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Illinois Real Estate Designated Agency Amendment: A Minefield for Brokers, 27 J. Marshall L. Rev. 953 (1994)

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NOTES

THE ILLINOIS REAL ESTATE “DESIGNATED AGENCY AMENDMENT”: A MINEFIELD FOR BROKERS

“Double, double toil and trouble;
Fire burn and caldron bubble.”

Macbeth, Act IV, Scene 1.¹

“Double, double agency trouble;
Brokers learn or lawsuits bubble.”

Real Estate Brokers, Act I, 1993.

INTRODUCTION

Seller decides to market her property and calls a local real estate company for help. Broker owns the real estate company and employs licensed salespersons. Seller talks to Salesman at the company, who then meets with her, obtains pertinent information on the property, and prepares a market analysis to determine a selling price range. If Seller decides she has confidence in Salesman and the real estate company, she signs a listing agreement giving Broker the exclusive right to sell the property. Seller wants to sell the property as quickly as possible for the highest possible price. She expects Salesman to aggressively market her property, advertise it, find a qualified buyer, and put the deal together to achieve her goals. Salesman assures Seller he will represent her well, work hard, and protect her interests.

Broker supervises Salesman who begins to market Seller's property by placing it in the multiple listing service. The listing will expose the property to other brokers in the area who may assist in the sale by finding a buyer. In addition, Salesman advertises Seller's property in the newspaper. The advertisement lists Broker's name and business phone number. Salesman and Broker hope to sell Seller's property as quickly as possible with the least amount of trouble and expense. A quick sale not only allows Salesman and Broker to earn a commission, but makes the client happy.

1. WILLIAM SHAKESPEARE, *MACBETH* act 4, sc.1.

A happy client may refer other potential buyers and sellers to Broker's company.

Salesman's advertisement catches the attention of Buyer, who calls to inquire about the property. Buyer speaks with a second salesperson, Saleslady. Saleslady invites Buyer to visit the office to discuss the type of property Buyer is interested in purchasing. Saleslady determines that Buyer is financially qualified to purchase property within a certain price range. Next, Buyer and Saleslady look at several properties, including Seller's property. After looking at several homes in her price range, Buyer decides she likes Seller's property best. Buyer wants to buy Seller's property for the lowest possible price. Buyer tells Saleslady she wants to buy Seller's property. Buyer also asks Saleslady to prepare an offer to purchase for presentation to the Seller.

This transaction is categorized as "in-house" because the real estate broker employs the salesperson representing the seller as well as the salesperson representing the buyer. In an in-house transaction, the common law categorizes Broker as a dual agent. Broker must disclose the fact of the dual agency to both Seller and Buyer, and both of them must consent to it in order for Broker to legally act as a dual agent.

Broker is an ethical man. He always conducts his real estate transactions with integrity according to the law. Therefore, his purchase contracts contain a disclosure statement which conforms to all statutory requirements for disclosure of dual agency. In this transaction the provision states that Salesman represents the seller and Saleslady represents the buyer. Both Seller and Buyer give their consent to the stated representation by initialing the disclosure form. Although the form meets all statutory requirements for proper disclosure, Broker may still face a nightmarish multimillion dollar lawsuit if his disclosure is not "full or adequate" under the common law of agency.

This not-so-hypothetical situation depicts a recent Minnesota decision² involving Edina Realty. That decision may dramatically affect brokers throughout the country who are grappling with questions regarding dual agency. Legislatures nationwide are seeking to provide guidance and protection for brokers who attempt to comply with their legal duties as agents. However, *Edina Realty* suggests that brokers who follow legislative guidelines may not be insulated from liability.³

2. *Dismuke v. Edina Realty, Inc.*, No. 92-8716, slip op. (D. Minn. June 17, 1993).

3. See *infra* notes 125-42 and accompanying text for a discussion of the *Edina Realty* case and the momentous liability involved in the troubling decision.

In an attempt to solve the evolving agency problems of brokers who offer representation to both sellers and buyers, the Illinois legislature has recently passed the "Designated Agency Amendment"⁴ to the Real Estate License Act of 1983.⁵ Illinois is the first state to try to resolve the problems of dual agency through legislative action. The Designated Agency Amendment attempts to protect brokers from liability for dual agency in in-house transactions.⁶ However, because the Amendment does not specifically abrogate the common law, crucial questions remain unanswered.⁷ Therefore, the Illinois legislature should improve the Designated Agency Amendment by defining the duties of brokers and specifying the necessary elements for full disclosure and informed consent in a dual agency situation.⁸ At the very least, the legislature should abrogate the common law of agency as applied to real estate brokers in dual agency relationships.⁹

This Note analyzes the Illinois Designated Agency Amendment to the Real Estate License Act of 1983 and its attempt to solve the inherent dual agency problems facing real estate brokers.¹⁰ Part I provides a brief history of agency law as it relates to real estate brokers. Part II traces recent transitions in practice which incorporate buyer agency and simultaneously create new challenges for brokers. Part III analyzes the Illinois Designated Agency Amendment as a legislative response to those challenges. Part IV focuses on the deficiencies of the Designated Agency Amendment in the light of common law agency principles and recent court decisions. In addition, it concludes that the Designated Agency Amendment is ineffective and needs immediate modification. Part V suggests three possible solutions to the problem and proposes a legislative modification specifically for the Illinois Real Estate License Act of 1983.

4. 225 ILCS 455/18.2a (Supp. 1993).

5. 225 ILCS 455/1-455/37.11 (1992).

6. See *infra* note 113 and accompanying text for an explanation of the intention of the Illinois legislature.

7. See *infra* note 120 and accompanying text which explains that a statute does not abrogate the common law unless it is completely clear that the legislature intended to abolish the common law.

8. See *infra* notes 184-87 and accompanying text for a discussion of Georgia's comprehensive legislation on brokers' duties and elements necessary for informed consent.

9. See *infra* notes 111-20 and accompanying text for an explanation of the brokers' positions in in-house transactions under the common law and the need to specifically abrogate the common law to achieve the intended effect.

10. This Note does not discuss single licensee dual agency, which arises when a listing agent sells his or her own listing to a buyer client, because the Designated Agency Amendment does not address it or attempt to provide insulation from liability in that situation.

I. AGENCY AND REAL ESTATE: CONCEPTS AND HISTORY

The definitions of agency concepts are old and enduring.¹¹ However, as applied to real estate brokers, these agency concepts are undergoing considerable change today.¹²

A. History of Real Estate Brokerage and Agency

Real estate brokerage began in the United States in the 19th century when developers and syndicates bought large tracts of western land from the government and sent their agents to the sites to divide and resell it as smaller tracts.¹³ No licensing laws existed,¹⁴ and no body of common law existed as precedent to govern its practice.¹⁵ During these early days, real estate transactions were often secured only by handshake and the personal reputations of the parties.¹⁶ Brokers were kept busy with turnover sales when homestead allotments proved too small to sustain farming families.¹⁷

By the early 1900s, some states began to pass license laws regulating real estate brokers in order to protect the public.¹⁸ Up to this time brokers had operated as "middlemen" and had none of the fiduciary duties of true agents.¹⁹ To encourage professionalism,²⁰ groups of real estate brokers met in Chicago, Illinois, in 1908 to form the National Association of Realtors.²¹ The members embraced agency as the foundation of their association.²²

11. *But cf.* HAROLD G. REUSCHLEIN & WILLIAM A. GREGORY, *THE LAW OF AGENCY AND PARTNERSHIP* 4 (2d ed. 1990) (stating "terminology in cases and commentaries on Agency is not consistent").

12. See *infra* notes 180-213 and accompanying text for an explanation of limited agency, facilitator, and independent contractor.

13. D. BARLOW BURKE, JR., *LAW OF REAL ESTATE BROKERS* 1 (1982).

14. *Id.*

15. ARTHUR R. GAUDIO, *REAL ESTATE BROKERAGE LAW* at v (1987).

16. GAIL LYONS & DON HARLAN, *BUYER AGENCY: YOUR COMPETITIVE EDGE IN REAL ESTATE* at viii (1993).

17. BURKE, *supra* note 13, at 2.

18. GAUDIO, *supra* note 15, at 1.

19. BURKE, *supra* note 13, at 3; see William D. North, *Agency vs. Facilitator Merits Debated*, REALTOR NEWS, Aug. 23, 1993, at 6 (criticizing the absence of fiduciary duties that existed before the formation of the National Association of Realtors). *But see* IRV ALSO, *INDEPENDENT CONTRACTOR: THE ALTERNATE TO ARIZONA'S REAL ESTATE AGENCY* (1993) (arguing against the application of agency law to real estate brokers).

20. See North, *supra* note 19, at 6. The founders of the National Association of Realtors recognized that every business that wanted to achieve the status of a profession embraced the fiduciary duties described by agency law. *Id.*

21. BURKE, *supra* note 13, at 6. The National Association of Realtors was originally called the National Association of Real Estate Boards. *Id.*

22. North, *supra* note 19, at 6. The Code of Ethics for the National Association of Realtors is "premised on the assumption that there exists an agency relationship between broker and seller or buyer." *Id.*

Illinois first enacted a real estate license law in 1921.²³ Today the Illinois Real Estate License Act of 1983²⁴ is the basic law governing Illinois brokers²⁵ and salespersons.²⁶ Salespersons must be employed under a broker who is allowed to own and operate a real estate company.²⁷

B. Agency Concepts Applied to Brokers

Agency²⁸ is one of the oldest legal relationships in the law.²⁹ It is a consensual agreement between a principal³⁰ and an agent³¹ who acts on behalf of and by authorization of the principal. An agency relationship may be created by written or oral contract,³² or

23. CLARKE R. MARQUIS & DANIEL P. SARRETT, ILLINOIS CONTINUING EDUCATION FOR REAL ESTATE SALESPERSONS & BROKERS 2 (1992).

24. 225 ILCS 455/1-455/37.11 (1992).

25. The Illinois statute states:

"Broker" means an individual, partnership or corporation, other than a real estate salesperson, who for another and for compensation:

(a) Sells, exchanges, purchases, rents or leases real estate.

(b) Offers to sell, exchange, purchase, rent or lease real estate.

(c) Negotiates, offers, attempts or agrees to negotiate the sale, exchange, purchase, rental or leasing of real estate.

(d) Lists, offers, attempts or agrees to list real estate for sale, lease or exchange.

(e) Buys, sells, offers to buy or sell or otherwise deals in options on real estate or improvements thereon.

(f) Collects, offers, attempts or agrees to collect rent for the use of real estate.

(g) Advertises or represents himself as being engaged in the business of buying, selling exchanging, renting or leasing real estate.

(h) Assists or directs in procuring of prospects, intended to result in the sale, exchange, lease or rental of real estate.

(i) Assists or directs in the negotiation of any transaction intended to result in the sale, exchange, leasing or rental of real estate.

225 ILCS 455/4(4).

26. The statute defines "salesperson" as "any individual, other than a real estate broker, who is employed by a real estate broker or is associated by written agreement with a real estate broker as an independent contractor and participates in any activity described in subsection (4) of this Section." 225 ILCS 455/4(21).

27. See MARQUIS & SARRETT, *supra* note 23, at 2 (explaining the "two-tiered system of licensing").

28. Agency is defined as a "fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." RESTATEMENT (SECOND) OF AGENCY § 1(1) (1957).

29. Telephone interview with Dale Eleniak, real estate attorney from California (Sept. 1, 1993); see MICHAEL L. CLOSEN, AGENCY, EMPLOYMENT, AND PARTNERSHIP LAW 3-4 (1984) (recognizing that agency concepts date back to ancient civilizations and permeate both "vast amount of business activities and a significant number of noncommercial activities" in modern society where the complexity of life dictates the necessity of employing agents or servants).

30. Principal is defined as "the one for whom action is to be taken." RESTATEMENT (SECOND) OF AGENCY § 1(2) (1957).

31. Agent is defined as "the one who is to act." RESTATEMENT (SECOND) OF AGENCY § 1(3).

32. REUSCHLEIN & GREGORY, *supra* note 11, § 12.

by conduct.³³ Its creation, however, does not necessarily depend on the specific intent of the parties to create it.³⁴ Courts apply an objective rather than a subjective standard to determine whether an agency relationship exists.³⁵ Once an agency is created, the scope of authority determines whether an agent is classified as "general"³⁶ or "special."³⁷

Two further designations in agency law determine attendant rights and liabilities³⁸ depending on which label is used.³⁹ The first is that of principal/agent or master/servant.⁴⁰ The second is

33. *Id.* The court may interpret certain conduct of the principal as manifesting his intent to appoint an agent. *Id.*

34. RESTATEMENT (SECOND) OF AGENCY § 1(1) cmt. b (1957). A person may create an agency relationship without realizing she has done so. *Id.* Conversely, a person may believe she has created an agency when in reality she has not. *Id.* An agency relationship results only if there is "an understanding between the parties which, as interpreted by the court, creates a fiduciary relation in which the fiduciary is subject to the directions of the one on whose account he [or she] acts." *Id.*

35. Interview with Professor Michael Closen, The John Marshall Law School, in Chicago, Illinois (Oct. 27, 1993).

36. "A general agent is an agent authorized to conduct a series of transactions involving a continuity of service." RESTATEMENT (SECOND) OF AGENCY § 3(1) (1957). *But see ALSO, supra* note 19, at 9-10 (stating that a real estate broker cannot be categorized as a general agent because a broker is not given the necessary broad authority over the client's property or the power to bind the principal).

37. "A special agent is an agent authorized to conduct a single transaction or a series of transactions not involving continuity of service." RESTATEMENT (SECOND) OF AGENCY § 3(2) (1957). *But see ALSO, supra* note 19, at 11 (challenging real estate broker's categorization as even a special agent because the broker has no power to bind his principal, the property owner; therefore, there is no basis for the agent/principal relationship).

38. RESTATEMENT (SECOND) OF AGENCY § 2 cmts. a-b (1957). Master falls within the category of principal and servant falls within the category of agent. *Id.* at cmt. a. Master/servant relationships are comparable to employer/employee relationships wherein a principal has liability in tort for the actions of the agent. *Id.* The principal is not similarly liable for the unauthorized conduct of an independent contractor. *Id.* at cmt. b. *See also* REUSCHLEIN & GREGORY, *supra* note 11, § 7(F) (stating that the labels are important today because many statutes such as Worker's Compensation Acts, the Social Security Act, and the Labor Relations Act do not apply to independent contractors). *See generally* CLOSEN, *supra* note 29, at 4-7 (explaining the public policy justifications for holding a principal or master liable for the actions of his agent or servant and further distinguishing a "servant" who is "employed to perform personal service for another" from an "agent" who "represents another in contractual negotiations or transactions").

39. *See* REUSCHLEIN & GREGORY, *supra* note 11, § 2 (stating that liability often depends on whether a person is designated as a servant or an independent contractor, but noting that "terminology in cases and commentaries on Agency is not consistent").

40. A master has the right to control the "physical conduct" of his servant agent. RESTATEMENT (SECOND) OF AGENCY §§ 2(1)-(2) (1957). The term "employee" as used in statutes indicates the same concept as "agent" or "servant." *Id.* § 2 cmt. b.

that of an independent contractor.⁴¹ The law imputes liability to the principal or master for the misconduct of the agent or servant,⁴² but not to an employer who hires an independent contractor.⁴³ "An independent contractor is hired to perform a specific task without being under the detailed control of the employer."⁴⁴ Although an agent "who contracts to act and who is not a servant is therefore an independent contractor, not all independent contractors are agents."⁴⁵ An independent contractor who is not an agent is also not a fiduciary.⁴⁶ The independent contractor designation plays a continuing role in creating the rights and liabilities of real estate brokers,⁴⁷ and has likewise been the impetus for innovative proposals for change in the real estate industry.⁴⁸

The most challenging agency concept and the source of most controversy resulting in litigation is dual agency.⁴⁹ Since a princi-

41. An independent contractor "contracts with another to do something for him but . . . is not controlled by the other . . . with respect to his physical conduct in the performance of the undertaking." *Id.* § 2(3). "He may or may not be an agent." *Id.*

42. See CLOSEN, *supra* note 29, at 231 (stating that the liability of the master is premised on the act being done "in the course of employment which the master has authorized").

43. See *Berg v. Parsons*, 50 N.E. 957, 957 (N.Y. 1898) (stating that the doctrine of respondeat superior which is based on a master/servant or principal/agent relationship does not impute liability to a party who hires a contractor to perform the work); see also CLOSEN, *supra* note 29, at 243 (stating that the independent contractor is an exception to the "respondeat superior" liability in master-servant law).

44. CLOSEN, *supra* note 29, at 243.

45. RESTATEMENT (SECOND) OF AGENCY § 2 cmt. b (1957). An independent contractor is not an agent if he "has no power to make the one employing him a party to a transaction, and is subject to no control over his conduct." *Id.*

46. *Id.* A fiduciary is "a person holding the character of a trustee, or a character analogous to that of a trustee, in respect to the trust and confidence involved in it and the scrupulous good faith and candor which it requires. A person having a duty, created by his undertaking, to act primarily for another's benefit in matters connected with such undertaking." BLACK'S LAW DICTIONARY 563 (5th ed. 1979).

47. See *infra* note 138 and accompanying text for a discussion of the argument, attempted by the defendant in *Edina Realty*, that agents are independent contractors, and therefore no information can be imputed to the broker. See generally CLOSEN, *supra* note 29, at 243 (explaining that it is "only a matter of degree of the control exercised by the employer that separates an independent contractor from a servant. In some cases, the issue of whether one is a servant or an independent contractor can be an extremely difficult one to resolve.").

48. See *infra* notes 202-11 and accompanying text for a discussion of advantages of an "independent contractor" label rather than an "agent" label.

49. Dual agency is a conflict of interest. DON HARLAN ET AL., CONSENSUAL DUAL AGENCY 13 (1993); see also FILLMORE W. GALATY, MODERN REAL ESTATE PRACTICE 34 (1991) (stating that "theoretically an agent cannot be loyal to two or more distinct principals in the same transaction"); BURKE, *supra* note 13, at 207 (stating "[t]he broker's duty is to bring the parties to the transaction together on his principal's terms A broker cannot fulfill this duty if he must divide his loyalties between the two principals."); RESTATEMENT (SECOND) OF AGENCY § 391 (1957) ("forbidding an agent to act for an adverse party in a transaction without his principal's knowledge"); *Id.* § 392 (stating that one who

pal is entitled to loyalty from an agent, an agent may not compromise that loyalty by accepting employment from a second principal with adverse interests.⁵⁰ Because buyers and sellers have adverse interests, a broker who represents both in a single transaction serves as a dual agent.⁵¹ Although an undisclosed dual agency is illegal,⁵² consensual dual agency⁵³ is lawful.⁵⁴ Illinois law proscribes dual agency unless both principals are fully informed and give their consent.⁵⁵

Illinois courts began to apply agency law⁵⁶ to brokers⁵⁷ and to address the issue of dual agency in real estate practice as early as 1891.⁵⁸ Moreover, Illinois courts have repeatedly held that in light of the duties and liabilities which brokers owe to clients, they are agents.⁵⁹

attempts to act as a dual agent must act fairly to each principal and disclose to each principal all facts which would affect the principal's judgment in allowing the dual agency). See generally Robert E. Kroll, Comment, *Dual Agency in Residential Real Estate Brokerage: Conflict of Interest and Interests in Conflict*, 12 GOLDEN GATE U. L. REV. 379 (1982) (recognizing the crucial and pervasive nature of the problem of conflict of interest in dual agency situations).

50. NATIONAL ASS'N OF REALTORS, WHO IS MY CLIENT? 9 (1986)[hereinafter WHO IS MY CLIENT?].

51. *Id.*

52. See James A. Bryant & Donald R. Epley, *The Conditions and Perils of Agency, Dual Agency, and Undisclosed Agency*, 21 REAL EST. L.J. 117, 129-33 (1992) (discussing the possible legal consequences of undisclosed dual agency, including rescission of the contract, damages, and license revocation).

53. See HARLAN ET AL., *supra* note 49, at 19. "Consensual dual agency is dual agency that is disclosed to and receives the informed consent of all parties." *Id.*

54. See *id.* (stating that common law, and even some statutory law, allows an exception to the general rule proscribing dual agency if the dual agency is "consensual").

55. 225 ILCS 455/18(h)(5). If an Illinois broker acts "for more than one party in a transaction without providing written notice to all parties for whom the licensee acts", *id.*, he faces license revocation or a civil penalty up to \$10,000. *Id.* at 455/18. For common law precedent in Illinois, see *infra* notes 57-59.

56. See GAUDIO, *supra* note 15, at v (stating that real estate brokerage law has developed in an "interdisciplinary fashion" applying principles from contract and tort law as well).

57. See *Warrick v. Smith*, 27 N.E. 709, 709 (Ill. 1891) (referring to the real estate salesman who conducted negotiations for the sale of land as the "agent" of the seller).

58. See *id.* at 710 (stating "[t]he same man cannot act at the same time as agent for both seller and buyer. His duty to the one is inconsistent with his duty to the other."); *Young v. Trainor*, 42 N.E. 139, 140 (Ill. 1895) (stating that the real estate agent could not prevail in his suit for a sales commission because he did not "rebut the presumption of unfair dealing, necessarily arising from this double agency," by showing knowledge and consent of his principal).

59. See *Sawyer Realty Group, Inc. v. Jarvis Corp.*, 432 N.E.2d 849, 851-52 (Ill. 1982) (stating that a broker's relationship with his employer is one of agency requiring full disclosure); *Bunn v. Keach*, 73 N.E. 419, 420 (Ill. 1905) (stating "[a]n agent employed to sell cannot also be agent for the purchaser, unless the principal sought to be held liable has consented" because an agent of the seller owes his best efforts and skill to obtain the highest possible price

II. RECENT AGENCY CHANGES AFFECTING BROKERS

Currently 750,000 brokers nationwide belong to the National Association of Realtors.⁶⁰ The National Association of Realtors, responding to forces⁶¹ mobilizing against traditional agency practices of the industry, recently made changes⁶² in its Code of Ethics and Standards of Conduct⁶³ regarding subagency and buyer agency. These changes enable both brokers and consumers to make new choices about agency representation, but at the same time these changes create unprecedented challenges for the real estate industry.

Buyer agency is the primary force affecting the real estate industry. The recognition of buyer agency affects brokers in many ways. Most crucially, the inclusion of buyer agency presents often-occurring situations of dual agency, which is inherently dangerous.

In the 1970s, Bill North, general counsel for the National Asso-

while the buyer's goal is to obtain the property at the lowest price); *United Investors, Inc. v. Tsotsos*, 477 N.E.2d 40, 43 (Ill. App. Ct. 1985) (stating that a broker has a duty to "keep his principal fully informed of all pertinent facts and that he act in good faith and promote the best interests of his principal"); *Rouse v. Brooks*, 383 N.E.2d 666, 669 (Ill. App. Ct. 1978) (stating that generally "a broker owes a fiduciary duty of loyalty to the sellers he represents"); *Duffy v. Setchell*, 347 N.E.2d 218, 222 (Ill. App. Ct. 1976) (holding that a "broker who has acted for both buyer and seller without the full knowledge of both is not allowed to recover compensation from either"); *Fairfield Sav. & Loan Ass'n v. Kroll*, 246 N.E.2d 327, 330 (Ill. App. Ct. 1969) (holding that a broker acting as seller's agent also became an agent of the buyer when broker helped her get a mortgage); see also North, *supra* note 19, at 6 (stating that between 1930 and late 1960s Realtors were so accepted as agents with attendant duties and liabilities that discussions of agency responsibilities were "superfluous"). See generally WHO IS MY CLIENT?, *supra* note 50, at 4-7 (explaining the fiduciary duties of loyalty, obedience, disclosure, confidentiality, reasonable care and diligence, and accounting which a broker owes his principal).

60. NATIONAL ASS'N OF REALTORS, MEMBERSHIP REPORT (Apr. 30, 1993). Membership was 746,808 on December 31, 1992. *Id.* Illinois accounted for 32,264 members. *Id.*

61. These forces range from consumer advocates such as Ralph Nader, who are criticizing the real estate industry's practices in general, to brokers who have chosen to represent buyers only and who are lobbying for acceptance, compensation and change. *Consumer Advocates Call For Revolutionary Real Estate Reforms*, 24 REAL EST. INSIDER, Apr. 26, 1993, at 1-3. In addition, buyers themselves are demanding representation of the sort formerly available only to sellers. Vivian Marino, *Buyer Broker Transactions On Rise Across Nation*, CHI. TRIB., May 16, 1993, at 2R.

62. As of July 1, 1993, there is no longer a mandatory offer of subagency for a listing placed in a realtor multiple listing service. NATIONAL ASS'N OF REALTORS, HANDBOOK ON MLS POLICY § 1.2 (1993)[hereinafter HANDBOOK ON MLS POLICY]. Rather, new language offers cooperation and compensation to either subagents, buyer agents or both. *Id.*

63. NATIONAL ASS'N OF REALTORS, CODE OF ETHICS AND STANDARDS OF PRACTICE (effective Jan. 1, 1993)[hereinafter CODE OF ETHICS AND STANDARDS OF PRACTICE]. The Code of Ethics prescribes "adherence to a lofty ideal of moral conduct in business relations . . . embodied in the Golden Rule." *Id.* at Preamble.

ciation of Realtors, "concocted the unilateral offer of subagency"⁶⁴ in order to maintain the exclusiveness of realtor multiple listing services (MLS)⁶⁵ without violating antitrust laws.⁶⁶ Until 1993, the MLS involved a listing broker who had the exclusive right to sell and a selling broker who operated as the subagent⁶⁷ of the listing⁶⁸ broker. The National Associations of Realtors required brokers to offer subagency to all member brokers when they placed a listed property in a multiple listing service.⁶⁹ When a seller signed a listing agreement with a broker, the seller became a principal and the listing broker became the seller's agent.⁷⁰ In addition, every licensed salesperson in the broker's company and every member of the multiple listing service became a subagent of the seller.⁷¹ Every broker in that chain owed the fiduciary duties of loyalty, disclosure and confidentiality to the seller.⁷²

However, the realities of human relationships disturbed the

64. Interview with an Illinois attorney well-versed in agency law and very well acquainted with the Designated Agency Amendment, who wishes to remain anonymous (Sept. 1, 1993); see HARLAN ET AL., *supra* note 49, at 9 (discussing the blanket unilateral offer of subagency introduced by the National Association of Realtors in the 1970s); see also Matthew M. Collette, *Sub-Agency in Residential Real Estate Brokerage: A Proposal to End the Struggle with Reality*, 61 S. CAL. L. REV. 399, 406-18 (1988) (discussing different theories of subagency and different ways courts have analyzed the theories). *But see* North, *supra* note 19, at 6 (stating "the status of the cooperating broker as a 'subagent' of the listing broker was at least tacitly understood and then, as a consequence of the review of the real estate industry by the federal and state antitrust agencies, was explicitly articulated"). See generally 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, 24-31 (1991) (discussing historical development of subagency and duties and responsibilities involved).

65. See BURKE, *supra* note 13, at 7 (explaining that an MLS is a brokers' arrangement to pool listings and split commissions).

66. *E.g.*, *Pomanowski v. Monmouth County Bd. of Realtors*, 399 A.2d 990 (N.J. Super. App. Div. 1979).

67. See Wolf & Jennings, *supra* note 64, at 26-31 (discussing various cases dealing with the duties and responsibilities of subagents in a multiple listing service).

68. A listing is "an agreement between an owner of real property and a real estate agent, whereby the agent agrees to secure a buyer or tenant for specific property at a certain price and terms in return for a fee or commission." BLACK'S LAW DICTIONARY 840 (5th ed. 1979); see BURKE, *supra* note 13, at 9 (discussing the contractual relationship between listing and selling broker).

69. See HARLAN ET AL., *supra* note 49, at 9 (stating that the mandatory blanket offer of subagency was "an inviolate concept" of realtor multiple listing services until April, 1992).

70. See FILLMORE W. GALATY, MODERN REAL ESTATE PRACTICE 30 (1991) (stating that the "broker-seller agency relationship is created by the employment contract called the listing agreement").

71. Kroll, *supra* note 49, at 388; see also Collette, *supra* note 64, at 407 (stating that "many courts offer little guidance as to the grounds for a decision upholding sub-agency").

72. See Collette, *supra* note 64, at 406-07 (stating "[a]s a sub-agent, the cooperating broker owes the same fiduciary duties of good faith and loyalty to the seller as does the listing broker"). *But cf.* Gail Lyons & Don Harlan, *Sharing the Commission Pie*, REAL EST. BUS., Winter 1990, at 8 (warning that sub-

contrived model of subagency.⁷³ Under the old system of mandatory subagency, a broker often accidentally became an undisclosed dual agent by inadvertently creating an agency relationship with a buyer.⁷⁴

The inadvertent or accidental creation of an agency relationship between broker and buyer can occur in several ways. First, buyers can misperceive the role of the selling agent, believing that the selling agent represents them in the transaction and is acting in their best interest.⁷⁵ This result is almost inescapable since selling agents often spend extended periods of time with buyers and form close relationships with them.⁷⁶ Secondly, some buyers who are close friends, family members or former clients of a selling broker⁷⁷ should actually have the status of "client"⁷⁸ but under subagency are allowed only "customer"⁷⁹ status. Finally, a selling broker may try to persuade the seller to agree to a lower price during contract negotiations, thereby acting as an advocate for the buyer.⁸⁰ In all

agency "exposes both sellers and listing brokers to potential liability created by the subagents' acts or failure to act").

73. See *A View From The Top*, ILL. REALTOR, July 1993, at 10, 13 (quoting Jim Nelson, broker/owner of RE/MAX Suburban, who states "[t]he marketplace has recognized for years that an agent working with buyers, for sometimes days at a time might have questionable loyalty as a subagent. Sellers and listing agents have for years, in our area, left the negotiating table and discussed price privately."); see also John R. Ardaugh, *Mandatory Disclosure: The Key to Residential Real Estate Brokers' Conflicting Obligations*, 19 J. MARSHALL L. REV. 201, 201-02 (1985) (discussing a broker's distinctive agency duties to a seller under the listing contract as opposed to a broker's unclear duties to a buyer and the confusion and misperceptions regarding a broker's loyalties).

74. See *Bryant & Epley*, *supra* note 52, at 119 (discussing *PMH Properties v. Nichols*, 263 N.W.2d 799 (Minn. 1978) in which the court allowed "the conduct of the parties to create an agency relationship so that a fiduciary duty, requiring disclosure of all pertinent facts, could be imposed on the broker").

75. See *LYONS & HARLAN*, *supra* note 16, at 21 (verifying through various studies that a large percentage of buyers feel that the selling agent is "their agent").

76. *Id.* at 20-21. Selling agents often feel "protective of the buyers" whom they have gotten to know well, and the agents often "suggest through their actions and words that they are advocates of the buyers." *Id.*

77. *HARLAN ET AL.*, *supra* note 49, at v. A "selling" broker, also called a "cooperating" broker if such person is not from the listing firm, brings the buyer to the transaction. *Id.*

78. *Id.* at 1-2. A client is a principal in an agency relationship to whom the broker owes fiduciary duties. *Id.* The classes of buyers who should have client status are: "1) relatives, 2) close friends, 3) business associates or partners, 4) former customers or clients, 5) first-time buyers, 6) out of town buyers, 7) buyers who want representation, 8) agents buying for their own account, and 9) buyers who require anonymity." *Id.* at 2-5.

79. See *id.* at 1. A customer does not have an agency relationship with a broker but is entitled to certain services and fair and honest treatment. *Id.* at 1-2. When a cooperating broker is a subagent of the seller/client, the buyer is merely a "customer" whom the agent can neither advise nor negotiate for because the agent owes loyalty to his client. *Id.* at 2.

80. Steve Bochenek, *Clearing Up The Mystery of Agency Disclosure*, ILL. REALTOR, Oct. 1991, at 12.

three situations the broker inadvertently enters into an agency relationship with the buyer;⁸¹ he becomes a dual agent who owes conflicting fiduciary duties to two opposing principals, the buyer and the seller.⁸²

Due to the lack of buyer representation and the misunderstandings surrounding agency duties, consumer groups lobbied⁸³ for the mandatory disclosure of agency relationships⁸⁴ and for the recognition of buyer agency.⁸⁵ In response, the National Association of Realtors formed a task force in 1985 to study the agency issues facing their industry. The goals of the task force were the elimination of the confusion over agency concepts and the reduction of potential broker liability.⁸⁶ A follow-up committee, appointed to study the "evolving agency issue," released its Report of the Presidential Advisory Group on Agency in March, 1992.⁸⁷ The report served as the foundation for the ensuing changes. As a result, buyers and sellers now have new options available to them regarding the type of agency relationships which they wish to establish with real estate brokers.⁸⁸ Brokers also have additional options available to them. They must make sound choices as to which types of

81. *Id.* "An example of an unintended, undisclosed dual agency would be when a selling agent assisted, advised, and otherwise worked with the buyer to negotiate the lowest price possible for a particular piece of property without providing any notice of the dual agency to the prospective buyer or seller." *Id.* A dual agency is also created when the seller's agent acts in a way that causes the buyer to believe the agent is acting for the buyer. *Id.*

82. See Robert Hayes, Comment, *The Practice of Dual Agency in California: Civil Code Sections 2373-2382*, 21 U.S.F. L. REV. 81, 93 & n.42 (1986) (stating that even if one salesperson represents the seller and another salesperson employed by the same broker represents the buyer, the broker is a dual agent for both seller and buyer).

83. See Frank Cook, *Advocates Say Real Estate Agents Should Vow 'Loyalty'*, MIAMI HERALD, Aug. 22, 1993, at 4G (quoting consumer advocate Ralph Nader attacking current real estate practices and calling for lobbying efforts for pro-consumer real estate laws); *Consumer Advocates Call For Revolutionary Real Estate Reforms*, REAL EST. INSIDER, Apr. 26, 1993, at 1 (calling for radical reform); *Corporations Turning to Buyer Brokerage*, AGENCY L.Q., Spring 1991, at 10 (concluding that relocation companies prefer to deal with buyers' agents).

84. NAR, *Regulators, CFA Form Disclosure Task Force*, AGENCY L.Q., Winter 1993, at 15.

85. See Michael Somers, *Buyer Brokering: Understanding the Concept*, MICH. REALTOR, June/July 1992, at 12 (discussing both why buyer brokerage evolved and the categories of buyers who should be represented in an agency relationship).

86. NATIONAL ASS'N OF REALTORS, REPORT OF THE PRESIDENTIAL ADVISORY GROUP ON AGENCY 2 (Mar. 1992)[hereinafter REPORT OF THE PRESIDENTIAL ADVISORY GROUP ON AGENCY].

87. *Id.* at 4. The Group heard testimony from advocates of each type of agency representation, from real estate educators and regulators, state associations of realtors, relocation firms and attorneys. *Id.*

88. Sellers can choose representation by a firm that offers to cooperate with subagents or buyers' brokers or both. Buyers can choose client status (agency representation) or customer status. These choices will affect the rights and liabilities of buyers and sellers.

services to incorporate into their company policies⁸⁹ and then must disclose those policies to their prospective clients and customers.⁹⁰

In addition to the National Association of Realtors' changed wording in its Code of Ethics and Standards of Practice to recognize buyer agency,⁹¹ brokers now offer "cooperation and compensation"⁹² to other brokers who may assist in selling the property, rather than the previous mandatory offer of subagency only. Thus, mandatory subagency with fiduciary duties extending only to sellers is no longer the operative policy for the National Association of Realtors.

Brokers may choose any of the following four types of representation services: seller agency exclusively, buyer agency exclusively, single agency, or a combination of seller and buyer agency with disclosed dual agency for in-house sales.⁹³ Each type of representation has advantages and disadvantages.⁹⁴ Many large real estate com-

89. See REPORT OF THE PRESIDENTIAL ADVISORY GROUP ON AGENCY, *supra* note 86, at 4-6 (analyzing the types of representation currently practiced by most firms).

90. See CODE OF ETHICS AND STANDARDS OF PRACTICE, *supra* note 63, at Standard of Practice 9-10(a) and 9-10(b) (mandating disclosure of general company policies regarding cooperation with subagents, buyer agents or both and any potential for the broker to act as a disclosed dual agent).

91. CODE OF ETHICS AND STANDARDS OF PRACTICE, *supra* note 63. The National Association of Realtors now incorporates language recognizing buyer agents. *Id.* at Standard of Practice 7-1(c), 9-10(a), 9-10(b), 21-12, and 21-13.

92. See HANDBOOK ON MLS POLICY, *supra* note 62, § 1.2 (replacing the previous blanket unilateral offer of subagency with an offer of cooperation and compensation to subagents, buyer agents, or both). A void now exists in Illinois law because if a listing broker chooses not to offer subagency, but the cooperating broker is working with a buyer who does not want to sign an agency agreement with that selling broker, the status of the cooperating broker is unclear. He is not a true subagent, yet he is not a buyer's agent.

93. *Loss Prevention Bulletin*, No.8, Supplement to REAL EST. TODAY (May 1993).

94. *Id.* Seller agency exclusively is the practice of representing sellers only, never buyers. *Id.* Representing sellers exclusively is the traditional way of operating and in theory can handle in-house sales without confronting dual agency. *Id.* Disadvantages of seller agency exclusively are the very real potential for undisclosed dual agency and the increasing demand by buyers for representation. *Id.* Buyer agency exclusively is the practice of representing buyers only, never taking a listing, never accepting subagency through MLS. *Id.* Buyer agency exclusively lessens the possibility of a dual agency arising and provides a more natural relationship working with buyers, but the client base is limited and there is a potential conflict of interest if compensation is based on a percentage of the purchase price. *Id.* Single agency is the practice of representing either sellers or buyers but never both in the same transaction. *Id.* Here, the buyer cannot have agency representation if purchasing a company listing or the company must choose not to show its own listings to buyer clients and suffer the economic consequences. *Id.* The potential for undisclosed dual agency also exists. *Id.* Seller and buyer agency with disclosed dual agency for in-house sales is the practice of representing both sellers and buyers as clients with the understanding that there will be a disclosed dual agency relationship. *Id.* This policy also reduces the possibility of undisclosed dual agency, but attempting to handle a disclosed dual agency situation is "not well understood." *Id.*

panies are opting for the combination of seller and buyer agency with disclosed dual agency for in-house sales due to the economic pressures to serve the entire client base of sellers and buyers.⁹⁵ Unquestionably for brokers implementing this policy, it produces by its very definition, dual agency⁹⁶ situations.

Dual agency is so difficult to practice properly,⁹⁷ that some authorities counsel brokers to refrain from it entirely.⁹⁸ Since many questions remain unanswered as to what constitutes full and proper disclosure and informed consent,⁹⁹ a broker who follows statutory guidelines for proper disclosure and believes he has obtained the principals' informed consent may still face substantial liability.¹⁰⁰ To resolve these uncertainties, the Illinois legislature sought to erase brokers' dual agency liability.

III. ILLINOIS' DESIGNATED AGENCY AMENDMENT

The Illinois legislature took the first responsive step regarding agency reform in 1989 when it mandated a written "disclosure of agency relationship."¹⁰¹ However, as the demand for buyer agency

95. See NATIONAL ASS'N OF REALTORS, REAL ESTATE BROKERAGE 47-52 (1991) (stating that firms with a high volume of in-house sales have the highest median net profit margin); *Buyer Agency: Legal, Ethical (Yeah, But Can You Make Any Money At It)*, AGENCY L.Q., Spring 1991, at 1, 7 (stating that although the volume of buyer agency transactions is growing, their percentage in overall transaction volume is not yet high enough to persuade traditional agents to give up the sellers' side); see also HARLAN ET AL., *supra* note 49, at 10 (explaining a real estate company's preference to sell its own listings both because of increased commissions and control over the sale).

96. See REPORT OF THE PRESIDENTIAL ADVISORY GROUP ON AGENCY, *supra* note 86, at 15 (defining dual agency as "[a]n agency relationship where the brokerage firm represents both the buyer and the seller in the same real estate transaction").

97. See Kroll, *supra* note 49, at 391-92. The agent must consider two aspects of disclosure requirements. He must properly disclose the fact of the dual agency and also handle being in the "schizophrenic position" of having conflicting duties of disclosure and confidentiality to both principals regarding the transaction. *Id.* at 392-93; see also HARLAN ET AL., *supra* note 49, at v. There are only two legal ways to handle the in-house transaction: 1) sell the company listing to a buyer-customer after disclosure of the broker's seller-agency relationship or 2) sell the company listing to a buyer client after both seller and buyer have agreed to the dual agency. *Id.*

98. See Terry McDermott, *Ethics And The Law: Ethical Aspects of Fiduciary Duty*, REAL EST. PROF., July/Aug. 1992 at 32, 34 (concluding that the conflicting fiduciary duties of good faith and loyalty created by dual agency put the agent in a serious "ethical dilemma" that is "an untenable position").

99. *Disclosure Meaningless Without Informed Consent*, REAL EST. INSIDER, June 21, 1993, at 1 (stating "the industry still has a long way to go in fully understanding the relationship between disclosure and informed consent.").

100. See *infra* notes 125-42 and accompanying text for discussion of the *Edina Realty* decision.

101. 225 ILCS 455/18.2. This amendment became effective December 1, 1989, and states:

Persons licensed under this Act shall disclose in writing to prospective buyers the existence of an agency relationship between the licensee and the

increased,¹⁰² the Illinois Association of Realtors convinced the Illinois legislature to accommodate brokers who wish to incorporate buyer representation into their traditional practice. The legislature responded to this pressure by passing the Designated Agency Amendment¹⁰³ to the Real Estate License Act of 1983.¹⁰⁴ The amendment became effective on April 2, 1993.¹⁰⁵ The Designated Agency Amendment impacts most large real estate companies¹⁰⁶ for two reasons. First, these companies face economic pressures to represent the entire client base of buyers and sellers.¹⁰⁷ Second, in-house transactions account for a substantial percentage of their business.¹⁰⁸

The Designated Agency Amendment permits a broker to designate a salesperson within the company to be the legal agent of a particular seller or buyer, excluding all other salespersons in the company from an agency relationship with that seller or buyer.¹⁰⁹

seller, or shall disclose in writing to sellers, or their agent, the existence of an agency relationship between the licensee and a prospective buyer at a time and in a manner consistent with regulations established by the Department.

225 ILCS 455/18.2.

102. Deborah Donovan, *New State Law Gives a Boost to Concept of Buyer's Agent*, DAILY HERALD, July 9, 1993, § 7, at 1. Buyers' agents have "arrived with a bang" and are producing a revolution in the traditional way of purchasing a home. *Id.*

103. 225 ILCS 455/18.2a.

104. 225 ILCS 455/1-455/37.11.

105. 225 ILCS 455/18.2a.

106. *Disclosed Dual Agency: The Debate Rages On*, REAL EST. INSIDER, Mar. 29, 1993, at 5. The most well-known firms in the real estate industry are coming out in favor of disclosed dual agency. *Id.* Included are Prudential, Coldwell-Banker, RE/MAX, Long & Foster, Windermere, and Century 21. *Id.* Therefore, they will be affected by the Designated Agency Amendment and its interpretation.

107. See generally NATIONAL ASS'N OF REALTORS, *supra* note 95 (reflecting higher productivity and profits in high percentage in-house firms.)

108. Approximately 30% of transactions in the Northwest Suburban Board of Realtors are in-house sales. MAP MULTIPLE LISTING REAL ESTATE SERVICE, SALES CATALOG (1993). Six-month marketing analyses from Jan. 1, 1993 to June 30, 1993 show that of 11,280 total properties sold 8,394 were co-op sales. *Id.* at 58. The actual number of in-house transactions is in reality higher than the 2,886 reflected because MAP multiple listing reports sales between different offices of the same corporation as co-op, but the common law would view such sales as in-house transactions.

109. 225 ILCS 455/18.2a. The text of 225 ILCS 455/18.2a is as follows:

Exclusive representation. A broker entering into an agreement with any person for the listing of property or for the purpose of representing any person in the buying, selling, exchanging, renting, or leasing of real estate may specifically designate those salespersons employed by or affiliated with the broker who will be acting as legal agents of that person to the exclusion of all other salespersons employed by or affiliated with the broker. A broker entering into an agreement under the provisions of this Section shall not be considered to be acting for more than one party in a transaction if the salespersons specifically designated as legal agents of a person are not representing more than one party in a transaction. No licensee shall be considered a dual agent nor shall the licensee be liable for acting as an

The stated purpose of the Designated Agency Amendment was to eliminate two common situations of dual agency. First, the legislature intended to prevent a broker from becoming an inadvertent, undisclosed dual agent.¹¹⁰ The possibility of undisclosed dual agency is almost inescapable for a broker involved in the simultaneous representation of multiple buyers and sellers. The common law holds that a broker and all salespersons in the company represent all principals as agents¹¹¹ and consequently owe each buyer and seller conflicting fiduciary duties.¹¹² Second, the Illinois legislature intended to allow a broker to handle in-house transactions without becoming a dual agent, so long as each client was represented by an exclusive legal agent.¹¹³

If the Designated Agency Amendment functioned as intended, it would insulate brokers from liability for dual agency. However, the Designated Agency Amendment contains no language specifically abrogating common law precedent in Illinois dealing with dual agency. Therefore, brokers may still be liable as dual agents under the common law and must fulfill the common law duty of full and proper disclosure.¹¹⁴

Although disclosed dual agency is lawful in Illinois as long as

undisclosed dual agent merely by performing licensed services in accordance with the provisions of this Section.

Id.

110. Letter from Stephen J. Bochenek, Illinois Association of Realtors Legal Counsel, to Local Association/Board Executive Officers and Their Attorneys (May 24, 1993) (on file with The John Marshall Law Review).

111. See Kroll, *supra* note 49, at 388 (stating "[w]here 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").

112. See REPORT OF THE PRESIDENTIAL ADVISORY GROUP ON AGENCY, *supra* note 86, at 16.

Fiduciary duties are duties owed by an agent to his principal:

1. Duty of Loyalty - An agent must act at all times solely in the best interests of his principal to the exclusion of all other interest, including the agent's own self-interest.
2. Duty of Obedience - An agent is obligated to obey promptly and efficiently all lawful instructions of his principal.
3. Duty of Disclosure - An agent is obligated to disclose to his principal all relevant and material information, unless obtained through a previous fiduciary relationship, that the agent knows and that pertains to the scope of the agency.
4. Duty of Confidentiality - An agent is obligated to safeguard his principal's confidence and secrets.
5. Duty of Reasonable Care and Diligence - An agent is obligated to use reasonable care and diligence in pursuing the principal's affairs.
6. Duty of Accounting - An agent is obligated to account for all money or property belonging to his principal that is entrusted to him.

Id.

113. See Bochenek letter, *supra* note 110, at 2 (discussing intention to negate broker's dual agency status for in-house transactions).

114. Christine Godsfil Cooper, *The Regulation of Brokers—New Developments*, 28 DEPAUL L. REV. 673, 683 (1979). "A broker cannot act for both the seller and the buyer without full disclosure." *Id.*

written notice is given to all parties,¹¹⁵ no clear guidance exists on the form and content of the requisite notice. The Illinois Department of Professional Regulation has issued Rules¹¹⁶ for the Administration of the Real Estate License Act of 1983 which require written disclosure of agency relationships.¹¹⁷ In addition, a broker who enters into a representation contract with a buyer or seller must disclose the possibility that a dual agency situation might arise due to the company policy of agency representation.¹¹⁸ However, the Rules require only that disclosure be in writing and that it be given at the first significant contact with buyer or seller.¹¹⁹ The Rules are silent as to what exactly the broker needs to disclose to make a full and proper agency disclosure.

Thus, brokers are facing two conflicting sources of law—Illinois statutory law and the common law. The Designated Agency

115. See 225 ILCS 455/18(h)(5) (proscribing only "acting for more than one party in a transaction without providing written notice to all parties for whom the licensee acts").

116. DEPARTMENT OF PROFESSIONAL REGULATION, RULES FOR THE ADMINISTRATION OF THE REAL ESTATE LICENSE ACT OF 1983 PART 1450, ILL. ADMIN. CODE tit. 68, § 1450 (1991).

117. *Id.* § 1450.55. Agency disclosure shall be in writing and shall be made "at or before the first significant contact." *Id.*

118. See CODE OF ETHICS AND STANDARDS OF PRACTICE, *supra* note 63. "When entering into listing contracts, Realtors must advise sellers/landlords of . . . any potential for the listing broker to act as a disclosed dual agent, e.g. buyer/tenant agent." *Id.* at Standard of Practice 9-10(a). "When entering into contracts to represent buyers/tenants, Realtors must advise potential clients of . . . any potential for the buyer/tenant representative to act as a disclosed dual agent, e.g. listing broker, subagent, landlord's agent, etc." *Id.* at Standard of Practice 9-10(b). See also HARLAN ET AL., *supra* note 49, at 25-26 (stating dual agency should be disclosed three times: First, the potential for its arising under company policy should be disclosed when a listing is taken or a buyer agency contract is entered into. Second, permission to perform as a dual agent should be obtained from both principals before showing the property in question. Third, consent should be confirmed in writing when an offer to purchase is submitted).

119. ILL. ADMIN. CODE tit. 68, § 1450.55. Agency Disclosure Pursuant to Section 18.2 of the Act states:

- 1) For the agent of a prospective buyer, "significant contact" shall mean the time at which the agent contacts the seller or seller's agent on behalf of one or more prospective buyers concerning the availability, price, condition of, or a showing of, a particular property or properties.
- 2) For the agent of a seller, "significant contact" shall mean the following:
 - A) the beginning of the showing of real property to the prospective buyer other than at an open house;
 - B) the beginning of the preparation of an offer to purchase real property for the prospective buyer; or
 - C) the beginning of an agent's prequalifications of a prospective buyer to determine the prospective buyer's financial ability to purchase real estate or the agent's request for specific financial information from a prospective buyer to determine ability to purchase or finance real estate in a particular price range.

Id.; see Steve Bochenek, *Clearing Up the Mystery of Agency Disclosure*, ILL. REALTOR, Oct. 1991, at 12, 13 (discussing the events that qualify for "significant contact").

Amendment declares that brokers are not dual agents so long as each buyer and seller are represented by their own legal agent in the firm. On the other hand, the common law declares that brokers are dual agents when salespersons employed by them represent both the buyer and the seller in a transaction. Since the Designated Agency Amendment does not specifically abrogate the common law, the broker must still confront all the unanswered questions about what constitutes proper disclosure and informed consent. While the Designated Agency Amendment was a first step toward change, it sets Illinois brokers adrift on the dark and dangerous sea of uncertain agency law without an effective statutory compass.

IV. LEGISLATION VS. COMMON LAW PRECEDENT

A. *Illinois: Past, Present . . . Future?*

If a statute does not contain language specifically abrogating the common law or if there is no clear legislative intent to do so, common law precedent prevails.¹²⁰ The Designated Agency Amendment contains no language expressly abrogating the common law. Therefore, an Illinois broker who acts as a dual agent cannot ignore the common law.

A limited amount of precedent exists in Illinois regarding dual agency, and no court has yet interpreted the Designated Agency Amendment. Generally, however, Illinois law permits dual agency if both principals are informed and give their consent.¹²¹ Currently, due to the simultaneous agency representation of buyers and sellers, Illinois brokers of large firms face the liability of dual agency in several commonly occurring situations. First, although a broker may never have actual knowledge, dual agency situations can arise inadvertently when different salespeople in the company are simultaneously representing buyers and sellers. For example, a broker may be held liable for not disclosing to a buyer-client that another agent in the firm is representing another buyer who is interested in the same property.¹²²

120. *Lites v. Jackson*, 387 N.E.2d 1118, 1119 (Ill. App. Ct. 1979). "[T]he common law is not to be deemed abrogated by statute unless it appears clearly that such was the legislative intent." *Id.* (citing *Waesch v. Elgin J. & E. Ry.*, 186 N.E.2d 369, 371 (1962)). "A statute will be construed as changing the common law only to the extent the terms thereof warrant, or is necessarily implied from what is expressed. It will not be presumed that an innovation was intended beyond what is specifically or clearly implied." *Id.* at 1120 (quoting *Cedar Park Cemetery Ass'n v. Cooper*, 96 N.E.2d 482, 484 (1951)).

121. 225 ILCS 455/18(h)(5); RESTATEMENT (SECOND) OF AGENCY § 392 cmt.b; Hayes, *supra* note 82, at 88.

122. *Stefani v. Baird & Warner, Inc.*, 510 N.E.2d 65 (Ill. App. Ct. 1987), *appeal denied*, 515 N.E. 2d 127 (Ill. 1987). In *Stefani* the court found the broker to be the agent of the buyers because the buyers asked for "[the] broker's assist-

Second, a broker is considered a dual agent whenever there is an in-house transaction.¹²³ At common law, even if one salesperson in the company represents the seller and another salesperson represents the buyer, the broker is the agent for both seller and buyer, and thus a dual agent.¹²⁴

Since the Designated Agency Amendment does not absolve the broker of the fiduciary duties and liabilities under the common law, the broker must disclose the fact of the dual agency and obtain the consent of both principals in order to comply with the law. The recent Minnesota decision against Edina Realty has the real estate industry in an uproar and points out the uncertainties brokers face when trying to properly disclose a dual agency relationship and obtain the informed consent of the buyer and seller.

B. Edina Realty: Recent Hurricane-Force Precedent

*Dismuke v. Edina Realty, Inc.*¹²⁵ addresses the situation of dual agency for an in-house transaction in a very troubling and confusing summary judgment opinion.¹²⁶ In this class action suit,¹²⁷

ance in obtaining a particular piece of property" and "understood" that the broker was acting as their agent. *Id.* at 68 (citations omitted). The court noted that an agent must not put himself in a position adverse to that of his principal. *Id.* (citations omitted). Because an agent is bound to keep his principal informed of all matters pertaining to the subject matter of the agency, if an agency relationship existed with the first buyers, then the broker breached his fiduciary duty to them by not disclosing its representation of the second buyer on the same property. *Id.* at 69.

123. See Hayes, *supra* note 82, at nn. 41-45 and accompanying text for an explanation of the legal relationships involved in an in-house transaction.

124. *Id.* at n. 42.

125. *Dismuke v. Edina Realty, Inc.*, No. 92-8716, slip op. (D. Minn. June 17, 1993).

126. See *id.* The order stated only "1. [t]hat defendant's motion for partial summary judgment is in all respects DENIED. 2. [t]hat plaintiffs' motion for summary judgment is GRANTED." *Id.* In the accompanying Memorandum of Law, the court gives no reasoning, but states only that Edina Realty's disclosure "cannot be characterized as either a full or adequate disclosure of all the facts under common law." Memorandum of Law at 6, *Dismuke v. Edina Realty, Inc.*, No. 92-8716, slip op. (D. Minn. June 17, 1993); see also *Dual Agency Reels Under Latest Ruling Against Edina*, REAL EST. INSIDER, July 19, 1993, at 3, 4. The biggest question facing brokers in a dual agency situation is "how much information the consumer requires to become informed." *Id.*

127. This is a state case involving sellers; a federal class action suit was filed by a buyer alleging Edina Realty's breach of fiduciary duty and violation of Racketeer Influence and Corrupt Organizations Act (RICO), which could triple the damages if Edina is found guilty. Willard Woods, *Lawsuit Against Edina Realty Certified as Class Action by Federal Court Judge*, STAR TRIB., Aug. 7, 1993, at 01D. The seller class action may involve 30,000 clients of Edina Realty who listed their homes from 1986 to May 1992 and were involved in dual agency transactions. Willard Woods, *Edina Realty Asks Judge to Decertify Suit*, STAR TRIB., May 4, 1993, at 03D. The federal class action suit was filed in U.S. District Court in Minneapolis (Civ. 3-92-223) by a homebuyer who alleges that dual agency practice was not disclosed to her. *Minnesota's Edina Hit With Undisclosed Dual Agency Lawsuit*, ALQ UPDATE, a supplement to AGENCY L.Q.,

sellers who Edina Realty had represented alleged that Edina's disclosure of dual agency was "inadequate under the common law."¹²⁸ In each of the alleged incidents, one agent working for Edina Realty represented the buyer, and another agent working for Edina Realty represented the seller.¹²⁹ In each transaction, written disclosures of the dual agency relationships complied with statutory requirements.¹³⁰ Even more shocking is the fact that the parties stipulated that all the plaintiffs in every instance initialed the disclosure statement and knew that Edina Realty sales associates represented both the sellers and the buyers.¹³¹

The attorneys for Edina Realty claimed that Edina made full and proper disclosure in each transaction to both principals on the

Apr. 1992, at 1. Interestingly, the instigating factor for the buyer's decision to file suit was a letter she received from attorneys "seeking plaintiffs for a class-action lawsuit against Edina Realty and its agents for failing to disclose dual agency status." Ingrid Sundstrom, *I Assumed They Were Working For Me*, STAR TRIB., May 24, 1992, at 04D. See also Ingrid Sundstrom, *Suit Against Edina Realty Spotlights Major Issue in Home Sales*, STAR TRIB., May 24, 1992, at 04D.

128. *Dismuke v. Edina Realty, Inc.*, No. 92-8716, slip op. (D. Minn. June 17, 1993). Plaintiffs assert that the gravamen of their claim is found in the common law of agency wherein a real estate broker acting as a dual agent must obtain informed consent to the dual agency. Plaintiffs' Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment at 2, *Edina Realty* (No. 92-8716). Plaintiffs allege that the broker must disclose not only the existence of the dual agency "but also the consequences, ramifications and effect of the dual agency." *Id.*

129. Memorandum of Law at 1, *Edina Realty* (No. 92-8716).

130. *Id.* at 6. The exact disclosure used by Edina Realty is as follows:

AGENCY DISCLOSURE: _____ STIPULATES HE
(selling agent)

OR SHE IS REPRESENTING THE _____ IN THIS TRANSACTION. THE LISTING AGENT OR BROKER STIPULATES HE OR SHE IS REPRESENTING THE SELLER IN THIS TRANSACTION. BUYER & SELLER INITIAL:

Buyer(s) _____ Seller(s) _____

Id. at 1 (capitalized as in original). The Minnesota statute governing disclosure states in pertinent part:

Disclosure regarding representation of parties. (a) No person licensed pursuant to this chapter or who otherwise acts as a real estate broker or salesperson shall represent any party or parties to a real estate transaction or otherwise act as a real estate broker or salesperson unless that person makes an affirmative written disclosure to all parties to the transaction as to which party that person represents in the transaction. The disclosure shall be printed in at least 6-point bold type on the purchase agreement and acknowledged by separate signatures of the buyer and seller. (b) The disclosure required by this subdivision must be made by the licensee prior to any offer being made to or accepted by the buyer. A change in licensee's representation that makes the initial disclosure incomplete, misleading, or inaccurate requires that a new disclosure be made at once. . . . A broker representing a buyer shall make known to the seller or the seller's agent the fact of the agency relationship before any showing or negotiations are initiated.

MINN. STAT. § 82.19(5) (1993).

131. Memorandum of Law at 1-2, *Edina Realty* (No. 92-8716).

contract to purchase.¹³² The Minnesota Association of Realtors had approved the wording of the disclosure statement, which was almost identical to the form approved by the local bar association.¹³³ In his order of June 17, 1993, the trial judge granted summary judgment in favor of plaintiff sellers stating that although the disclosure statement "appears to satisfy Edina Realty's statutory disclosure obligation to plaintiffs . . . it cannot be characterized as either a full or adequate disclosure of all the facts under common law."¹³⁴ Thus, the court held that Edina had breached its fiduciary duty to the sellers.¹³⁵ In addition, consistent with the general common law of recovery for breach of fiduciary duties, plaintiffs had no obligation to prove actual injury or intentional wrongdoing.¹³⁶

An issue not addressed by the *Edina* court,¹³⁷ yet raised in Edina's motion for partial summary judgment, was whether Edina Realty's sales associates are independent contractors.¹³⁸ Edina Realty argued that its sales associates are independent contractors and thus, there can be no "imputation of information, confidential or otherwise, between or among Edina Realty or the sales associate."¹³⁹ Therefore, Edina Realty is a dual agent in name only.¹⁴⁰ However, the trial court's ruling precluded a decision on the argument. Edina Realty faces a \$210 million judgment representing all commissions paid from 1986 to the commencement of the suit in

132. See Defendant's Memorandum in Support of Summary Judgment at 7, *Edina Realty* (No. 92-8716). In Defendant's Memorandum in Support of Summary Judgment, defendant asserts the disclosure form complies with statutory requirements which when proposed were intended to fulfill the disclosure requirements in a dual agency situation. *Id.* at 4.

133. *Id.*

134. Memorandum of Law at 6, *Edina Realty* (No. 92-8716). *But see* Responsive Memorandum of Defendant at 4-5. Defendant cited *Jorgensen v. Beach 'N' Bay Realty, Inc.*, 177 Cal. Rptr. 882 (Ca. App. 1981) where the court held a similar disclosure adequate. In *Jorgensen*, two sales associates representing the seller found a buyer for the property and orally told the seller that they represented both parties in the transaction. *Id.* When the seller sued later on a dual agency theory, the court stated that her "assumption [that the listing sales associates] were acting independently of their employer for her, was not reasonable." Responsive Memorandum of Defendant at 5, *Edina Realty* (No. 92-8716). *Id.* at 5 (quoting *Jorgensen*).

135. Memorandum of Law at 7, *Edina Realty* (No. 92-8716).

136. *Id.*

137. *Id.* "As plaintiffs need not prove actual injury or intentional fraud, there are no factual issues to submit to a jury. Accordingly, plaintiffs are entitled to judgment as a matter of law, and there is no need to reach Edina Realty's motion for partial summary judgment." *Id.*

138. Defendant's Brief in Support of Partial Summary Judgment at 7, *Edina Realty* (No. 92-8716). "They are independent contractors for federal and state income tax purposes. They are independent contractors for workers' compensation purposes. They are independent contractors under the common law." *Id.*

139. Responsive Memorandum of Defendant at 9, *Edina Realty* (No. 92-8716) (citing RESTATEMENT (SECOND) OF AGENCY § 348).

140. See *id.* at 10 (concluding that there can be no adverse consequences for either buyer or seller in this situation).

1992.¹⁴¹ Consequently, though admitting no wrongdoing, Edina Realty has offered to settle the class action lawsuit.¹⁴²

Illinois brokers face the possibility of a similar holding. To avoid such a ruinous consequence, Illinois brokers need a clear definition of what elements constitute full and proper disclosure to obtain the informed consent of buyers and sellers. However, the Illinois Designated Agency Amendment does not provide the necessary guidance. Moreover, in light of *Edina*, even if brokers follow statutory disclosure guidelines to the letter, a court could still find that their disclosure fails to meet common law standards. Alternatively, if brokers engage in the in-depth explanation of the ramifications and effects of dual agency, which *Edina* apparently mandates, a court might construe their conduct as the unauthorized practice of law.

C. *In-depth Explanation: Unauthorized Practice of Law?*

The *Edina* decision seems to require more than the disclosure of the "fact" of dual agency. Yet, if brokers go beyond disclosing the fact of a dual agency situation to explain the "ramifications and effects" of dual agency,¹⁴³ such an explanation constitutes the unau-

141. James Walsh, *Edina Realty Records to be Combed to Figure Refunds*, STAR TRIB., June 24, 1993, at 03B.

142. *Late Breaking News: Edina Offers to Settle State Court Lawsuit*, REAL EST. INSIDER, Dec. 6, 1993, at 8. The offer was estimated at \$21 million, but the only actual money payment would be \$2.5 million to plaintiffs' attorneys. *Id.* Under this initial offer, the plaintiffs were each to receive three coupons valued between \$300 and \$450 to be used in future deals with Edina. *Id.* Plaintiffs were also to have the opportunity to buy stock in the company for up to ten years at the initial offering rate when it went public. *Id.* When some plaintiffs objected to having to continue to do business with Edina Realty in order to take advantage of the settlement offer, Edina agreed to redeem the coupons even if they were used in deals with competitor real estate brokers. *Edina Settlement Offer Modified*, ALQ UPDATE, a supplement to AGENCY L.Q., Feb. 1994, at 2. Judge Gary Larson has recently given preliminary approval to the settlement proposal. Willard Woods, *Judge Gives Preliminary Approval To Settlement of Edina Realty Suit*, STAR TRIB., Mar. 24, 1994, at 01D. Along with his order which effectively vacated his previous summary judgment, the judge included a letter in which he stated, "The court has been influenced by the litigation risks involved in this case. The legal issues upon which defendant's liability rest are novel and untested." *Id.* Attorneys must send notices of the proposed settlement by July 11 to class members who will then have until August 11 to opt out of the settlement. *Id.* If more than 5 percent of the plaintiffs in the state action opt out, the proposed settlement will be void. *Id.* Plaintiffs' attorney in the separate federal class action sharply criticized the settlement because plaintiffs in the state case which includes only sellers would have to agree to release Edina Realty from liability in the federal case as well, which includes both buyers and sellers. *Id.* A final hearing is set for September 15, 1994. *Id.*

143. In addition, the National Association of Realtors voted at their annual convention in November 1992 to accept the recommendation of the Presidential Advisory Group on Agency which requires licensees to advise potential clients not only of the possible agency relationships that exist but also "the most significant implications of choosing one type over another." Tom Dooley, *NAR Sets A New Stage For Buyer/Seller Representation*, REAL EST. PROF., Jan./Feb. 1993,

thorized practice of law.¹⁴⁴ Thus, brokers find themselves in an untenable position.

Real estate brokers are proscribed from practicing law.¹⁴⁵ Brokers are limited to filling in the blanks on a purchase contract.¹⁴⁶ They may not advise their clients on the legal effect of documents, nor give legal advice of any kind.¹⁴⁷ This proscription protects the public from the consequences of receiving unskilled legal advice concerning a real estate transaction.¹⁴⁸

Illinois law on this issue rests on *Chicago Bar Ass'n v. Quinlan & Tyson, Inc.*¹⁴⁹ In *Quinlan & Tyson* the court clearly stated this prohibition:

[A broker] may not undertake to explain to its principal or any third party the legal effects of the provisions of any of these legal documents, whether forms or otherwise, or advise his principal or any third party concerning the legal effects of the provisions of any of these legal documents, whether forms or otherwise.¹⁵⁰

at 22, 24. This Note's author feels an attorney is the only one qualified to advise a client regarding the significant implications of choosing one type of agency relationship over another. *But see infra* note 154 (explaining that knowledgeable advice is not always easy to find, either for the broker or the buyer or seller).

144. See *infra* notes 145-54 and accompanying text for a discussion of statements, explanations and advice by real estate brokers that courts have held to be the unauthorized practice of law.

145. See *Hulse v. Criger*, 247 S.W.2d 855, 857-58 (Mo. 1952) (explaining that the reason for limiting the practice of law only to persons licensed by the judicial department is to protect the public from being advised in legal affairs by incompetent persons).

146. See *State Bar of Michigan v. Kupris*, 116 N.W.2d 341, 343 (Mich. 1962) (stating that a broker who limits himself to filling in blanks in standard forms used in real estate transactions can "scarcely be said to be engaged in the law business"). *But see id.* at 344 (Black, J., dissenting) (stating that had this been a case of first impression, he would have held that "the drafting of legal instruments by which title to real and personal property is conveyed, transferred or otherwise affected as between contracting parties, constitutes both the practice of law and engagement 'in the law business'" (emphasis added)).

147. See *State ex. rel. Indiana State Bar Ass'n v. Indiana Real Estate Ass'n*, 191 N.E.2d 711, 717 (Ind. 1963) (stating "a real estate broker may not give advice or opinions as to the legal rights of the parties" and if "in conferring with parties . . . for the purpose of advising them of their rights and the action to be taken concerning them, is engaging in the practice of law").

148. See *People ex rel. Illinois State Bar Ass'n v. Schafer*, 87 N.E.2d 773, 778 (Ill. 1949) (stating that "the public should be protected from falling into the hands of one not skilled in the laws of conveyancing when seeking advice or service concerning real estate titles"); *Washington State Bar Ass'n v. Washington Ass'n of Realtors*, 251 P.2d 619, 621 (Wash. 1952) (noting the "constant stream of litigation" arising from "the acts of the unskilled" and asserting the court's power to grant an injunction if the continuation of that work is against the public interest).

149. *Chicago Bar Ass'n v. Quinlan & Tyson, Inc.*, 203 N.E.2d 131 (Ill. App. Ct. 1964), *aff'd in part, rev'd in part*, 214 N.E.2d 771 (Ill. 1966).

150. 203 N.E.2d at 145; see also Robert E. Jones, *Homestead Clarifies Quinlan-Tyson Decision and Sets Precedent for Future*, 66 ILL. B.J. 512, 513 (1978) (discussing summary judgment decision granting injunctive relief to prevent defendant broker from "advising the parties to real estate transactions, as to

A broker may fill in blanks of the contract with "simple factual material"¹⁵¹ because doing so requires no more than ordinary business expertise.¹⁵² However, if the broker's actions go beyond those requiring ordinary business expertise and require "legal skill or knowledge," they constitute the practice of law.¹⁵³

Few attorneys themselves are experts in agency law.¹⁵⁴ Even attorneys well versed in agency law, who are now advising real estate brokers, often disagree on the meaning of current law and on what form of agency representation brokers should implement.¹⁵⁵ As a result of the differing opinions on agency law within the legal community itself, as well as the pervasive uncertainty as to how courts will interpret the Designated Agency Amendment,¹⁵⁶ brokers are clearly not qualified to explain to their clients the ramifications and effects of dual agency.

the content, meaning, interpretation or effect of any document . . . except as to factual matters").

151. *Chicago Bar Ass'n v. Quinlan & Tyson, Inc.*, 214 N.E.2d 771, 774 (Ill. 1966). Simple factual material is enumerated as "the date, price, name of the purchaser, location of the property, date of giving possession and duration of the offer". *Id.*

152. *Id.*

153. *Id.* at 775 (Underwood, J., dissenting). The holding specifically "prohibits explanation by the brokers of the provisions of the contract." *Id.* But by allowing brokers to prepare contracts by filling in blanks results in a binding contract "executed by the parties without informed consideration of the serious questions involved except in those instances where the buyer or seller is aware of the inherent hazards and consults his attorney before signing the contract." *Id.*

154. *Realtors Lack Legal Qualified Help to Cope with Complex Agency Issues*, REAL EST. INSIDER, July 19, 1993, at 4. "[A]gency is not a fact of the average attorney's life. As a result, there are very few attorneys around who fully understand agency and can relate that knowledge to the real estate business." *Id.*

155. Expert real estate attorneys in Illinois hold differing views. One agency expert who wishes to remain anonymous agrees with Doug Kaplan and Irv Also that independent contractor status is right for brokers. Another prominent attorney feels the Designated Agency Amendment is a wonderful piece of work and sees no need to modify it. A third attorney recognized for his expertise on real estate matters and agency in particular feels that the Illinois Designated Agency Amendment is confusing and only egos are blocking its modification. Two of these three attorneys believe that brokers must offer subagency because, if they don't, there is a void in Illinois law due to the absence of a category for a cooperating broker who shows a listing to a "customer." These attorneys feel that, if the agent does not have a buyer-client agreement, he must operate as a subagent when showing property to a customer. The third attorney feels it is just fine not to offer subagency. "Let the cooperating broker call himself a facilitator or whatever name he chooses, but there is no reason to feel compelled to offer subagency." The fact that these attorneys wish to remain anonymous in this context says a great deal about the uncertain state of agency law in Illinois and the potential liability involved.

156. Attorneys preparing forms for brokers to comply with new agency relationships and disclosures are admitting that, "[t]here are no guarantees of protection. We don't know how the courts will interpret this amendment." Interview with well-known real estate attorney who is actively involved in preparing new agency forms and agreements for brokers, who wishes to remain anonymous (Sept. 10, 1993).

D. Precedent for Future Outlawing of Dual Agency?

In addition to *Edina*, real estate brokers are wondering if a recent New Jersey decision, *Baldasarre v. Butler*,¹⁵⁷ may be an omen of future decisions regarding dual agency in their industry.¹⁵⁸ *Baldasarre* involved an attorney who represented both the seller and the buyer in a real estate transaction.¹⁵⁹ Although the attorney had explained the situation orally, disclosed the dual representation in a "conflict of interest letter,"¹⁶⁰ and complied with ethical guidelines by advising his clients to obtain independent counsel, the appellate court found the sellers' rights were "clearly compromised."¹⁶¹ The court found that both the disclosure in the attorney's conflict-of-interest letter and plaintiffs' consent to dual representation were "immaterial"¹⁶² and awarded damages totaling \$1,930,000.¹⁶³

Legal analysts regard *Baldasarre* as an indication of the courts' low tolerance for dual agency in general in real estate transactions.¹⁶⁴ A high-ranking government attorney also suggests that *Baldasarre* affirms what the common law has always said, "that

157. *Baldasarre v. Butler*, 604 A.2d 112 (N.J. Super. Ct. App. Div. 1992), *aff'd in part, rev'd in part by*, 625 A.2d 458 (N.J. 1993).

158. *NJ Dual Agency Court Decision Sends Ominous Message to Real Estate*, REAL EST. INSIDER, May 10, 1993, at 4. "[B]eing a faithless fiduciary is fundamentally wrong. Consent does not cure a conflict of interest, nor does it excuse an offender from the consequences of disloyalty. This applies equally to lawyers as to real estate brokers. Both are agents, and have the duty of undivided loyalty." *Id.* (citation omitted). *But see Reader Feedback: Real Estate Rule-Making In New Jersey*, REAL EST. INSIDER, June 21, 1993, at 7 (quoting the Executive Director of the New Jersey Real Estate Commission who believes the holding in *Baldasarre* was explicitly limited to complex commercial transactions and does not affect dual agency practice "in routine residential transactions with the informed consent of the parties").

159. *Baldasarre v. Butler*, 604 A.2d at 115.

160. *Id.* at 116.

161. *Id.* at 119. The court referred to an Advisory Committee on Professional Ethics Opinion which held "in all circumstances it is unethical for the same attorney to represent buyer and seller in negotiating the terms of a contract of sale" because it is at the negotiation stage in which the interests of the buyer and seller are "diametrically opposed" regarding price, fixtures to be included, and mortgage contingencies. *Id.*

162. *Id.* at 120. The Supreme Court of New Jersey affirmed, holding "an attorney may not represent both the buyer and the seller in a complex commercial real estate transaction even if both give their informed consent." *Baldasarre v. Butler*, 625 A.2d at 467. "The disastrous consequences of Butler's dual representation convinces us that a new bright-line rule prohibiting dual representation is necessary in commercial real estate transactions where large sums of money are at stake, where contracts contain complex contingencies, or where options are numerous. The potential for conflict in that type of complex real estate transaction is too great to permit even consensual dual representation of buyer and seller." *Id.*

163. *NJ Dual Agency Court Decision Sends Ominous Message to Real Estate*, REAL EST. INSIDER, May 10, 1993, at 4.

164. *Id.* at 4-5.

being a faithless fiduciary is fundamentally wrong."¹⁶⁵ Consumer advocates such as Ralph Nader are adding force to this movement by calling for an organized struggle against dual agency.¹⁶⁶

Despite the intent of the Illinois legislature, the Designated Agency Amendment's effect on the dual agency dilemma is still a mystery. Clearly, the amendment has provided no real solution for brokers in dual agency situations. Meanwhile, *Edina* and *Baldassarre* have intensified brokers' anxiety over how Illinois courts will decide dual agency issues. If the practice of dual agency is to survive, the depth of disclosure necessary to obtain informed consent must be clarified. The Designated Agency Amendment has provided no answers.

V. POSSIBLE SOLUTIONS AND A PROPOSAL FOR ILLINOIS

Experts across the nation disagree on the future of agency in real estate transactions,¹⁶⁷ and they disagree even more strongly on the future of dual agency. Some support a total boycott of dual agency.¹⁶⁸ Others advocate maintaining agency terminology but support statutory definition and limitation of the duties and liabilities of agents.¹⁶⁹ Finally, some propose the eradication of agency concepts from real estate law and promote replacing agency with contract law.¹⁷⁰ Each of these solutions merits examination and can provide ways in which the Illinois legislature could modify the Designated Agency Amendment to the Real Estate Act of 1983.

A. *Forbid Dual Agency in Real Estate*

Several factors seem to support the outright prohibition of dis-

165. See *id.* at 4 (stating that the principle applies equally to real estate brokers and lawyers because both are agents with a duty of undivided loyalty).

166. *Consumer Advocates Call for Revolutionary Real Estate Reforms*, REAL EST. INSIDER, Apr. 26, 1993, at 3 (quoting Ralph Nader criticizing dual agency as "a maneuver for the big guys to have it both ways" and calling for buyer brokers to make "the struggle against disclosed dual agency their number one priority").

167. See *Disclosed Dual Agency: The Debate Rages On*, REAL EST. INSIDER, Mar. 29, 1993, at 5, 6 (comparing the big name firms in favor of disclosed dual agency on the one hand, with the buyer agency franchises that are barring dual agency and the independent voices calling dual agency "inherently dangerous" on the other).

168. See *Consumer Advocates Call For Revolutionary Real Estate Reforms*, *supra* note 166, at 3 (quoting Ralph Nader calling dual agency "[a] maneuver for the big guys to have it both ways . . . and shaft the consumer").

169. See *infra* notes 180-89 and accompanying text for a discussion of Georgia's "limited agency" concept.

170. See *infra* notes 202-11 and accompanying text for a discussion of the proposal to legislate a change in brokers' status from agent to independent contractor.

closed dual agency.¹⁷¹ First, the potential liability which brokers encounter as dual agents is staggering, and the Errors and Omissions insurance for brokers does not cover "fraud."¹⁷² An undisclosed (or improperly disclosed) dual agency is considered a fraud on the consumer.¹⁷³ Since brokers who do not properly disclose dual agency face an uninsurable risk, a decision like *Edina* would bankrupt most brokers.

Second, *Baldassarre* may serve as persuasive precedent for similar decisions regarding real estate transactions and brokers' actions.¹⁷⁴ Illinois received immediate attention from groups opposed to dual agency when the Designated Agency Amendment was signed into law.¹⁷⁵ In considering the future course of disclosed dual agency practice, Illinois legislators may find themselves in the midst of a national controversy over whether the entire practice of dual agency should be abolished.¹⁷⁶

B. Redefine Agency Duties and Liabilities

Even though the National Association of Realtors is currently studying "limited agency" concepts,¹⁷⁷ some states have refused to

171. The consumer would then receive full, loyal representation and be protected against the broker's conflict of interest. In addition, the broker would not have to operate under the uncertainties of what constitutes proper disclosure and informed consent.

172. CNA Real Estate Agents Errors and Omissions Liability Policy (G-44533-A, Ed. 5/89) lists "Exclusions: We will not defend or pay under this policy for: (C) any dishonest, fraudulent, criminal or malicious act or omission." This insurance program is endorsed by the National Association of Realtors and is administered by Victor O. Schinnerer & Co., Inc. and underwritten by CNA; see also Hayes, *supra* note 82, at n.38 and accompanying text (stating that violation of fiduciary duty is a fraud "as a matter of law").

173. See HARLAN ET AL., *supra* note 49, at 20. "If the actions and consequences of the dual agency are of a very serious nature, the real estate agent could be charged with fraud." *Id.* "Some states consider undisclosed dual agency a form of constructive fraud even when it is the result of negligent acts. Fraud is a criminal act and, in an extreme situation of reckless disregard of the consumer, the potential punishment can even lead to imprisonment." *Id.*

174. *Supreme Court Decision Strengthens Opposition to Dual Agency*, REAL EST. INSIDER, May 10, 1993, at 4 (warning real estate professionals to take notice that under the common law it is not legal to be a dual agent).

175. *New Illinois Bill Spurs Call for Dual Agency Boycott*, REAL EST. INSIDER, Apr. 26, 1993, at 4. The Massachusetts Homebuyers Club, a consumer reporting group for real estate, proposed a boycott of dual agency immediately after Governor Edgar signed the Illinois bill. *Id.* The group plans to organize boycotts in states planning similar legislation, but Illinois is the number one state on their list. *Id.*

176. Albert G. Marquis, *The Dangers of Dual Agency*, S. NEV. REALTOR, Dec. 1992, at 30. Brokers should be aware that lawyers who will be litigating the disputes over dual agency and judges judging those controversies have all been trained that dual agency is a contradiction in terms and anathema to competent agency representation. *Id.*

177. Telephone interview with Earl Espeseth, chairman of the National Association of Realtor's Presidential Advisory Group on Facilitation Concept, (Sept. 1, 1993). This group's report will be available to the public at the time of

wait for national leadership. Georgia¹⁷⁸ and Colorado¹⁷⁹ have passed statutes that redefine agency duties and liabilities and effectively address the problems of disclosure and informed consent in dual agency situations.

1. Limited Agent

Georgia recently enacted the Brokerage Relationships in Real Estate Transactions Act (Act).¹⁸⁰ A task force made up of legislators, consumer advocates, and representatives of both large and small real estate firms cooperated to draft the Act.¹⁸¹ Under the Act, a broker is a "limited agent"¹⁸² who does not function in a fiduciary capacity but is responsible only for exercising ordinary care in the discharge of the duties specified under the brokerage agreement.¹⁸³

In addition to setting out the specific duties brokers will provide,¹⁸⁴ the Georgia Act permits dual agency with the written con-

the National Association of Realtor's annual convention in November. *Id.* See generally *The Great Debate*, REAL EST. TODAY, Apr. 1993, at 13-17 (interviewing five well-respected professionals holding opposing views in "one of the most fiery debates the industry has ever witnessed").

178. See *infra* notes 180-89 and accompanying text for discussion of the Georgia statute.

179. See *infra* notes 190-98 and accompanying text for discussion of the Colorado statute.

180. GA. CODE ANN. § 10-6A-1 to § 10-6A-14 (1993). The Act, entitled "Brokerage Relationships in Real Estate Transactions" went into effect January 1, 1994. *Id.* § 3. The Act was written as part of the general law of agency, creating a specific sub-category in which to fit real estate agency rather than as part of the real estate license law. *Agency Office Policies Mandatory for Georgia Brokers*, REAL EST. INSIDER, July 5, 1993, at 6.

181. See *Agency Office Policies Mandatory for Georgia Brokers*, *supra* note 180, at 6 (attributing enactment of the statute to the fact that "all the stake holders" collaborated on the task force that drafted the legislation).

182. GA. CODE ANN. § 10-6A-3(10). The Brokerage Relationships Act defines a limited agent as "a broker who, acting under the authority of a brokerage engagement, solicits offers to purchase, sell, lease, or exchange real property without being subject to the control of the client except as to the result of the work." *Id.*

183. GA. CODE ANN. § 10-6A-4(a). The full text is as follows:

A broker who performs services under a brokerage engagement for another is a limited agent, unless a different legal relationship between the broker and the person for whom the broker performs the service is intended and is reduced to writing and signed by the parties. If a broker is not a limited agent, then notice of said different relationship shall be timely furnished to all parties to the proposed real estate transaction. Except as set out in this chapter, a limited agent shall not be deemed to have a fiduciary relationship with any party or fiduciary obligations to any party but shall only be responsible for exercising ordinary care in the discharge of its specified duties under the brokerage engagement. Unless a broker enters into a brokerage engagement with a person, it shall be presumed that the person is a customer of the broker rather than a client.

Id.

184. GA. CODE ANN. § 10-6A-5. Duties of Brokers Engaged by Sellers:

(a) A broker engaged by a seller shall:

sent of all clients.¹⁸⁵ Most importantly, under the Georgia Act, consent "shall be presumed to have been given and to be informed" if a client signs a consent form that includes certain listed items.¹⁸⁶

(1) Perform the terms of the brokerage engagement made with the seller;

(2) Promote the interests of the seller by:

(A) Seeking a sale at the price and terms stated in the brokerage engagement or at a price and terms acceptable to the seller; provided, however, the broker shall not be obligated to seek additional offers to purchase the property while the property is subject to a contract of sale, unless the brokerage engagement so provides;

(B) Timely presenting all offers to and from the seller, even when the property is subject to a contract of sale;

(C) Disclosing to the seller material facts which the broker has actual knowledge concerning the transaction;

(D) Advising the seller to obtain expert advice as to material matters which are beyond the expertise of the broker;

(E) Timely accounting for all money and property received in which the seller has or may have an interest;

(3) Exercise reasonable skill and care; and

(4) Comply with all requirement of this chapter and all applicable statutes and regulations, including but not limited to fair housing and civil rights statutes.

(b) Brokers shall treat all prospective buyers honestly and shall not knowingly give them false information. A broker engaged by a seller shall timely disclose to prospective buyers with whom the broker is working all material adverse facts pertaining to the physical conditions of the property including but not limited to material defects in the property, environmental contamination, and facts required by statute or regulation to be disclosed which are actually known by the broker which could not be discovered by a reasonably diligent inspection of the property by the buyer. A broker shall not be liable to a buyer for providing false information to the buyer if the false information was provided to the broker by the broker's seller-client and the broker did not have actual knowledge that the information was false. Nothing in this subsection shall limit any obligation of a seller under any applicable law to disclose to prospective buyers all material adverse facts actually known by the seller pertaining to the physical condition of the property nor shall it limit the obligation of prospective buyers to inspect the physical condition of the property. No cause of action shall arise on behalf of any person against a broker for revealing information in compliance with this subsection.

(c) A broker engaged by a seller in a real estate transaction may provide assistance to the buyer by performing such ministerial acts as preparing offers and conveying them to the seller; locating lenders, inspectors, attorneys, insurance agents, surveyors, schools, shopping facilities, places of worship, and all such other like or similar services; and performing such ministerial acts shall not be construed in such a manner as to violate the broker's brokerage engagement with the seller nor shall performing such ministerial acts for the buyer be construed in such a manner as to form a brokerage engagement with the buyer.

(d) A broker engaged by a seller does not breach any duty or obligation by showing alternative properties to prospective buyers.

Id.

185. GA. CODE ANN. § 10-6A-12(a).

186. *Id.* The consent form must contain the following items:

(1) A description of the transactions or types of transactions in which the broker will serve as a dual agent;

The Georgia Act allows a broker to assign separate agents in the firm to "represent exclusively different clients in the same transaction"¹⁸⁷ and states "[t]here shall be no imputation of knowledge or information among or between the clients, brokers, or their affiliated licensees."¹⁸⁸ By specifying the duties of brokers and the necessary elements for disclosure and informed consent, the Georgia legislature sought to effectively clarify the misunderstanding caused by application of common law agency principles to real estate transactions.¹⁸⁹

2. Transaction Broker

Colorado likewise recently added a "Brokerage Relationships"

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- (2) A statement that, in serving as a dual agent, the broker represents two clients whose interests are or at times could be different or even adverse;
 - (3) A statement that a dual agent may not disclose to any client information made confidential by request or instructions from another client, except information allowed to be disclosed by this Code section or required to be disclosed by this Code section or required to be disclosed by this chapter;
 - (4) A statement that the broker or the broker's affiliated licensees have no material relationship with either client other than that incidental to the transactions, or if the broker or the broker's affiliated licensees have such a relationship, a disclosure of the nature of such a relationship. For the purposes of this Code section, a material relationship shall mean any actual known personal, familial, or business relationship between the broker or the broker's affiliated licensees and a client which would impair the ability of the broker or affiliated licensees to exercise fair and independent judgment relative to another client;
 - (5) A statement that the client does not have to consent to the dual agency; and
 - (6) A statement that the consent of the client has been given voluntarily and that the engagement has been read and understood.

Id. In addition, the Georgia Association of Realtors has issued a form to be used for in-house transactions which virtually nullifies a broker's common law dual agency liabilities. GEORGIA ASS'N OF REALTORS, LIMITED DUAL AGENCY Jan. 8, 1993. The form states:

Seller and Purchaser shall have a duty to protect their own interests . . . may seek independent legal counsel in order to assist them with any matter relating to this Agreement . . . Seller and Purchaser agree to indemnify and hold Broker harmless against all claims, damages, losses, expenses or liabilities arising from Broker's dual agency role except those arising from Broker's intentional wrongful acts.

Id.

187. GA. CODE ANN. § 10-6A-12(c). The section further specifies that the licensees may not disclose any confidential information from their clients unless allowed by or required by the statute. *Id.*

188. GA. CODE ANN. § 10-6A-12(d).

189. GA. CODE ANN. § 10-6A-2(a). Legislative Declaration.

[I]t is in the best interests of the public to provide codification of the relationships between real estate brokers and consumers of brokerage services in order to prevent detrimental misunderstandings and misinterpretations of such relationships by both consumers and real estate brokers and thus promote and provide stability in the real estate market.

Id.

section¹⁹⁰ to its statutes governing real estate transactions in order to define the duties and obligations of brokers within the several types of available broker relationships.¹⁹¹ Similar to the Georgia Act, which regards brokers as limited agents, the Colorado statute presumes brokers will be transaction brokers unless the parties enter into a written agency agreement.¹⁹² Since transaction brokers act merely as facilitators,¹⁹³ the broker's concerns over dual agency are lessened because transaction brokers have only statutorily enumerated obligations.¹⁹⁴

A transaction broker is not an agent¹⁹⁵ for the seller or buyer, but serves both with integrity.¹⁹⁶ The Colorado statute benefits consumers by reducing the clients' potential liability for their

190. COLO. REV. STAT. § 12-61-801 to § 12-61-811 (1993); *Debate Over Colorado's New Agency Reform Bill Raises Serious Questions For Brokers*, REAL EST. INSIDER, July 5, 1993, at 3.

191. COLO. REV. STAT. § 12-61-801. The broker may be employed as a single agent, subagent, dual agent, or transaction-broker. *Id.*

192. *Debate Over Colorado's New Agency Reform Bill Raises Questions for Brokers* *supra* note 190, at 4; see also STATE OF COLORADO, DEPARTMENT OF REGULATORY AGENCIES, REAL ESTATE COMMISSION, optional form for agency disclosure entitled "Brokerage Relationships Available" (stating on line one of the form, "Agency: If you do not sign an agency contract we are not your agent.").

193. See *Debate Over Colorado's New Agency Reform Bill Raises Serious Questions for Brokers*, *supra* note 190, at 3, 4 (defining a transaction broker as "representing neither side in a transaction but having responsibility only to the deal itself" . . . "another term for facilitator"). *But cf.* HARLAN ET AL., *supra* note 49, at 62-63 (stating "there is no consensus on what a 'facilitator' is and what one is allowed to do").

194. COLO. REV. STAT. § 12-61-807. A transaction broker must exercise reasonable skill and care, disclose all adverse material facts pertaining to the property, account for all money and property received, assist the parties in complying the terms of a contract including closing the transaction. *Id.* A transaction broker may not disclose motivation factors for any party or that the seller would accept a price less than list price or that a buyer would pay more than the price offered. *Id.* The parties shall not be vicariously liable for the acts of a transaction broker, and there shall be no imputation of knowledge or information between any party and the transaction broker or among persons in the firm engaged as a transaction broker. *Id.* Section 12-61-806 address the dual agent. *Id.* § 806. A broker may act as a dual agent if he obtains the informed consent of the parties. *Id.* Informed consent "shall be evidenced by a written agreement" which lists specific duties of disclosure and nondisclosure. *Id.* § 12-61-806. There is also no imputation of knowledge or information between any party and the dual agent or among persons employed by the brokerage firm. *Id.* But the buyer and seller "shall be informed that they may both be vicariously liable for the acts of the dual agent when he is acting within the scope of his agency." *Id.* See generally COLORADO REAL ESTATE COMMISSION, Memorandum and enclosed proposed rules, forms, and disclosures (Aug. 1, 1993). One enclosed form, Transaction-Broker Addendum, to be used in an in-house transaction to amend agency contracts, includes the advice "[t]his is a legal instrument. If not understood, legal, tax or other counsel should be consulted before signing." *Id.* Form No. LC17C-X-XX (July 27, 1993, FINAL DRAFT).

195. COLO. REV. STAT. § 12-61-807. "A broker engaged as a transaction-broker is not an agent for either party." *Id.*

196. See *Legislature Passes New Agency Law*, COLO. REALTOR NEWS, June 1993, at 1, 10 (stating "the standard duties of honesty, reasonable skill and

agents' actions and giving them, in essence, the same service as they receive when a broker acts as their agent.¹⁹⁷ Critics warn, however, that the consumer will receive "discounted services" because the statute does not require that brokers notify consumers that there are other forms of agency relationships available that may be more beneficial.¹⁹⁸

C. *Substitute Contract Law for Agency Law*

Finally, some propose classifying brokers as independent contractors rather than agents, eliminating agency concepts entirely and substituting contract principles to govern real estate transactions.¹⁹⁹ Supporters of this innovative proposal are calling for a statute that identifies real estate brokers as independent contractors and sets strict standards and rules governing their practice.²⁰⁰

A true agency relationship is comprised of a principal, who has the right to control the conduct of his agent, and an agent who has the power to affect the legal status of his principal.²⁰¹ However, supporters of independent-contractor-broker status claim that these elements have no practical application to the realities of the real estate transaction²⁰² since brokers function more as independent contractors than as traditional agents.²⁰³ The advocates of contract principles argue that the law of agency only introduces confusion in real estate transactions and is totally "out of sync"²⁰⁴

care, and disclosure of actual knowledge remain for the transaction broker" and they are "also not relieved of liability for negligence and fraud").

197. *See id.* at 1 (stating sellers have been sued for the action of their agents and had been totally unaware that they had such liability under subagency); *see also Debate Over Colorado's New Agency Reform Bill Raises Serious Questions for Brokers*, *supra* note 190, at 4 (quoting Andrew McElhany, chairman of Colorado's task force on agency).

198. *Debate Over Colorado's New Agency Reform Bill Raises Serious Questions for Brokers*, *supra* note 190, at 4; *see also Colorado to Consider Comprehensive Agency Disclosure Law*, ALQ UPDATE, Jan. 1993.

199. *Can Agency Survive Into The Twentieth Century?*, REAL EST. INSIDER, Oct. 12, 1992, at 1.

200. *Id.*; *see also supra* notes 38-47, 138 and accompanying text for a discussion of independent contractor status.

201. *See supra* notes 30-42 and accompanying text for a discussion of agency concepts.

202. Douglas C. Kaplan, *The Independent Real Estate Broker*, FLA. B.J., Oct. 1989, at 24. No language exists in a standard real estate listing contract that specifically creates a fiduciary relationship. *Id.* The seller-principal does not actually control the broker's conduct; instead, the broker is independently licensed and operates his business as he wishes. *Id.* Finally, the broker is not given the power to affect the legal rights of the seller by virtue of a listing contract. *Id.*

203. Douglas C. Kaplan, *An In-Depth Analytical Look at the Concept of Agency*, THE REAL EST. PROFESSIONAL, Mar./Apr. 1993, at 20.

204. *Id.* "That Agency has survived as the principal relationship in the real estate brokerage industry until now is a testimonial to the lack of meaningful disclosure, the absence of candid self-examination, and a shadowy notion that 'if it ain't broke, why fix it?'" *Id.*

with the modern practice of real estate brokers.

They contend that, because the law of contracts is well established, agency law could be replaced simply by amending real estate license laws.²⁰⁵ Courts could then apply to real estate transactions established precedent of contract law and the rights and obligations of independent contractors in business relationships.²⁰⁶

Real estate transactions need not be adversarial.²⁰⁷ Buyers and sellers want to come to a "meeting of the minds"²⁰⁸ rather than enter into combat.²⁰⁹ Moreover, fairness through disclosure to all parties is possible for independent contractors where it is not for agents.²¹⁰ Furthermore, independent contractors can act as ethically as agents.²¹¹ Proponents conclude that classifying brokers as independent contractors and applying contract law fits the realities of real estate transactions much better than arbitrarily classifying brokers as agents and applying agency law.

Although the terms "limited agent", "transaction-broker", and "independent contractor" are defined differently by different segments of the industry,²¹² each term embodies a comprehensive redefinition of the real estate broker's practice. Illinois should choose a solution that clearly and accurately defines the broker's role and

205. *See id.* at 21 (suggesting a statutory amendment stating, "a broker who performs a service for another is an independent contractor, unless a different legal relationship between the broker and the person for whom he performs the service is reduced to writing and notice of said different relationship is timely furnished to all parties affected by the relationship" and "the broker's independent contractor relationship 'shall not be the source of a fiduciary relationship or fiduciary obligations'").

206. *Id.*

207. *See ALSO, supra* note 19, at 16. In contrast to a lawyer's adversarial position, a real estate broker operating fairly and ethically can help the seller sell the house he wants to sell and help the buyer buy the house he wants to buy. *Id.* There is no need for either side to lose, and if one side loses and one side wins, a broker has not done his job correctly. *Id.* The real estate broker's attitude is characterized as "win/win" as opposed to a lawyer's adversarial "win/lose" attitude. *Id.* at 24.

208. Hayes, *supra* note 82, at 111.

209. *Id.*; *see also Reflecting 'Many Faces' of Today's Licensee*, REALTOR NEWS, July 5, 1993, at 9 (commenting that real estate transactions are not necessarily adversarial but rather have a common goal of "successful transfer of property").

210. *See ALSO, supra* note 19, at 26. A legal agent with a fiduciary duty of confidentiality may have limited ability to fully disclose. *Id.*

211. *See id.* at 28. Irv Also sums up ethics in two phrases, "don't hurt anyone" and "make it right." *Id.* Don't hurt anyone either physically, mentally, morally or monetarily. *Id.* If you accidentally do hurt someone, make it right. *Id.*

212. *See id.* at 24 (differentiating between facilitator which "suggests an absence of fiduciary obligations . . . however, is little more than a mechanical buzz-word" and independent contractor which "identifies a historical body of law"). *But cf. HARLAN ET AL., supra* note 49, at 62 (stating "there is no consensus on what a 'facilitator' is and what one is allowed to do").

serves the public fairly and honestly.²¹³

D. The Illinois Solution

Although the Illinois legislature should consider a total redefinition of duties and liabilities in all relationships between brokers and buyers and sellers, the focus of the Designated Agency Amendment is dual agency. Focusing on the narrower issue of dual agency alone, the Illinois legislature should draft legislation that both clarifies and limits brokers' roles and protects consumers.

At the very least, to accomplish its original goal of insulating brokers from dual agency liability, the Illinois legislature must specifically state its intention to abrogate the common law. However, the legislature can better accomplish its goal and provide greater protection for consumers by setting forth the following specific propositions.

First, brokers may act in a dual agency capacity with the written consent of all parties to the transaction. Second, when brokers act in a dual agency capacity, they shall act as "limited agents" who shall not be deemed to have a fiduciary relationship with any party but shall only be responsible for exercising reasonable skill and care in discharging specified contractual duties. Third, the requisite written consent shall be presumed to have been given, and to be informed, as against a buyer or seller who signs the consent form so long as the following statements are included:

- A) This is a legal document. You should obtain independent legal counsel before signing;
- B) A broker acting as a dual agent represents two clients whose interests are different or even adverse; therefore, you must protect your own interests;
- C) A broker acting as a dual agent shall not disclose to one party information that the other party has requested be kept confidential, such as acceptable price or terms; however, no cause of action shall arise against a dual agent who discloses material facts allowed or required by law;
- D) You do not have to accept a dual agency relationship. In fact, independent representation by another broker may be preferable; and
- E) By signing, you acknowledge you have read and understood this form, and voluntarily give your consent.²¹⁴

213. See *Legislature Passes New Agency Law*, COLO. REALTOR NEWS, June 1993, at 1, 10 (stating that a transaction-broker is not relieved of liability for negligence and fraud and also still has the duties of honesty, reasonable skill and care and disclosure). Labels don't determine ethical behavior. *Id.* An ethical broker will behave ethically whether he is called an agent or an independent contractor. *Id.* And unfortunately, an unethical broker is not constrained by a label of fiduciary. *Id.* All possible solutions could afford a cause of action for injury to the consumer. *Id.*

214. This consent form draws concepts and statements from the Georgia statute, G. CODE ANN. § 10-6A-4 and § 10-6A-12, and the Colorado statute, COLO. REV. STAT. § 12-61-807. In addition, Irv Also feels that the Georgia stat-

Including these statements protects consumers by advising them to obtain independent counsel before they sign the consent form and by advising them that they are not required to accept dual agency representation. On the other hand, it also provides brokers with clear guidelines for disclosure necessary to obtain informed consent. Additionally, it specifies what information brokers will keep confidential and what information they may disclose without incurring liability. Such guidance allows brokers to operate on firm ground, secure that they are complying with the law. Finally, it resolves the untenable imposition on brokers of conflicting traditional agency fiduciary duties by defining brokers as "limited agents." As limited agents in dual agency situations, brokers are only responsible for performing the duties specified in the brokerage agreement and for treating all parties fairly and honestly.

CONCLUSION

By enacting the Designated Agency Amendment, the Illinois legislature has attempted to allow brokers to represent both sellers and buyers as clients at the same time without confronting the problems of dual agency. However, because common law duties and liabilities remain, the Designated Agency Amendment fails to meet its objective. The Illinois legislature must act wisely both to protect the public and to clarify the Designated Agency Amendment so that brokers can be confident of compliance. The real estate industry affects people's lives so pervasively that the law governing broker practices must not be enveloped in confusion.

*Sandra Nelson**

ute, although it maintains agency terminology, effectively accomplishes a result similar to his goal of independent contractor status for brokers.

* The Illinois legislature has just passed SB 1624, which embodies many concepts discussed in this Note. It is awaiting the governor's signature. Thanks to my wonderful husband, Jim Nelson, for *everything*.

