deal closed be expected to keep secrets?");

concerns posed by designated agency practice, a few Type II statutes contain additional precautions to protect the clients' confidences.<sup>99</sup> Indiana's statute, for example, prohibits designated agents from disclosing "material or confidential information obtained from the client to other licensees, except to the principal or managing broker for the purpose of seeking advice or assistance for the client's benefit."<sup>100</sup> It also requires the broker and her licensees to "take reasonable and necessary care to protect any material or confidential information disclosed by a client to the client's in-house agent."<sup>101</sup> North Dakota's regulations go even further to protect clients' confidential information. Any North Dakota real estate agency that represents both buyers and sellers in residential real estate transactions must maintain a written policy manual setting forth the brokerage's procedures for preventing breaches of client confidence stemming from the informal sharing of information, the arrangement of office space, and the personal relationships of the appointed agents.<sup>102</sup>

With appropriate safeguards, designated agency is really no different than exclusive agency—it ensures that each party is individually represented by an agent who will maintain the client's confidences and who

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Sarah P. Jones, *Brokering a Peace*, BOSTON HERALD, Feb. 7, 1997, at 37 ("[Y]ou've got an enormously increased possibility that confidential information will pass side by side in those desks . . . . Not on purpose, of course, but papers do get left around.").

<sup>99</sup> The duty of nondisclosure or confidentiality is owed by licensees not just in Type II states and not just in the "in-house" or designated agency context. In many states, this duty is also owed by a licensee to her clients and sometimes even to all parties to the transaction. Typical statutory provisions prohibit disclosure to the buyer that the seller is willing to sell the property at a price less than the listing price or disclosure to the seller that the buyer is willing to pay a price greater than the offering price. Other specifics may be included in the definition of confidential information. *See, e.g.*, CONN. GEN. STAT. § 20-325h (2001) (including information related to party's assets and liabilities); FLA. STAT. ch. 475.278(2)(a)(6) (2000) (including information that a party will agree to financing terms other than those offered); MD. CODE ANN., BUS. OCC. & PROF. § 17-528(h) (2001) (including facts relating to a party's negotiating strategy); MO. REV. STAT. § 339.710(8) (2000) (including information made confidential by the client's written instructions). *See generally infra* Part VI.

Other states' definitions of information that must be kept confidential are even broader. *See, e.g.*, S.D. CODIFIED LAWS § 36-21A-127 (Michie 2001) (stating that the duty of confidentiality includes duty not to disclose "information given to the licensee in confidence, or any information obtained by the licensee that the licensee knows a reasonable individual would want to keep confidential"); UTAH ADMIN. CODE 162-6.2.16.1 to -.2 (2001) (stating that licensee may not disclose any information "which would likely weaken the [party's] bargaining position if it were known"); WIS. STAT. § 452.133(1)(d) (2000) (similar).

<sup>100</sup> IND. CODE ANN. § 25-34.1-10-12.5(c) (West 2002).

<sup>101</sup> *Id.* § 25-34.1-10-12.5(d). Subsection (e) statutorily eliminates imputation of knowledge and information between clients, licensees, and the principal or managing broker in the in-house sale. *See id.* § 25-34.1-10-12.5(e). This is a common provision in statutes that feature designated agency.

<sup>102</sup> N.D. ADMIN. CODE § 70-02-03-17 (2001). *See also* CONN. GEN. STAT. § 20-325h (2001); GA. CODE ANN. § 10-6A-13(c) (2000); 201 KY. ADMIN. REGS. 11:410 § 2(2)-(4) (2001); MICH. COMP. LAWS § 339.2517(7) (2001); VA. CODE ANN. § 54.1-2139(E) (Michie 2000). *Cf.* ILL. ADMIN. CODE tit. 68, § 1450.207 (2000) (requiring all licensees in possession of confidential information to take reasonable precautions to safeguard it from unauthorized disclosure).

will place the party's best interests first. Not all laws providing for designated agency are as clear as they could be, though. North Carolina's administrative regulations, for example, instruct that in the designated agency context, "the broker or salesperson so designated shall represent only the interest of the buyer . . . ."<sup>103</sup> The licensing statute and regulations are silent, however, as to what duties, if any, may be owed by the designated agent to his or her client.<sup>104</sup>

From the consumer's perspective, no form of dual or designated agency is particularly desirable, and critics have spoken out against both practices.<sup>105</sup> Ideally, the agent representing a seller or buyer would be entirely independent, free from financial and other ties to the opposing party that might be inherent in the designated agency situation.<sup>106</sup> Many commentators, particularly consumer advocacy groups and exclusive buyer agency firms, argue that the entire system should be changed to require brokers to represent either buyers or sellers and not both.<sup>107</sup> The reality of the residential real estate marketplace, however, renders designated agency a necessary evil. The economic and practical aspects of the marketplace may pressure firms to represent both buyers and sellers.

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<sup>103</sup> See N.C. ADMIN. CODE tit. 21, r. 58A.0104(l) (2002) (agents designated to represent buyers); N.C. ADMIN. CODE tit. 21, r. 58A.0104(k) (agents designated to represent sellers).

<sup>104</sup> In fact, the only guidance is found in a state Real Estate Commission brochure, which notes: "Some firms also offer a form of dual agency called 'designated agency' where one agent in the firm represents the seller and another agent represents the buyer. This option (when available) may allow each 'designated agent' to more fully represent each party N.C. REAL EST. COMM'N, WORKING WITH REAL ESTATE AGENTS, available at <http://www.ncrec.state.nc.us/consumers/WorkingWith.asp>. To provide more guidance, the statute should be amended to clarify the implication that designated agents representing buyers owe the same duties to their clients that are owed by other licensees representing buyers, and the same for designated agents representing sellers. This could easily be accomplished by adding language to the quoted section as follows: "In addition to the duty of confidentiality set forth herein, the broker or salesperson designated to represent a buyer owes to the buyer the duties set forth in § \_\_\_\_\_." Maine's statute is similarly vague with respect to the duties of an "appointed agent." See ME. REV. STAT. ANN. tit. 32, § 13271(2) (West 2001) (defining "appointed agent" but making no reference to its duties).

<sup>105</sup> See, e.g., Douglas C. Kaplan, *Time to End "Let's Pretend,"* 71 FLA. BAR J. 97, 98–99 (May 1997) ("Only in a world of fantasy would salespeople within one office not share communications and disclosures with each other and with the principal broker. This [designated] agency design appears to be little more than a house of cards built upon a foundation of dual agency."). See generally Vickie J. Brady, Comment, *The "Brokerage Relations" Addition to the Illinois Real Estate License Act: The Case of the Legalized Conflict of Interest*, 22 S. ILL. U. L.J. 725 (1998); Sandra Nelson, Note, *The Illinois Real Estate "Designated Agency Amendment": A Minefield for Brokers*, 27 J. MARSHALL L. REV. 953 (1994).

<sup>106</sup> There are other distressing incentives inherent in the system. For example, except where an exclusive buyer's agent is employed and paid by the buyer separately, commissions paid to the realtors are based on the sales price of the home. See Wilson, *supra* note 12, at 91. Accordingly, the agents in the transaction, whether representing seller or buyer, get higher commissions the higher the sales price. *Id.*

<sup>107</sup> See, e.g., Nelson, *supra* note 105, at 978 (citing *Consumer Advocates Call for Revolutionary Real Estate Reforms*, REAL EST. INSIDER, Apr. 26, 1993, at 3) (quoting Ralph Nader as advocating that buyer brokers eliminate dual agency, which he describes as "a maneuver for the big guys to have it both ways;" and calling for buyer brokers to make elimination of dual agency their number one priority).

Firms that do a high volume of intra-company sales have the highest median net profit margins, the number and percentage of buyer agency transactions is not high enough to persuade sellers' agents to give up seller-side representation, and designated agency allows firms to not only increase their commissions but also better "control" sales transactions.<sup>108</sup>

Unless and until the market or legislation turns exclusive buyer and seller agency firms into the norm,<sup>109</sup> designated agency is a compromise that can work. Indeed, law firms have effectively represented clients on opposite sides of deals and even litigation for years.<sup>110</sup> While some have argued, in the context of legal "Chinese walls," that protection policies are difficult to enforce,<sup>111</sup> there is no reason to believe that real estate professionals—whose "Chinese walls" will be temporally shorter, more focused in scope, and necessarily less complex than those of law firms—are incapable of effectuating policies that will protect client confidences. In addition, private rights of action against offending licensees and administrative discipline, including the suspension or revocation of a broker or agent's license, could go a long way in insuring that licensees comply.

### C. Type III: Two-Tiered Service

In a small number of states, the legislatures have chosen to avoid denomination of realtors' roles altogether. Rather than necessarily identifying licensees as exclusive or single seller's or buyer's agents, or sub-agents, these states' statutes focus almost entirely on licensees' duties. In so doing, they create two categories of consumers: customers and clients. Customers are generally defined as consumers with whom the licensee does not have an agency relationship; clients are those who have entered into an agency or other brokerage agreement with the licensee.<sup>112</sup> Logically,

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<sup>108</sup> See Nelson, *supra* note 105, at 966 n.95.

<sup>109</sup> Another alternative that would eliminate the need for the designated agency role is a complete overhaul of the existing system, perhaps by way of federal legislation. Congress could replace the exclusive right to sell listing agreements with the open listing agreement, making MLS information available to brokers and consumers alike. This would require the seller to pay a commission only to the "selling" broker, whether that is the listing broker or any other agent who found a buyer via the MLS or otherwise. This would also encourage brokers to charge fees for services rendered and would increase competition among brokers, thereby reducing overall costs to sellers and buyers. See Braswell, *supra* note 14.

<sup>110</sup> To create "[judicially] unassailable" "Chinese walls," one commentator suggests that specific institutional mechanisms and timeliness of implementation are key. John Robert Parker, *Private Sector Chinese Walls: Their Efficacy as a Method of Avoiding Imputed Disqualification*, 19 J. LEGAL PROF. 345 (1995). According to Parker, stiff penalties (termination) and physical separation are indicative of an effective screen. *Id.* at 348. See also Christopher J. Dunnigan, Note, *Conflict of Interest: The Art Formerly Known as the Chinese Wall: Screening in Law Firms: Why, When, Where, and How*, 11 GEO. J. LEGAL ETHICS 291 (1998)(providing complete history of "Chinese wall" concept and addressing screening in the context of successive legal representation conflicts of interest).

<sup>111</sup> See Dunnigan, *supra* note 110, at 298–99.

<sup>112</sup> A few other states define customers and clients similarly but do not use these categories to define licensee duties to individuals in each category. See, e.g., IND. CODE ANN.

then, in Type III states clients are owed more expansive duties than are mere customers, for whom more limited “ministerial acts” are performed.

In Illinois,<sup>113</sup> for example, a licensee can perform services for an unrepresented customer that are “informative or clerical in nature and do not rise to the level of active representation.”<sup>114</sup> These “ministerial” acts include many of the typical functions of the old “real estate agent,” such as responding to phone inquiries about availability and price of both listings and services, attending open houses and answering questions about the property, setting appointments to view a property, responding to questions from walk-in consumers, accompanying an appraiser to visit a property, describing a property and its condition, and completing information for a consumer’s offer or contract for purchase.<sup>115</sup> “Safe harbor” provisions accompany ministerial act provisions, expressly stating that performance of these activities shall not be construed to form a brokerage relationship with the buyer, nor does it violate the broker’s engagement with the seller.<sup>116</sup> Thus, agents working in a two-tiered structure may per-

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§§ 25-34.1-10-5 to -6 (Michie 2001); 201 KY. ADMIN. REGS. 11:400 (5)(a) (2001). Nearly all states’ statutes define the word “client” in analogous terms. *See, e.g.*, MD. CODE ANN., BUS. OCC. & PROF. § 17-528(f) (2001).

<sup>113</sup> Like many others, Illinois’s statute defines the term “customer” in terms of ministerial acts. *See* 225 ILL. COMP. STAT. 454/1-10 (2001) (“‘Customer’ means a consumer who is not being represented by the licensee but for whom the licensee is performing ministerial acts.”).

<sup>114</sup> 225 ILL. COMP. STAT. 454/1-10 (2001). Other safe harbors, clearly designed to protect licensees, also appear in the various state statutes. For example, many statutes provide that a licensee representing a seller may safely show other properties to a buyer and may list other “competing” properties without liability to the client. *See, e.g.*, COLO. REV. STAT. § 12-61-804(4) (2001); ME. REV. STAT. tit. 32, § 13273(1)(G) (2001). Likewise, licensees representing buyers may show the same property to other buyers without liability to any buyer client. *See, e.g.*, 63 PA. CONS. STAT. § 455.606a (f) (2001); S.C. CODE ANN. § 40-57-137(I) (Law. Co-op. 2001). Illinois and Louisiana laws eliminate as a potential issue for litigation the fact that licensees “will receive a higher fee or compensation based on higher selling price or lease cost.” 225 ILL. COMP. STAT. 454/15-15(c) (2001); LA. REV. STAT. ANN. § 9:3893(C) (West 2001). Some states’ statutes protect licensees from liability in any action arising out of matters for which the licensee advised the consumer to obtain other professional advice. *See, e.g.*, KAN. STAT. ANN. § 58-30,106(b) (2001).

<sup>115</sup> *See* GA. CODE ANN. § 10-6A-3(12), § 10-6A-14 (2000) (similar); IOWA ADMIN. CODE r. 193E-1.1 (1997) (similar); KAN. STAT. ANN. § 58-30,102(n) (2001) (similar); LA. REV. STAT. ANN. § 9:3891(12) (West 2001) (similar); MO. REV. STAT. § 339.710(17) (2000) (similar); S.D. CODIFIED LAWS § 36-21A-128 (Michie 2001) (defining “informative acts that do not constitute representation” similarly); VA. CODE ANN. § 54.1-2130 (Michie 2001) (defining ministerial acts as “those routine acts which a licensee can perform for a person which do not involve discretion or the exercise of the licensee’s own judgment”); ME. REV. STAT. tit. 32, § 13271(9) (2001) (similar); IDAHO CODE § 54-2083(10) (Michie 2001) (defining ministerial acts as “reasonably necessary and customary acts typically performed by real estate licensees in assisting a transaction to its closing or conclusion”).

<sup>116</sup> 225 ILL. COMP. STAT. 454/15-25(b) (2001). *See also* GA. CODE ANN. § 10-6A-5(c) (2000) (similar); KAN. STAT. ANN. §§ 58-30,106(e), 58-30,107(e) (2001) (providing the corollary for buyer’s agents); LA. REV. STAT. ANN. § 9:3894(A) (West 2001) (similar); DEL. CODE ANN. § 2900, r. 10.0 (2001) (“The broker, any cooperating broker, and any salesperson working with either, without breaching the fiduciary responsibilities to the seller, may, among other services, provide a potential purchaser with information about the attributes of properties and available financing, show properties, and assist in preparing an

form a wide array of services for customers, yet the law does not impose the fiduciary obligations that some unsuspecting buyers may expect.<sup>117</sup>

This two-tiered service model is employed by the statutes of Idaho,<sup>118</sup> Illinois,<sup>119</sup> Iowa,<sup>120</sup> Louisiana,<sup>121</sup> Nevada,<sup>122</sup> and Wisconsin,<sup>123</sup> among other states.<sup>124</sup>

#### D. Type IV: Transaction Brokerage

In addition to making available to consumers the realtor relationship options provided in Type I and Type II states, Type IV states also offer a completely new legislatively created option called “transaction brokerage” or something similar.<sup>125</sup> Transaction brokers are not agents. Instead, they tend to act more as middlemen or go-betweens, real estate licensees who are beholden to the transaction first and foremost, and who do not individually represent either party.

The notion of a transaction broker or “non-agent”—whose responsibilities would be delineated by state statute rather than the common law of agency—was first suggested in 1992 and was debated by NAR at its national meeting in 1993.<sup>126</sup> While NAR ultimately chose not to endorse

offer to purchase.”); OHIO REV. CODE ANN. § 4735.69 (Anderson 2001) (providing more limited list of acts that fall within the safe harbor); S.C. CODE ANN. § 40-57-137(L) (Law. Co-op. 2000) (similar). *Cf.* MD. CODE ANN., BUS. OCCUP. & PROF. § 17-532(h)(1) (2001) (creating safe harbor only if client consents in the brokerage agreement to the provision of ministerial acts to the other party); VA. CODE ANN. §§ 54.1-2131(C), 54.1-2132(C) (Michie 2001) (giving safe harbor for licensee who provides ministerial acts, but only to the extent “not inconsistent with” duties to client); IND. CODE ANN. § 25-34.1-10-10(e)(2) (Michie 2001) (similar).

<sup>117</sup> See *infra* Part VIII.C.

<sup>118</sup> See, e.g., IDAHO CODE § 54-2083(4), (6) (Michie 2000) (defining client and customer, respectively); *id.* § 54-2086 (duties to customers); *id.* § 54-2087 (duties to clients).

<sup>119</sup> See, e.g., 225 ILL. COMP. STAT. 454/1-10 (2001) (defining client and customer); *id.* 454/15-15 (duties of licensees representing clients); *id.* 454/15-25 (licensees’ relationship with customers).

<sup>120</sup> See, e.g., IOWA CODE § 543B.5(9)–(10) (2001) (defining client and customer); *id.* § 543B.56(1)–(2) (providing duties of licensees “to all parties in a transaction” and “to a client,” respectively).

<sup>121</sup> See, e.g., LA. REV. STAT. ANN. § 9:3891(4), (7) (West 2001) (defining client and customer); *id.* § 3893 (“duties of licensees representing clients”); *id.* § 3894 (“licensees relationship with customers”).

<sup>122</sup> See, e.g., NEV. REV. STAT. § 645.252 (2001) (defining duties owed to all parties to a real estate transaction); *id.* § 645.254 (defining duties owed to clients with a brokerage agreement); *id.* § 645.009 (defining client).

<sup>123</sup> See, e.g., WIS. STAT. § 452.133(1)–(2) (2000) (defining “duties to all parties” and “duties to a client,” respectively); *id.* § 452.01(3s), (3m) (2000) (defining client and customer).

<sup>124</sup> Some states that have created the customer/client distinction for defining licensees’ duties have also elected to establish a “transaction broker” or similar role. This is the case in Alabama, Kansas, Kentucky, New Mexico, South Dakota, and Tennessee. Each of these states, then, is a Type IV state. See *infra* Part IV.D.

<sup>125</sup> In 2000, eight percent of NAR’s member-REALTORS® described their practice as primarily “transactional” agency. NAR MEMBER PROFILE, *supra* note 20, at 23 tbl. III-7.

<sup>126</sup> Brown, *supra* note 12, at 28–29; see also Pancak, *supra* note 10, at 352–53.

the idea,<sup>127</sup> the non-agent concept nonetheless has been adopted by many states in varying forms since 1994.

As one might expect, no two statutory non-agents or transaction brokers are precisely the same. The next Section looks at the typical statutory definitions of transaction brokerage, and, more importantly, the usual duties and responsibilities associated with this new form of realtor representation.

### 1. Statutory Definitions

The purest form of “transaction broker”—also referred to as a “transaction coordinator,” “transaction licensee,” or “facilitator”<sup>128</sup>—is a broker devoted to the transaction itself, representing *neither* party as a fiduciary.<sup>129</sup> This is the transaction broker at work in most Type IV states.<sup>130</sup>

Colorado created the first transaction broker by statute in 1994.<sup>131</sup> Colorado law today defines a transaction broker as:

a broker who assists one or more parties throughout a contemplated real estate transaction with communication, interposition, advisement, negotiation, contract terms, and the closing of such real estate transaction *without being an agent or advocate for the interests of any party to such transaction . . .*<sup>132</sup>

Other states that recognize a similar transaction broker role are Florida, Georgia, Kansas, Montana, New Jersey, South Dakota, and Wyoming.<sup>133</sup>

<sup>127</sup> Pancak, *supra* note 10, at 352–53.

<sup>128</sup> Montana calls its equivalent of the transaction broker a “statutory broker.” MONT. CODE ANN. § 37-51-102(24)(a) (2001). For ease of reference, the term “transaction broker” will refer to licensees in all states that define transaction brokerage basically in this way.

<sup>129</sup> Compare Virginia’s “independent contractor,” which is defined as “a licensee who acts for or represents a client other than as a [licensee who represents the client and has statutorily prescribed duties only] and whose duties and obligations are governed by a written contract between the licensee and the client.” 18 VA. ADMIN. CODE § 135-20-10 (West 2001). While this may signify a variant form of agency representation, it does not qualify as a transaction broker as that term is used in this Article because, by definition, the licensee is representing a client in some agency capacity, however it is defined by the written agreement. A number of states explicitly permit this type of contracting, which functions to augment the duties otherwise statutorily owed by a licensee, without calling the licensee an “independent contractor.” See, e.g., MD. CODE ANN., BUS. OCC. & PROF. § 17-532 (2001). Note, however, that the converse is not necessarily true. Maryland and a number of other states expressly prohibit waiver of a licensee’s statutorily prescribed duties. See, e.g., *id.* § 17-532(g); OR. REV. STAT. § 696.805(4) (2001); 63 PA. CONS. STAT. § 455.606(a) (2001); WASH. REV. CODE § 18.86.030 (2001).

<sup>130</sup> See *infra* notes 132–133.

<sup>131</sup> Recall that NAR studied the non-agency concept in the early 1990s and ultimately chose not to endorse it. Brown, *supra* note 12, at 29; Pancak, *supra* note 10, at 352. This apparently did not dissuade individuals and local real estate boards from suggesting and/or lobbying for state adoption of such a licensee role.

<sup>132</sup> COLO. REV. STAT. § 12-61-802(6) (2001) (emphasis added).

<sup>133</sup> See GA. CODE ANN. § 10-6A-3(14) (2000) (“‘Transaction broker’ means a broker

Two states, Missouri and Tennessee, use the term “transaction broker” to refer to more than one category of licensee. In addition to the traditional transaction broker, Missouri’s real estate licensing law adds any agent who “assists one or more parties to a transaction and who has not entered into a specific written agency agreement to represent one or more of the parties” or “assists another party to the same transaction either solely or through licensee affiliates,” provided that both the buyer and seller have notice.<sup>134</sup> Essentially, this language contemplates neutral licensees working with one or both parties but representing neither in an agency capacity, and it includes what would be called “designated” agents or brokers in other states.

A few states vary the definition to encompass a somewhat different group of realtors. For example, in Alabama, a “transaction broker” is defined as a “licensee who assists one or more parties in a contemplated real estate transaction without being an agent or fiduciary or advocate for the interest of that party to a transaction.”<sup>135</sup> By implication, this form of “transaction broker” could have an agency relationship with one party but not the other—a listing agent or seller’s subagent providing assistance to a buyer.<sup>136</sup> In those cases where the transaction broker represents one party but not the other in a fiduciary capacity, the arrangement is

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who has not entered into a client relationship with any of the parties to a . . . real estate transaction and who performs only ministerial acts on behalf of one or more of the parties . . . .”; N.J. ADMIN. CODE tit. 11, § 5-6.9(a)(7) (2001) (“Transaction broker” . . . works with both parties in an effort to arrive at an agreement on the sale or rental of real estate and facilitates the closing of a transaction, but does not represent either party, and has no agency relationship with either party”). Some states streamline the definition by removing the reference to the specific tasks performed by the licensee. *See, e.g.*, FLA. STAT. ch. 475.278(2)(a) (2000) (“A transaction broker provides a limited form of representation to a buyer, a seller, or both in a real estate transaction but does not represent either in a fiduciary capacity or as a single agent.”); MONT. CODE ANN. § 37-51-102(24)(a) (2001) (“Statutory broker” means a broker or salesperson who assists one or more parties to a real estate transaction without acting as an agent or representative of any party to the real estate transaction.”); KAN. STAT. ANN. § 58-30,102(s) (2001) (“Transaction broker” means a broker who assists one or more parties with a real estate transaction without being an agent or advocate for the interests of any party to such transaction.”); S.D. CODIFIED LAWS § 36-21A-1(20) (Michie 2000) (defining “transaction broker” similarly); WYO. STAT. ANN. § 33-28-301(a)(iv) (2000) (defining “intermediary” in similar terms); MICH. COMP. LAWS § 339.2517(9)(k) (2001) (defining “transaction coordinator”).

<sup>134</sup> MO. REV. STAT. § 339.710(22) (2000). Tennessee’s statute describes a transaction broker in terms very similar to those in subparagraphs (b) and (c) of the Missouri statute. *See* TENN. CODE ANN. § 62-13-102(8) (2001).

<sup>135</sup> ALA. CODE § 34-27-81(17) (2001). *See also* OKLA. STAT. tit. 59, § 858-351(5) (2001) (defining “transaction broker” as “a broker who provides services by assisting a party in a transaction without being an advocate for the benefit of that party”); 63 PA. CONS. STAT. § 455.201(6) (2001) (defining “transaction licensee” as one “who provides . . . services . . . without being an agent or advocate of the consumer”).

<sup>136</sup> Some licensing schemes that do not provide for transaction brokers also accomplish the same thing by permitting an agent to perform “ministerial acts” for the other party to the transaction (a “customer”) without creating an agency relationship with the customer and without violating fiduciary duties to the licensee’s own client.

really no different than the traditional model, with the buyer perhaps erroneously believing he is represented in an agency capacity.<sup>137</sup>

## 2. Duties

Some commentators have erroneously assumed that the transaction broker, if not a fiduciary, owes no duties to the parties involved in a real estate transaction.<sup>138</sup> If this were true, the transaction broker might be dangerous indeed.<sup>139</sup> Fortunately for consumers, however, most states that permit transaction brokers have vested them with at least a few statutory duties.

The number and extent of the duties a transaction broker owes differ from state to state. On one end of the spectrum, neither Michigan's licensing statute nor its administrative regulations enumerate any duties incumbent upon its "transaction coordinator."<sup>140</sup> Kentucky law requires only honesty and fairness of its transaction brokers.<sup>141</sup> New Hampshire

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<sup>137</sup> This is the case with some transaction brokers in Missouri and all transaction brokers in Tennessee. *See supra* note 134 and accompanying text.

<sup>138</sup> *See, e.g.*, Neal Gendler, *New Laws Touch on Agent Disclosure, Escrow Funds and Mortgage Insurance*, MINN. STAR-TRIB., July 27, 1996, at 4H (stating that a nonagent "owes the customer none of the fiduciary responsibilities of the client relationship"); Washington, *supra* note 9, at 3 (stating that transaction brokers "do not represent either party and there is no liability involved"); H. Jane Lehman, *Association to Redefine Agent Roles*, WASH. POST, Nov. 20, 1993, at E1 (stating that facilitators are "middlemen with no responsibilities other than matching up buyers and sellers"); Cyd King, *Transaction Brokers Ease Liability Concerns*, ARK. DEM.-GAZ., July 5, 1998, at BM16 (stating that a transaction broker is a "glorified paper shuffler"); Kindleberger, *supra* note 80, at 37 (stating that a facilitator is "only a finder or middleman").

<sup>139</sup> Indeed, even when fiduciary duties *are* in place, unfortunate consumers have been the victims of realtor malfeasance, for example in cases involving self-dealing. In a troubling but apparently common scenario, the listing agent makes a secret profit by buying the property directly from the seller and then selling it to a buyer of whom the agent was already aware. *See, e.g.*, *Letsos v. Century 21-New West Realty*, 675 N.E.2d 217, 220 (Ill. App. Ct. 1996); *Ellison v. Alley*, 842 S.W.2d 605, 607 (Tenn. 1992); *Nguyen v. Scott*, 253 Cal Rptr. 800, 806 (Ct. App. 1988); *Licari v. Blackwelder*, 539 A.2d 609, 611 (Conn. App. Ct. 1988); *Johnson Realty, Inc. v. Hand*, 377 S.E.2d 176, 178-79 (Ga. Ct. App. 1988); *Chien v. Chen*, 759 S.W.2d 484, 497 (Tex. Ct. App. 1988); *Falle v. Metalios*, 517 N.Y.S.2d 534, 536 (App. Div. 1987). This occurs despite the fact that nearly all states require licensees to disclose their status as principals to the transaction, usually in writing.

Disclosure of a licensee's interest in the property that is the subject of the real estate transaction is required as part of licensees' overall duties to the parties, presumably creating a private right of action for damages or rescission in some states. *See, e.g.*, ALA. CODE § 34-27-84(a)(6) (2002); CONN. AGENCIES REGS. § 20-328-2a (2002); IOWA CODE ANN. § 543B.56(3) (West 2002).

<sup>140</sup> *See* MICH. COMP. LAWS ANN. § 339.2517 (West 2002); MICH. ADMIN. CODE r. 339.22309 (2002). Presumably, since Michigan's licensing law does not supersede the common law with respect to agency relationships and duties, the common law will dictate a transaction coordinator's duties to the parties to the real estate contract. *See infra* note 246 (supersession provisions).

<sup>141</sup> A Kentucky transaction broker "assists the parties to a potential real estate transaction as a real estate broker in communication, interposition and negotiation, to reach an agreement between or among them, without acting as agent for any party." 201 KY. ADMIN. REGS. 11:400 § 5(1)(a) (2001). The Kentucky transaction broker must treat both buyer and seller as "customers." In turn, all licensees "are required to deal honestly and fairly with

“non-agents” and New Jersey transaction brokers have a further obligation to warn prospective buyers of any known adverse material facts about the property.<sup>142</sup> Facilitators in Minnesota owe an additional statutory duty of limited confidentiality and must perform any other contractual duties.<sup>143</sup> Finally, in Georgia, transaction brokers must also account for property belonging to the parties that is placed under their control, present offers and other communications in a timely manner, and disclose known material adverse facts about the property or transaction.<sup>144</sup>

While consumers have benefited from the wider array of agency relationships made available over the past few decades, examining choice alone does not paint a full—or accurate—picture of the protection provided to consumers. In fact, the degree of choice does not necessarily even correlate with the level of consumer protection a given statute provides. To evaluate that level of protection, an examination of the default representation status of an otherwise “unrepresented” party and the duties licensees will owe him by legal implication is necessary to give a fuller sense of the challenges faced by consumers. These topics are discussed in the next two Parts.

## V. DEFAULT POSITION

States’ statutes differ markedly in their default positions—the level of representation that the licensee must afford to the typical buyer (or seller in a “for sale by owner” setting) if he does not engage in a contract or otherwise actively seek out representation. The various statutes and regulations provide for default to seller agency, default to buyer agency, default to “customer status,” or default to transaction brokerage for the passive consumer. Some statutes create no default at all, simply providing for a number of different possible relationships. In almost all states—with or without a statutory presumption—the default for the passive unrepresented consumer will tend towards the traditional model.<sup>145</sup> The statutory provisions creating the different default positions are explained below, beginning, as before, with the traditional model and then moving

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customers.” *Id.*

<sup>142</sup> N.H. CODE ADMIN. R. ANN. [Real Est. Comm’n] 701.02 (2002) (requiring non-agent to disclose to prospective buyers any material facts relating to “physical, regulatory, mechanical or onsite environmental” defects in the property); N.J. ADMIN. CODE tit. 11, § 5-6.9 (2002) (requiring all licensees to disclose material adverse facts about the relevant real estate and/or a buyer’s financial ability to perform the proposed contract).

<sup>143</sup> MINN. STAT. § 82-197(4)(V), (6) (West 2001).

<sup>144</sup> GA. CODE ANN. § 10-6A-14(b) (2002).

<sup>145</sup> Of course, local custom may vary. In some areas, for example, it may be common practice for licensees to automatically offer transaction brokerage to unrepresented buyers or sellers. The “default” position, as discussed in this Article, refers to the position (vis-à-vis agency representation) in which an unrepresented party would find himself based on the statute and without the benefit of any such atypical local custom. See Ronald J. Mass, *Agency Disclosure: A Real Estate Broker’s Responsibility*, 11 S.C. LAW. 39 (1999).

along the spectrum to those categories of states that provide the greatest default protection to the passive or uninformed consumer.

*A. Category A: Traditional Model Prevails*

In the majority of states, the default position faced by a buyer who does not actively seek to be exclusively represented is still the traditional listing/selling broker model, with both licensees representing the seller and the buyer remaining unrepresented. This result may be due to an explicit provision in the licensing statute that the default for licensees is seller agency/subagency.<sup>146</sup> In the more common case, however, the traditional model as default arises as a practical consequence of requiring agency representation agreements to be in writing.<sup>147</sup> This is the case in Alabama,<sup>148</sup> Iowa,<sup>149</sup> Kansas,<sup>150</sup> Missouri,<sup>151</sup> New Hampshire,<sup>152</sup> New Jersey,<sup>153</sup> North Carolina,<sup>154</sup> Utah,<sup>155</sup> Vermont,<sup>156</sup> Wisconsin,<sup>157</sup> and Wyoming.<sup>158</sup>

While the requirement that agency agreements be in writing may appear to be even-handed, it is not. Sellers, who in most cases sign a listing agreement,<sup>159</sup> are likely to be represented by a listing agent and possibly also a cooperating or selling subagent. On the other hand, buyers in these states remain unrepresented unless and until they contract in writing with

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<sup>146</sup> Rhode Island law provides that “real estate agents are considered to be the agent of the seller of real estate unless there is an agreement in writing to the contrary between the buyer(s) and agent, and the agreement is disclosed to all parties.” R.I. GEN. LAWS § 5-20.6-2(a) (2001). Missouri’s regulations state, in describing the purpose of the regulation governing brokerage service agreements, that “[i]n a cooperative listing, the selling broker shall be presumed to be a subagent of the listing broker.” MO. CODE REGS. ANN. tit. 4, § 250-8.090 (2002). Another regulation also contemplates that cooperative sales may involve sellers’ agents working with another licensee representing the buyer as a transaction broker. *Id.* § 250-8.095(1)(A)(4).

<sup>147</sup> A variation is found in statutes that are silent with respect to listing agreements, but which require buyers’ agency agreements (and dual agency agreements) to be in writing. *See, e.g.*, N.D. ADMIN. CODE §§ 70-02-03-05.1, 70-02-03-15.1.7(c) (2002). *Cf.* 63 PA. CONS. STAT. §§ 455.201, 455.606a(b) (2002) (stating that written agency agreements are not required but preventing agents from collecting a commission without a written agency agreement).

<sup>148</sup> ALA. CODE § 34-27-81(3) (2002).

<sup>149</sup> IOWA CODE § 543B.5(2) (2001).

<sup>150</sup> KAN. STAT. ANN. § 58-30,102(b)–(c) (2001).

<sup>151</sup> MO. REV. STAT. § 339.780 (2001).

<sup>152</sup> N.H. REV. STAT. ANN. § 331-A:2(III-a) (2000).

<sup>153</sup> N.J. ADMIN. CODE tit. 11, § 5-6.9(a)(1) (2002).

<sup>154</sup> N.C. ADMIN. CODE tit. 21, r. 58A.0104(a) (July 2002).

<sup>155</sup> UTAH ADMIN. CODE 162-6.1.11 (2002).

<sup>156</sup> VT. REAL EST. COMM’N R. 4.7(a) (2001).

<sup>157</sup> WIS. STAT. ANN. § 452.01(1m) (West 2002).

<sup>158</sup> WYO. STAT. ANN. § 33-28-302 (Michie 2002) (requiring that any agreement for agency or transaction brokerage be written).

<sup>159</sup> Almost all states’ licensing statutes and regulations incorporate a sort of Statute of Frauds, requiring listing agreements to be in writing in order for a licensee to recover a commission. *See, e.g.*, CONN. GEN. STAT. ANN. § 20-325a(b) (West 2002); 63 PA. STAT. ANN. § 455.302 (West 2002).

a broker.<sup>160</sup> While expressly allowing for buyer agency and perhaps other forms of agency representation, provisions that require all agency agreements to be in writing, without some other sort of presumption built in, encourage the traditional listing/selling agency model.

Licensing statutes in Nebraska, Maryland, and Washington take a seemingly different approach by making representation of the buyer the default for a licensee working with a buyer. Even in these states, however, this protection is severely undermined by the numerous exceptions contained in the statutes. Nebraska's statute, for example, provides that a licensee shall be considered a buyer's agent unless the licensee's broker has entered into one of the following other relationships: (a) a limited agency agreement with the seller, (b) a limited subagency agreement with the seller, (c) a dual agency agreement with the parties, or (d) another agency agreement (with either party) that provides for duties greater than those required of a "limited agent" under the licensing statute.<sup>161</sup> Maryland's statute, on the other hand, provides for a presumed buyer agency for any licensee who assists the buyer and is neither the listing agent or affiliated with the listing agent.<sup>162</sup> The exceptions to this presumption are considerable, however. The presumed buyer agency is nullified if "either the licensee or the buyer expressly declines to have the licensee act as a buyer's . . . agent."<sup>163</sup> While a buyer may not decline such representation, it is highly likely that the licensee would do so for two reasons. First, the buyer has no obligation to work exclusively with or to compensate the licensee who is acting as a presumed buyer's agent.<sup>164</sup> Second, and probably more importantly, a licensee acting as a presumed buyer's agent may show only those properties that are not listed by that licensee or her brokerage.<sup>165</sup> If a licensee shows properties listed by her firm, she is then acting as the listing agent and will no longer represent the buyer, except possibly in an intra-company capacity.<sup>166</sup> Even in these states, then, as a practical matter the default is most likely to be the traditional model.

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<sup>160</sup> An interesting downside for the industry that is presented by the written agency agreement requirement is a Tennessee case in which the parties to a commercial real estate contract successfully avoided paying the facilitator/licensee a commission in part because there was no written brokerage agreement. *Coldwell Banker-Hoffman Burke v. KRA Holdings*, 42 S.W.3d 868, 874–75 (Tenn. Ct. App. 2000). Notably, the facts of the case also permitted a finding that the licensee was not the procuring cause of the sale, despite the fact that she introduced the buyer to the property and participated in negotiations. *See id.* at 875–76.

<sup>161</sup> NEB. REV. STAT. § 76-2416(2) (2001). Washington's statute is similar. Licensees who provide real estate services to buyers are deemed buyers' agents unless any of the exceptions apply, i.e., the licensee is either the seller's agent or subagent, the licensee is a dual agent for both parties, the licensee is the seller, or the parties otherwise agree in writing. WASH. REV. CODE ANN. § 18.86.020 (West 2002).

<sup>162</sup> MD. CODE ANN., BUS. OCC. & PROF. § 17-533(a) (2001).

<sup>163</sup> *Id.* § 17-533(a) (2001). The result is the same if either the licensee or the buyer expresses a desire to terminate the presumed agency. *Id.* § 17-533(b)(1).

<sup>164</sup> *Id.* § 17-533(c).

<sup>165</sup> *Id.* § 17-533(d).

<sup>166</sup> *Id.* § 17-533(f). *See also supra* Part IV.B.

Finally, by definition, in Type III states the default position is for a consumer without a written agency<sup>167</sup> or other brokerage agreement<sup>168</sup> to qualify only as a customer.<sup>169</sup> This makes most sellers “clients” and most buyers customers.<sup>170</sup> In states with two-tiered service models, realtors may work with but do not represent customers.<sup>171</sup> This scenario creates

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<sup>167</sup> See, e.g., GA. CODE ANN. § 10-6A-3(4), (6) (2002) (defining brokerage engagement as a “written contract” and client as one with brokerage engagement); IDAHO CODE §§ 54-2083(4), 54-2083(6), 54-2084 (Michie 2001) (stating that no agency relationship is established without a writing); KAN. STAT. ANN. § 58-30,102(c) (2001) (defining agency agreement as “written agreement setting forth the terms and conditions of the relationship between a broker and the broker’s client”); MO. REV. STAT. § 339.780 (2000) (requiring agreements for brokerage services to be in writing); S.C. CODE ANN. § 40-57-137(C), (H) (Law. Co-op. 2000); S.C. REAL EST. COMM’N, ADVISORY (Feb. 1998) (on file with author) (“seller and buyer agency agreements must be in writing”); S.D. CODIFIED LAWS § 36-21A-130 (Michie 2001) (stating that agency agreements shall be in writing).

<sup>168</sup> The following states’ statutes provide for two-tiered service, and do not require agency agreements to be in writing: Illinois, Kentucky, Mississippi, and Virginia. These states fall in Category B.

<sup>169</sup> Virginia’s statute provides an example: “[u]nless a licensee enters into a brokerage relationship with such person, it shall be presumed that such person is a customer of the licensee rather than a client.” VA. CODE ANN. § 54.1-2130 (Michie 2001). The definition of “brokerage relationship” is any contractual relationship in which the client engages the broker to procure a seller or buyer on the client’s behalf. *Id.* This sort of ambiguity with respect to the creation of an agency relationship is a double-edged sword. By implication it permits both oral and implied agency agreements, leaving the licensee and the party free (absent a written agreement) to assert that an agency relationship exists or does not exist, depending on the factual circumstances. This opens the door to fact intensive litigation. Many licensing statutes have sought to avoid precisely this result by narrowing this potential loophole. See, e.g., IDAHO CODE § 54-2084 (2001) (“No type of agency representation may be assumed by a brokerage, buyer or seller or created orally or by implication.”). On the other hand, requiring agency relationships in writing also has the less-than-salutary effect of encouraging the traditional listing/selling agency representation model. See *supra* notes 147–160 and accompanying text (discussing written agency agreements).

<sup>170</sup> Less than half of U.S. homebuyers report having engaged a real estate licensee in exclusive buyer agency agreements. BUYERS AND SELLERS PROFILE, *supra* note 75, at 23. The number of buyers who actually entered into enforceable agency relationships with the licensee with whom they are working is probably lower. Even in the post-disclosure era, buyers are probably not the best arbiters of whether they have legally entered into an agency arrangement with “their” agent in a given real estate transaction, particularly when the courts themselves are in flux on this subject. See *supra* note 82 (referring to *ex post facto* implied agency).

<sup>171</sup> Indiana and Louisiana have unique two-tiered service statutes. Their provisions do purport to create a default agency relationship. Louisiana’s statute provides as follows:

a licensee engaged in any real estate transaction shall be considered to be representing the person with whom he is working as [an] agent unless there is a written agreement between the broker and the person providing that there is a different relationship or the licensee is performing only ministerial acts on behalf of the person.

LA. REV. STAT. ANN. § 9:3892 (West 2001). Indiana’s statute is nearly identical. See IND. CODE ANN. § 25-34.1-10-9.5 (West 2002). Cf. 225 ILL. COMP. STAT. ANN. 454/1-10 (West 2002) (defining “customer” as “a consumer who is not being represented by the licensee but for whom the licensee is performing ministerial acts”). For a discussion of what constitutes “ministerial acts” and the confusion that this may engender, see Part VIII.C.

Also notable is that neither of these statutes requires that agency agreements be in writing. For example, Louisiana defines agency as a “relationship in which a real estate

precisely the same danger that the traditional model did—a party or both parties may be confused as to the role the “agent” plays in the transaction, the responsibilities that “agent” has, and to whom they run.

### B. Category B: Statutes Providing “Choice”

A number of states’ statutes create no presumption,<sup>172</sup> instead providing for a variety of different realtor representation options and simply permitting the consumer to select one among them or none at all.<sup>173</sup> While consumers (buyers in particular) in Category B states ostensibly have a number of representational choices, it appears that by default most transactions are still likely to fall into the traditional listing/selling agency model.<sup>174</sup> This is because absent local practice<sup>175</sup> or a particular competi-

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broker or licensee represents a client by the client’s consent, whether express or implied, in an immovable property transaction.” LA. REV. STAT. ANN. § 9:3891(1). *See also* IND. CODE ANN. § 25-34.1-10-0.5 (West 2002). Like Virginia’s statute, Louisiana’s statutes leave the door open for a mere “customer” to argue for the imposition of an implied agency relationship with the licensee “with whom he is working.” *See supra* note 169. This argument would be particularly persuasive if the licensee engaged in more than ministerial acts for the “customer.”

<sup>172</sup> Courts can also create a default presumption in any Category B state. For example, courts in Arizona have rendered the agent who works with the buyer a “buyer’s agent,” complete with fiduciary obligations owed to clients. *See, e.g.,* Alaface v. Nat’l Inv. Co., 892 P.2d 1375, 1383–84 (Ariz. Ct. App. 1994) (agent working with buyer is buyer’s agent, even if seller is paying commission); Lombardo v. Albu, 14 P.2d 288 (Ariz. 2000) (referring to agent working with buyer as buyer’s agent); Aranki v. RKP Invs., Inc., 979 P.2d 534 (Ariz. Ct. App. 1999) (same). The same would be true in Category A states. Further treatment of these judicially created anomalies is outside the scope of this Article.

<sup>173</sup> *See, e.g.,* FLA. STAT. ch. 475.278 (2000) (providing for “no brokerage” representational status); MICH. COMP. LAWS ANN. § 339.2517(2) (2001) (providing “none of the above” as an option on agency relationship disclosure form).

<sup>174</sup> Historically, there were numerous disincentives in place that resulted in few brokers rejecting subagency. *See generally* Collette, *supra* note 6, at 427–29 (discussing practical barriers, under former MLS system, to formation of any cooperating broker relationship other than subagency). It is possible, if not likely, that in many quarters this attitude has persisted, both in the minds of realtors and in their form documents.

Default to the subagency representation model also occurs in those states that have such scant statutory or regulatory provisions relative to forms of agency representation—these typically focusing on disclosure thereof rather than the creation of duties—that no default position is established. *See, e.g.,* ALASKA STAT. § 08.88.396 (Michie 2001); ARK. CODE ANN. § 17-42-108 (Michie 2001); ARK. REAL EST. COMM’N REGS. 8.1–8.5 (2001); DEL. CODE ANN. tit. 24, § 2931 (2001); DEL. ADMIN. CODE tit. 24, § 2900 (2000); HAW. ADMIN. R. § 16-99-3.1 (2002); MASS. REGS. CODE tit. 254, § 3.00(13) (2002).

Arizona’s statutory and regulatory scheme falls into this category as well. ARIZ. REV. STAT. ANN. § 32-2101 (West 2002); ARIZ. ADMIN. CODE 4-28-1101 (2002). However, Arizona case law converts what would traditionally have been cooperating or selling agents into buyers’ agents. *See supra* note 172.

<sup>175</sup> *See, e.g.,* Maas, *supra* note 145 (reporting that in response to legislative agency relationship changes, some local real estate brokerage firms have eliminated subagency practice, instead formulating firm-wide policies that require listing agents to be sellers’ agents; other licensees who work with buyers to act as buyers’ agents; and, where a buyer represented by the firm seeks to purchase one of the firm’s listings, the licensees act as disclosed dual agents); Christopher Curran & Joel Schrag, *Does It Matter Whom an Agent Serves? Evidence From Recent Changes in Real Estate Agency Law*, 43 J. LAW & ECON. 265

tive setting, the onus is on the unsophisticated and relatively uninformed consumer to seek out a relationship other than the one that is easiest, most familiar, or most economically beneficial to the licensee.

California, Connecticut, Florida, Kentucky, Maine, Michigan, Minnesota, Nevada, Ohio, Oregon, New York, Texas, and West Virginia are all Category B states.<sup>176</sup>

### C. Category C: Default Is Transaction Brokerage

Only five states' statutes are Category C,<sup>177</sup> in which transaction brokerage is the default position: Alabama, Oklahoma, New Mexico, Pennsylvania, and Tennessee.<sup>178</sup> Alabama's statute, for example, provides that "[i]n the absence of a signed brokerage agreement between the parties, the transaction brokerage relationship shall remain in effect."<sup>179</sup> Oklahoma's statute similarly provides that "if a broker does not enter into a

(2000) (reporting a shift from seller agency to buyer agency in the Atlanta, Georgia market, resulting in downward pressure on home prices). Presumably, other uncharacteristic practices have developed in other discrete localities.

<sup>176</sup> CAL. CIV. CODE § 2079 (West 2002); CONN. GEN. STAT. §§ 20-311 to -329 (2001); FLA. STAT. ch. 475.278 (2001); 201 KY. ADMIN. REGS. 11:400 §5(1)(a) (2001); 32 ME. REV. STAT. ANN. §§ 13271-13281 (West 2001); MICH. COMP. LAWS § 339.2517 (2001); MINN. STAT. § 82.197 (2002); NEV. REV. STAT. § 645.005 (2001); OHIO REV. CODE ANN. § 4735.01 (Anderson 2001); OR. REV. CODE ANN. § 696.800 (2002); N.Y. REAL PROP. LAW § 443 (McKinney 2001); TEX. REV. CIV. STAT. ANN. art. 6373a, § 15C(c) (Vernon 2000); W.V. REAL EST. COMM'N, NOTICE OF AGENCY RELATIONSHIP (on file with author) (suggesting but not mandating written agency agreement).

<sup>177</sup> For a variety of reasons, a number of states that purport to make transaction brokerage the default do not actually fall into this category. Colorado's, Kansas's, and Missouri's licensing statutes also create a "presumption" that licensees are transaction brokers. In these states, however, this presumption is essentially eviscerated by its statutory exceptions. *See* COLO. REV. STAT. § 12-61-803(2) (1996) (making the default that of transaction broker except when licensee is the seller's agent or subagent); KAN. STAT. ANN. § 58-30,103(c) (2002) (same); MO. REV. STAT. § 339.720(1)-(2) (2001) (establishing transaction brokerage default except when licensee is seller's agent or subagent, buyer's agent, disclosed dual agent, a designated broker, or is just performing ministerial acts for a customer). In these states, the default is more likely to be the traditional agency representation model. Therefore, these are Category A states.

Likewise, Georgia's and Montana's statutes only appear to create a default transaction broker. *See* GA. CODE ANN. § 10-6A-3(14) (2000) (defining transaction broker as "a broker who has not entered into a client relationship with *any* of the parties to a particular real estate transaction and who performs only ministerial acts on behalf of one or more of the parties . . .") (emphasis supplied); MONT. CODE ANN. § 37-51-102(24)(b) (2001) (licensee "is presumed to be acting as a statutory [transaction] broker unless . . . [licensee] has entered into a listing agreement with a seller or a buyer broker agreement with a buyer or has disclosed, as required by this chapter, a relationship other than statutory broker"). In each of these states the default is not transaction broker status; instead, the agent working with the unrepresented buyer could just as easily and perhaps more likely be a subagent under the statute. These states, therefore, are Category A states.

<sup>178</sup> *See supra* notes 161-166 and accompanying text (creating a statutory default to buyer agency, but with numerous exceptions that essentially vitiate the rule).

<sup>179</sup> ALA. CODE § 34-27-82(e) (1997).

written brokerage agreement with a party, the broker shall perform services only as a transaction broker.”<sup>180</sup>

The other Category C states create a transaction broker default in a different manner. In New Mexico, Pennsylvania, and Tennessee, the definitions of facilitator, transaction licensee, and nonagent, respectively, dictates that licensees who work with unrepresented parties without written brokerage agreements do so as transaction brokers.<sup>181</sup>

The degree of protection provided by the transaction broker default over the traditional model default depends on the number of duties owed in a particular state.<sup>182</sup> In Oklahoma, transaction brokers owe significant duties to the party with whom they work—duties that nearly coincide with a single-party agents’ duties:

1. To perform the terms of the written brokerage agreement, if applicable;
2. To treat all parties with honesty;
3. To comply with all requirements of the Oklahoma Real Estate License Code and all applicable statutes and rules; and
4. To exercise reasonable skill and care including:
  - a. timely presentation of all written offers and counteroffers,

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<sup>180</sup> OKL. STAT. tit. 59, § 858-352 (2001). Statutes like Oklahoma’s permit but do not necessarily encourage seller subagency practice. Indeed, in Alabama and Oklahoma, where a licensee does not have a written subagency agreement with the seller, she must act as a transaction broker for the otherwise unrepresented buyer. Subagency agreements in this context may be entered into between the listing agent and the cooperating or selling agent who brings the buyer to the transaction. *See, e.g.*, CAL. CIV. CODE § 2079.13(o) (Deering Supp. 2001); IND. CODE ANN. § 25-34.1-10-9 (2001); IOWA ADMIN. CODE r. 193E-1.1(543B) (1997); S.C. CODE ANN. § 40-57-137(N) (Law. Co-op. 2001). They may also be created by way of a written authorization contained within the listing agreement. Oklahoma’s transaction broker default, which requires any subagent to contract directly with the party represented, may present another effective way of handling the “unknown” subagent and vicarious liability problem. *See supra* note 135 at accompanying text.

<sup>181</sup> *See* N.M. ADMIN. CODE tit. 16, § 61.19.8(C) (2002) (mandating that a “nonagency” relationship include a “brokerage relationship providing real estate related services without Agency, . . . to Customers with no written agreement”); 63 PA. CONS. STAT. § 455.201 (2001) (defining a transaction licensee as “a licensed broker or salesperson who provides communication or document preparation services or performs acts described under the definition of ‘broker’ or ‘salesperson’ for which a license is required, without being an agent or advocate of the consumer”); TENN. CODE ANN. § 62-13-102(8)(a) (1997) (transaction broker is one who “assists one or more parties to a transaction who has not entered into a specific written agency agreement . . .”).

<sup>182</sup> There is very little practical difference between the Class C default transaction brokerage in New Mexico, Pennsylvania, and Tennessee, on the one hand, and the treatment of “customers” in Iowa and Wisconsin, where *all parties*, including customers, are owed the same duties by licensees. *See* IOWA CODE § 543B.56 (2001); WIS. STAT. § 452.133 (2000). These latter states are not categorized as Class C because their statutes do not provide for transaction broker status. In a sense, though, in these two states the default position is irrelevant.

- b. keeping the party for whom the transaction broker is providing services fully informed regarding the transaction,
- c. timely accounting for all money and property received by the broker,
- d. keeping confidential information received from a party confidential as required by Section 7 of this act,<sup>183</sup> and
- e. disclosing information pertaining to the property as required by the Residential Property Condition Disclosure Act.<sup>184</sup>

The duties owed by licensees in the other Category C states are similar in scope.<sup>185</sup>

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<sup>183</sup> See *supra* note 99.

<sup>184</sup> OKLA. STAT. tit. 59, § 858-353 (2001). Oklahoma statutes require the seller to disclose material facts related to the condition of the property being sold, typically in the form of a written "Seller's Disclosure Statement." OKLA. STAT. tit. 60, § 833 (2001) (quoting the operative provision of Oklahoma's "Residential Property Condition Disclosure Act"). See generally Leroy Gatlin II, Note, *Reforming Residential Real Estate Transactions: An Analysis of Oklahoma's Disclosure Statute*, 22 OKLA. CITY U. L. REV. 735 (1997).

Many other states now also impose this requirement. See, e.g., HAW. REV. STAT. §§ 508D-7 to 508D-14 (2000) (requiring sellers to provide such a disclosure form to buyers); KY. REV. STAT. § 324.360 (Banks-Baldwin 2002) (same); 68 PA. CONS. STAT. § 7301 (2001) (same). For sample forms in use currently, see, for example, 876 IND. ADMIN. CODE tit. 876, r. § 1-4-2 (2001); 201 KY. ADMIN. REGS. 11:350 (2001). In addition to the duties owed by transaction brokers, clients who have contractually engaged a licensee are also owed duties of "performing all brokerage activities for the benefit of the party for whom the single-party broker is performing services unless prohibited by law," and "obeying the specific directions of the party for whom the single-party broker is performing services that are not contrary to applicable statutes and rules or contrary to the terms of a contract between the parties to the transaction." OKLA. STAT. tit. 59, §§ 858-354(B)(4)(e), (g) (2001).

<sup>185</sup> ALA. CODE § 34-27-84 (1997) (requiring the following duties of all licensees: honesty, good faith, reasonable skill and care, confidentiality, accounting, presentation of all offers in a "timely and truthful manner," disclosure of conflicts of interest in writing); N.M. ADMIN. CODE tit. 16, §§ 61.1.7.6, 61.19.9(C) (2002) (stating that "duties required of all Licensees regardless of any contractual or non-contractual Brokerage Relationship" include disclosure of adverse material facts about the property, transaction or financial ability of the parties to complete the transaction, disclosure of any material interests of the licensee or her relatives in the transaction, timely presentation of offers, performance of any oral or written agreement, accounting, suggestion to obtain professional advice, compliance with fair housing and anti-discrimination laws, assistance to parties with complying with terms and conditions of contract required for closing, confidentiality); 63 PA. CONS. STAT. § 455.606a (2001) (listing duties owed by all licensees to all consumers, including reasonable care, honesty and good faith, prompt presentation of written communications, compliance with the state's Real Estate Seller Disclosure Act, accounting, provision of agency relationship information at an initial interview, timely disclosure of conflicts of interest or financial interest in recommended ancillary services, suggestion to seek professional advice for matters outside the scope of the realtor's services, assistance with tasks needed to complete the transaction, advice on compliance with relevant laws); TENN. CODE ANN. § 62-13-403 (1997) (stating that all licensees owe the following duties to the parties: reasonable skill and care, disclosure of adverse facts, confidentiality, honesty and good faith, disclosure of market conditions information upon request, accounting,

Without the benefit of the transaction broker presumption, all that an unrepresented buyer in Oklahoma would be entitled to from a licensee representing the seller would be the basic duty of honesty that is owed by single party licensees to the other party to the transaction.<sup>186</sup> Because Oklahoma's transaction broker provision imposes a good number of both general and detailed duties and because all licensees without a written brokerage agreement with a party are transaction brokers by default, unrepresented parties in Oklahoma are more protected than it might initially appear.

Reference to a statute's default representation status reveals something about the consumer protection provided in a given state. Not all states default to transaction broker status, however, and, of those, not all require as much of their transaction brokers as Oklahoma. In fact, when assessing whether the consumer is being served by these new licensing statutes and regulatory regimes, the number and weight of the duties imposed on licensees vis-à-vis other parties is a more useful gauge. Therefore, the next Part classifies state statutes by level of other-party duties.<sup>187</sup>

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disclosure of all conflicts of interest and any self dealing).

<sup>186</sup> See OKLA. STAT. tit. 59, § 858-354(B)(2) (2001) (duties of single agent licensee include duty "to treat all parties with honesty"). This is not the case in Alabama or in Tennessee, where all licensees owe all parties the duties set forth *supra* at note 185.

<sup>187</sup> In addition to other-party duties, a licensee obviously owes numerous duties to her client—the consumer with whom she has entered into a brokerage agreement. Rather than list these duties, a few states simply refer to these obligations as fiduciary. See, e.g., ARIZ. ADMIN. CODE 4-28-1101(A) (2001) ("A licensee owes a fiduciary duty to the client, and shall protect and promote the client's interest."); N.Y. REAL PROP. LAW § 443(4) (McKinney 1989) (A licensee has, "without limitation, the following fiduciary duties to the [client]: reasonable care, undivided loyalty, confidentiality, full disclosure, obedience, and a duty to account."); OHIO REV. CODE ANN. § 4735.62 (Anderson 2000) ("In representing any client in an agency or subagency relationship, the licensee shall be a fiduciary of the client. . ."); 23 TEX. ADMIN. CODE § 531.1 (West 2001) ("A real estate broker or salesperson, while acting as an agent for another, is a fiduciary.")

A large percentage of states have redefined the realtor function altogether, removing the common law fiduciary obligations an agent owes to his principal or client and replacing them with concrete enumerated licensee duties that are specifically tied to the residential real estate transaction. See, e.g., MONT. CODE ANN. § 37-51-313 (2001) (defining duties to govern relationships between brokers or salespersons and buyers or sellers and noting that statutory provisions "are intended to . . . replace the common law as applied to these relationships"). Even as redefined, the statutory duties owed to clients tend to include, among others, a number of common law fiduciary or fiduciary-like duties. See, e.g., OHIO REV. CODE ANN. § 4735.62 (Anderson 2001) (listing specific real estate-related "fiduciary duties" owed by licensee to client). See also GA. CODE ANN. § 10-6A-5(2) (2000) (including as seller's agent's duties, "seeking a sale at the price and terms . . . acceptable to the seller" and "timely presenting all offers to and from the seller, even when the property is subject to a contract of sale"); 63 PA. CONS. STAT. § 455.606b(2) (2001) (stating that seller's agent's duties include, *inter alia*, the duty "to make a continuous and good faith effort to find a buyer for the property"). As such, those who are formally represented by a licensee are protected to a level that generally approximates what was available under the common law of agency.

## VI. LICENSEES' STATUTORILY DEFINED OTHER-PARTY DUTIES

Contemporary amendments to most states' real estate licensing statutes have broken completely with the common law and have extended certain agency duties, like the duties of honesty and fairness and the duty to account for any party's funds, to those consumers that are not represented by the licensee. Using "other party" duties, these states have added substantive protections for all parties to a real estate transaction, whether or not these parties are represented by a licensee.<sup>188</sup> Some states have done more than others in creating these other-party duties.<sup>189</sup>

The levels of protection provided fall into four basic categories. At one end of the spectrum are Class 1 states, in which no duties are enumerated at all. Class 2 states impose only a duty of "honesty and good faith." Class 3 states go further, requiring licensees to disclose "material adverse facts" in the transaction. Finally, Class 4 states are those in which licensees are held to a duty of reasonable care to non-clients. Each group is examined in more detail below.

A. *Class 1: No Statutorily Enumerated Other-Party Duties*

A few states did not participate in the widespread reform of licensing statutes that occurred in the late 1990s. While these "Class 1" states have generally imposed a duty on licensees to disclose agency relationship information,<sup>190</sup> they have done nothing to change the common law with respect to the licensee's role as an agent for her principal.<sup>191</sup>

Utah's administrative regulations, for example, contemplate unrepresented buyers, but do not prescribe any duty towards them.<sup>192</sup> Alaska's and Hawaii's regulations are similarly silent with respect to any specific duties owed to either the agent's principal or to other actual or prospective parties to the transaction.<sup>193</sup> Michigan's statute has also avoided the

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<sup>188</sup> See, e.g., IOWA CODE § 543B.56(d) (2001) (listing duties of licensees owed to *all parties* in a transaction); N.M. ADMIN. CODE tit. 16, § 61.19.9(C) (2002) (same); WIS. STAT. § 452.133 (2000) (same).

<sup>189</sup> The term "other-party duties" is used to include any duties that may be owed to a consumer or client other than the licensee's client. For example, if buyer and seller are represented separately by "exclusive agents," the term refers to those duties that are owed by each licensee to the other party to the transaction. The term also encompasses the duties owed by a single licensee to both parties to the transaction, if the licensee represents neither party in an agency capacity. Finally, it could also mean the listing agent's or selling/seller's subagent's duties to the frequently unrepresented buyer, or conversely a buyer's broker's duties to the seller, in the atypical case where the seller is unrepresented.

<sup>190</sup> See *infra* Part VII.A.

<sup>191</sup> Due to the failure of these states to adopt new realtor roles, three of the four Class 1 states are also Type I states.

<sup>192</sup> UTAH ADMIN. CODE 162-6.2.16 (2001) (setting forth duties owed by licensees to clients, when acting for seller, buyer, or as disclosed dual "limited" agent).

<sup>193</sup> ALASKA STAT. § 08.88.396 (Michie 2000); 12 ALASKA ADMIN. CODE tit. 64 (2002); HAW. REV. STAT. § 467-1 (2002); HAW. ADMIN. R. 16-99-1 (2002).

enumeration of licensee duties.<sup>194</sup> In all of these states where there is no statutory delineation of licensee duties, those that do exist can be found in the common law.<sup>195</sup>

Relying on the common law, however, creates a number of problems. For one, uncertainty may exist over which parties the licensee must serve since agents continue to work with buyers who have not expressly contracted with the licensee.<sup>196</sup> Moreover, with no statutory provision prohibiting it, “accidental” or implied agency may arise depending on the predisposition of the state’s courts.<sup>197</sup> The resulting confusion and unpredictability was a driving force for other states to overhaul their licensing statutes. These efforts are described below.

### *B. Class 2: Simple Requirement of Honesty, Good Faith, and Fairness of All Licensees*

Class 2 states impose a single other-party-duty,<sup>198</sup> to treat (1) the other party to the transaction, (2) any non-principal, and/or (3) all parties to the transaction honestly and/or fairly. Class 2 states include Arkan-

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<sup>194</sup> MICH. COMP. LAWS §§ 339.2517(1)–(2) (Supp. 2002). Michigan’s statute does not delineate any duties either to the client or to parties other than disclosure of agency status and of any fees or commissions earned by referrals to related service providers. MICH. COMP. LAWS § 339.2517(1)–(2) (Supp. 2002); MICH. ADMIN. CODE r. 339.22321 (1999). Designated agents in Michigan owe a duty of limited confidentiality. *See* MICH. COMP. LAWS § 339.2517(7) (2001).

<sup>195</sup> *See* *Horvath v. Langel*, 267 N.W. 865, 869 (Mich. 1936) (finding that brokers and salespeople owe a fiduciary duty to seller); *Andrie v. Chrystal-Anderson & Ass’n Realtors, Inc.*, 466 N.W.2d 393 (Mich. Ct. App. 1991) (holding that licensee owed duty to seller/principal to accurately present prospective buyer’s offer, but owed no such duty to prospective buyers); *Att’y Gen. v. Diamond Mortgage*, 327 N.W.2d 805, 811 (Mich. 1982) (ruling that real estate brokers are subject to the Michigan Consumer Protection Act).

<sup>196</sup> The principal-agent doctrine in this area has suffered much erosion. *See* *Price v. Long Realty, Inc.*, 502 N.W.2d 337 (Mich. App. 1993) (affirming jury verdict in favor of buyers against a licensee “engaged” by them, based on fraudulent misrepresentation and malpractice, with no discussion of precise relationship between plaintiffs and licensee).

<sup>197</sup> *See supra* note 82 (discussing *ex post facto* imposition of agency by courts). *See generally* Black, *supra* note 6.

<sup>198</sup> Many states, either by statute or regulation, create other duties that may indirectly inure to the benefit of the parties to the transaction. *See, e.g.*, ARIZ. ADMIN. CODE 4-28-1101(D) (2000) (“[A] licensee shall not allow a controversy with another licensee to jeopardize, delay, or interfere with the initiation, processing, or finalizing of a transaction on behalf of a client.”); DEL. ADMIN. CODE tit. 24, § 2900 r. 10.2 (2002) (giving licensees who make “if we can’t sell it we’ll buy it” advertisements sixty days after expiration of original listing agreement within which to purchase the home and settle); HAW. ADMIN. REGS. § 16-99-4(a) (2002) (calling for maintenance of client funds in trust); MONT. CODE ANN. § 37-51-313 (2001) (stating that seller’s agents owe to buyers and buyer’s agents owe to sellers a duty to “comply with all applicable federal and state laws, rules, and regulations”); N.J. ADMIN. CODE tit. 11, §§ 5-7.5, 5-7.6 (2002) (stating that collusion and discrimination with respect to commission rates and splits are prohibited). These sorts of duties are outside the scope of this Article.

sas,<sup>199</sup> Connecticut,<sup>200</sup> Kentucky,<sup>201</sup> Louisiana,<sup>202</sup> Oklahoma,<sup>203</sup> Rhode Island,<sup>204</sup> and Texas.<sup>205</sup> In a similar vein, licensees in Massachusetts must “present properties honestly and accurately” to non-principal parties.<sup>206</sup>

In contexts outside the residential real estate transaction, the statutory imposition of a basic duty of honesty and fair dealing might be unnecessary in light of the availability of common law claims for negligent misrepresentation or even fraudulent inducement. In a number of states that considered a non-client’s claim for misrepresentation prior to the advent of these new licensing statutes, however, no duty could be imposed given the fiduciary relationship owed to the other party to the transaction and the concomitant lack of fiduciary relationship with the non-client.<sup>207</sup> Thus, these new statutory provisions have extended the

<sup>199</sup> ARK. REAL EST. COMM’N R. 8.5(a) (2001) (The “obligation of absolute fidelity to the interest of the client or clients is primary, but does not relieve a licensee from the equally binding obligation of dealing honestly with all parties to the transaction.”).

<sup>200</sup> CONN. AGENCIES REGS. § 20-325d-2 (2002) (outlining obligation of all licensees to “treat all parties to a real estate transaction honestly and fairly,” regardless of representation articulated in state’s Agency Disclosure Notice).

<sup>201</sup> 201 KY. ADMIN. REGS. 11:400 (2001) (“Licensees are required to deal honestly and fairly with [those not represented by them].”).

<sup>202</sup> LA. REV. STAT. ANN. § 9:3894 (West 2001) (“Licensees shall treat all [parties not represented by them] honestly and fairly.”).

<sup>203</sup> OKLA. STAT. tit. 59, § 858-354(B)(2) (2000) (“The single-party broker shall . . . treat all parties with honesty”). Recall that in Oklahoma, otherwise unrepresented parties who deal with a licensee will be owed those duties of a transaction broker. *See supra* text accompanying note 178. Oklahoma’s statute expressly contemplates that a seller’s agent might also represent a buyer as a transaction broker and, therefore, might owe him substantial duties beyond “honesty.” OKLA. STAT. tit. 59, § 858-355(B)(2) (2001). On the other hand, if the seller and buyer are represented separately by a buyer’s broker and seller’s agent, each of the two licensees owes the other party honesty, in addition to the duties owed to their own clients. *Id.*

<sup>204</sup> R.I. GEN. LAWS §§ 5-20.6-6(b), (d) (2001) (stating that listing agent and seller’s subagent must “[t]reat the buyer honestly and fairly.”); *id.* § 5-20.6-6(c) (declaring that buyer’s agent must “[t]reat the seller honestly and fairly.”).

<sup>205</sup> 22 TEX. ADMIN. CODE § 531.1(1) (West 2001) (mandating that “the agent, in performing duties to the client, shall treat other parties to a transaction fairly”).

<sup>206</sup> MASS. BD. OF REG. OF REAL EST. BROKERS & SALESPERSONS, MANDATORY AGENCY DISCLOSURE—AGENCY RELATIONSHIP (on file with author) (“All real estate licensees must, by law, present properties honestly and accurately.”). *See also* S.C. CODE ANN. § 40-57-137(F) (Law. Co-op. 2001) (stating that seller’s agents must treat buyers honestly and “may not knowingly give them false or misleading information about the condition of the property which is known to the licensee or, when acting in a reasonable manner, should have been known to the licensee”); *id.* § 40-57-137(K) (requiring same in terms of buyer’s ability to perform terms of a transaction).

<sup>207</sup> *See, e.g.,* Mosca v. Kiner, 716 N.Y.S.2d 543, 544 (App. Div. 2000) (finding that listing agent had no duty to disclose matters of public record to buyers); Lopata v. Miller, 712 A.2d 24 (Md. 1997) (holding that selling agent had no duty to buyers); Harrington v. Mikell, 469 S.E.2d 627 (S.C. Ct. App. 1996) (finding no fiduciary relationship between seller’s agent and buyer); Slavin v. Hamm, 621 N.Y.S.2d 393, 394–95 (App. Div. 1994) (ruling that seller/licensee had no fiduciary duty to purchasers); Moser v. Bertram, 858 P.2d 854, 855 (N.M. 1993) (holding listing agent had no fiduciary duty to buyer); McAdams v. Dorothy Edwards Realtors, Inc., 604 N.E.2d 607, 611 (Ind. 1992) (stating that seller’s agent had no duty to act in buyer’s best interest); Burman v. Richmond Homes Ltd., 821 P.2d 913, 922 (Colo. Ct. App. 1991) (holding that selling agent is seller’s agent

common law, clarifying in Class 2 states that a duty of honesty and fair dealing is indeed owed to non-principals as well.

*C. Class 3: Additional Requirement That Licensees Disclose  
Material Adverse Facts*

As in Class 2 states, licensees in Class 3 states also owe a duty of honesty to non-principals, sometimes expressed in these states as the duty not to knowingly provide false information to the other party.<sup>208</sup> The twenty-five states<sup>209</sup> in Class 3 take another step towards increased protection for consumers, adding the duty to disclose “material adverse facts.”<sup>210</sup> This duty has its roots in the landmark California case of *Easton*

with no duty to purchasers); *Allen v. Lindstrom*, 379 S.E.2d 450, 456 (Va. 1989) (ruling that seller’s agent has no duty to buyers; buyers are not third party beneficiaries of listing agreement); *Proctor v. Holden*, 540 A.2d 133, 143 (Md. Ct. Spec. App. 1988) (stating that selling agent who deals with buyers owes agency duties to seller only); *Walter v. Murphy*, 573 N.E.2d 678, 680 (Ohio Ct. App. 1988) (holding that listing agent had no fiduciary duty to buyers).

A few more recent cases appear to approve of fraud and/or fraudulent inducement claims brought by buyers. *See, e.g.*, *Power v. Georgia Exterminators, Inc.*, 532 S.E.2d 475, 479 (Ga. Ct. App. 2000) (holding that buyer could not recover against listing agent for misrepresentations absent showing of scienter); *Svensen v. Stock*, 979 P.2d 476, 502 (Wash. Ct. App. 1999) (stating that a listing agent is liable to purchasers for fraudulent concealment); *Esposito v. Saxon Home Realty, Inc.*, 679 N.Y.S.2d 152, 152–3 (App. Div. 1998) (same); *Simon v. Wilkinson Agency, Inc.*, 518 N.W.2d 154, 157 (Neb. Ct. App. 1994) (holding that negligent misrepresentation not recognized but fraudulent misrepresentation claim possible).

<sup>208</sup> *See, e.g.*, GA. CODE ANN. § 10-6A-5(b) (2000); IND. CODE ANN. §§ 25-34.1-10-10 to -11 (West 2001); OHIO REV. CODE ANN. § 4735.61 (Anderson 2001); VA. CODE ANN. §§ 54.1-2131(B), 54.1-2132(B) (Michie 2001).

<sup>209</sup> The twenty-five states in Class 3 are: Arizona, Colorado, Delaware, Florida, Georgia, Illinois, Indiana, Kansas, Maine, Maryland, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, South Dakota, Vermont, Virginia, and Wyoming.

<sup>210</sup> *See, e.g.*, DEL. ADMIN. CODE tit. 24, § 2900 r. 10.3.1.1–2 (2001) (requiring sellers’ agents and buyers’ agents to disclose “material facts about properties” and “disclose material facts about the transaction”).

Notably, this duty ordinarily does not require licensees to affirmatively disclose information regarding “psychologically tainted” property. *See, e.g.*, MINN. STAT. § 82.197(6) (2001) (stating that licensees are not required to disclose fact or suspicion that property is or was occupied by a person with HIV/AIDS, that the property is subject to “perceived paranormal activity,” that the property is a site of an accidental or natural death, or that a registered sex offender lives nearby); N.J. ADMIN. CODE § 11:5-6.4(d) (2002) (stating licensees are not required to disclose “social conditions” and “psychological impairments” except upon inquiry); S.D. CODIFIED LAWS §§ 36-21A-134.1 to -138.1 (Michie 2001) (maintaining that sellers’ agents have no duty to disclose “sex offender information,” but upon inquiry, buyers’ agents must disclose any actual information they have in that regard). Washington, a Class 4 state, perhaps provides the most general and comprehensive safe harbor for licensees in this regard:

The fact or suspicion that the property, or any neighboring property, is or was the site of a murder, suicide or other death, rape or other sex crime, assault or other violent crime, robbery or burglary, illegal drug activity, gang-related activity, political or religious activity, or other act, occurrence, or use not adversely affecting

v. *Strassburger*,<sup>211</sup> and its ramifications can be more or less substantial depending upon what information must be disclosed in each state and to whom.<sup>212</sup>

Differences in the various state statutes' definitions of "material adverse facts," though sometimes subtle, have an impact on the level of consumer protection provided. For example, Colorado's statute states:

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the physical condition of or title to the property is not a material fact.

WASH. REV. CODE § 18.86.010(9) (2002).

There is a large body of scholarly commentary on this topic. *See, e.g.*, Thomas D. Larson, Comment, *To Disclose or Not to Disclose: The Dilemma of Homeowners and Real Estate Brokers Under Wisconsin's "Megan's Law,"* 81 MARQ. L. REV. 1161 (1998); Flavio L. Komuves, Comment, *For Sale: Two-Bedroom Home with Spacious Kitchen, Walk-in Closet, and Pervert Next Door,* 27 SETON HALL L. REV. 668 (1997); Lori A. Polonchak, Comment, *Surprise! You Just Moved Next to a Sexual Predator: The Duty of Residential Sellers and Real Estate Brokers to Disclose the Presence of Sexual Predators to Prospective Purchasers,* 102 DICK. L. REV. 169 (1997); Ronald Benton Brown & Thomas H. Thurlow III, *Buyers Beware: Statutes Shield Real Estate Brokers and Sellers Who do not Disclose that Properties are Psychologically Tainted,* 49 OKLA. L. REV. 625 (1996); Ross R. Hartog, Note, *The Psychological Impact of AIDS on Real Property and a Real Estate Broker's Duty to Disclose,* 36 ARIZ. L. REV. 757 (1994); Michael D. Isacco Jr., *A Massachusetts Real Estate Broker's Duty to Disclose: The Quandary Presented by AIDS Stigmatized Property,* 27 NEW ENG. L. REV. 1211 (1993); Sharlene A. McEvoy, *Caveat Emptor Redux: "Psychologically Impacted" Property Statutes,* 18 W. ST. U. L. REV. 579 (1991).

<sup>211</sup> *See Easton v. Strassburger*, 199 Cal. Rptr. 383 (Ct. App. 1984). In *Easton*, the Court observed, "[the] real estate broker's relationship to the buyer is such that the buyer usually expects the broker to protect his interests." *Id.* at 388. According to the court, this trust and confidence derives both from "the potential value of the broker's service" and the broker's superior knowledge of the complexity of the transaction. *Id.* "[Many] buyers in fact justifiably believe the seller's broker is also protecting their interest in securing and acting upon accurate information and rely upon him, . . ." *Id.* at 389. Accordingly, *Easton* held that brokers have a duty to disclose material facts "which through reasonable diligence" they should know. *Id.* at 390. The court also held that realtors have a duty "to conduct a reasonably competent and diligent inspection of the residential property listed for sale and to disclose to prospective purchasers all facts materially affecting the value or desirability of the property that such an investigation would reveal." *Id.*

*Easton's* duty towards prospective buyers was codified in CAL. CIV. CODE § 2079 (Deering 2001). *See generally* Ann J. Rosenthal & R. Stuart Phillips, *Tell It Like It Is: Sellers' Duties of Disclosure in Real Estate Transactions Under California Law*, 26 GOLDEN GATE U. L. REV. 473 (1996) (offering a fuller discussion of California law post-*Easton*).

<sup>212</sup> To a lesser extent, "by whom" may also be relevant. Some states require this disclosure by seller's agents to buyers and/or prospective buyers only. *See, e.g.*, MISS. REAL EST. COMM'N, WORKING WITH A REAL ESTATE BROKER (on file with author) (stating that seller's agent has duty to disclose to buyer all known facts that materially affect the value of the property and are not known to or readily observable by the parties); N.C. REAL EST. COMM'N, WORKING WITH REAL ESTATE AGENTS (May 1, 2001) (on file with author) (requiring seller's agent to provide "any 'material facts' (such as a leaky roof) about properties."); VT. REAL EST. COMM'N R. § 4.5(a) (2000); WYO. STAT. § 33-28-303(c) (Michie 2001). Some states require all licensees to disclose material adverse facts to prospective buyers. *See, e.g.*, 225 ILL. COMP. STAT. 454/15-25(a) (2001); MINN. STAT. § 82.197 (2002).

Finally, and outside the scope of this discussion, some statutes require licensees to disclose material adverse facts to their own clients. *See, e.g.*, GA. CODE ANN. §§ 10-6A-5(b) to -7(b) (2000); MD. CODE ANN., BUS. OCCUP. & PROF. § 17-532(c)(1)(iii) (2001); S.D. CODIFIED LAWS § 36-21A-132(3)(c) (Michie 2001).

“adverse material facts may include but shall not be limited to adverse material facts pertaining to the title and the physical condition of the property, any material defects in the property, and any environmental hazards affecting the property which are required by law to be disclosed.”<sup>213</sup> Georgia’s statute is unique in encompassing disclosure of adverse conditions within a mile of the property under consideration.<sup>214</sup> Minnesota’s statute may be even more expansive in its simplicity: it requires disclosure of facts “which could adversely and significantly affect an ordinary purchaser’s use or enjoyment of the property, or any intended use of the property.”<sup>215</sup> Other states, on the other hand, limit facts that must be disclosed to those that would not reasonably be discovered by the party to whom the duty of disclosure is owed.<sup>216</sup>

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<sup>213</sup> COLO. REV. STAT. § 12-61-804(3)(a) (2001). *See also* MO. REV. STAT. § 339.710 (2000) (similar); NEB. REV. STAT. § 76-2403 (2001) (similar); S.D. CODIFIED LAWS § 36-21A-125 (Michie 2001) (similar); WYO STAT. § 33-28-303(c) (Michie 2001) (similar).

<sup>214</sup> Georgia law requires sellers’ agents to disclose to buyers all known material adverse facts about the property, as well as:

all material facts pertaining to existing adverse physical conditions in the immediate neighborhood within one mile of the property . . . and which could not be discovered by the buyer upon a diligent inspection of the neighborhood or through the review of reasonably available governmental regulations, documents, records, maps, and statistics.

GA. CODE ANN. § 10-6A-5(b) (2000).

<sup>215</sup> MINN. STAT. § 82.197(6) (2002). *See also* FLA. STAT. ch. 475.278 (2000) (requiring disclosure of “facts materially affecting the value of residential real property”); N.D. ADMIN. CODE § 70-02-03-15.1(7)(d) (2001) (stating that licensees must disclose to buyer facts that “may adversely and significantly affect that person’s use or enjoyment of the property”); TENN. CODE ANN. § 62-13-102(10) (2001) (same, but Class 4 state).

Some Class 4 states provide equally expansive definitions, for example, requiring disclosure of such facts as “affect value and desirability of the property.” *E.g.*, N.Y. REAL PROP. LAW § 443(4) (McKinney 2001). Others require the disclosure of facts that are “not apparent or readily ascertainable to a party.” *E.g.*, OR. REV. STAT. §§ 696.805(2)(d), 696.810(2)(d) (2001). The fact that Class 4 states also frequently impose this duty merely multiplies the number of alternative definitions of “material adverse facts.” For example, Iowa’s statute requires licensees to disclose to all parties all material adverse facts except:

- (1) Material adverse facts known by the party.
- (2) Material adverse facts the party could discover through a reasonably diligent inspection, and which would be discovered by a reasonably prudent person under like or similar circumstances.
- (3) Material adverse facts the disclosure of which is prohibited by law.
- (4) Material adverse facts that are known to a person who conducts an inspection on behalf of the party.

IOWA CODE § 543B.56 (2001).

<sup>216</sup> *See, e.g.*, 225 ILL. COMP. STAT. 454/15-25 (2001) (directing all licensees to disclose to prospective buyers facts “pertaining to the physical condition of the property . . . that could not be discovered by a reasonably diligent inspection of the property by the [party not represented by the licensee]”); IND. CODE ANN. § 25-34.1-10-10 (West 2001) (imposing similar duty on seller’s agent to disclose facts “that could not be discovered by a reasonable and timely inspection of the property by the buyer”); MISS. REAL EST. COMM’N,

Some states go further and require disclosure of adverse facts about the transaction, in addition to disclosures regarding the physical condition of or defects in the property itself. Arizona licensees must disclose “any information that the seller [or buyer] is, or may be, unable to perform.”<sup>217</sup> Other states are more specific with respect to disclosure of the buyer’s financial qualifications. For example, Maine’s statute requires a buyer’s agent to disclose to the seller “material facts about the buyer’s financial ability to perform the terms of the transaction.”<sup>218</sup> In some states the enumeration of these duties is simply a codification of existing case law;<sup>219</sup> for others, it represents an important extension and clarification of licensees’ duties.<sup>220</sup>

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WORKING WITH A REAL ESTATE BROKER (stating that seller’s agent has duty to both parties to disclose material adverse facts “which are not known to or readily observable by, the parties in the transaction”) (on file with author).

<sup>217</sup> ARIZ. ADMIN. CODE 4-28-1101(B) (2001). *See also* MO. REV. STAT. § 339.710(1)(e) (2000) (calling for disclosure of any “material limitation of the party’s ability to perform under the terms of the contract”); S.D. CODIFIED LAWS § 36-21A-125(4) (Michie 2001) (same); MONT. CODE ANN. § 37-51-102(2)(a)(ii) (2001) (requiring disclosure of “buyer’s ability or intent to perform”); NEB. REV. STAT. § 76-240316 (2001) (mandating disclosure of a “reasonable belief that another party will not be able to, or does not intend to, complete that party’s obligations”). At least one Class 4 state also includes this obligation. IDAHO CODE § 54-2083(1) (Michie 2000) (defining material adverse facts as including any fact “which establishes a reasonable belief that a party to the transaction is not able to or does not intend to complete that party’s obligations”).

<sup>218</sup> ME. REV. STAT. ANN. tit. 32, § 13274(2) (2001). *See also* COLO. REV. STAT. § 12-61-805(3)(a) (2001) (same); GA. CODE ANN. § 10-6A-7(b) (2000) (same); KAN. STAT. ANN. § 58-30,113(b)(2)(G) (2001) (same); NEB. REV. STAT. § 76-2418(3)(a) (2001) (same). *Compare* N.M. ADMIN. CODE tit. 16, § 61.19.9(C) (2001) (requiring disclosure of “financial ability to the parties to the transaction to complete the transaction”), *with* N.J. ADMIN. CODE § 11:5-6.9 (2001) (barring buyer’s agent from making misrepresentations regarding such material matters as “buyer’s financial ability to pay”).

<sup>219</sup> Several states have a duty to disclose the buyer’s financial inability to perform. *See, e.g.,* Lombardo v. Albu, 14 P.3d 288, 291 (Ariz. 2000) (holding that buyer’s agent has duty to disclose financial inability of buyer to seller); Givan v. ASK Realty, Inc., 788 S.W.2d 503, 505 (Ky. Ct. App. 1990) (same); Grunewald v. Warren, 655 So. 2d 1227 (Fla. Dist. Ct. App. 1995) (same in commercial real estate transaction). Others have such duties in connection with the condition of the property or title. *See, e.g.,* Carter v. Gugliuzzi, 716 A.2d 17, 21 (Vt. 1998) (affirming judgment based on Consumer Fraud Act against listing broker for failure to disclose to buyer known facts about unusually windy conditions in neighborhood); Haberstick v. Gordon A. Gundaker Real Est. Co., 921 S.W.2d 104, 107 (Mo. Ct. App. 1996) (finding listing agents liable to buyers for failure to disclose known environmental hazard on adjacent land); Seidel v. Gordon A. Gundaker Real Estate Co., Inc., 904 S.W.2d 357, 362 (Mo. Ct. App. 1995) (holding listing agent liable for failure to disclose sewer easement encroachments to buyer); Lawyers Title Ins. Corp. v. Vella, 570 So. 2d 578, 584–85 (Ala. 1990) (finding that listing agent had fiduciary duty to buyer to disclose existing IRS lien on property). *But see* Choung v. Iemma, 708 N.E.2d 7, 14 (Ind. Ct. App. 1999) (finding that the listing agent had no duty to disclose material defect in property where buyers relied on third party inspection under Indiana law, which requires disclosure only of material adverse facts that a buyer could not discover through his own reasonable inspection); Black v. Cosentino, 689 N.E.2d 1001, 1004 (Ohio Ct. App. 1996) (finding there was no duty to disclose open and obvious defect).

<sup>220</sup> *See, e.g.,* Burman v. Richmond Homes, Ltd., 821 P.2d 913, 919 (Colo. Ct. App. 1991) (refusing to find realtors liable for failing to disclose that property was in general improvement or tax district); Brady v. Dandridge, 379 S.E.2d 429, 430–31 (Ga. Ct. App.

Several other important features of the disclosure duty bear noting. Most states' statutes impose no obligation on the licensee to conduct an investigation on either a client's or a customer's behalf,<sup>221</sup> instead requiring licensees only to disclose those material adverse facts known to them.<sup>222</sup> Some even expressly exempt licensees from any obligation to verify their clients' material statements of fact about the property or transaction.<sup>223</sup>

While falling short of actually requiring an investigation, other statutes impose what might be interpreted as a limited duty of inquiry by defining "material facts" as those the licensee knows or should know.<sup>224</sup> This kind of provision opens up an issue of fact with respect to what a licensee should have known about a particular piece of property, party, or transaction.<sup>225</sup> In addition, it gives the potential plaintiff, buyer or seller, a

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1989) (finding that the listing agent had no obligation to guarantee purchasers' financial worthiness or whether their home sale would close); *Blackmon v. First Real Est. Corp.*, 529 So. 2d 955, 956 (Ala. 1988) (holding that seller's agent had no duty to disclose malfunctioning sewage system to purchasers).

<sup>221</sup> See, e.g., GA. CODE ANN. § 10-6A-5(b) (2000) (stating that sellers' agents have no duty to "discover or seek to discover either adverse material facts pertaining to the physical condition of the property or existing adverse conditions in the immediate neighborhood"); N.H. CODE ADMIN. R. ANN. Pt. Rea 701.02 (2001); WYO. STAT. § 33-28-303(d) (2001). Cf. N.J. ADMIN. CODE § 11:5-6.4(b) (2001) (imposing duty to make a "reasonable effort to ascertain material information" about properties with which the licensee is involved).

<sup>222</sup> See, e.g., FLA. STAT. ch. 475.278(2)(a)(4), (3)(a)(9), (4)(a)(2) (2000); 225 ILL. COMP. STAT. 454/15-25 (2001); S.D. CODIFIED LAWS §§ 36-21A-134 to -138 (Michie 2001); VT. REAL EST. COMM'N R. § 4.5 (2000); VA. CODE ANN. § 54.1-2131(B) (Michie 2001). Cf. OHIO REV. CODE ANN. § 4735.67 (Anderson 2001) (stating that knowledge of material facts will be inferred if licensee acts with reckless disregard for the truth); ARIZ. ADMIN. CODE 4-28-1101 (2001) (requiring disclosure of "any [material adverse] information which the licensee possesses").

<sup>223</sup> See, e.g., COLO. REV. STAT. §§ 12-61-804(3)(a) to -805(3)(a) (2001) (stating that the licensee has no obligation to verify any statements made by client "or independent inspector"); IND. CODE ANN. § 25-34.1-10-10(d) (Michie 2001) (stating that the licensee representing the seller owes no duty to conduct an independent inspection of property for the buyer "or to verify the accuracy of any statement, written or oral, made by the seller . . . or an independent inspector"); MONT. CODE ANN. § 37-51-313(3) (2001) (similar). Cf. OHIO REV. CODE ANN. § 4735.67(B) (Anderson 2001) (stating that licensee has no duty of verification unless "licensee is aware of information that should reasonably cause the licensee to question the accuracy or completeness of such statement").

<sup>224</sup> See, e.g., MD. CODE ANN., BUS. OCCUP. & PROF. § 17-530(b)(5) (2001) (requiring licensees to disclose those facts that are "known or should be known" to them); MO. REV. STAT. § 339.710 (2000) (same); ME. REV. STAT. ANN. tit. 32, § 13273(2) (West 2001) (mandating that sellers' agents disclose those facts they "knew or acting in a reasonable manner, should have known"); OHIO REV. CODE ANN. § 4735.67 (Anderson 2001) ("For purposes of this division, actual knowledge of material facts shall be inferred to the licensee if the licensee acts with reckless disregard for the truth.").

Class 4 states tend to impose this same sort of obligation. See, e.g., NEV. REV. STAT. § 645.252(1)(a) (2001); S.C. CODE ANN. §§ 40-57-137(C)(2)(c), (F), (H) (Law. Co-op. 2001).

<sup>225</sup> Wisconsin, a Class 4 state, uses standard of care language in defining adverse facts and material adverse facts in terms of what "is generally recognized by a competent licensee." WIS. STAT. § 452.01(1e), (5g) (2000). See also IOWA CODE § 543B.5(14) (2001) (same). In both of these states, however, the licensee is already obligated to act with reasonable care, skill, and diligence towards all parties to the transaction. Therefore, the jury

broader net within which to ensnare licensees in litigation.<sup>226</sup> Statutes with duties of discovery go the furthest of the Class 3 statutes in protecting the unrepresented consumer, building in a sort of implied warranty about the property and the transaction.

Finally, perhaps adding the most teeth to this disclosure duty, two states, Arizona and Nebraska, require written disclosure of any material adverse facts.<sup>227</sup> Under Arizona's regulation, for example:

A licensee participating in a real estate transaction shall disclose in writing to all other parties any information which the licensee possesses that materially and adversely affects the consideration to be paid by any party to the transaction, including:

1. Any information that the seller or lessor is or may be unable to perform;
2. Any information that the buyer or lessee is, or may be, unable to perform;
3. Any material defect existing in the property being transferred; and
4. The possible existence of a lien or encumbrance on the property being transferred.<sup>228</sup>

#### *D. Class 4: Additional Duty of Reasonable Care Owed to Non-Clients*

Beyond requiring licensees to treat other parties to the transaction honestly and fairly,<sup>229</sup> and to disclose known material adverse facts,<sup>230</sup> Class 4 states go even further in protecting non-principals. Specifically, these states generally impose upon licensees a duty of reasonable care to

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in a case against a licensee in either state would necessarily already be considering factual issues and comparing them against a standard of care.

<sup>226</sup> Conversely, the statutory imposition of specific licensee duties may also limit them to those that are statutorily enumerated. *See, e.g.*, *Robinson v. Grossman*, 67 Cal. Rptr. 2d 380, 385–86 (Ct. App. 1997) (refusing to expand listing agent's duty beyond what is called for by the relevant statute, CAL. CIV. CODE § 2079 (Deering 2001)).

<sup>227</sup> *See* ARIZ. ADMIN. CODE 4-28-1101(B) (2001); NEB. REV. STAT. §§ 76-2417(3)(a), 76-2418(3)(a) (2001).

<sup>228</sup> ARIZ. ADMIN CODE 4-28-1101 (2001).

<sup>229</sup> Of the Class 4 statutes, only Nevada's appears not to impose this obligation. *See* NEV. REV. STAT. § 645.252 (2001).

<sup>230</sup> Alabama's and Pennsylvania's statutes are the only Class 4 laws that fail to require disclosure of material adverse facts. *See* ALA. CODE § 34-27-84(a)(2) (1997); 63 PA. CONS. STAT. § 455.606(a)–(f) (2001).

all parties to the transaction.<sup>231</sup> Alabama,<sup>232</sup> California,<sup>233</sup> Idaho,<sup>234</sup> Iowa,<sup>235</sup> Nevada,<sup>236</sup> New York,<sup>237</sup> Oregon,<sup>238</sup> Pennsylvania,<sup>239</sup> Tennessee,<sup>240</sup> Washington,<sup>241</sup> West Virginia,<sup>242</sup> and Wisconsin<sup>243</sup> fall into this category.

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<sup>231</sup> See, e.g., NEV. REV. STAT. § 645.254(1) (2001). Some statutes outside of Class 4 also impose a duty of reasonable care in favor of the licensee's client. See, e.g., GA. CODE ANN. §§ 10-6A-5 to -7 (2000) (maintaining that licensees representing both sellers and buyers have a duty of reasonable care to their clients); MONT. CODE ANN. § 37-51-313(2)(e), (4)(e) (2001) (same).

In some Class 2 and 3 states, however, poor legislative drafting leaves some ambiguity as to whom the duty of reasonable care is owed. See, e.g., VA. CODE ANN. §§ 54.1-2131(A)(4), 54.1-2132(A)(4) (Michie 2002) (mandating that the "licensee engaged by a seller [buyer] shall . . . exercise ordinary care"). OKLA. STAT. tit. 59, § 858-354(B)(4) (2001) (providing that "the single-party broker shall . . . exercise reasonable skill and care" and enumerating a list of tasks, some of which apply to clients, and some of which do not); 22 TEX. ADMIN. CODE § 531.3 (West 2000) (imposing a duty of "competency," including the duty to "exercise judgment and skill in the performance of the work," on all licensees, with no indication to whom the duty runs).

In these states, or any which have provisions like them, it is possible that a duty of reasonable care could be extended to non-principals. If this were to happen, this would render any such statute Class 4.

<sup>232</sup> ALA. CODE § 34-27-84(a)(2) (1997). Notably, Alabama's code does not require disclosure of material adverse facts to either party. Instead, it provides that "a licensee may provide requested information which affects a transaction to any party who requests the information, unless disclosure of the information is prohibited by law or in this article." *Id.* § 34-27-84(b). The duties owed by licensees to all parties are honesty and good faith, reasonable skill and care, confidentiality, accounting, timely presentation of all offers and counter-offers during negotiation, and disclosure of any licensee conflicts of interest. *Id.* § 34-27-84(a).

<sup>233</sup> CAL. CIV. CODE § 2079.16 (Deering Supp. 2002) (stating that, beyond honesty, good faith, and disclosure of known and reasonably discoverable latent property defects, licensees owe duty of reasonable care).

<sup>234</sup> IDAHO CODE § 54-2086(1) (Michie 2000) (maintaining that non-clients are also owed reasonable skill, care, and accounting).

<sup>235</sup> IOWA CODE § 543B.56(1) (1997) (stating that all parties are owed duties of reasonable skill, care, and accounting).

<sup>236</sup> NEV. REV. STAT. § 645.252(2) (2001) (declaring that all parties are owed disclosure of conflicts of interest, disclosure of sources of compensation, and a duty of reasonable skill and care, in addition to honesty and good faith).

<sup>237</sup> N.Y. REAL PROP. LAW § 443(4) (McKinney Supp. 2002) (stating that duty of sellers' and buyers' agents to exercise reasonable skill and care is added to the requirement that they "deal honestly, fairly and in good faith" and disclose known material adverse facts).

<sup>238</sup> OR. REV. STAT. §§ 696.805(2), 696.810(2) (2002) (maintaining that sellers' and buyers' agents owe all principals and other agents the following duties in addition to Class 3 duties: reasonable care and diligence, timely communication and presentation of offers, accounting, and disclosure of licensee's conflicts of interest).

<sup>239</sup> 63 PA. CONS. STAT. § 455.606a(a) (2001).

<sup>240</sup> TENN. CODE ANN. § 62-13-403 (1997) (demanding reasonable skill and care, confidentiality, disclosure of publicly available market information upon request, accounting, and disclosure of any conflicts of interest).

<sup>241</sup> WASH. REV. CODE ANN. § 18.86.030 (West 1999) (stating that duties are owed to all parties to whom brokerage services are rendered).

<sup>242</sup> W. VA. REAL EST. COMM'N, NOTICE OF AGENCY RELATIONSHIP (May 1991) (on file with author) (establishing that all licensees owe all parties duties of reasonable care, honesty and good faith, non-discrimination, prompt presentation of offers to owner, disclosure of all material adverse facts that affect the value of the property, and dissemination of copies of all contracts).

<sup>243</sup> WIS. STAT. § 452.133(1) (2000) (stating that all parties are owed: diligent exercise

The inclusion of this duty in state licensing statutes is an important step forward for the consumer. By imposing a duty of reasonable care towards non-principals, Class 4 statutes open the door to negligence claims against realtors brought by all parties to the transaction, and potentially even to suits brought by other unsuccessful prospective buyers and sellers.<sup>244</sup> This broadens the scope of licensee liability as compared to what was previously available under the common law.<sup>245</sup> While particularly advantageous to the consumer, the express imposition of a duty of reasonable care to non-principals can also benefit licensees by creating the implication that, since duties that are owed are specifically enumerated, no other duties are owed.<sup>246</sup> This provides more certainty for all parties involved.<sup>247</sup>

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of reasonable skill and care in providing brokerage services, confidentiality, provision of “accurate information about market conditions that affect the transaction” upon request, accounting, and a presentation of contract proposals in an “objective and unbiased manner” by licensee negotiating on behalf of party).

<sup>244</sup> See, e.g., 63 PA. CONS. STAT. § 455.606a(a)(1) (2001) (maintaining that the “licensee owes to all consumers to whom the licensee renders real estate services . . . reasonable professional skill and care . . .”); WASH. REV. CODE ANN. § 18.86.030(1)(a) (West 1999) (same). This would not be the case in those states where careful drafting has limited the licensee’s duty of reasonable care to only the parties to the real estate transaction. See, e.g., TENN. CODE ANN. § 62-13-403 (1997) (stating that “[a] licensee who provides real estate services in a real estate transaction shall owe *all parties to such transaction* . . . reasonable skill and care . . .”); IOWA CODE §§ 543B.5(6), 543B.5(16) (1997) (enumerating duties owed by all licensees to “all parties in a transaction” and defining party as *inter alia* any “person seeking to sell, exchange, buy, or rent an interest in real estate”).

<sup>245</sup> Negligence claims will fail where there is no duty to the plaintiff. See, e.g., *Speigner v. Howard*, 502 So. 2d 367, 371 (Ala. 1987) (finding that seller’s agent could not be held liable for negligence to buyer to whom he owed no duty); *Dawson v. Tindell*, 733 P.2d 407, 409 (Okla. 1987) (same).

<sup>246</sup> Many of today’s licensing statutes supersede the common law, at least with respect to the duties owed by a licensee. See, e.g., IOWA CODE § 543B.62(1) (1997) (holding that statutory licensee duties “supersede any fiduciary duties of a licensee to a party to a transaction based on common law principles of agency to the extent that those common law fiduciary duties are inconsistent with the duties specified” by the statute); IDAHO CODE § 54-2095 (Michie 2000) (declaring that provisions of the licensing statute control when found to be “in conflict with any other provision of Idaho law”); OKLA. STAT. tit. 59, § 858-360 (2001) (establishing that the duties and responsibilities of licensees set forth in the statute “shall replace and abrogate the fiduciary or other duties of a broker to a party based on common law principles of agency”); S.C. CODE ANN. § 36-21A-149 (Law. Co-op. 2001) (superseding the “duties of the parties under common law including fiduciary duties of an agent to a principal, to the extent inconsistent with this chapter”); OHIO REV. CODE ANN. §§ 4735.52, 4735.57(B) (Anderson 2000). *But see* OR. REV. CODE ANN. § 696.855 (2002) (applying common law); N.Y. REAL PROP. LAW § 443(6) (McKinney Supp. 2002) (declaring that “[n]othing in this section shall be construed to limit or alter the application of the common law of agency with respect to residential real estate transactions”).

<sup>247</sup> Some gray area inevitably remains. For example, one commentator asks what is to become of an agent’s traditionally implied “incidental powers” under the new statutory agency in effect in Missouri. See Valerie M. Seiverling, *The Changing Face of the Real Estate Professional: Keeping Pace*, 63 MO. L. REV. 581, 589 (1998) (discussing a 1997 version of Missouri’s broker licensing statute and then-pending transaction broker amendment). Likewise, given Missouri’s presumption of transaction brokerage status and its prohibition of agency without a written agreement, it is possible that a customer may be left without a remedy where a transaction broker improperly performs more than the per-

## VII. DISCLOSURE OF AGENCY RELATIONSHIPS

The preceding Parts illustrate that state legislatures and relevant administrative agencies have redesigned their licensing statutes in different ways, sometimes creating new and different licensee roles and also enumerating different types and numbers of substantive legal duties now incumbent upon licensees. Some states offer minimal protection to unsophisticated, passive consumers. Other states have vigorously and extensively legislated consumer protections in the form of licensee duties to clients and non-principals alike.

The case for minimal protection can be made using the following *caveat emptor* argument. The real estate licensing laws of most states now provide the consumer with a number of realtor representation choices and impose at least a minimum set of substantive duties on licensees. This promotes competition, thereby lowering prices for everyone, while still providing a modicum of consumer protection. An informed consumer should be able to assess the alternatives and choose the licensee relationship that best suits him, and he should be presumed to look out for himself.<sup>248</sup>

This argument is premised, however, on an “informed consumer.” Surely, as a matter of policy, a state may reasonably adopt any number of realtor roles while only providing minimum automatic protection via other-party duties but only if consumers are promptly and effectively informed of this state of affairs.

How are consumers made aware of their options and of any redefinition of realtor duties and obligations? All but one state today requires the licensee to disclose information about permissible agency relationships and/or the licensee’s specific agency relationship to the parties.<sup>249</sup> Many state statutes and regulations also include an obligation to

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mitted ministerial acts. *See id.* at 592–93.

<sup>248</sup> A number of states expressly incorporate *caveat emptor*-type provisions into their statutes, regulations, or forms. *See, e.g.*, CAL. CIV. CODE § 2079.16 (Deering Supp. 2002) (stating that agency disclosure forms must include the following statement: “The above duties of the agent in a real estate transaction do not relieve a Seller or Buyer from the responsibility to protect his or her own interests”); OR. REV. CODE ANN. § 696.835 (2002) (“None of the affirmative obligations of a real estate licensee or agent in a real estate transaction under [statutory provisions] relieves a seller or a buyer from the responsibility to protect the seller’s or buyer’s own interests respectively”); R.I. GEN. LAWS § 5-20.6-6(e)(1) (2001) (same); S.D. REAL EST. COMM’N, AGENCY AGREEMENT ADDENDUM (Aug. 1998) (on file with author) (same); ME. REV. STAT. tit. 32, § 13274(2)(B) (2001) (“Nothing in this subchapter precludes the obligation of a buyer to inspect the physical condition of the property.”).

<sup>249</sup> Neither Arizona’s licensing statute nor its real estate related regulations contains an agency disclosure provision. ARIZ. REV. STAT. ANN. § 32-2101 (West 2002); ARIZ. ADMIN. CODE 4-28-1101 (2001). Perhaps this is because case law has deemed the licensee working with a buyer to be the buyer’s agent, avoiding the counterintuitive seller subagency setting and its resulting consumer confusion. *See* ARIZ. REV. STAT. §§ 32-2101 to -2166 (West 2002). The only disclosure that is required is a disclosure of the identity of the broker(s)

disseminate general information about the basic duties owed by licensees who undertake the various legislatively created roles.

The earliest efforts to resolve the traditional subagency problem were the first agency disclosure statutes of the late 1980s.<sup>250</sup> While realtor advocacy groups and many legislatures realized that disclosure alone was not a panacea—and responded with a wave of revisions to licensing statutes and the redefinition of realtor roles—effective agency disclosure is still a critical component of many state statutes today. To evaluate the role agency disclosure plays in protecting consumers, this Part will examine the current state of agency disclosure statutes and assess their efficacy in light of their policy goals.

### A. Agency Disclosure Statutes Today

While forty-nine states now formally require agents to disclose some information about agency relationships in a residential real estate transaction, there is an almost absolute lack of uniformity in the way that this disclosure is accomplished. Utah, for example, requires only that a written disclosure of the licensee's agency relationships, if any, be given prior to the parties' entering into a binding purchase and sale contract.<sup>251</sup> At the other end of the spectrum, a few states mandate early verbal and subsequent written agency disclosures of a prescribed form with signed acknowledgements of receipt.<sup>252</sup> In between these two poles are states that provide for informational brochures designed to explain agency relationships to the residential real estate consumer.<sup>253</sup> Distribution of these materials is optional in some jurisdictions and mandatory in others.<sup>254</sup> In

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that will receive compensation in the transaction. *See* ARIZ. ADMIN. CODE 4-28-1101 (West 2000).

<sup>250</sup> California was one of the first states to pass agency disclosure legislation (effective January 1, 1988). CAL. CIV. CODE §§ 2374–2375 (Deering 1988) (thereafter renumbered § 2079). Disclosure of agency relationships is as far as some states have come. *See supra* notes 190–197 and accompanying text (discussing states that have failed or refused to legislate duties).

<sup>251</sup> UTAH ADMIN. CODE 162-6-2.7 (2001).

<sup>252</sup> *See infra* text accompanying notes 277–279.

<sup>253</sup> *See, e.g.,* MAINE REAL EST. COMM'N, AGENCY RELATIONSHIPS, available at <http://www.state.me.us/pfr/olr/PDF/recagydis.pdf>.

<sup>254</sup> *See, e.g.,* ALA. ADMIN. CODE r. 790-X-3.13(1) (2002) (making “Consumer Information Booklet” optional); LA. ADMIN. CODE tit. 46, § 3703 (2001) (stating that “[l]icensees shall provide the agency disclosure informational pamphlet to all parties”); NEB. REV. STAT. § 76-2421(1) (1996) (requiring that licensees provide a copy of the “brokerage disclosure pamphlet” to unrepresented parties with whom they work).

Some brochures are also or only available as “e-pamphlets,” downloadable and/or printable from an agency Web site. *See, e.g.,* CAL. DEP'T OF REAL EST., DISCLOSURES IN REAL PROPERTY TRANSACTIONS (5th ed. 1999), at <http://www.dre.cahwnet.gov/disclosures.htm>; CAL. DEP'T OF REAL EST., REFERENCE BOOK: A REAL ESTATE GUIDE (2000), at [http://www.dre.cahwnet.gov/pdf\\_docs/ref10.pdf](http://www.dre.cahwnet.gov/pdf_docs/ref10.pdf); S.D. REAL EST. COMM'N, REAL ESTATE CONSUMER GUIDE, available at <http://www.state.sd.us/dcr/realestate/consumer.htm>.

Massachusetts also has a very informative Web site, containing more consumer informa-

yet other states, an explanation of agency relationships must be included in a standard form notice that also discloses the licensee's relationships in the transaction at hand.<sup>255</sup>

### B. Technical Aspects of Disclosure Laws

The objective of agency disclosure laws is to reduce the confusion created by the counterintuitive nature of the traditional seller's subagency scenario and the newer forms of representation.<sup>256</sup> If the goal of disclosure is to convey agency relationship information to the consumer in a meaningful way, some disclosure statutes are better than others. By examining (1) the timing of disclosure, (2) to whom it is provided, (3) the manner of disclosure required, (4) whether a written acknowledgement is mandated, and (5) the substance of the disclosure language used, this Part will attempt to evaluate the efficacy of disclosure in general, as well as which forms of regulation best serve to give consumers notice of their level of representation in the real estate transaction.<sup>257</sup>

#### 1. Timing

A major, if not the primary, impetus for agency disclosure laws is the danger that consumers may be unaware that the agent with whom they are working is actually an agent for the other party.<sup>258</sup> The concern is that it is possible, if not likely, that a buyer will reveal his top offer (or a seller his lowest acceptable price) to a licensee who has a fiduciary obli-

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tion and lengthier explanations than does its mandatory agency disclosure form. Bd. of Reg. of Real Est. Brokers & Salespersons, <http://www.state.ma.us/reg/consumer/fspagere.htm>.

<sup>255</sup> See *infra* note 290 and accompanying text. Other statutes require only the distribution of the informational pamphlet or a form notice describing agency relationships but without disclosure of the relationship of the licensee that is working with the consumer. See N.J. ADMIN. CODE tit. 11, § 5-6.9 (2001); CAL. CIV. CODE § 2079 (Deering 2001); KAN. ADMIN. CODE § 86-4-26 (2001). See also *infra* notes 287, 290.

<sup>256</sup> See, e.g., COLO. REV. STAT. § 12-61-801 (2001) (stating that the "public will best be served through a better understanding of the public's legal and that the working relationships with real estate brokers" and "public should be advised of" brokers' duties and obligations); FLA. STAT. ch. 475.272 (2000) (stating that the purpose of Brokerage Relationship Disclosure Act is "to eliminate confusion and provide for a better understanding on the part of customers in real estate transactions."); See also MASS. BD. OF REG. OF REAL EST. BROKERS & SALESPERSONS, MANDATORY AGENCY DISCLOSURE—AGENCY RELATIONSHIP FORM (on file with author) ("The purpose of this disclosure is to enable you to make informed choices before working with a real estate licensee.").

<sup>257</sup> A 1992 study of the adequacy of agency disclosures recommended that disclosures be written in a prescribed form, distributed at the first substantive meeting between consumer and realtor, and signed by the consumer. See STEPHEN BROBECK & CARLA FELDPAUSCH, REAL ESTATE AGENT DISCLOSURE TO HOME BUYERS: AN EVALUATION 2 (Consumer Federation of America, 1992).

<sup>258</sup> See *supra* text accompanying note 6.

gation to convey that information to the other party to the transaction.<sup>259</sup> Without this agency information—which would have told the consumer to keep his top or bottom dollar number closer to his vest—the consumer’s bargaining position has clearly been compromised.

Thus, to be effective in eliminating one of the greatest harms posed by lack of agency information, disclosures should be made at the earliest feasible time—before confidential information has been divulged by the consumer. To accomplish this, some states mandate that disclosure be made so as to avoid eliciting confidential information from the consumer, leaving it to the licensee’s discretion as to when the disclosure should be made.<sup>260</sup> The precise time at which a consumer might reveal confidential information, however, may be quite difficult to gauge. Perhaps that is why a number of states have instead chosen to mandate agency disclosure before certain enumerated events occur. Ohio’s statute provides a good example:

A licensee working directly with a purchaser in a real estate transaction, whether as the purchaser’s agent, the seller’s agent, or the seller’s subagent, shall provide the purchaser with an agency disclosure statement . . . prior to the earliest of the following events:

- (a) Initiating a prequalification evaluation to determine whether the purchaser has the financial ability to purchase or lease the particular property;
- (b) Requesting specific financial information from the purchaser to determine the purchaser’s ability to purchase or finance real estate in a particular price range;
- (c) Showing the property to the purchaser other than at an open house;
- (d) Discussing, with the purchaser, the making of an offer to purchase real property;

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<sup>259</sup> *Id.* A corollary to this problem is the case of late disclosure of and purported consent to dual agency, which is exemplified by the case of *Brown v. FSR Brokerage, Inc.*, 72 Cal. Rptr. 2d 828 (Ct. App. 1998). In *Brown*, the listing agent also represented the buyer. *Id.* The agent allegedly persuaded the seller to sell his home for \$2.4 million after telling the buyer he was fairly certain the seller would go that low. *Id.* at 829–30. The only evidence of “consent” to this dual agency was found among the papers the seller signed at the closing. *Id.* at 833–34. The court found the agent’s conduct arguably coercive and permitted the case to proceed to a jury on the issue of whether such consent was valid, assuming it found that the seller had actually consented to the dual agency. *Id.*

<sup>260</sup> *See, e.g.*, ARK. CODE ANN. § 8.1(a)(1) (Michie 2001); COLO. ADMIN. CODE ch. 2 RE-35(a) (2001); IOWA CODE § 543B.57(2)(a) (2001); MICH. COMP. LAWS § 339.2517(1) (2001). *See also* 225 ILL. COMP. STAT. 454/15-35(b) (West 2001) (stating that in no event must such disclosure occur later than preparation of an offer).

(e) Submitting an offer to purchase or lease real property on behalf of the purchaser.<sup>261</sup>

This type of precise timing regulation gives a licensee ample guidance and aims to avoid a consumer's unintentional revelation of confidential information to a licensee not representing him.

Other statutes increase the risk of unintentional and prejudicial consumer revelations by allowing much more time to pass before a licensee's agency relationship must be disclosed. Sellers' agents in New Hampshire, for example, need only disclose their agency relationships to prospective buyers before showing any properties.<sup>262</sup> California, Georgia, Idaho, and West Virginia permit agency disclosure to be made or agency information to be distributed as late as "before an offer is made."<sup>263</sup> Montana requires

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<sup>261</sup> OHIO REV. CODE ANN. § 4735.58(B) (Anderson 2001). *See also* 201 KY. ADMIN. REGS. 11:400(4) (2001) (stating that a disclosure statement must be provided before the earliest of receiving confidential information, entering into an agreement for representation, submitting an offer, or concluding the second meeting); WASH. REV. CODE § 18.86.030 (2001) (requiring that a disclosure statement be provided before consumer signs an agency agreement or offer, consents to dual disclosed agency, or "waives any rights").

An alternative is to require disclosure at the first "substantive contact" with a prospective party. *See, e.g.*, DEL. CODE ANN. tit. 24, § 2931 (2001); N.M. STAT. ANN. § 61-29-10.2 (Michie 2001); S.C. CODE ANN. § 40-57-139(E) (Law. Co-op. 2001). The South Carolina code defines first "substantive contact" as either the point when the licensee prequalifies a potential buyer by requesting specific financial information from him or when the licensee shows a property (other than an open house) to the prospective buyer, whichever occurs first. *See, e.g.*, OR. REV. CODE § 696.800(3) (2001) (defining first substantive contact as "first face-to-face contact or first written communication, whichever occurs first, in which a prospective buyer's or seller's specific real property needs or financial information is discussed"); ALASKA STAT. § 08.88.396 (Michie 2001) (requiring seller's agent to "disclose in writing the licensee's agency relationship with the seller to each prospective buyer at the time that the licensee begins to provide specific assistance to locate or acquire real estate for the buyer"); CONN. GEN. STAT. § 20-325(d) (2001) (requiring disclosure at the beginning of the first meeting concerning the buyer's specific needs); 63 PA. CONS. STAT. § 455.608(a) (2001) (similar); MASS. REGS. CODE tit. 254, § 3.00(13) (2001) (stating that disclosure must be made at first meeting for purposes of discussing a particular property); 39 ME. ADMIN. CODE ch. 330(9)(B) (2001) (indicating when there is "substantive communication about a real estate transaction by either a face to face meeting or a written communication"). For statutes possibly providing for disclosure slightly sooner, *see*, for example, MD. CODE ANN., BUS. OCCUP. & PROF. § 17-530(b)(2) (2001) (at first scheduled face-to-face contact); TEX. REV. CIV. STAT. art. 6573a, § 15C (Vernon 2000) (at first contact).

Incidentally, twenty-eight percent of homebuyers surveyed by NAR in 1999 reported not having been presented with agency disclosure until the time the sale contract was written. BUYERS AND SELLERS PROFILE, *supra* note 75, at 23. Only thirty-eight percent of buyers indicated that they signed an agency disclosure at their first meeting with the real estate agent with whom they worked. *Id.*

<sup>262</sup> N.H. CODE ADMIN. R. ANN. Real Est. Comm'n 701.01(a) (2001). Of course, the licensee may have no agency relationship unless the home being shown is listed by that licensee or her brokerage firm. If the licensee has not agreed to be a buyer's agent, however, the agency relationship should be disclosed earlier to avoid the situation in which the listing agent learns confidential information that might prejudice the buyer in negotiations. The onus should be on the licensee to make that disclosure meaningful.

<sup>263</sup> CAL. CIV. CODE § 2079.14(d) (Deering 2001) (as soon as practicable before an of-

disclosure of agency relationships to parties not represented by the licensee “at the time negotiations commence,”<sup>264</sup> which may be marginally later in the process. Hawaii requires such disclosures only before preparation of a contract between buyer and seller.<sup>265</sup> Kansas licensees need only disclose their agency relationship in the purchase and sale contract.<sup>266</sup>

States that do not specify the time at which disclosures should be made<sup>267</sup> or that permit disclosure as late as the presentation of an offer ignore the problems that lack of disclosure breeds. All agency disclosure statutes should call for mandatory disclosures before confidential information is revealed. Because it is not always possible for the realtor to avoid the unsolicited revelation of confidential information, express statutory guidelines should err on the side of earlier agency disclosure by enumerating early events before which disclosure must occur.

## 2. Audience

The thrust of the agency disclosure requirements should be to provide agency information to parties not represented by the licensee and, perhaps more importantly, to the consumer who is altogether unrepresented. A number of states effectively accomplish this goal. Virginia, for example, requires a licensee to disclose his agency relationships to a prospective buyer or seller “who is not the client of the licensee and who is not represented by another licensee.”<sup>268</sup> Similarly, South Carolina, Cali-

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fer); GA. COMP. R. & REGS. r. 520-1.08(2) (2000) (before first offer); IDAHO CODE § 54-2085(3) (Michie 2000) (agency disclosures and agency relationships must be determined and agreements executed before “preparation or presentation of a purchase and sale agreement.”); W.VA. CODE § 174-1-29.1 (2000) (before any offer signed by any party).

<sup>264</sup> MONT. CODE ANN. § 37-51-314 (2001).

<sup>265</sup> HAW. ADMIN. CODE § 16-99-3.1(c) (2001). Practically speaking, this might result in disclosure before the offer is made if the buyer’s first written offer is accepted by the seller, but this will certainly not always be the case. Recall that Utah’s regulation also requires disclosure of agency relationships “prior to the parties entering into a binding agreement with each other.” *See supra* note 251.

<sup>266</sup> KAN. STAT. ANN. § 58-30,110(a) (2001). A brochure describing agency relationships is to be given to prospective buyers and sellers “at the first practical opportunity.” Unfortunately no brochure need be given to a consumer for whom only “ministerial acts” are being performed by the licensee. *Id.* at § 58-30,110(a)(3)(E). It is precisely in the non-representation setting that an informational brochure should be given and agency disclosure should be made. In Kansas, the unrepresented consumer may not be made aware of agency relationships until he reads that portion of the purchase and sale contract. As one can imagine, in some instances this may mean never.

<sup>267</sup> *See, e.g.*, IND. CODE ANN. §§ 25-34.1-10-10 to -11 (West 2001) (providing no guideline on when disclosure should be made); WYO. STAT. ANN. § 33-28-306(c) (2001) (stating that brokers shall provide notice of established agency relationships “to any other party to the transaction at the earliest reasonable opportunity.”); NEB. REV. STAT. § 76-2421(1) (2001) (“at the earliest practicable opportunity during or following the first substantial contact”).

<sup>268</sup> VA. CODE ANN. § 54.1-2138(A) (Michie 2001); 18 VA. ADMIN. CODE § 135-20-220

ifornia, and Maryland licensees who work with potential buyers must disclose their agency relationships to the buyer.<sup>269</sup>

Disclosure to the licensee's own client or the party with whom the licensee is working is also desirable not only because it will help alleviate the unknown subagent problem<sup>270</sup> but because it clarifies the precise nature of the client's relationship with the licensee (i.e., exclusive agent versus transaction broker). This is particularly important in those states where agency agreements need not be in writing.<sup>271</sup> Many states do not require specific separate agency disclosures to the licensee's client, or they are unclear on this point.<sup>272</sup> In Indiana, for example, agents do have a duty to disclose agency relationships, but the statute does not indicate to whom such disclosure should be made, what form it should take, or when it must be made.<sup>273</sup> Agency disclosures should be made both to the client and the other party, as well as any unrepresented party.

Finally, some states also require agency disclosure to be made to other licensees.<sup>274</sup> Just as disclosure to other principals is desirable, so too is disclosure to other licensees, who might not otherwise be aware, for example, that a licensee working with a buyer is actually that consumer's true agent, and not a subagent or transaction broker.

### 3. Manner

The manner in which agency relationships are conveyed can have a substantial impact on whether they are understood by consumers. Be-

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(West 2001).

<sup>269</sup> S.C. CODE ANN. § 40-57-139(E) (Law. Co-op. 2001); CAL. CIV. CODE § 2079.14 (Deering 2001); MD. CODE ANN., BUS. OCC. & PROF. § 17-530(b)(3) (2001) (indicating disclosure can be made by the seller's agent if there is no cooperating agent).

<sup>270</sup> See *supra* notes 6, 47 and accompanying text.

<sup>271</sup> See, e.g., statutes cited *supra* note 167.

<sup>272</sup> California and Maryland appear to fall into this category. See, e.g., MD. CODE ANN., BUS. OCC. & PROF. § 17-530(b) (2001); CAL. CIV. CODE § 2079.14 (Deering 2001). New York and West Virginia law, by contrast, require licensees to disclose their agency relationships to all parties. N.Y. REAL PROP. LAW § 443(3) (McKinney 2001); W.VA. CODE § 47-12-17(d) (2000). While it might make sense to err on the side of over-disclosure, it is also possible that at some point, multiple versions of disclosure forms may reduce the overall effectiveness of the disclosures being made. Michigan's statute is more narrowly drafted, requiring licensees with any agency relationship(s) to provide disclosure to prospective sellers or buyers with whom they work. MICH. COMP. LAWS § 339.2517(2) (2001). See also WIS. STAT. § 452.145(2) (2000) (stating that disclosure must be made to any party to whom real estate services are provided). Some states eliminate the disclosure requirement where the person to whom disclosure would be made is represented by another licensee. See, e.g., CONN. GEN. STAT. § 20-325d (2001); FLA. STAT. ch. 475.278(5)(b) (2000).

<sup>273</sup> IND. CODE ANN. §§ 25-34.1-10-10, 25-34.1-10-11 (2001). Indiana's relevant agency regulations are also completely silent on this topic. IND. ADMIN. CODE tit. 876, 1.1.1 (2001).

<sup>274</sup> See, e.g., TENN. CODE ANN. § 62-13-405(d) (2001); TEX. REV. CIV. STAT. ANN. art. 6573a, § 15C(a)(2) (Vernon 2000); UTAH ADMIN. CODE 162-6-2-7.3 (2001).

cause verbal notice alone is generally viewed as insufficient,<sup>275</sup> most states require written disclosure of the agency relationship. In actuality, though, depending on how the written disclosure is accomplished, it may be less effective than verbal notification. Thus, in an effort to prevent the written disclosure notice from becoming *pro forma* or its being buried in a shuffle of other documents, North Carolina's regulations require that agents "review" the contents of the disclosure notice with the client or consumer, so as to determine in what capacity the licensee will serve.<sup>276</sup>

Other states have incorporated both verbal and written disclosure requirements in their licensing statutes or regulatory schemes in different manners. One such alternative to a verbal "review" format is adopted in Tennessee's statute.<sup>277</sup> There, the initial verbal disclosure of the licensee's relationship to an unrepresented party to the transaction must thereafter be confirmed in writing before the presentation of any offer.<sup>278</sup> A number of other states use this model.<sup>279</sup>

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<sup>275</sup> See BROBECK & FELDPASCH, *supra* note 257, at 126–27.

<sup>276</sup> N.C. ADMIN. CODE tit. 21, r. 58A.0104(c) (July 2002) (providing that "[i]n every real estate sales transaction, a broker or salesperson shall, at first substantial contact directly with a prospective buyer or seller, provide the prospective buyer or seller with a copy of the publication "Working with Real Estate Agents," review it with him or her, and determine whether the agent will act as the agent of the buyer or seller in the transaction). See also MINN. STAT. § 82.19(4) (2002) ("Minnesota law requires that early in any relationship, real estate brokers or salespersons discuss with consumers what type of agency representation or relationship they desire."); NEV. REAL EST. DIV., NRED POSITION STATEMENT (Apr. 1999) (stating that disclosures must be "presented, reviewed and explained" to consumer).

Some may argue that this treads uncomfortably close to the unauthorized practice of law. Brown, *supra* note 12, at 30, 78; Wilson, *supra* note 12, at 97, 105. At least one state's regulatory agency has attempted to assuage these concerns and perhaps to eliminate liability for licensees in that regard. See N.J. ADMIN. CODE tit. 11, § 5–6.9(f)(2001) (acknowledging that the purpose of the state mandated Consumer Information Statement is "to require licensees to provide basic and introductory information to the public. . . rather than a comprehensive explanation of agency law.").

<sup>277</sup> See TENN. CODE ANN. § 62-13-405 (2001).

<sup>278</sup> *Id.*

<sup>279</sup> See, e.g., VA. CODE ANN. § 54.1-2138 (Michie 2001) (contemplating verbal agency disclosure during any "substantive discussion about a specific property," followed up with written disclosure no later than when "specific real estate assistance" is given to the party not represented by the licensee); N.J. ADMIN. CODE tit. 11, § 5-6.9(g)(3) (2001) (requiring verbal disclosure prior to first discussion about purchasing motivation or ability, with written notification of agency relationships in agency agreements and all offers and contracts); VT. CODE R. 04-030-290(4.5)(b) (2001) (requiring oral disclosure of existing agency relationships "as soon as reasonably necessary to avoid leading the buyer into a misplaced confidence" and written disclosure at the first substantial contact); IOWA CODE § 543B.57 (2001).

Arkansas's regulation requires agency relationship disclosures to be written. ARK. ADMIN. CODE R. 8.1–8.2 (2001). The regulation allows but does not mandate an early verbal agency relationship disclosure, which is followed by a required written disclosure "at a convenient time" that is no later than when the party "signs any document related to the transaction, such as an offer or lease/rental agreement." *Id.* On the other hand, Hawaii provides the least effective disclosure regime. See HAW. ADMIN. CODE § 16-99-3.1 (2001) (requiring verbal or written disclosure before an offer is presented to a seller, and written confirmation thereof in the purchase and sale agreement). The written confirmation in the

For sellers, who are usually represented by the listing agent, the form or manner of disclosure likely presents no problems.<sup>280</sup> Sellers generally will have sought out the licensee and will have discussed the agency relationship as part of the necessary detail of entering into the written listing agreement, whether or not such a discussion is mandated by statute or regulation.<sup>281</sup>

On the other hand, since the prospective buyer often goes unrepresented in the typical transaction, agency disclosure to buyers should be handled with more care. A single written disclosure may elude the buyer,<sup>282</sup> and even the combination of verbal and written disclosures could be insufficient if the statutory or regulatory requirement is too lax. For example, an early verbal disclosure to a prospective buyer might consist only of the words “You are my customer.” While this disclosure might be followed by a possibly more informative written disclosure later on, the consumer may have already established erroneous assumptions about the nature of the relationship. This scenario would be an acceptable minimum under some existing statutes.<sup>283</sup>

As a practical matter, no disclosure can be structured such that every consumer will take note of (and, in fact, understand) the legal relationships involved in his transaction. Nevertheless, meaningful verbal explanation thereof by the licensee who is working with a consumer is vital to providing the buyer with notice and understanding.

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parties’ contract perhaps is too little too late after a scant, but legally sufficient, verbal disclosure at some point prior to an offer.

<sup>280</sup> Likewise, in those states with the most statutory protection for unrepresented parties, the form of disclosure is less critical.

<sup>281</sup> To be comprehensive, any disclosure statute should also require the listing agent to discuss alternative agency relationships with the prospective seller.

<sup>282</sup> See, e.g., N.M. STAT. ANN. § 61-29-10.2 (Michie 2001); N.M. ADMIN. CODE, tit. 16 § 61.19.9 (2001) (requiring agency disclosure at first substantive contact). A number of states require written disclosure more than once. See, e.g., CONN. GEN. STAT. § 20-325(d) (2001) (mandating written agency disclosure at first contact during which personal needs are discussed, and requiring that written disclosure be signed by prospective buyer and attached to any offers made). As a matter of practical fact, the Connecticut buyer may never see the disclosure statement again after signing it at the first meeting.

<sup>283</sup> In many states the substance of disclosure is not mandated. See *infra* text notes 288–296 and accompanying text. There are also problems inherent in defining necessary terms like “client” and “customer.” Webster’s defines client as “a person who engages the professional advice or services of another,” and customer as “one that purchases a commodity or service.” WEBSTER’S NEW COLLEGIATE DICTIONARY 248, 318 (1983). Without checking the dictionary, or reading the statutory definition or other written disclosures, a consumer might reasonably assume these two words mean the same thing. See also *supra* note 79 and *infra* note 301 (discussing the ambiguity to lay people of the word “represent”). It is posited, however, that if a licensee said to a consumer simply “Please keep in mind during our conversations that I do not represent you,” the consumer might understand that the licensee is in some sense his adversary.

#### 4. Acknowledgement

Requiring the recipient to acknowledge in writing the receipt of the agency disclosures might afford consumers even more protection. That acknowledgement could provide useful evidence in future litigation, and it could also increase the likelihood that the disclosure will be noticed and meaningful.

From a litigation standpoint, evidence of compliance with the statutory minimum is desirable for both parties to the agency disclosure. A mandatory written form or notice distributed to the client or consumer and subsequently signed and returned to the licensee would serve that evidentiary purpose. This procedure would eliminate most disputes over whether the statutorily required notice had in fact been given. States that require a licensee to distribute a written form containing agency information and disclosures typically also require a separate acknowledgement of receipt from the recipient.<sup>284</sup> Some of these states require the realtor to keep the acknowledgement receipt as a business record for a minimum number of years.<sup>285</sup> This assists the realtor in creating proof of her compliance with the law.

More importantly, written acknowledgement could make disclosure more meaningful to the consumer. The requirement of obtaining the consumer's signature on a disclosure form may draw the consumer's attention to the document, reducing the possibility that disclosure of the agency relationship will become lost amongst the collection of documents a prospective buyer or seller amasses during proposed purchase or sale of a home.

Unfortunately, some states do not require separate acknowledgement of the nature of the agency relationship.<sup>286</sup> Instead they mandate only that

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<sup>284</sup> See, e.g., LA. ADMIN. CODE tit. 46, § 3703 (2001), which requires the recipient to sign a "tear off" acknowledgement of receipt of the commission-mandated agency information and relationships disclosure form, which signature is witnessed by the licensee. *Id.* More common is the requirement of a single signature by the recipient. See, e.g., MASS. REGS. CODE tit. 254, § 3.00 (13) (2001); OHIO ADMIN. CODE §§ 1301:5-6-05 to -06 (2001). Finally, some states require signatures by all parties to the transaction on such an agency disclosure form. See, e.g., IOWA CODE § 543B.57 (2001).

<sup>285</sup> See, e.g., LA. ADMIN. CODE tit. 46, § 3703(D) (2001) (indicating signed acknowledgement of receipt of agency relationships information brochure must be maintained by licensee for five years); MASS. REGS. CODE tit. 254, § 3.00(13)(b) (2001) (three years); CODE ME. R. 02-039 § 330(9)(F) (2001) (two years); OHIO ADMIN. CODE § 1301:5-6-06 (2001) (three years); VA. CODE ANN. § 54.1-2138(D) (Michie 2001) (three years). See also IDAHO CODE § 54-2085(1) (Michie 2000) (no prescribed number of years).

Other states do not require that signed acknowledgements of receipt of agency information be maintained by licensees as business records. See, e.g., COLO. REV. STAT. § 12-61-808 (2001); NEB. REV. STAT. § 76-2421(5) (2001). An acceptable alternative in some states is for the signed disclosure form to be appended to the Purchase and Sale Contract. See MD. CODE ANN., BUS. OCC. & PROF. § 17-530 (2001); CONN. AGENCIES REGS. § 20-325d-2, 20-325-5 (2001).

<sup>286</sup> See, e.g., ALA. ADMIN. CODE r. 790-X-3.13(2) (2001); GA. COMP. R. & REGS. r. 520-1-.08(2) (2001); WASH. REV. CODE § 18.86.120 (2001).

it be included in other lengthier transaction documents, such as the listing agreement, any offers, the purchase and sale agreement, or the ultimate contract for sale.<sup>287</sup> This likely draws the least attention to the agency relationship disclosure, and while this method does provide for written disclosure, it is quite possible that the purchaser will miss it altogether.

### 5. Substance

Beyond timing and manner of disclosure, an important inquiry regarding agency disclosure is the substance of what is conveyed. To this end, one must examine whether the disclosure is simple or detailed; whether it is phrased in the affirmative (“You are my client”) or the negative (“I do not represent you”); and whether it is written in legalese or language that is understandable to the layman.

Predictably, states have taken multiple approaches. Some require that agency disclosures be made but mandate only their content and not their form;<sup>288</sup> others establish the precise language or paper form of disclosure to be made.<sup>289</sup> The required disclosure in many states includes a description of agency relationships from which the consumer and licensee can choose and of the licensees’ duties when acting in the various

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<sup>287</sup> See, e.g., N.J. ADMIN. CODE tit. 11, § 5-6.9 (2001) (requiring written disclosure of the agency relationship only in any written agency agreement, offers to purchase, and/or contracts for sale drafted by the licensee). The New Jersey statute also requires the dissemination of a “Consumer Information Statement” describing agency with realtors; it does not require, however, that the licensee also disclose the chosen agency relationship in that document. *Id.* The buyer must acknowledge receipt of the “Consumer Information Statement,” and, where a sale or lease transaction is fully executed, the licensee must retain the signed acknowledgement of receipt as a business record for six years. *Id.* § 5-6.9(g)(1)(i). See also LA. ADMIN. CODE tit. 46, § 3703 (2001); LA. REAL EST. COMM’N, REAL ESTATE AGENCY DISCLOSURE: A CONSUMER GUIDE TO UNDERSTANDING AGENCY RELATIONS IN REAL ESTATE TRANSACTIONS, available at <http://www.lrec.state.la.us>.

Similarly, Texas requires verbal or written disclosure of a licensee’s agency relationship at first contact with the consumer, with a written statement of agency relationships information to be provided at the first face-to-face contact. This form must be acknowledged but is not required to contain the licensee’s agency relationship disclosure. See TEX. REV. CIV. STAT. art. 6573a, § 15C(d) (Vernon 2000). It is possible that the provision of the informational brochure or statement will spark another discussion of the licensee’s specific relationship to the consumer. Nevertheless, the additional requirement that the licensee disclose that relationship (or lack thereof) in the informational form might still be prudent.

<sup>288</sup> See, e.g., COLO. REV. STAT. § 12-61-808 (2001); DEL. CODE ANN. tit. 24, § 2900, R. 10.3 (2001) (mandating the form of the written confirmation to be included within the purchase and sale agreement); IOWA CODE § 543B.57(3) (2001); IOWA ADMIN. CODE r. 193E-1.37 (1997); MONT. CODE ANN. § 37-51-314(6) (2001); 49 PA. CODE § 35.284 (2001); N.M. ADMIN. CODE tit. 16, § 61.19.9(B) (2001); VT. REAL EST. COMM’N R. 4.5 (2002).

<sup>289</sup> See, e.g., FLA. STAT. ch. 475.278 (2000) (setting forth various forms for different representational capacities); 201 KY. ADMIN. REGS. 11:400(5) (2001) (setting forth single form); MD. REGS. CODE tit. 09, § 11.08.01 (2001); MINN. STAT. § 82.197(4) (2001) (same).

alternative capacities.<sup>290</sup> In addition, the disclosure typically identifies the particular relationship the parties have chosen.<sup>291</sup>

Some states go further by including warnings in disclosure documents provided to consumers.<sup>292</sup> For example, New York mandates a written disclosure form, which warns that real estate agents are qualified only to give advice about real estate and that the parties should seek legal, tax, and other professional advice if necessary.<sup>293</sup> Idaho's statute requires a conspicuous statement warning the consumer that he is not represented unless and until he has entered into a written agreement with a broker.<sup>294</sup> North Dakota's form warns that the consumer should not divulge confidential information without first ascertaining his relationship with the licensee with whom he is working.<sup>295</sup> By contrast, Virginia's suggested form contains only a brief statement disclosing whom the licensee represents, with no informative descriptions of the various available agency relationships, no warnings about disclosure of confidential information, and no invitation to obtain professional advice.<sup>296</sup>

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<sup>290</sup> See, e.g., CONN. AGENCIES REGS. § 20-325d-2 (2002); OHIO REV. CODE ANN. § 4735.57 (Anderson 2001); OHIO ADMIN. CODE § 1301:5-6-07 app. A (2001); WIS. STAT. § 452.135(2) (2001). See also NEV. REAL EST. DIV., DUTIES OWED BY A NEVADA REAL ESTATE LICENSEE/CONFIRMATION REGARDING REAL ESTATE AGENT RELATIONSHIP (1999), available at <http://www.red.state.nv.us/forms/525.pdf>; S.C. REAL EST. COMM'N, CONSUMER INFORMATION: AGENCY RELATIONSHIPS IN REAL ESTATE—WHEN BUYING OR SELLING REAL ESTATE, ARE YOU A CUSTOMER OR CLIENT?, available at <http://www.lfr.state.sc.us/POL/RealEstateCommission>; S.D. REAL EST. COMM'N, REAL ESTATE RELATIONSHIPS DISCLOSURE (1998), available at <http://www.state.sd.us/cr/realestate/agcydisc.pdf>.

A less desirable alternative is to require the inclusion of the relevant language from the statutory provision or provisions. See, e.g., CAL. CIV. CODE § 2079.16 (Deering 2001); WASH. REV. CODE § 18.86.120 (2001). While many statutes are relatively comprehensible to those trained in law, lay persons will likely have difficulty understanding statutes due to the legal terminology and complex sentence structures.

<sup>291</sup> See, e.g., MICH. COMP. LAWS § 339.2517(2) (2001).

<sup>292</sup> Other statements are required by a number of states. See, e.g., WYO. STAT. ANN. § 33-28-306 (a)(i) (Michie 2001) (requiring statement that broker's fees are negotiable); MO. CODE REGS. ANN. tit 4, § 250-8.096(1)(A)(2) (2001) (requiring statement identifying sources of licensees' compensation); 63 PA. CONS. STAT. § 455.608 (2001) (requiring statement that a recovery fund is available in the event of realtor malfeasance); N.H. CODE ADMIN. R. ANN. Rea 701.01(f)(2) (2001) (requiring statement regarding vicarious liability for agents' and subagents' conduct); OR. REV. CODE ANN. § 696.830 (2002) (same).

<sup>293</sup> N.Y. REAL PROP. LAW § 443(4) (McKinney 2001). See also R.I. GEN. LAWS § 5-20.6-6 (2001) (same).

<sup>294</sup> IDAHO CODE § 54-2085(2) (Michie 2002) (requiring, *inter alia*, a "conspicuous notice that no representation will exist absent a written agreement between the buyer or seller and the brokerage"). See also COLO. REV. STAT. § 12-61-808(2)(d)(I)(a) (2001) (stating that seller's agent or subagent who works with prospective buyers must disclose that she is not an agent for the buyer unless she enters into a written agreement to act as a buyer's agent); CONN. AGENCIES REGS. § 20-325d-2(4) (2002) ("Do not assume that a real estate brokerage firm or its agents are representing you or are acting on your behalf unless you have contracted in writing with that real estate brokerage firm."). Cf. ALA. ADMIN. CODE § 790-X-3.13(2) (2001) ("If you do not sign an agreement, by law the licensee working with you is a transaction broker.").

<sup>295</sup> N.D. ADMIN. CODE § 70-02-03-15.1(7) (2001).

<sup>296</sup> VA. CODE ANN. § 54.1-2138(A) (Michie 2001). The sum total of the suggested disclosure language is as follows: "Disclosure of brokerage relationship—The undersigned do

*C. The Effectiveness of Disclosure Laws*

Beyond the technical aspects of disclosure laws with respect to timing, manner, and substance, a more important consideration is the overall meaningfulness of the disclosures themselves. Despite the best legislative intentions, mandatory disclosures are likely less effective than anticipated.

First, the regulations requiring disclosures may be ignored or overlooked by licensees. Only sixty-six percent of homebuyers surveyed by NAR in 1999 reported having signed an agency disclosure statement, while thirty-four percent of buyers were either unsure whether they signed one or were sure they had not signed an agency disclosure.<sup>297</sup> Assuming that the vast majority of licensees comply with the law, a more benign (and perhaps more likely) explanation for this statistic may be that the homebuyer to whom a statutory disclosure was given did not see it, did not read it, or did not understand it to be an agency disclosure form.<sup>298</sup>

Second, the written disclosures contemplated by current statutes may not be conveying the intended meaning or even basic notice to the consumer who does read them. A full one-half of adults in the United States read only at the first to eighth grade level, and about half of that group (nearly a quarter of the adult population) reads below the fourth grade level.<sup>299</sup> Most of the current disclosure forms are written at a twelfth grade level or higher.<sup>300</sup> Thus, assuming that consumers who are provided

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hereby acknowledge disclosure that: The licensee [blank for "Name of Firm"] represents the following party in a real estate transaction: [blank] Seller(s) or [blank] Buyer(s). [blank] Landlord(s) or [blank] Tenant(s)." *Id.* This simplistic form of disclosure may be the most understandable to the layperson.

<sup>297</sup> BUYERS AND SELLERS PROFILE, *supra* note 75, at 23. Buyers fared even worse in a smaller study. According to the Massachusetts Office of Consumer Affairs, not one examiner posing as a "homebuyer" in its 1997 survey received an agency disclosure form from any of the forty-five top real estate firms in the state, despite the fact that Massachusetts state law has required such disclosure since 1993. June Fletcher, *New Rules: What Agents Won't Tell You*, WALL ST. J., Mar. 13, 1998, at B12.

<sup>298</sup> Cf. David W. Stewart & Ingrid M. Martin, *Intended and Unintended Consequences of Warning Messages: A Review and Synthesis of Empirical Research*, 13 J. PUB. POL'Y & MKTG. 1, 1 (1994) (noting that many consumers do not even read warnings).

<sup>299</sup> See IRWIN S. KIRSCH ET AL., EXECUTIVE SUMMARY OF ADULT LITERACY IN AMERICA: A FIRST LOOK AT THE FINDINGS OF THE NATIONAL ADULT LITERACY SURVEY (1993), available at <http://nces.ed.gov/naal/resources/execsumm.asp#litskill>.

<sup>300</sup> Utilizing the Flesch-Kincaid method, *see id.*, for determination of reading level, the author analyzed legislatively mandated or agency devised/approved disclosure forms from twenty-five states. See generally Mark Hochhauser, *Writing for Staff, Employees, Patients, and Family Members*, 76 HOSP. TOPICS 5-8 (Jan. 1998) (discussing reading comprehension problems and the need for simpler writing to reach the average consumer in the health care context).

A large majority of disclosure forms proved to be written at a reading level of twelfth grade or higher. Of the cross section of forms tested, only two were written at or below the eighth grade level: Florida's single agent notice, which is given to those consumers who are represented by the licensee, and Virginia's simple disclosure quoted *supra* at note 296.

disclosure forms actually read the prescribed disclosure information, it is still possible that they do not comprehend it.<sup>301</sup> Efforts could be made to rewrite these disclosures in a more universally understandable form.<sup>302</sup> Presumably, this would result in disclosures that are relatively short and that are presented in a user-friendly fashion. Until this happens, a significant number of consumers will still be operating in a context in which agency disclosure might as well not have been given at all.

#### VIII. RESIDUAL PROBLEMS IN THE WAKE OF REFORM

The stated purpose of many new agency laws is the reorganization and codification of agency duties and roles to recognize and reform the counterintuitive nature of the relationships inherent in the traditional subagency model.<sup>303</sup> But have the new laws achieved this purpose? Or have the new regulatory regimes simply succeeded in perpetuating—or worse, exacerbating—the problem of the unrepresented consumer and the other troubling aspects of subagency practice? This Part considers the effect those reforms have had on the market in an effort to determine

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The grade levels for the tested forms from each of twenty-five states are listed here: Alabama (Consumer Information Booklet > 12.0; Real Estate Brokerage Services Disclosure 7.8); Arkansas (> 12.0), California (> 12.0), Connecticut (> 12.0), Delaware (> 12.0), Florida (transaction broker notice, 10.3; single agent notice, 7.9; no brokerage notice > 12.0), Hawaii (> 12.0), Iowa (consumer information pamphlet, 10.7), Kansas (11.6), Kentucky (> 12.0), Louisiana (9.3), Nebraska (> 12.0), Massachusetts (10.5), Minnesota (> 12.0); Mississippi (11.3), Missouri (> 12.0), New Jersey (> 12.0), Nevada (> 12.0), Ohio (> 12.0), Oregon (> 12.0), South Carolina (> 12.0), South Dakota (Real Estate Consumer Guide > 12.0, Agency Disclosure Form, 11.5), Texas (> 12.0), Virginia (2.8), Wisconsin (> 12.0).

<sup>301</sup> Complicating the objective problem of reading level is the disclosure forms' troubling use of the highly ambiguous word "represent." This word could be interpreted in a number of ways, depending on who reads it. For example, Texas's statutorily mandated agency disclosure form provides that a "broker can assist you in locating a property, preparing a contract or lease, or obtaining financing without representing you." TEX. REV. CIV. STAT. art. 6573a, § 15C(d) (Vernon 2000). That statutory form also states: "A licensee who represents a party in a real estate transaction is that party's agent." *Id.* § 15C(c). While these are accurate statements of the law, they may not have meaning to the lay consumer. *See also* MINN. STAT. § 82.197(4) (2002) (indicating that a subagent is a broker or salesperson who is working with a buyer but represents the seller). In Minnesota, the buyer is the broker's customer and is not represented by that broker, where "customer" is not defined in the form. *Id.* *See also supra* notes 79, 283.

<sup>302</sup> North Dakota's administrative code requires that the obligatory written agency disclosures be given in "clearly understood terms." N.D. ADMIN. CODE § 70-02-03-15.1(7) (2001). The burden of accomplishing this, however, is on the brokerage firms and licensees themselves. Ideally, cognitive psychologists and marketing/consumer behavior specialists trained in assessing the impact of particular words, combinations of words, and visual formatting would be involved in the process.

<sup>303</sup> *See, e.g.,* GA. CODE ANN. § 10-6A-2 (2000) (indicating that codification of agency relationships will "prevent detrimental misunderstandings and misinterpretations of such relationships by both consumers and real estate brokers"); NEB. REV. STAT. § 76-2401 (2001) (similar).

whether they have achieved their intended purpose of alleviating the difficulties and confusion consumers face.

*A. Consumer Confusion Created by Conflicting Terminology*

The existence of novel and frequently conflicting terminology among the various states has created a new source of consumer confusion. In today's mobile society, many consumers are bound to participate in residential real estate transactions in more than one state. Even a well-informed consumer in one state may assume that terminology used in the profession is uniform and may thus be misled when purchasing a second home in another state.

There are many examples of this often perplexing nomenclature. In Minnesota, a "facilitator" is the equivalent of a transaction broker,<sup>304</sup> whereas in New Mexico, a "facilitator" is a disclosed dual agent.<sup>305</sup> A "limited broker" in Idaho is a qualified broker who does not have associate brokers or salespeople working with her,<sup>306</sup> a "limited agent" in Indiana and South Dakota is a disclosed dual agent,<sup>307</sup> and a "limited broker" in Minnesota is one who is licensed only to act as a principal in connection with a real estate transaction.<sup>308</sup> Then again, "limited agent" is the term used in a number of states to refer to the statutorily created and defined non-fiduciary licensee ("exclusive agent") capacity.<sup>309</sup>

In addition, the terms "non-agent"<sup>310</sup> and "no-brokerage" have been used in a few of the new licensing statutes. In New Hampshire, a "non-agent" is essentially a transaction broker.<sup>311</sup> Alternatively, "non-agents" in Idaho are only those licensees who work with a buyer or seller who is not represented by a licensee.<sup>312</sup> New Mexico law refers to the relationship between a licensee and a consumer with whom the licensee does not have

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<sup>304</sup> MINN. STAT. § 82.197(4)(V) (2002).

<sup>305</sup> N.M. ADMIN. CODE tit. 16, § 61.1.7.21 (2001).

<sup>306</sup> IDAHO CODE § 54-2004(22) (Michie 2001).

<sup>307</sup> IND. CODE ANN. § 25-34.1-10-12 (West 2001); S.D. CODIFIED LAWS § 36 21A-140 (Michie 2001).

<sup>308</sup> MINN. STAT. § 82.20(13) (2000).

<sup>309</sup> See, e.g., MO. REV. STAT. § 339.710(16) (2000); NEB. REV. STAT. § 76-2413 (2001). Cf. TENN. CODE ANN. § 62-13-102(9) (2001) (defining "limited agency" so as to relieve client of vicarious liability for agent's misrepresentations). On the other hand, Virginia's statute denominates a licensee whose duties are dictated by statute a "standard agent." VA. CODE ANN. § 54.1-2130 (Michie 2001).

<sup>310</sup> Any statute that supersedes common law and statutorily enumerates duties that are inconsistent with or fall short of traditional fiduciary obligations agents owe has created "non-agent" options. Despite common parlance, licensees in these states are no longer "agents" as defined by the common law.

<sup>311</sup> New Hampshire defines a non-agent as a licensee that "can only perform ministerial acts and is not obligated as an agent to either the buyer/tenant or seller/landlord." N.H. CODE ADMIN. R. ANN. [Real Est. Comm'n] 701.01(e) (2002).

<sup>312</sup> IDAHO CODE §§ 54-2083(11), 54-2086 (Michie 2002).

a brokerage relationship as “non-agency.”<sup>313</sup> Florida law designates this same group of licensees as “no brokerage.”<sup>314</sup> Realtor relationships with the same name, therefore, can actually be quite different depending upon the jurisdiction.

At a minimum, licensees who have not been engaged as agents, with attendant fiduciary duties to their clients, should refrain from using the term “agent” to describe themselves or their practice. Likewise, statutes and regulations should avoid the use of this term altogether—in favor of the more generic terms licensee, broker, or salesperson—unless describing one who is legally an agent.

### *B. Consumer Confusion Created by Transaction Broker Status*

The creation of the transaction broker has probably not changed the practical setting for the consumer considerably. In the scenario where a transaction broker works with both parties but represents neither, the result is quite similar to that of the single licensee acting as a disclosed dual agent representing both parties to the transaction. This model existed prior to the revision of state licensing statutes and the promulgation of new regulations. The difference today is that a transaction broker may have reduced disclosure and consent requirements and likely owes fewer duties to the parties than under a disclosed dual agency agreement.<sup>315</sup> While this protects the licensee from liability, it does so at the expense of the consumer.

This type of transaction brokerage arrangement also creates the possibility that each party will mistakenly assume that the transaction licensee represents him in an agency capacity. The error, however, will probably operate to the buyer’s detriment. Where the seller is not represented, he is likely to be aware of that fact—not having engaged the services of any realtor—and will act accordingly to protect himself. The prospective buyer, on the other hand, may reasonably assume that a licensee who is participating in the transaction represents him, particularly if he has sought the services of that realtor in the first instance.<sup>316</sup>

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<sup>313</sup> N.M. ADMIN. CODE tit. 16, § 61.1.7(CC) (2002). In New Mexico, “non-agency” also refers to a written brokerage relationship that expressly does not call for fiduciary duties. *Id.*

<sup>314</sup> FLA. STAT. ANN. § 475.278(4)(a) (West 2001). A number of other states refer to this relationship, by implication, as the licensee-customer relationship. *See supra* note 112 and accompanying text.

<sup>315</sup> Recall that in all states that permit disclosed dual agency, a written consent form is required. *See supra* note 83 and accompanying text. This is not the case with transaction broker status, which simply must be disclosed as part of the agency relationship disclosures in most states that permit it. *See supra* notes 142–144 and accompanying text.

<sup>316</sup> The confusion problem is precisely the same where the transaction broker represents one party (usually the seller) in an agency capacity and the other (usually the buyer) as a transaction broker. This situation is expressly contemplated in some states that provide for transaction brokers. *See, e.g.*, MO. REV. STAT. § 339.755(9) (2000); NEB. REV. STAT.

Confusion also remains a problem where two licensees are involved in the transaction but only the licensee working with the buyer is operating as a transaction broker. From the practical perspective of the parties, this representational model is no different than the seller subagency model. The buyer (and seller) may still believe that the transaction broker is legally the buyer's agent—complete with fiduciary obligations—when, in fact, she is not.<sup>317</sup>

### C. Consumer Confusion Perpetuated by “Ministerial Acts” Provisions

Many state statutes expressly permit a licensee representing one party in an agency capacity to perform so-called “ministerial acts” for the other party.<sup>318</sup> These are performed for an unrepresented party without creating an agency relationship.

In a representative scenario, an interested buyer meets the listing realtor at an open house. Because the buyer does not perceive the need for separate representation, the seller's agent then willingly<sup>319</sup> performs ministerial acts for the buyer, including answering questions, assisting the buyer in filling out a contract offer, arranging for necessary inspections, and ultimately attending the closing. In fact, these are the acts that are most frequently performed by realtors. Some consumers may even believe these are the only services provided by realtors or the only services that they are qualified to perform. It is no wonder, then, that an unrepresented buyer may conclude that a realtor providing him with ministerial assistance “represents” him in some legal capacity, even when that realtor is the listing agent—legally the agent of the seller.<sup>320</sup> Indeed, it was precisely the rendering of ministerial services to unrepresented par-

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§ 76-2416(4) (2001).

<sup>317</sup> Of course, a buyer who finds himself in this setting has actually been assisted by the imposition of any affirmative statutory duties imposed upon the transaction broker in his favor. The seller, too, is better off because the transaction broker is likely not his sub-agent.

<sup>318</sup> It is not just two-tiered service states, however, that run into this problem. For example, without creating the customer/client distinction, New Hampshire's regulatory scheme establishes this same scenario. Sellers' or buyers' agency agreements must be written, and the statute expressly provides that sellers' and buyers' agents may perform ministerial acts for the other party to the transaction. See N.H. REV. STAT. ANN. §§ 331-A:25-b(II)(b), 331-A:25-c(II)(b) (2000); see also N.H. CODE ADMIN. R. ANN., Rea 701.01(e) (2001) (stating that “non-agents” may perform only ministerial duties).

<sup>319</sup> A seller's broker who sells the property without the participation of a buyer's broker or other cooperating broker does not have to split the six to eight percent commission with anyone.

<sup>320</sup> This is frequently the case with a cooperating broker (seller's subagent), who responds to a buyer's inquiries about property, shows him properties listed by other agents, arranges for inspections, and attends the closing. This realtor is even more likely to appear to the buyer as his “own” agent, while the statute clearly provides that the licensee has no agency relationship with such a customer.

ties that caused the legal and practical confusion inherent in the traditional agency representation model.

States that have expressly incorporated safe harbors for licensees who perform ministerial acts have gone a long way towards protecting the licensee from liability, either to her client or to the unrepresented party, to whom no fiduciary duty is owed. But in the process, they have exacerbated—and in fact codified—the negative features of the traditional seller subagency relationship, leaving the buyer dangerously unrepresented.

*D. Attempts To Resolve the Danger to Sellers Imposed by the Persistence of Seller Subagency Practice*

The employment of seller's subagents who work with buyers has long been perceived as the root of the consumer confusion regarding whom licensees represent. It also has acted as a catalyst for the promulgation of agency disclosure laws in all but one of the fifty states.<sup>321</sup> Despite new disclosure laws, the creation of various other new agency roles, and the explicit definition of agents' duties, the practice of seller subagency persists today. The two primary concerns here are intertwined: the notion that a subagent may be appointed without the principal's actual authorization, and the principal's vicarious liability for the subagent's conduct.

State statutes addressing these issues have taken different approaches. A number of them have eliminated the principal's (seller's) liability for the subagent's conduct.<sup>322</sup> This goes a long way towards addressing the problem. An alternative approach is to retain the principal's vicarious liability for the conduct of the subagent but require that the principal be made aware of this liability. Connecticut's statute<sup>323</sup> effectively accomplishes this end:

No real estate broker shall make any unilateral offer of subagency or agree to compensate, appoint, employ, cooperate with or otherwise affiliate with a subagent for the sale or purchase of real property without the informed written consent of the person

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<sup>321</sup> See *supra* note 247.

<sup>322</sup> See, e.g., N.Y. REAL PROP. LAW § 443(4) (McKinney 2002) (holding that neither buyer nor seller is vicariously liable for conduct of subagents); IND. CODE ANN. § 25-34.1-10-16 (West 2001) (stating that client is not vicariously liable for agents' misrepresentations unless client knew or should have known of the misrepresentation); NEB. REV. STAT. § 76-2426 (2001) (same); OHIO REV. CODE ANN. § 4735.68 (Anderson 2001) (stating that there is no vicarious liability for client who did not have actual knowledge of licensee's misrepresentation); TEX. REV. CIV. STAT. ANN. art. 6573a, § 15F(c) (Vernon 2002) (stating that neither party nor licensee is vicariously liable for subagents' misrepresentation or concealment unless party or licensee knew of a falsity and failed to disclose it). Indiana, Ohio, and Texas are not Type I states.

<sup>323</sup> Connecticut's statute is Type II. See *supra* Part IV.B.

whom the real estate broker represents. Such written consent shall contain the name and real estate license number of the real estate broker to be appointed as the subagent and shall contain a statement notifying the person whom the real estate broker represents that the law imposes vicarious liability on the principal for the acts of the subagent.<sup>324</sup>

Notably, this statute requires the informed written consent of the seller.<sup>325</sup> Many states, however, simply require that “authority” to appoint subagents be given in writing.<sup>326</sup> This latter approach condones the historical practice of placing a “consent” or “authorization” to the appointment of subagents in the listing agreement, where it may never be read or noticed by the seller.<sup>327</sup> Thus, a seller might conceivably become liable for the conduct of a subagent he “constructively” authorized, but of whom he was in actuality unaware.<sup>328</sup> State statutes that do not eliminate vicarious liability for the conduct of these “unknown” subagents have maintained the original and arguably unfair situation for the seller.<sup>329</sup>

States that choose to retain vicarious liability for subagents should add a requirement that the licensee more clearly highlight this liability to the seller. A better solution, though, is to retain the tradition of nearly automatic authorization of subagents as necessary, but eliminate vicarious liability for unknown sublicensee’s conduct.

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<sup>324</sup> CONN. GEN. STAT. § 20-325(f) (2001).

<sup>325</sup> Compare OHIO REV. CODE ANN. § 4735.64 (Anderson 2001) (offer of subagency prohibited without “knowledge and consent of the seller”), with S.C. CODE ANN. § 40-57-137 (Law. Co-op. 2001) (seller’s “consent” required).

<sup>326</sup> See, e.g., KAN. STAT. ANN. § 58-30,106(g) (2001) (establishing that seller may agree in writing to appointment of subagents); LA. REV. STAT. ANN. § 9:3898 (West 2001) (“subagency can be created only by written agreement”); MASS. BD. OF REG. OF REAL EST. BROKERS & SALESPERSONS, MANDATORY AGENCY DISCLOSURE—AGENCY RELATIONSHIP FORM (on file with author) (allowing written authorization of subagent representation); MO. REV. STAT. § 339.780(2) (2001) (requiring all seller representation agreements to indicate whether subagency is permitted); WASH. REV. CODE § 18.86.010 (15) (2001) (establishing that the subagent is hired by “principal’s agent where the principal has authorized the agent in writing to appoint subagents”); WYO. STAT. ANN. § 33-28-303(f) (Michie 2001) (establishing that seller may agree in writing to extend offer of subagency).

<sup>327</sup> See Collette, *supra* note 6, at 420 (noting that “in all probability, sellers rarely read or understand the contents of the standard form listing agreements they sign, nor do they give much thought to the scope of their authorization of sub-agency”).

<sup>328</sup> The law has long required agents who employ subagents to do so only with the permission of the principal, unless the delegated act is “ministerial” or “mechanical.” RESTATEMENT (SECOND) OF AGENCY § 78 (1957).

<sup>329</sup> For example, in Pennsylvania, a subagent who cooperates with a listing broker need not obtain a written agreement from the seller, yet vicarious liability is not statutorily eliminated. 63 PA. CONS. STAT. § 455.606(b)(3) (2001). See, e.g., S.C. CODE ANN § 40-57-137(E) (Law. Co-op. 2001) (declaring no subagency without “knowledge and consent” of seller; vicarious liability not statutorily eliminated). The vicarious liability problem is not limited just to subagents. See WYO. STAT. ANN. §§ 33-28-301 to -309 (2001) (declaring no statutory elimination of vicarious liability for licensee conduct); KAN. STAT. ANN. §§ 58-30,106(k), 58-30,107(h) (2001) (eliminating only principal’s liability for punitive damages arising out of agent’s failure to perform statutory duties owed to other party to transaction).

*E. Safe Harbors and Other Statutory Protections for Licensees*

As explained previously, the advent of new licensing laws has resulted in licensees being better protected now than ever before. If licensees faced any problems in connection with the historical subagency practice, they were related to the confusion over to whom their legal duties ran, the precise form and quantum of legal duties (given unpredictable changes in common law), and the possibility of accidental dual agency.

The first two problems have been eliminated in most states by legislative or regulatory articulation of precise duties, express direction as to whom they are owed, and outright abrogation of the common law. The specter of accidental dual agency has also been all but eradicated by the fact that in-house transactions are now specifically provided for and condoned by many state statutes. Finally, legislative safe harbors for seller's agents and subagents who deal with buyers have dealt with problems persisting as a result of the inherent conflict of interest posed by lingering subagency or the new problems posed by the sanctioned performance of ministerial acts for unrepresented parties.<sup>330</sup>

## IX. CONCLUSION

The last fifteen years have witnessed a revolution in real estate licensing statutes. New realtor roles have been created and adopted, licensees' duties have been redefined, and agency relationship disclosure of some type is now the norm. Each state's definition of the various realtor roles tends to vary from the others' at least in small part, as do other substantive provisions in state statutes. As a result, the fifty states' statutory models for realtor relationships and disclosure, and the resulting level of consumer protection they provide, are different.

The adoption of new realtor roles certainly has added flexibility and more consumer choice to the marketplace. But this has not come without costs. The introduction of non-agency realtor roles and the redefinition of existing ones no doubt has caused some confusion in the short term for licensees as they have altered their practices and adjusted to the new

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<sup>330</sup> See, e.g., COLO. REV. STAT. § 12-61-804(3)(b) (2001) (declaring that sellers' agents have no duty "to conduct an independent inspection of the property for the benefit of the buyer" and no duty to "independently verify the accuracy or completeness of any statement made by [the seller] or any independent inspector."); KAN. STAT. ANN. § 58-30,106(d)(2) (2001) (same); OR. REV. CODE ANN. § 4735.69(B) (2001) (establishing that licensee's provision of ministerial assistance to a party who is not her client does not create an implied agency relationship with that party); S.C. CODE ANN. § 40-57-137(F) (Law. Co-op. 2000) (declaring that licensee acting as seller's agent is "not liable to a buyer for providing the buyer with false or misleading information if that information was provided to the licensee by his client and the licensee did not know or have reasonable cause to suspect the information was false or incomplete")

statutory models. For the consumer, though, the situation is more grave—the confusion perpetuated or even created by the new statutes is not likely to be short term. Consumers do not buy and sell homes every day. Even repeat buyers or sellers may have moved to another state where the laws are different, or they may have had their only previous experience with a home purchase or sale prior to the adoption of the new statutes. With consumer confusion still pervasive in many states even after the passage of disclosure statutes, it is time to recognize the limits of disclosure.

Given the questionable efficacy of disclosure in solving the problem of the unrepresented consumer, legal reform must follow the lead of states that have imposed concrete duties upon licensees towards those that they do not represent in a fiduciary capacity, whether in the form of other-party duties, duties owed to all parties, or even duties owed by a transaction broker to her “client.” This is where the real consumer protection, if any, is found in the new real estate broker licensing statutes. In fact, the level of imposition of other-party duties is the most appropriate yardstick by which to measure new real estate broker regulations; it accurately reveals how far the states have come in achieving the goal of protecting the public, while also encouraging free enterprise on the part of realtors.

Home ownership is an essential ingredient of the American way of life. Realtors get their slice of this enormous pie; they are engaged in and profit from the vast majority of the millions of home purchase and sale transactions nationwide each year. In their lobbying and public relations efforts, they are represented by a formidable national trade association as well as by local practitioner groups and boards.<sup>331</sup> The individual consumer, by contrast, is alone, lacking in political clout, frequently ill-informed about the state of the law despite disclosure laws, and apparently of least concern to the regulatory setting in some states. As a matter of public policy, state laws and regulations should not become vehicles for eliminating or reducing realtor liability at the expense of the consumer. Instead, state residential real estate licensing laws should seek proactively to protect sellers—and especially buyers—using the most protective statutes in existence today as their models.

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<sup>331</sup> FTC REPORT, *supra* note 3, at 82, 97.

APPENDIX: CLASSIFICATION OF STATES BY REALTOR ROLES, DEFAULT  
POSITION, AND OTHER-PARTY DUTIES

Alabama	IV C 4	Montana	IV A 3
Alaska	I B 1	Nebraska	I A 3
Arizona	I B 3	Nevada	II B 4
Arkansas	I B 2	New Hampshire	IV A 3
California	I B 4	New Jersey	IV A 3
Colorado	IV A 3	New Mexico	IV C 3
Connecticut	II B 2	New York	I B 4
Delaware	I B 3	North Carolina	II A 3
Florida	IV B 3	North Dakota	II A 3
Georgia	IV A 3	Ohio	II B 3
Hawaii	I B 1	Oklahoma	IV C 2
Idaho	III A 4	Oregon	II B 4
Illinois	III B 3	Pennsylvania	IV C 4
Indiana	III A 3	Rhode Island	I A 2
Iowa	III A 4	South Carolina	I A 2
Kansas	IV A 3	South Dakota	IV A 3
Kentucky	IV B 2	Tennessee	IV C 4
Louisiana	III A 2	Texas	II B 2
Maine	II B 3	Utah	I A 1
Maryland	I A 3	Vermont	I A 3
Massachusetts	I B 2	Virginia	II B 3
Michigan	IV B 1	Washington	II A 4
Minnesota	IV B 3	West Virginia	I B 4
Mississippi	I B 3	Wisconsin	III A 4
Missouri	IV A 3	Wyoming	IV A 3

**Key:**Realtor Roles

Type I: recognize buyers' brokers

Type II: add designated agency

Type III: two-tiered service

Type IV: add transaction brokers

Default Position

Class A: traditional model

Class B: "choice"/traditional model

Class C: transaction broker default

Other-Party Duties

Cat. 1: none enumerated

Cat. 2: honesty/good faith

Cat. 3: disclose material  
adverse factsCat. 4: include reason-  
able care