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type of brokerage relationship and a section providing that the source of compensation does not determine agency.<sup>158</sup> Under the new law, a broker may act as a single agent for either the buyer or seller, sub-agent, dual agent, or transaction broker.<sup>159</sup> Unless otherwise specified, the Colorado statutory scheme considers brokers to be transaction brokers.<sup>160</sup> The statute lists each type of brokerage relationship and implies an abrogation of common law agency and its fidu-

*Id.*

158. *Id.* §§ 12-61-801-811.

159. *Id.* § 12-61-803.

160. *Id.* Section 12-61-803 provides that transaction brokers have the following duties and obligations:

(a) To perform the terms of any written or oral agreement made with any party to the transaction;

(b) To exercise reasonable skill and care as a transaction-broker, including, but not limited to:

(I) Presenting all offers and counteroffers in a timely manner regardless of whether the property is subject to a contract for sale or lease or letter of intent;

(II) Advising the parties regarding the transaction and suggesting that such parties obtain expert advice as to material matters about which the transaction-broker knows but the specifics of which are beyond the expertise of such broker;

(III) Accounting in a timely manner for all money and property received;

(IV) Keeping the parties fully informed regarding the transaction;

(V) Assisting the parties in complying with the terms and conditions of any contract including closing the transaction;

(VI) Disclosing to all prospective buyers or tenants any adverse material facts actually known by the broker including but not limited to adverse material facts pertaining to the title, the physical condition of the property, any defects in the property, and any environmental hazards affecting the property required by law to be disclosed;

(VII) Disclosing to any prospective seller or landlord all adverse material facts actually known by the the broker including but not limited to adverse material facts pertaining to the buyer's or tenant's financial ability to perform the terms of the transaction and the buyer's intent to occupy the property as a principal residence; and

(VIII) Informing the parties that as seller and buyer or as landlord and tenant they shall not be vicariously liable for any acts of the transaction-broker;

(c) To comply with all requirements of this article and any rules promulgated pursuant to this article; and

(d) To comply with any applicable federal, state, or local laws, rules, regulations, or ordinances including fair housing and civil rights statutes or regulations.

(3) The following information shall not be disclosed by a transaction-broker without the informed consent of all parties:

(a) That a buyer or tenant is willing to pay more than the purchase price or lease rate offered for the property;

(b) That a seller or landlord is willing to accept less than the asking price or lease rate for the property;

(c) What the motivating factors are for any party buying, selling, or leasing the property;

(d) That a seller, buyer, landlord, or tenant will agree to financing terms other than those offered;

(e) Any facts or suspicions regarding circumstances which may psychologically impact or stigmatize any real property pursuant to section 38-35.5-10<sup>2</sup>, C.R.S.;

or

ciary duties.<sup>161</sup> This abrogation, however, is not expressly stated.

(3) Any material information about the other party unless disclosure is required by law or failure to disclose such information would constitute fraud or dishonest dealing.

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

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

(6) A transaction-broker may do the following without breaching any obligation or responsibility:

(a) Show alternative properties not owned by the seller or landlord to a prospective buyer or tenant;

(b) List competing properties for sale or lease;

(c) Show properties in which the buyer or tenant is interested to other prospective buyers or tenants; and

(d) Serve as a single agent, subagent, or dual agent for the same or for different parties in other real estate transactions.

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

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

COLO. REV. STAT. § 12-61-803 (Supp. 1994).

161. *Id.* § 12-61-804. Section 12-61-804 provides that single agents engaged by the seller have the following duties and obligations:

(a) To perform the terms of the written agreement made with the [party represented];

(b) To exercise reasonable skill and care for the [party represented];

(c) To promote the interests of the [party represented] with the utmost good faith, loyalty, and fidelity, including, but not limited to:

(I) Seeking a price and terms which are acceptable to the [party represented]; except that the broker shall not be obligated to seek additional offers to purchase the property while the property is subject to a contract for sale or to seek additional offers to lease the property while the property is subject to a lease or letter of intent to lease;

(II) Presenting all offers to and from the [party represented] in a timely manner regardless of whether the property is subject to a contract for sale or a lease or letter of intent to lease;

(III) Disclosing to the [party represented] adverse material facts actually known by the broker;

(IV) Counseling the [party represented] as to any material benefits or risks of a transaction which are actually known by the broker;

(V) Advising the [party represented] to obtain expert advice as to material matters about which the broker knows but the specifics of which are beyond the expertise of such broker;

(VI) Accounting in a timely manner for all money and property received; and

(VII) Informing the [party represented] that such [party] may be vicariously liable for the acts of such [party's] agent or any subagent when the broker is acting within the scope of the agency relationship;

(d) To comply with all requirements of this article and any rules promulgated pursuant to this article; and

(e) To comply with any applicable federal, state, or local laws, rules, regulations, or ordinances including fair housing and civil rights statutes or regulations.

(2) The following information shall not be disclosed by a broker acting as a [party's] agent without the informed consent of the [party represented]:

The state real estate commission is to provide the specific disclosure forms the broker must use.<sup>162</sup> The statute also preserves freedom of contract by allowing the parties to make agreements providing for additional duties.<sup>163</sup> Brokers must advise the parties that the disclosure has legal consequences and urge them to consult legal counsel before

(a) That [the party represented] is willing to accept less than the asking price or lease rate for the property;

(b) What the motivating factors are for the party [in] the property;

(c) That the [party represented] will agree to financing terms other than those offered;

(d) Any material information about the [party represented] unless disclosure is required by law or failure to disclose such information would constitute fraud or dishonest dealing; or

(e) Any facts or suspicions regarding circumstances which may psychologically impact or stigmatize any real property pursuant to section 38-35.5-101, C.R.S.

(3)(a) A broker acting as a [party's] agent owes no duty or obligation to the [party not represented]; except that a broker shall, subject to the limitations of section 38-35.5-101, C.R.S., concerning psychologically impacted property, disclose to any prospective [party] all adverse material facts actually known by such broker. Such adverse material facts may include but shall not be limited to adverse material facts pertaining to the title and the physical condition of the property, any material defects in the property, and any environmental hazards affecting the property which are required by law to be disclosed.

(b) A [party's] agent owes no duty to conduct an independent inspection of the property for the benefit of the [party not represented] and owes no duty to independently verify the accuracy or completeness of any statement made by [the party represented] or any independent inspector.

(4) A seller's or landlord's agent may show properties not owned by such seller or landlord to prospective buyers or tenants and may list competing properties for sale or lease and not be deemed to have breached any duty or obligation to such seller or landlord.

(5)(a) A seller or landlord may agree in writing with a seller's or landlord's agent that other brokers may be retained and compensated as subagents.

(b) Any broker acting as a subagent on the seller's or landlord's behalf shall be a limited agent with the obligations and responsibilities set forth in subsections (1), (2), (3), and (4) of this section.

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

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

(a) That a buyer or tenant is willing to pay more than the purchase price or lease rate offered for the property;

(b) That a seller or landlord is willing to accept less than the asking price or lease rate for the property;

(c) What the motivating factors are for any party buying, selling, or leasing the property;

(d) That a seller, buyer, landlord, or tenant will agree to financing terms other than those offered; and

(e) Any facts or suspicions regarding circumstances which may psychologically impact or stigmatize any real property pursuant to section 38-35.5-101, C.R.S.

*Id.* § 12-61-806(4).

162. *Id.* § 12-61-803(4).

163. *Id.* § 12-61-803(5).

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

### c. Florida

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

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164. *Id.* § 12-61-803(4).

165. See FLA. STAT. ANN. § 475.01(1)(i) (West 1991 Supp. 1995). Section 475.01(1)(i) provides the definition of "fiduciary" as "a broker in a relationship of trust and confidence between that broker as agent and the seller or buyer as principal. The duties of the broker as a fiduciary are loyalty, confidentiality, obedience, full disclosure, and accounting and the duty to use skill, care, and diligence." *Id.*

Section 475.01(1)(j) provides the definition of "disclosed dual agent" as a broker who works as an agent for both the buyer and the seller. The broker must obtain the informed consent in writing of all parties to the transaction to be a disclosed dual agent. The disclosed dual agent has all the duties of a fiduciary except full disclosure between the buyer and seller.

*Id.* § 475.01(1)(j).

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

*Id.* § 475.01(1)(k).

Section 475.01(1) provides the definition of "single agent" is defined as "a broker who represents, as a fiduciary, either the buyer or seller but not both in the same transaction." *Id.* § 475.01(1).

166. *Id.* § 475.25 (q). Rule 61J2-24.001 of the Florida Administrative Code, which provides disciplinary guidelines for the Florida Real Estate Commission, prescribes license suspension of up to five years as the penalty for nondisclosure. FLA. ADMIN. CODE ANN. R. 61J2-24.001 (1994).

167. FLA. STAT. ANN. § 475.25(q) (West 1991 Supp. 1995).

168. *Id.* § 475.25(q)(2).

169. *Id.*

role to all parties.<sup>170</sup> The source of compensation does not determine or create agency.<sup>171</sup> The statute does not mention any abrogation of common law agency and does not specify the disclosure form the broker must use.

#### d. Georgia

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

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

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170. *Id.* § 475.25(q)(3).

171. *Id.* § 475.256.

172. GA. CODE ANN. §§ 10-6A-1-14 (Harrison Supp. 1993).

173. *Id.* § 10-6A-3. This section also contains definitions distinguishing between "customer" and "client" and "brokerage engagement" and "ministerial acts." See *id.*

174. *Id.* § 10-6a-4.

175. *Id.*

176. *Id.* § 10-6a-5.

177. *Id.* § 10-6a-5(b).

178. *Id.* § 10-6a-5(b)(c).

179. *Id.* § 10-6a-7.



represents a party whose interests are adverse to those of another client the firm represents. Article 4 creates a presumption that a real estate licensee is the designated agent of the party for whom the licensee is working, unless the broker and the consumer enter into a written agreement to the contrary or the licensee performs only ministerial acts on behalf of the customer.<sup>187</sup>

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

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

#### f. Indiana

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

187. *Id.* § 38.15.

188. *Id.* § 38.40.

189. *Id.* §§ 38.20, 38.25, 38.45 (discussing a licensee's duty to the customer, the licensee's relationship with the client, and dual agency, respectively). *Id.* § 38.20 (c). This is, of course, an attempt to deny reality by statute.

190. *Id.* § 38.55.

191. *Id.* § 38.60.

192. *Id.* § 38.35.

193. *Id.* § 38.35(b). *But see id.* § 38.45 (allowing for the creation of dual agency and proscribing the specific written disclosures the broker must make prior to entering the dual agency relationship).

194. IND. CODE ANN. §§ 25-34.1-10-4, 25-34.1-10-5, 25-34.1-10.6 (Burns 1995) (defining "brokerage relationship," "client," and "customer," respectively).

195. *Id.* § 25-34.1-10-7. Section 25-34.1-10-12 provides in relevant part:

(a) A broker may act as a limited agent only with the written consent of all parties to a real estate transaction. The written consent is presumed to have

each of the duties and disclosures required of each type of agent, the Indiana statute attempts to deal with the issue of divided loyalties by abrogating the common law and creating statutory agency.<sup>196</sup> Similar to the other states which have enacted comprehensive statutes, compensation does not determine agency.<sup>197</sup> The statute also requires brokers to develop and implement a written office policy which identifies and describes the types of brokerage relationships in which the office will engage with its clients.<sup>198</sup>

g. Maine

Maine requires "a meaningful, written real estate brokerage agency relationship disclosure form as defined and mandated by rules

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been given and all parties are considered informed for any party who signs a writing or writings at the time of entering into a brokerage relationship with the broker that contains the following:

- (1) A description of the real estate transaction or types of real estate transactions in which the broker will serve as a limited agent.
- (2) A statement that in serving as a limited agent, the broker represents parties whose interests are different or even adverse.
- (3) A statement that a limited agent shall not disclose the following without the informed consent, in writing, of the parties to the real estate transaction:
  - (A) Any material or confidential information, except adverse material facts or risks actually known by the broker concerning the physical condition of the property and facts required by statute, rule, or regulation to be disclosed and that could not be discovered by a reasonable and timely inspection of the property by the parties.
  - (B) That a buyer or tenant will pay more than the offered purchase price or offered lease rate for the property.
  - (C) That a seller or landlord will accept less than the listed price or lease rate for the property.
  - (D) What motivates a party to buy, sell, or lease the property.
  - (E) Other terms that would create a contractual advantage for one (1) party over another party.
- (4) A statement that there will be no imputation of knowledge or information between any party and the limited agent or among brokers within an entity engaged as a limited agent.
- (5) A statement that a party does not have to consent to the limited agency.
- (6) A statement that the consent of each party has been given voluntarily and that any limited agency disclosure has been read and understood.
- (b) Under a brokerage engagement, a broker may assign different salespersons affiliated with the broker to represent exclusively different clients in the same transaction. The salespersons may not disclose, except to the salesperson's broker, information made confidential by request or instructions of the client the salesperson is representing, except information permitted or required to be disclosed under this chapter. The broker may not be considered to be acting for more than one (1) party to a real estate transaction.
- (c) A cause of action does not arise against a broker for disclosing or failing to disclose information in compliance with this section, and the limited agent does not terminate the limited agency relationship by making a required disclosure.

*Id.* § 25-34.1-10-12.

196. *Id.* § 25-34.1-10-15.

197. *Id.* § 25-34.1-10-13 (d).

198. *Id.* § 25-34.1-10-13(a).

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

#### h. Maryland

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

199. ME. REV. STAT. ANN. tit. 32, § 13279 (West Supp. 1994).

200. See *id.* §§ 13273-75.

201. *Id.* § 13272.

202. *Id.* § 13273 (2) (C).

203. *Id.* § 13278.

204. *Id.* § 13278(3).

205. MD. CODE ANN., BUS. OCC. & PROF. § 17-528 (1995).

206. See *id.* § 17-528(a).

207. *Id.* § 17-528(b)(2).

208. *Id.* § 17-528(b)(5). The disclosure must explain the following differences between a buyer's agent, seller's agent, dual agent, and cooperating agent; the duties of the broker to exercise reasonable care, diligence, and confidentiality; a presumption that a seller agency exists absent an agreement to the contrary; that regardless of agency, a broker must act honestly, fairly and in good faith; that the broker is not qualified to advise on tax and legal matters; that all agreements, duties, and manner of compensation need to be in writing; that dual agency could possibly arise later; that the client may refer complaints to the real estate commission. *Id.*

209. *Id.* § 17-528(g).

## i. Michigan

Michigan's statute took effect on January 1, 1994, and requires the broker to make disclosure of the agency relationship and the duties owed to the buyer or seller.<sup>210</sup> Brokers must tailor their disclosure forms to conform to the prescribed details.<sup>211</sup> The statute permits dual agency "without the full range of fiduciary duties owed by a buyer's agent and a seller's agent."<sup>212</sup> Michigan also allows brokers to act as "transaction coordinators" who are not agents for either party.<sup>213</sup>

## j. Minnesota

Minnesota preserves common law agency but also establishes minimum standards governing broker duties.<sup>214</sup> Minnesota courts addressed this apparent discrepancy in the *Edina Realty* cases where the court found *Edina Realty* breached the more stringent common law duties. To clarify the *Edina Realty* decisions, the Minnesota Legislature, effective April 14, 1994, added a statement to its disclosure statute, providing that disclosures complying with the statute are sufficient to meet common law disclosure requirements.<sup>215</sup> This still preserves the common law but attempts to prevent further litigation similar to *Edina Realty*.

Minnesota permits a broker to act as a buyer's broker or dual agent provided the broker discloses the relationship to the parties in the prescribed form.<sup>216</sup> If a party refuses to consent to dual agency, the refusing party may not participate in a sales transaction involving the other represented party.<sup>217</sup> The disclosure form advises clients to keep to themselves all information they do not want revealed.<sup>218</sup>

## k. Nebraska

Nebraska enacted a comprehensive act defining the agency relationships created by real estate brokerage, operative July 1, 1995.<sup>219</sup> After finding that "the application of the common law of agency to the relationships between real estate brokers or salespersons and persons

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210. MICH. COMP. LAWS ANN. § 339.2517 (West Supp. 1995).

211. *Id.* § 339.2517(2).

212. *Id.* § 339.2517(3)(c).

213. *Id.* § 339.2517(3)(g).

214. MINN. STAT. ANN. § 82.197 (West Supp. 1995).

215. *Id.* § 82.197 Subd. 3.

216. *Id.* § 82.197 Subd. 1-2.

217. *Id.* § 82.197 Subd. 4(c).

218. *Id.* § 82.197 Subd. 4(d). The statutory disclosure language is included in the Appendices to this Article. See Appendix B(2).

219. NEB. REV. STAT. §§ 76-2401-30 (Supp. 1994).

who are sellers, landlords, buyers, or tenants of rights and interests in real property has resulted in misunderstandings and consequences that are contrary to the best interests of the public[.]" the legislature then concluded that "it is in the best interests of the public to codify in statute the relationships."<sup>220</sup>

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

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

220. *Id.* § 76-2401(1), (3).

221. *Id.* §§ 76-2417(1), 76-2418(1), 76-2419(2) (identifying the broker as a limited agent and defining the limited agents duties when acting as a seller's broker, buyer broker's or dual agent).

222. *Id.* § 76-2414.

223. *Id.* § 76-2415, 76-2419.

224. *Id.* § 76-2416(2).

225. *Id.* § 76-2416(1).

226. *Id.* §§ 76-2417(1)(c)(iii), 76-2417(2).

227. *Id.* § 76-2417(3).

228. *Id.* §§ 76-2418(1)(c)(iii), 76-2418(2).

229. *Id.* §§ 2419(4), 2419(5)(a). Section 2419(4) provides that a dual agent must not disclose:

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

*Id.* § 2419(4).

has with the seller or landlord and, consequently, the possible relationship the broker could offer that prospective buyer or tenant.<sup>230</sup>

#### l. New York

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

#### m. Oregon

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

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230. *Id.* § 76-2421(1)(b).

231. N.Y. REAL PROP. § 443 (McKinney Supp. 1995).

232. *Id.* § 443(1).

233. *Id.*

234. *Id.* § 443(4). Part B(3) of the Appendices to this Article includes the prescribed form. See Appendix B(3).

235. *Id.* § 443(3).

236. *Id.* § 443(6).

237. OR. REV. STAT. § 696.855 (1993).

238. *Id.* §§ 696.800, 696.815.

239. *Id.* §§ 696.805, 696.810.

240. *Id.*

241. *Id.* § 696.820. Part B(4) of the Appendices to this Article includes Oregon's prescribed disclosure form. See Appendix B(4).

242. *Id.* § 696.845.

243. *Id.* § 696.840.

## n. Rhode Island

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

## o. Wisconsin

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

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244. R.I. GEN. LAWS § 5-20.6-1-2 (Supp. 1994).

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

246. *Id.* § 5-20.6-7.

247. *Id.* § 5-20.6-4.

248. *Id.*

249. *Id.* § 5-20.6-7.

250. *Id.* § 5-20.6-8.

251. WIS. STAT. ANN. § 452.01 (West Supp. 1994).

252. *Id.* § 452.139.

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

254. WIS. STAT. ANN. § 452.135(d) (West Supp. 1994).

255. *Id.* § 452.139(2).

ity.<sup>256</sup> Dual agency is permitted with the broker owing the same duties to each party.<sup>257</sup>

## 2. Minimal Provisions

### a. Alabama

Alabama added a disclosure provision to its statutes dealing with the state's real estate commission, applicable to offers to purchase prepared after April 6, 1989.<sup>258</sup> This disclosure is nothing more than a clause stating who the listing and the selling agent represents. The broker may insert the clause into the offers in handwriting and need only obtain the initials of the buyer and seller. One potential problem with the wording of the Alabama statute is that the statute does not require the broker to include the agency disclosure clause in the executed contract. The statute requires disclosure only for offers. The importance of this distinction has not been raised in any reported cases, but it seems to present a statute of frauds/merger problem. Additionally, the statute does not require an explanation to accompany the insertion of the disclosure statement.

### b. Arkansas

Effective January 1, 1994, licensees must "clearly disclose to all parties . . . which party he or she is representing."<sup>259</sup> The Arkansas statute empowers the state real estate commission to establish the details of the disclosure form and penalties.<sup>260</sup> The statute does not state whether clear disclosure includes an explanation of what is meant by "representing" nor does the statute state the duties the agent owes to the principal. This implicates the potential unauthorized practice of law by brokers.

### c. Delaware

Section 2929A requires written disclosure to all parties "who the licensee does not represent but with whom the licensee has substantive contact, such as prospective sellers, lessors, buyers, and lessees."<sup>261</sup> The disclosure must be made "at the first substantive contact."<sup>262</sup>

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256. *Id.* §§ 452.133, 452.135.

257. *Id.* § 452.137.

258. ALA. CODE § 34-27-8(c) (Supp. 1994).

259. ARK. CODE ANN. § 17-35-108(a) (Michie Supp. 1993).

260. *Id.* § 17-35-108(b).

261. DEL. CODE ANN. tit. 24 § 2929A(a) (Supp. 1994).

262. *Id.* § 2929A(b).

## d. Louisiana

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

- A. Notwithstanding the provision of Civil Code Arts. 2985 through 3034 or any other provisions of law, a licensee engaged in any real estate transaction is the agent or subagent of the seller unless there is a written agreement to the contrary and that agreement is disclosed to all parties.
- B. Licensees shall provide the parties to a real estate transaction with an agency disclosure form.
- C. The commission may prescribe such forms as it deems necessary for the enforcement of this Section.<sup>263</sup>

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

## e. South Dakota

South Dakota, like Louisiana, presumes that a real estate licensee is always an agent of the owner/seller, unless all parties agree otherwise in writing.<sup>264</sup> The disclosure must be given to the party who is not being represented (usually the buyer) before showing the property.<sup>265</sup>

## f. Other States

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

263. LA. REV. STAT. ANN. § 37:1467 (West Supp. 1995).

264. S.D. CODIFIED LAWS ANN. § 36-21A-85 (1994).

265. *Id.*

souri, Nevada, New Hampshire, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, Utah, Vermont, West Virginia, and Wyoming, and this is also the approach of the District of Columbia.<sup>266</sup> Washington does not have a provision expressly dealing with disclosure of agency, but the state statute includes a provision requiring disclosure when a broker charges or accepts compensation from more than one party in a transaction.<sup>267</sup>

New Mexico's statute does not specifically mention agency disclosure, but, arguably, agency disclosure is covered by provisions dealing with "substantial misrepresentation" or "any other conduct . . . that constitutes or demonstrates bad faith, incompetency, untrustworthiness, impropriety, fraud, dishonesty, negligence[,] or any unlawful act."<sup>268</sup> The same may be said of Idaho and Montana.<sup>269</sup> Connecticut

266. See ARIZ. REV. STAT. ANN. § 32-2153(A)(2) (Supp. 1994); HAW. REV. STAT. §§ 467-14(4), (12) (1994); KAN. STAT. ANN. §§ 58-3062(14)-(16) (1994). Section 58-3062(14)-(16) provides that disclosure may be oral or in writing at the outset, but must be reduced to writing as part of any sales contract or lot reservation agreement. *Id.*

KY. REV. STAT. ANN. § 324.160(1)(e) (Baldwin 1994); MASS. GEN. LAWS ANN. ch. 112, § 87AAA(c) (West 1983); MISS. CODE ANN. § 73-35-21(e) (1995); MO. ANN. STAT. § 339.100(6) (Vernon 1995); NEV. REV. STAT. § 645.630(3) (1987); N.H. REV. STAT. ANN. § 331-A:26 (XII) (Supp. 1994); N.J. REV. STAT. § 45:15-17(b), (i) (West 1995).

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

N.C. GEN. STAT. § 93A-6(a)(4) (1994); N.D. CENT. CODE § 43-23-11.1(1)(d) (1993); OHIO REV. CODE ANN. § 4735.18(A)(4) (Baldwin 1994); OKLA. STAT., tit. 59, § 868-312(3) (West 1989 Supp. 1995); S.C. CODE ANN. §§ 40-57-170(A)(5), (17) (Law. Co-op. 1986 Supp. 1994); UTAH CODE ANN. § 61-2-11(4) (1993); VT. STAT. ANN. tit. 26, § 2296(a)(11) (1989). Vermont's statute § 2296(a)(11) only requires disclosure to the buyer of "the existence of an agency relationship between the licensee and the seller." *Id.*

W. VA. CODE §§ 47-12-11(6), (9), (10), 47-12-17(d) (1995); WYO. STAT. §§ 33-28-111 (xviii), (xxiv) (1987); D.C. CODE ANN. § 45-1936(4) (1990).

267. WASH. REV. CODE ANN. § 18.85.230 (13) (West Supp. 1995).

268. N.M. STAT. ANN. §§ 61-29-12 (A), (K) (Michie 1993).

269. IDAHO CODE § 54-2040 (i) (1994 Supp. 1995) (allowing the state's real estate commission to revoke or suspend a broker's license for "any conduct . . . which constitutes dishonest or dishonorable dealings"); MONT. CODE ANN. § 37-51-321 (c) (1993) (allowing revocation or suspension of a broker's license for "misrepresentation or making false promises").

enacted a specific statutory section requiring disclosure, effective January 1, 1995.<sup>270</sup>

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

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

## VI. CRITICISMS OF THE VARIOUS LEGISLATIVE SOLUTIONS

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

270. CONN. GEN. STAT. ANN. § 20-325d (West Supp. 1995).

271. ALASKA STAT. § 08.88.396 (a)(1) (1991).

272. *Id.* § 08.88.396(a)(2).

273. *Id.* § 08.88.396(b).

274. *Id.* § 08.88.396(c).

275. *Id.* § 08.88.396(d).

276. TENN. CODE ANN. § 66-5-206 (Supp. 1994). Again, informing a person about his legal rights and obligations is within the scope of a lawyer's duties, making such explanations by brokers an unauthorized practice of law. See VA. CODE ANN. § 55-523 (Michie 1994).

277. IOWA CODE ANN. § 543B.55 (West Supp. 1995).

278. TEX. REV. CIV. STAT. ANN. art. 6573a § 15 (a)(6)(D) (West Supp. 1995).

279. *Id.* § 15C.

280. PA. STAT. ANN. tit. 63, § 455.607-608 (1968 Supp. 1995).

the relationship. However, disclosing this information presents new problems and does not effectively resolve old ones.<sup>281</sup> Buyers and sellers still have the natural tendency to feel that brokers owe them undivided loyalty.<sup>282</sup> Initial disclosure may provide momentary illumination for buyers and sellers, but, to be fully effective, brokers will need to remind consumers of the consumers' status throughout the transaction, especially when the broker massages them with friendliness and salesmanship. Additionally, although brokers are allowed to perform certain legal tasks incident to their business without incurring liability for the unauthorized practice of law, the new disclosure requirements arguably exceed the scope of brokers' permissible conduct.<sup>283</sup>

#### A. MISCONCEPTIONS WILL EXIST DESPITE DISCLOSURE

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

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

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

282. An often cited 1983 Federal Trade Commission survey revealed that seventy-two percent of home buyers believed that the selling/cooperating broker they dealt with in a purchase transaction was their agent. See Pryor, *supra* note 66, at 35. Even in transactions where the buyers dealt directly with the listing agent, thirty-one percent believed that the listing agent was working for them. *Id.* Although the new disclosure laws helped to alleviate this confusion, a 1993 Gallup Poll revealed that a sizeable number of consumers were still confused about whom a broker represented: thirty-five percent of the home buyers surveyed either did not understand or were not advised of whom the agent they dealt with represented. *Id.*

283. One example of a legal task incident to a broker's business is the filling in the blanks in form sales contracts.

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

Giving a potential customer a disclosure form prepared by a lawyer or by a government agency is ineffective. Probably only a few customers will read the form, and, of those, fewer will understand it. Most recipients will ask: "What's this?" or "What does it mean?" Because these statutes incorporate the concept of agency, a good answer would provide a short course in agency law. But how can state legislatures expect brokers to teach an agency course to members of the general public in a short interview while trying to win the business of the questioner?<sup>284</sup> They cannot. Legislatures that mandate broker disclosure of the agency relationships ignore reality. If brokers attempt disclosure, customers will probably just ignore the information, regarding the disclosure as one more meaningless formality, similar to suggestions that the customer seek legal advice before signing anything. Customers may develop a distrust of brokers who seem to be trying to protect themselves, and, thus, the effectiveness of the broker is undermined. However, requiring brokers to hand a disclosure document to customers while refusing to explain the document would be worse. Aggravated customers will feel like they have fallen down the rabbit hole if they are handed a page that the broker cannot or will not explain. The broker's act of disclosure has not accomplished anything positive.

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

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284. In effect, agency disclosure will become meaningless paperwork, in a league with Truth-in-Lending or Real Estate Settlement Procedure Act disclosures.

loyalties to the other side in the transaction. This will be particularly difficult for the seller who is, at least facially, paying the entire commission. Dual agent representation also undermines the broker's justification in asking for the same amount of commission as is received by a broker who owes full loyalty to the seller.<sup>285</sup> Dual agency creates an inherent conflict of interest that should not be waivable through disclosure. By analogy, some conflicts of interest encountered by attorneys may not be waived by consent and require the attorney to withdraw from representation. The legal profession's ethical rules would require the attorney to withdraw under conflict situations similar to those posed by dual agency. The ethical standards require withdrawal despite the attorney's training and ability to fully explain conflicts of interest and their consequences.<sup>286</sup> No justification exists to permit brokers to undertake dual agency when these brokers are not qualified to explain or understand the legal ramifications of conflicts of interest.

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

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285. See Hathaway, *supra* note 281, at J1 (discussing the impact of Connecticut's new disclosure law). The article raises the issue of how long sellers will continue to pay six percent commissions for selling their houses if they receive less representation. *Id.*

286. See, e.g., *Baldassarre v. Butler*, 625 A.2d 458, 467 (N.J. 1993) (holding that a lawyer may not represent both the buyer and the seller in a "complex commercial real estate transaction" even if both the buyer and the seller give their "informed consent"). Although the case may be distinguished because it involved a commercial real estate transaction, the decision is notable because the New Jersey Supreme Court held that even a lawyer who is competent and qualified to explain the legal implications of dual agency cannot undertake such representation. *Baldassarre*, 625 A.2d at 457. Regardless of whether the transaction involves residential or commercial property, the "disclosed dual agency" practiced by real estate brokers should be even less permissible. Most brokers generally possess only a high school diploma and most are only required to attend a short real estate course.

if that person is entirely innocent of wrongdoing. The "designated agent" concept is an unrealistic attempt to avoid dual agency, because the listing broker has been compromised and thereafter has at least some responsibility to both parties. Moreover, the minimal separation between the brokers would probably not pass muster under legal professional responsibility analysis.<sup>287</sup>

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

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

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

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

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

cations have complicated business for brokers and have exposed them to unreasonable potential risks.

#### B. DISCLOSURE MAY CONSTITUTE UNAUTHORIZED PRACTICE OF LAW

Disclosure requirements that essentially mandate defining the legal relationships created as well as the consequences that follow may force brokers into committing the unauthorized practice of law. The purpose of the rule against unauthorized practice is to protect the public. Brokers, however, are permitted to execute purchase contracts by using forms approved by their state's bar.<sup>289</sup> The traditional rationale allowing brokers this ability is that "[l]egal consequences become irrevocable and binding at the time a real estate transaction is closed, as distinguished from the execution of the contract of sale by the parties."<sup>290</sup> The real reason for permitting brokers to perform this essentially legal function is probably that the practice has been accepted for too long to change in the face of consumer demand.

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... Then the problem can get more complicated when another buyer turns up escorted by any [X firm] agent, who is acting in a more traditional role of sub-agent for the seller. Then that agent must also change his or her relationship with the seller to match [X firm's] new role as dual agent. The more houses a[n] [X firm] buyer agent shows, the more times the company must disclose and change relationships with sellers . . .

See Hathaway, *supra* note 281, at J1 (interviewing John Sable, counsel for Connecticut Prudential Real Estate).

289. Brokers are usually allowed to complete such form contracts if they meet the so-called "incident to business" test which provides in relevant part: 1) the act must be an essential and inherent part of the business enterprise, the existence of which is dictated and relied upon by the public to fulfill a vital need, and the operation of which would be disabled and its value to society destroyed if the acts were prohibited; and 2) such acts have not injured the public, with the future potential of injury being purely speculative in nature.

BURKE, *supra* note 1, § 13.1.2 at 13:9-10 (citing Baier, *The Developing Principles in the Law of Unauthorized Practice re Real Estate Brokers*, 9 ST. LOUIS U. L.J. 127, 127-28 (1964)). Whether or not the drafting of standard form contracts constitutes the unauthorized practice of law is a case-by-case, fact-specific determination. *Id.* § 13.1.1 at 13:6-7, n.17 (citing Hagan & Van Camp P.S. v. Kassler Escrow, Inc., 635 P.2d 730 (Wash. 1981) (reopening the issue to discussion)).

290. *Id.* at 13:6. Some courts have also held that it is in the public's interest to allow brokers to perform these arguably legal services, claiming that referring such matters to attorneys will cost the consumers more money, that it is more convenient to allow brokers to perform such tasks, and that the public has the right to use the "full range of services that brokers and salespersons can provide." *Id.* § 13.1.2 at 13:15 (citing Cultum v. Heritage House Realtors, Inc., 694 P.2d 630 (Wash. 1985)). This rationale presupposes that the function of lawyers is only corrective rather than preventative.

Still other jurisdictions apply a "substantial interest" test to determine whether a broker's preparation of certain legal documents constitutes the unauthorized practice of law. The test establishes a boundary, permitting brokers to prepare legal documents necessary for the broker to complete his services and become entitled to his commission, but not after that point. Thus, because a listing broker becomes entitled to his commission when he produces a ready, willing and able buyer, he can prepare all documents necessary to meet that goal, but cannot prepare conveyancing documents because they are not necessary for him to earn his commission. *Id.* § 13.1.3 at 13:21.

The traditional rationale, however, does not justify the new brokers' disclosure laws. These disclosures are intended to fix and define the legal rights of the parties. Article 17 of NAR's Code of Ethics and Standards of Practice states that "[r]ealtors shall not engage in activities that constitute the unauthorized practice of law and shall recommend that legal counsel be obtained when the interest of any party to the transaction requires it."<sup>291</sup> Additionally, Statement of Principles propounded jointly by the American Bar Association and NAR state that:

[t]he Realtor shall not practice law or give legal advice directly or indirectly; he shall not act as a public conveyancer, nor give advice or opinions as to the legal effect of legal instruments, nor give opinions concerning the validity of title to real estate, and he shall not prevent or discourage any party to a real estate transaction from employing the services of a lawyer. . . . The Realtor shall not undertake to draw or prepare documents fixing and defining the legal rights of parties to a transaction.<sup>292</sup>

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

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

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291. NATIONAL ASSOCIATION OF REALTORS, CODE OF ETHICS AND STANDARDS OF PRACTICE, Art. 17 (1994).

292. See BURKE, *supra* note 1, § 13.2.1 at 13:25-26.

## VII. THE REALISTIC SOLUTION: A STATUTORY BROKERAGE RELATIONSHIP

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

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

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

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293. Brokers do have a very legitimate function and area of expertise. Talents within their province include the following: sales of all types of residential, commercial, industrial, income-producing, agricultural and other types of real property; property management, a growing business in Florida, with its large number of condominiums and community associations; market analysis and property valuation; facilitation of fi-

As seen above, the agency characterizations and recent statutory reactions to the common law's inadequacies do not satisfy the sellers', buyers', or brokers' needs or expectations. The current variations merely confuse everyone. The solution lies in designing a statute that, in simple terms, mandates a role for real estate brokers. The statute should simply specify what the broker must and must not do in terms that are both consistent with the realistic expectations of the parties and allow the real estate business to proceed with as little disruption as possible. The statute should provide that real estate brokers will: (1) act in good faith at all times; (2) make reasonable efforts to help sellers market properties listed with them; (3) make reasonable efforts to locate appropriate properties and service providers for potential buyers with whom they are working; (4) disclose to both sellers and potential buyers all information concerning the property that the broker has or should have; and (5) prohibit disclosure of personal information about the sellers or potential buyers to any person unless given specific authorization by the subject of the information.<sup>294</sup> Violation of these rules should expressly become both a statutory tort, giving rise to a private cause of action for damages suffered, and a basis for discipline by the brokers' licensing authority.

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

This solution satisfies the reasonable needs and expectations of each party. Sellers want a sale at the best price to obtain the maximum return on their investment and usually want a quick sale. Sell-

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nancing; property inspection and identification of repair needs; and assistance in land development, subdividing, and marketing. See generally, *FLORIDA REAL ESTATE COMMISSION HANDBOOK*, Chap. 2 § 1 at 2-1-4 (1993).

294. The current prohibition against a nonlawyer performing legal services such as giving advice to any person should, of course, be continued. Brokers are often called upon to give legal advice, e.g., What does this contract term mean? Can we insert a clause which allows me to do this? What do I have to do now? Can they sue me if I do this? Can I make them do that? Due to experience, brokers may feel competent to give the advice, but it is a temptation that the wise broker carefully avoids. The threat of being accused of practicing law without a license is minor compared to the potential liability to a customer who claims to have been given advice, particularly bad advice. But the parties may be disappointed, or even angry, if the broker will not answer these questions. Nonlawyers are currently prohibited from giving legal advice in every state, although they are generally allowed to fill in form contracts. The ideal system would protect the brokers from liability for the unauthorized practice of law.

ers expect the broker will help find buyers, obtain a signed contract, and close the transaction. The broker has the expertise to provide marketing advice, a listing price, and what inexpensive fix-ups would help most in producing a quick sale.

Requiring the full disclosure of all information concerning the property is a logical expansion of the current trend that requires the seller to make full disclosure.<sup>295</sup> Requiring the broker to reveal any information that the broker has, or should have, would allow the parties to receive maximum benefit from the broker's real estate expertise.<sup>296</sup> This "requirement" provides significant relief for the broker because it relieves the broker of any responsibility to keep certain information secret. It also simplifies things for the broker because there is only one simple standard to apply. When it comes to information about the property, disclose everything to the interested parties. This standard also has tremendous advantages for the buyer and the seller. Each will be dealing from a position of knowledge about the property. The standard will eliminate subsequent surprises resulting in the elimination of most causes of buyer's or seller's remorse. Full disclosure will create a relaxed atmosphere where the parties will emerge satisfied with the transaction. Neither the buyer nor the seller will have to fear that they might later discover that they have been treated unfairly.

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

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

296. Such knowledge would include the property's value, condition or defects, and suitability for a particular use.

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

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

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

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

298. Perhaps this would not elevate the brokerage profession to the level of the priesthood with its sanctity of the confessional, but it certainly would improve the public's perception of brokers if it became widely known that personal information given brokers would not and could not be divulged without risking a penalty or liability.

ing simple understandable rules and remedies for rule violation while insuring that valuable brokerage services will continue to be readily available. This proposal will also allow continued development and expansion of brokerage services.

#### VIII. CONCLUSION

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

IX. APPENDIX - A  
 SALIENT ELEMENTS OF STATE REAL ESTATE  
 BROKER AGENCY DISCLOSURE LAWS AS OF  
 AUGUST 28, 1995

STATE	CITATION	ELEMENTS
Alabama	§§ 34-27-1-11	B, I
Alaska	§§ 08.88.011-990	B, G, I, J, M, N
Arizona	§§ 31-2101-2198.14	B, L, R
Arkansas	§§ 17-35-101-17-35-603	B, I, L
California	§§ 2373-82	A, C, D, F, G, J, K, M, N, O, P, R
Colorado	§§ 12-61-101-811	A, C, D, E, F, G, H, J, N, O, S
Connecticut	§§ 20-311-329gg	I
Delaware	tit. 24, §§ 2901-2929A	B, I, N
District of Columbia	§§ 45-1921-1951	B, L, R
Florida	§§ 475.001-5017	A, E, G, J, N, P, R
Georgia	§§ 10-6A-1-14	A, C, D, E, F, G, J, P, Q, T
Hawaii	§§ 467-1-30	B, L, R
Idaho	§§ 54-2021-2053	B, I
Illinois	ch. 225, para. 455, §§ 38.1-65	A, C, D, E, F, J, M, O, P, Q, T
Indiana	§§ 25-34.1-10-1-10-16	A, C, E, G, J, N, P, Q, S
Iowa	§§ 543B.1-55	L
Kansas	§§ 58-3001-3075	B, L, R
Kentucky	§§ 324.010-990	B, L, R
Louisiana	§ 37:1431-37:1468	B, H, I, L, R
Maine	tit. 32, §§ 13271-13281	C, D, F, J, K, S
Maryland	§§ 17-101-614	A, D, G, H, J, N
Massachusetts	ch. 112, § 87AAA	B, L, R
Michigan	§§ 339.2501-2516	E, C, G, J
Minnesota	§§ 82.17-34	C, G, J, K, M, R
Mississippi	§§ 73-35-1-37	B, L, R
Missouri	§§ 339.010-617	B, L, R
Montana	§§ 37-51-102-608	B, I
Nebraska	§§ 76-2401-2430	C, D, E, G, J, T
Nevada	§§ 645.0005-850	B, L, R
New Hampshire	§§ 331-A-1-35	B, L, R
New Jersey	§§ 45:15-1-42	B, L, R
New Mexico	§§ 61-29-1-29	B, I
New York	Real Prop. § 443	B, G, J, K, R
North Carolina	§§ 93A-1-10	B, L, R
North Dakota	§§ 43-23-01-17	B, L, R
Ohio	§§ 4735.01-99	B, L, R
Oklahoma	tit. 59, §§ 858-101-605	B, L, R
Oregon	§§ 696.800-870	B, C, G, J, K, M, N, P, R
Pennsylvania	tit. 63, §§ 455.101-902	L, M
Rhode Island	§§ 5-20.6-1-8	A, D, E, G, J, K, M, R
South Carolina	§§ 40-57-10-280	B, L, R
South Dakota	§§ 36-21A-1-123	B, H, I
Tennessee	§§ 66-5-201-210	I
Texas	art. 6573a, §§ 1-28	I, E
Utah	§ 61-2-1-61-2-22	B, L, R
Vermont	tit. 26, §§ 2211-2299	B, L, R
Virginia	§§ 55.517-525	I
Washington	§§ 18.85.010-920	I
West Virginia	§§ 47-12-1-23	B, L, R
Wisconsin	§§ 452.01-23	C, D, G, J, T
Wyoming	§§ 38-28-101-12?	B, L, R

## key

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

## IX. APPENDIX - B TYPICAL DISCLOSURE FORMS

### 1. California's Disclosure Form

#### DISCLOSURE REGARDING REAL ESTATE AGENCY RELATIONSHIP

(As required by the Civil Code)

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

#### SELLER'S AGENT

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

To the Seller:

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

To the Buyer and the Seller:

(a) Diligent exercise of reasonable skill and care in performance of the agent's duties.

(b) A duty of honest and fair dealing and good faith.

(c) A duty to disclose all facts known to the agent materially affecting the value or desirability of the property that are not known to, or within the diligent attention and observation of, the parties.

An agent is not obligated to reveal to either party any confidential information obtained from the other party which does not involve the affirmative duties set forth above.

#### BUYER'S AGENT

A selling agent can, with a Buyer's consent, agree to act as agent for the Buyer only. In these situations, the agent is not the Seller's agent, even if by agreement the agent may receive compensation for services rendered, either in full or in part from the Seller. An agent acting only for a Buyer has the following affirmative obligations:

To the Buyer:

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

To the Buyer and the Seller:

(a) Diligent exercise of reasonable skill and care in performance of the agent's duties.

(b) A duty of honest and fair dealing and good faith.

(c) A duty to disclose all facts known to the agent materially affecting the value or desirability of the property that are not known to, or within the diligent attention and observation of, the parties. An agent is not obligated to reveal to either party any confidential information obtained from the other party which does not involve the affirmative duties set forth above.

#### AGENT REPRESENTING BOTH SELLER AND BUYER

A real estate agent, either acting directly or through one or more associate licensees, can legally be the agent of both the Seller and the Buyer in a transaction, but only with the knowledge and consent of both the Seller and the Buyer.

In a dual agency situation, the agent has the following affirmative obligations to both the Seller and the Buyer:

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

(b) Other duties to the Seller and the Buyer as stated above in their respective sections.

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

The above duties of the agent in a real estate transaction do not relieve a Seller or Buyer from the responsibility to protect their own interests. You should carefully read all agreements to assure that they adequately express your understanding of

the transaction. A real estate agent is a person qualified to advise about real estate. If legal or tax advice is desired, consult a competent professional.

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

This disclosure form includes the provisions of Article 2.5 (commencing with

Section 2373) of Chapter 2 of Title 9 of Part 4 of Division 3 of the Civil Code set forth on the reverse hereof. Read it carefully.

Agent (Signature)	Buyer/Seller (date)
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Associate Licensee (date) (Signature)	Buyer/Seller (date) (Signature)
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2. Minnesota's Disclosure Form

82.197. Disclosure requirements

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

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

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

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

(b) ADDENDUM TO LISTING AGREEMENT

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

sale of your property. Dual agency will limit the level of representation which ....(Broker).... can provide.

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

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

SELLER'S INSTRUCTIONS TO BROKER

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

.... Seller agrees to dual agency representation and will consider offers made by buyers represented by ....(Broker)....

.... Seller does not agree to dual agency representation and will not consider offers made by buyers represented by ....(Broker)....

\_\_\_\_\_  
Seller (Broker)  
\_\_\_\_\_  
BY: \_\_\_\_\_  
Seller Salesperson  
Dated: \_\_\_\_\_

(c) ADDENDUM TO BUYER REPRESENTATION AGREEMENT

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

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

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

BUYER'S INSTRUCTIONS TO BROKER

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

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

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

\_\_\_\_\_  
Seller (Broker)

\_\_\_\_\_  
BY: \_\_\_\_\_

\_\_\_\_\_  
Seller Salesperson

Dated: \_\_\_\_\_

(d) DISCLOSURE TO CUSTOMER

Before ....(Broker).... begins to assist you in finding and purchasing a property, we must disclose to you that ....(Broker).... will be representing the seller in the transaction.

....(Broker).... will disclose to you all material facts about the property of which ....(Broker).... is aware, that could adversely and significantly affect your use or enjoyment of the property. ....(Broker).... will also assist you with the mechanics of the transaction.

When it comes to the price and terms of an offer, ....(Broker).... will ask you to make the decision as to how much to offer for any property and upon what terms and conditions. ....(Broker).... can explain your options to you, but the ultimate decision is yours. ....(Broker).... will attempt to show you properties in the price range and category you desire so that you will have information on which to base your decision.

....(Broker).... will present to the seller any written offer that you ask ....(Broker).... to present. ....(Broker).... asks you to keep to yourself any information about the price or terms of your offer, or your motivation for making an offer, that you do not want the seller to know. ....(Broker).... would be required, as the seller's agent, to disclose this information to the seller. You should carefully consider sharing any information with .... (Broker).... that you do not want disclosed to the seller.

\_\_\_\_\_  
Customer (Broker)  
\_\_\_\_\_  
BY: \_\_\_\_\_  
Customer Salesperson  
Dated: \_\_\_\_\_

**(e) DISCLOSURE TO BUYER AND SELLER AT TIME OF OFFER TO PURCHASE**

....(Broker).... represents the seller at the property located at

....(Broker).... also represents a buyer who offered to purchase the seller's property. When ....(Broker).... represents both the buyer and the seller in a transaction, a dual agency is created. This means that ....(Broker).... and its agents owe a fiduciary duty to both buyer and seller. Because buyer and seller may have conflicting interests, ....(Broker).... and its agents are prohibited from advocating exclusively for either party.

....(Broker).... cannot represent both the buyer and seller in this transaction unless both the buyer and seller agree to this dual agency.

Buyer and seller acknowledge and agree that:

1. Confidential information communicated to ....(Broker).... which regards price, terms, or motivation to buy or sell will remain confidential unless buyer or seller instructs ....(Broker).... in writing to disclose this information about the buyer or seller. Other information will be shared.

2. ....(Broker).... and its salespersons will disclose to buyer all material facts of

which they are aware which could adversely and significantly affect the buyer's use or enjoyment of the property or any intended use of the property of which ....(Broker).... or its salespersons are aware (this disclosure is required by law whether or not a dual agency is involved).

3. ....(Broker).... and its salespersons will disclose to both parties all information of which they are aware that either party will not perform in accordance with the terms of the purchase agreement or other written agreement to convey real estate (this disclosure is required by law whether or not a dual agency is involved).

4. ....(Broker).... and its salespersons will not represent the interests of either party to the detriment of the other.

5. Within the limits of dual agency, ....(Broker).... and its salespersons will work diligently to facilitate the mechanics of the sale.

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

\_\_\_\_\_  
Buyer Seller  
\_\_\_\_\_  
BY: \_\_\_\_\_  
Buyer Seller  
Dated: \_\_\_\_\_

Subd. 5. Application. The disclosures required by subdivision 4 apply only to residential real property transactions.

### 3. New York's Agency Disclosure Form

§ 443. Disclosure regarding real estate agency relationship; form

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

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

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

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

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

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

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

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

h. "Seller's agent" means a listing agent who acts alone, or an agent who

acts in cooperation with a listing agent, acts as a seller's subagent or acts as a broker's agent to find or obtain a buyer for residential real property.

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

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

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

c. A buyer's agent shall provide the disclosure form to the buyer prior to entering into an agreement to act as the buyer's agent and shall obtain a signed acknowledgment from the buyer, except as provided in paragraph f of this subdivision. A buyer's agent shall provide the form to the seller or seller's agent at the time of the first substantive contact with the seller and shall obtain a signed acknowledgment from the seller or the seller's listing agent, except as provided in paragraph f of this subdivision.

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

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

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

4. The following shall be the disclosure form:

#### DISCLOSURE REGARDING REAL ESTATE AGENCY RELATIONSHIPS

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

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

#### SELLER'S OR LANDLORD'S AGENT

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

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

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

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

#### BUYER'S OR TENANT'S AGENT

If you are interested in buying or leasing real property, you can engage a real estate agent as a buyer's or tenant's

agent. A buyer's agent acts solely on behalf of the buyer. You can authorize a buyer's agent to do other things including hire subagents, broker's agents or work with other agents such as seller's agents on a cooperative basis.

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

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

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

#### BROKER'S AGENTS

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

#### AGENT REPRESENTING BOTH SELLER AND BUYER

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

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

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

An agent acting as a dual agent must explain carefully to both the buyer/tenant and seller/landlord that the agent is acting for the other party as well. The agent

should also explain the possible effects of dual representation, including that by consenting to the dual agency relationship the buyer/tenant and seller/landlord are giving up their right to undivided loyalty.

press your understanding of the transaction. A real estate agent is a person qualified to advise about real estate. If legal, tax or other advice is desired, consult a competent professional in that field.

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

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

**GENERAL CONSIDERATIONS**

You should carefully read all agreements to ensure that they adequately ex-

**ACKNOWLEDGEMENT OF  
PROSPECTIVE BUYER/TENANT**

**ACKNOWLEDGEMENT OF  
PROSPECTIVE SELLER/LANDLORD**

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

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

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

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

(3) I understand that subagents, including subagents participating in a multiple listing service, are agents of the seller/landlord exclusively.

(3) I understand that subagents, including subagents participating in a multiple listing service, are agents of the seller/landlord exclusively.

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

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

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

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

\_\_\_\_\_ of  
(name of licensee)

\_\_\_\_\_ of  
(name of licensee)

\_\_\_\_\_ is  
(name of firm)

\_\_\_\_\_ is  
(name of firm)

(check applicable relationship)  
\_\_ an agent of the seller/landlord  
\_\_ my agent as a buyer's/tenant's agent

(check applicable relationship)  
\_\_ my agent as a seller's/landlord's  
\_\_ an agent of the buyer/tenant

Dated: \_\_\_\_\_

Dated: \_\_\_\_\_

Buyer/tenant: \_\_\_\_\_

Seller/landlord: \_\_\_\_\_

Dated: \_\_\_\_\_

Dated: \_\_\_\_\_

Buyer/tenant: \_\_\_\_\_

Seller/landlord: \_\_\_\_\_

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

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

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

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

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

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

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

\_\_\_\_\_ of (name of licensee)

\_\_\_\_\_ is (name of firm)

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

Dated: \_\_\_\_\_

Dated: \_\_\_\_\_

Buyer/tenant: \_\_\_\_\_

Seller/landlord: \_\_\_\_\_

Dated: \_\_\_\_\_

Dated: \_\_\_\_\_

Buyer/tenant: \_\_\_\_\_

Seller/landlord: \_\_\_\_\_

ACKNOWLEDGMENT OF THE PARTIES TO THE CONTRACT

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

(2) I understand that \_\_\_\_\_ of

(name of real estate licensee)

\_\_\_\_\_ is (name of firm)

(check applicable relationship)

\_\_\_ an agent of the seller/landlord

\_\_\_ an agent of the buyer/tenant

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

I also understand that

\_\_\_\_\_ of (name of real estate licensee)

\_\_\_\_\_ is (name of firm)

(check applicable relationship)

\_\_\_ an agent of the seller/landlord

\_\_\_ an agent of the buyer/tenant

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

Dated: \_\_\_\_\_

Dated: \_\_\_\_\_

Buyer/tenant: \_\_\_\_\_

Seller/landlord: \_\_\_\_\_

Dated: \_\_\_\_\_

Dated: \_\_\_\_\_

Buyer/tenant: \_\_\_\_\_

Seller/landlord: \_\_\_\_\_

5. This section shall not apply to a real estate licensee who works with a buyer or a seller in accordance with terms agreed to by the licensee and buyer or seller and in a capacity other than as an agent, as such term is defined in paragraph a of subdivision one of this section.

6. Nothing in this section shall be construed to limit or alter the application of the common law of agency with respect to residential real estate transactions.

#### 4. Oregon's Disclosure Form

696.830. Agency disclosure and acknowledgment forms.

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

---

#### DISCLOSURE REGARDING AGENCY RELATIONSHIP(S)

(As required by Oregon Revised Statutes Chapter 696)

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

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

#### SELLER'S AGENT

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

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

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

#### BUYER'S AGENT

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

(1) To the buyer: The fiduciary duties of loyalty, obedience, disclosure, confiden-

tiality, reasonable care and diligence, and accounting in dealings with the buyer.

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

#### SELLERS AND BUYERS

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

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

---

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

---

#### DISCLOSURE ACKNOWLEDGMENT

##### (A) INITIAL ACKNOWLEDGMENT OF SELLER

By my signature below, I acknowledge:

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

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

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

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

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

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

**(B) INITIAL ACKNOWLEDGMENT OF PROSPECTIVE BUYER**

By my signature below, I acknowledge:

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

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

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

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

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

\_\_\_\_\_ an agent of the seller.  
\_\_\_\_\_ my agent as buyer's agent.

**(C) SIGNATURES**

. Buyer/Seller: \_\_\_\_\_ Dated: \_\_\_\_\_  
. Buyer/Seller: \_\_\_\_\_ Dated: \_\_\_\_\_  
. Buyer/Seller: \_\_\_\_\_ Dated: \_\_\_\_\_  
. Buyer/Seller: \_\_\_\_\_ Dated: \_\_\_\_\_

. Circle applicable title.

Agent to sign and date:

\_\_\_\_\_ Real Estate Licensee  
\_\_\_\_\_ Real Estate Organization

(3) If the broker intends to offer "in-company" representation to buyers and sellers, then the disclosure form required by ORS 696.820 shall be printed or typed on the back of the form, in addition to the disclosure required by subsection (1) of this section, in substantially the following form:

**IN-COMPANY SALES**

(1) A licensee, acting either alone or through one or more licensees within the same real estate organization, may give limited representation to both the seller and the buyer in a real estate transaction.

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

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

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

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

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

(b) Reasonable care and diligence.

(c) Honest dealing.

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

**BUYER'S LIMITED AUTHORIZATION REGARDING IN-COMPANY SALES**

By my initials below, I acknowledge:

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

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

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

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

\_\_\_\_ UNDERSTOOD AND AGREED:  
\_\_\_\_ (Initials)

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

**SELLER'S LIMITED AUTHORIZATION REGARDING IN-COMPANY SALES**

\_\_\_\_ UNDERSTOOD AND AGREED:  
\_\_\_\_ (Initials)

By my initials below, I acknowledge:

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

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

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

**SIGNATURES**

Buyer/Seller: \_\_\_\_\_ Dated: \_\_\_\_\_  
Buyer/Seller: \_\_\_\_\_ Dated: \_\_\_\_\_  
Buyer/Seller: \_\_\_\_\_ Dated: \_\_\_\_\_  
Buyer/Seller: \_\_\_\_\_ Dated: \_\_\_\_\_  
Circle applicable title.

Agent to sign and date:

\_\_\_\_ Real Estate Licensee  
\_\_\_\_ Real Estate Organization

**HB**

**41**

**FISCAL NOTE**

STATE OF ALASKA  
1997 LEGISLATIVE SESSION

BILL NO. HB 41

Revision Date: \_\_\_\_\_  
 Title: "An Act relating to impairment rating guides used in evaluation of certain workers' compensation claims."  
 Sponsor: Rokeyburg  
 Requestor: (H) L&C

Department Affected: Administration  
 BRU: Risk Management  
 Component: Risk Management  
 COMPONENT SERIAL NO. 0071

**EXPENDITURES/REVENUES:**

(Thousands of Dollars)

OPERATING EXPENDITURES	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>
<b>CAPITAL EXPENDITURES</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>
<b>CHANGE IN REVENUES ( )</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

**FUND SOURCE:**

(Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
OTHER						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

Estimate of any current year (FY 97) cost: \$ None

**POSITIONS:**

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

**ANALYSIS:** (Attach a separate page if necessary.)

This bill requires the use of the most recently published edition (including supplements) of the American Medical Association Guides to the Evaluation of Permanent Impairment — when determining the existence and degree of permanent impairment compensable under the workers' compensation act.

Agency "Cost of Risk" premium allocations (inter-agency receipts collected by Risk Management) reflect average of 5 prior years of actual claims costs. Any incremental cost increase realized by applying newer rating guideline will be included in the claims experience - and reflected in future workers' compensation premium allocations to each agency.

There is no direct fiscal impact on the Division of Risk Management.

Prepared by: J. Brad Thompson, Director  
 Division: Risk Management

Phone: 465-5723  
 Date: \_\_\_\_\_

Approved by Commissioner: Mark Boyer  
 Agency: Department of Administration

Date: 1/14/97

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# FISCAL NOTE

STATE OF ALASKA  
1997 LEGISLATIVE SESSION

BILL NO. HB 41

Revision Date: \_\_\_\_\_  
 Title: Impairment rating guides for  
Workers' Comp  
 Sponsor: Representative Rokeberg  
 Requestor: House L&C

Department Affected: Labor  
 BRU: Workers' Compensation  
 Component: Workers' Compensation

COMPONENT SERIAL NO. 344

**EXPENDITURES/REVENUES:** (Thousands of Dollars)

OPERATING	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

CAPITAL						
---------	--	--	--	--	--	--

CHANGE IN REVENUE FUND SOURCE #						
------------------------------------	--	--	--	--	--	--

**FUNDING:** (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipt						
1006 GF/MHTIA						
Other						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

**POSITIONS:**

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year (FY97) impact: \$ None

**ANALYSIS:** (Attach a separate page if necessary)

This bill proposes amending AS 23.30.190(b) to use the most recent published editions of the American Medical Association Guides, including supplementary materials, for the Evaluation of Permanent Impairment. This bill results in a zero fiscal note for the Workers' Compensation Division.

Prepared by: Paul Grossi, Director *Paul Grossi* Phone: 465-2790  
 Division: Workers' Compensation Date: 1/16/97

Approved by Commissioner: Tom Cashen, Commissioner *Tom Cashen*  
 Agency: Department of Labor Date: 1/16/97

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# HOUSE COMMITTEE REPORT

(7)  
Date Referred to Committee: January 13, 1997

FURTHER REFERRALS:

Date of Committee Action: 1/22/97

The LABOR AND COMMERCE Committee considered:

HB 41

HOUSE BILL NO. 41

IMPAIRMENT RATING GUIDES FOR WORKERS COMP

"An Act relating to impairment rating guides used in evaluation of certain workers' compensation claims."

recommends it be replaced  
with the following committee substitute CSHB 41 (LVC)

the same title  
 a new title

additional referral to \_\_\_\_\_ Committee

attached amendment(s)

ADOPTS: \_\_\_\_\_ Letter of Intent

ATTACHES NEW FISCAL NOTE(S): (Dept) \_\_\_\_\_

APPROVES PREVIOUS: (Dept/Date) \_\_\_\_\_

fiscal note(s) \_\_\_\_\_

fiscal note(s) \_\_\_\_\_

zero fiscal note(s) \_\_\_\_\_

zero fiscal note(s) LAB'DCA

SIGNING WITH RECOMMENDATIONS	DP	DNP	NR	AM
<i>[Signature]</i>	<input checked="" type="checkbox"/>			<input checked="" type="checkbox"/>
<i>[Signature]</i>	<input checked="" type="checkbox"/>			<input checked="" type="checkbox"/>
<i>[Signature]</i>	<input checked="" type="checkbox"/>			<input checked="" type="checkbox"/>
<i>[Signature]</i>	<input checked="" type="checkbox"/>			

CHAIR'S SIGNATURE

*[Signature]*

1-22-97

# STATE OF ALASKA

## DEPARTMENT OF LAW

### OFFICE OF THE ATTORNEY GENERAL

January 22, 1997

Honorable Norman Rokeberg  
Chairman, Labor and Commerce Committee  
State of Alaska  
State Capitol  
Juneau, Alaska 99801-1182

JAN 27 1997

RE: HB 41; An Act relating to impairment rating guides used in evaluation of certain workers' compensation claims.

Dear Representative Rokeberg:

I understand that the goal of HB 41 is to allow medical providers, when they assess an injured worker's impairment, to apply the most recent available edition of the AMA Guidelines as soon as possible. I am concerned that the bill, as proposed, will not accomplish what you intend as the Board will still have to establish a date when medical providers can begin using the newest edition.

HB 41 provides that the "board shall begin using the new edition not later than 90 days after the date of publication." The bill does not establish a process by which medical providers will know the exact date, within the 90 day period, that the Board will begin using the new edition of the AMA Guidelines. Consequently the Department of Labor will have to adopt a regulation providing for a fixed date each time the American Medical Association publishes a new edition.

The Department of Law's amendment provides a process to establish a fixed date and does not require the Department of Labor to adopt a regulation each time there is a new edition. The amendment provides that the Board will not have to go through regulation process required under the Administrative Procedure Act, but only will have to hold an open meeting to select the exact date and to issue a press release announcing the date.

This process should reduce costs since the Department of Labor will not have to go through the regulatory process. The meeting could be held telephonically and possibly during a regularly scheduled Board meeting. The amendment will allow medical providers to use the most up to date medical information

TONY KNOWLES, GOVERNOR

PLEASE REPLY TO:

■ 1031 WEST 4TH AVENUE, SUITE 200  
ANCHORAGE, ALASKA 99501-1994  
PHONE: (907) 269-5100  
FAX: (907) 276-3697

□ KEY BANK BUILDING  
100 CUSHMAN ST., SUITE 400  
FAIRBANKS, ALASKA 99701-4679  
PHONE: (907) 451-2811  
FAX: (907) 451-2846

□ P.O. BOX 110300-DIMOND COURT HOUSE  
JUNEAU, ALASKA 99811-0300  
PHONE: (907) 465-3600  
FAX: (907) 465-5735

Honorable Norman Rokeberg  
Chairman, Labor and Commerce Committee  
File No. 661-97-0078

January 22, 1997  
Page 2

more expeditiously since the Department of Labor would not have to adopt a regulation.

Very truly yours,

BRUCE M. BOTELHO  
ATTORNEY GENERAL



By: Toby N. Steinberger  
Assistant Attorney General

TNS:akb

cc: Honorable Commissioner Tom Cashen  
Department of Labor  
Patrick Pourchot, Legislative Director  
Dwight Perkins, Special Assistant  
Department of Labor  
Deborah Behr, Assistant Attorney General  
Legislation & Regulations Section  
Department of Law  
Chrystal Smith, Legal Administrator  
Department of Law

JAN 22 1997

## LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES  
LEGISLATIVE AFFAIRS AGENCY  
STATE OF ALASKA

(907) 465-3867 or 465-2450  
FAX (907) 465-2029  
Mail Stop 3101

130 Seward Street, Suite 409  
Juneau, Alaska 99801-2105

### MEMORANDUM

January 22, 1997

**SUBJECT:** Workers' compensation (HB 41)

**TO:** Representative Norm Rokeberg  
Attn: Janet

**FROM:** Michael F. Ford *M.F. Ford*  
Legislative Counsel

You have asked for my opinion on the Department of Law's suggested amendment to HB 41. Their approach would place the responsibility of choosing a date for using a new edition of the AMA guide with the Worker's Compensation board and would require the board to hold an open meeting and publicly release the new date selected by the board. First, I would note that this amendment does not change the existing language in HB 41 that requires the board to begin using the new edition within 90 days. I would think that if the Department of Law suggestion is adopted that some change or elimination of the existing sec. 1 of HB 41 would be necessary. Second, the amendment does not specify any limit on the board's discretion to select a date to begin using the new AMA guide. This discretion can certainly be placed with the board, however I assume the purpose of HB 41 is to establish a date certain by statute.

Whether the legislature establishes a specific date for using a newly published AMA guide by statute, or whether the board selects a date, is a policy matter for resolution by the legislature. Either system would presumably achieve the same goal.

Please contact me if you have further questions.

MFF:lmb:pl  
97-014.lmb

Enclosure

A M E N D M E N T

OFFERED IN THE HOUSE

BY REPRESENTATIVE ROKEBERG

TO: HB 41

- 1 Page 1, lines 10 - 11:
- 2 Delete "not later than 90 days"
- 3 Insert "on the 90th day"

# ALASKA STATE LEGISLATURE

## House of Representatives

### COMMITTEE ASSIGNMENTS:

LABOR & COMMERCE, CHAIRMAN  
JUDICIARY, MEMBER  
OIL AND GAS, MEMBER



INTERIM:  
716 WEST 4TH AVENUE, SUITE 640  
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STATE CAPITOL  
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## Representative Norman Rokeberg

### SPONSOR STATEMENT REPRESENTATIVE NORMAN ROKEBERG HOUSE BILL 41

#### HB 41 - "AN ACT RELATING TO IMPAIRMENT RATING GUIDES USED IN EVALUATION OF CERTAIN WORKERS' COMPENSATION CLAIMS"

HB 41 provides that the most recently published edition of the American Medical Association Guides to the Evaluation of Permanent Impairment ("Guides") shall be used in determining eligibility for benefits under the Alaska Worker's Compensation Act. It also provides that the Board shall begin using the new edition not later than 90 days after the date of publication. This bill passed the House in 1996 but did not make it through the Senate before the adjournment deadline.

Reasons for adopting this legislation are:

- **Cost of Adopting Regulations** —  
Decrease both the hard and soft costs of adopting regulations.
- **Reduce Time Lag** —  
Fourth edition published June 1993; regulation approved in April 1996.  
New edition published; older editions hard to come by.
- **New Science** —  
Adopting the latest "state of medical arts".

This bill will not change the current process used but will make it more efficient and less costly.

I would appreciate your support of this legislation.

Sec. 23.30.190. Compensation for permanent partial impairment.

(a) In case of impairment partial in character but permanent in quality, and not resulting in permanent total disability, the compensation is \$135,000 multiplied by the employee's percentage of permanent impairment of the whole person. The percentage of permanent impairment of the whole person is the percentage of impairment to the particular body part, system, or function converted to the percentage of impairment to the whole person as provided under (b) of this section. The compensation is payable in a single lump sum, except as otherwise provided in AS 23.30.041, but the compensation may not be discounted for any present value considerations.

(b) All determinations of the existence and degree of permanent impairment shall be made strictly and solely under the whole person determination as set out in the American Medical Association Guides to the Evaluation of Permanent Impairment, except that an impairment rating may not be rounded to the next five percent. The board shall adopt a supplementary recognized schedule for injuries that cannot be rated by use of the American Medical Association Guides.

(c) The impairment rating determined under (a) of this section shall be reduced by a permanent impairment that existed before the compensable injury. If the combination of a prior impairment rating and a rating under (a) of this section would result in the employee being considered permanently totally disabled, the prior rating does not negate a finding of permanent total disability.

History -

(sec. 7(3) ch 193 SLA 1959; am sec. 5 - 10 ch 46 SLA 1964; am sec. 1 ch 24 SLA 1965; am sec. 1 ch 102 SLA 1965; am sec. 1 ch 174 SLA 1968; am sec. 1 ch 119 SLA 1970; am sec. 1 ch 10 SLA 1972; am sec. 1 ch 54 SLA 1974; am sec. 5 ch 83 SLA 1975; am sec. 4 ch 75 SLA 1977; am sec. 7 ch 70 SLA 1983; am sec. 34 ch 79 SLA 1988)

Editors Notes -

Section 48, ch. 79, SLA 1988 provides that the amendments to this section by ch. 79, SLA 1988 apply only to injuries sustained on or after July 1, 1988.

Decisions -

Annotators notes. Some of the cases cited below were decided under prior statutes but have been retained for aid in construing present law.

This section governs compensation for permanent partial disability. - *Hewing v. Alaska Workmen's Comp. Bd.*, 512 P.2d 896 (Alaska 1973).

Section controls permanent impairment under AS 23.30.041. - Because subsection (b)'s rule for evaluating permanent impairments, which requires use of the American Medical Association's "Guides to the Evaluation of Permanent Impairment," controls the determination of a permanent impairment worker AS 23.30.041 (f)(3), and because under received a rating of zero permanent impairment under the AMA Guides, the superior court correctly found her ineligible for reemployment benefits. *Rydwell v. Anchorage Sch. Dist.*, 864 P.2d 526 (Alaska 1993).

Premise for concept of disability compensation. - The concept of disability compensation rests on the premise that the primary consideration is not medical impairment as such, but rather loss of earning capacity related to that impairment. *Vetter v. Alaska Workmen's Comp. Bd.*, 524 P.2d 264 (Alaska 1974); *Hewing v. Peter Kiewit & Sons*, 586 P.2d 182 (Alaska 1978).

No retroactive effect unless clear legislative intent shown. - Workmen's compensation acts should be liberally construed in favor of the employee, but statutes are presumed to operate prospectively and will not be given a retroactive effect, unless by express terms or necessary implication, it clearly appears that that was the legislative intent. *Hood v. State, Workmen's*

Comp. Bd., 574 P.2d 811 (Alaska 1978).

There were four basic types of disability compensation - payable under the Alaska Workmen's Compensation Act: (1) temporary total disability, (2) temporary partial disability, (3) permanent total disability and (4) permanent partial disability. Hood v. State, Workmen's Comp. Bd., 574 P.2d 811 (Alaska 1978).

Distinction between temporary total disability and permanent partial disability. - The period of temporary total disability is defined as: the healing period or the time during which the worker is wholly disabled and unable by reason of his injury to work. It is, therefore, a separate and unitary period of compensation, and as such is distinguished from a permanent partial disability. Phillips Petroleum Co. v. Alaska Indus. Bd., 17 Alaska 658 (1958).

Permanent partial disability includes temporary disability. - The very fixing of a rate for a permanent partial disability indicates that the applicant will permanently thereafter suffer disability. Certainly this would include within its terms temporary disability from time to time. Keehn v. Alaska Indus. Bd., 16 Alaska 101, 230 F.2d 712 (9th Cir. 1956).

And no further award should be granted for temporary disability. - Where the permanent award is made, no further awards should be granted for temporary disability, whether total or partial. Keehn v. Alaska Indus. Bd., 16 Alaska 101, 230 F.2d 712 (9th Cir. 1956).

Award for compensation must be supported by a finding that claimant suffered a compensable disability - or, more precisely, a decrease in earning capacity due to a work-connected injury or illness. Vetter v. Alaska Workmen's Comp. Bd., 524 P.2d 264 (Alaska 1974); Hewing v. Peter Kiewit & Sons, 586 P.2d 182 (Alaska 1978).

Consideration of retirement in determining award. - In calculating a lump sum award for a permanent partial disability, the employee's total future loss equals the total payments the employee would receive for his normal life expectancy, without considering actual or possible retirement. Bailey v. Litwin Corp., 780 P.2d 1007 (Alaska 1989).

Post-injury earning capacity. - The determination of lost earning capacity is not limited to an examination of those losses that appear immediately after claimant's injury stabilizes, but it requires the board to use all "available clues" to forecast the losses that the disabled claimant will incur over the course of her work life. Fairbanks N. Star Borough Sch. Dist. v. Crider, 736 P.2d 770 (Alaska 1987).

To fairly measure the difference between pre- and post-injury earning capacity, the board must first eliminate substantial differences caused by inflation. Where there is a substantial difference in wage levels, the post-injury earnings should be corrected to correspond with the general wage level in force at the time that pre-injury earnings were calculated, or the pre-injury earnings should be recomputed at the scale in effect at the time of the post-injury earnings. Fairbanks N. Star Borough Sch. Dist. v. Crider, 736 P.2d 770 (Alaska 1987).

Basis for finding of decrease in earning capacity. - In permanent partial disability situations, the ultimate finding of decrease in earning capacity must be based upon basic fact findings which relate to inability to earn wages, as evidenced by proof of a disparity between wages earned before and after the injury was sustained, and to the claimant's physical condition. Hewing v. Alaska Workmen's Comp. Bd., 512 P.2d 896 (Alaska 1973).

What is necessary is to compare the earnings made prior to the injury with the earnings likely to be made in the future. - Hewing v. Peter Kiewit & Sons, 586 P.2d 182 (Alaska 1978).

Award not to be delayed. - Although it is impossible to predict an employee's earnings in the future, an award must nevertheless be made without waiting until the end of the employee's worklife. Hewing v. Peter Kiewit & Sons, 586 P.2d 182 (Alaska 1978).

Where there is a substantial difference in wage levels, - the post-injury earnings should be corrected to correspond with the general wage level in force at the time that pre-injury earnings were calculated, or the pre-injury earnings should be recomputed at the scale in effect at the time of the post-injury earnings. *Hewing v. Peter Kiewit & Sons*, 586 P.2d 182 (Alaska 1978).

Availability of work is determinant of earning capacity. - The availability of work in the employee's community which he can perform in his injured condition is an important determinant of earning capacity. *Hewing v. Alaska Workmen's Comp. Bd.*, 512 P.2d 896 (Alaska 1973).

Serious conceptual differences exist between the "whole man" and "earning capacity" theories of disability. - *Hewing v. Alaska Workmen's Comp. Bd.*, 512 P.2d 896 (Alaska 1973).

Under the whole man theory, the primary criteria governing disability awards are physiological and psychiatric. This theory challenges the concept, basic to Alaska's workmen's compensation law, that unscheduled partial disability awards should be made for economic loss, not for physical injury as such. *Hewing v. Alaska Workmen's Comp. Bd.*, 512 P.2d 896 (Alaska 1973).

Where the loss of a leg is total in the statutory sense - and the question of the pyramiding of claims is not involved, the employee is entitled to the compensation fixed for the loss of a leg. *Alaska Packers Ass'n v. Alaska Indus. Bd.*, 12 Alaska 465 (1949).

Condition of leg before loss. - In providing payment for the loss of a leg the statute does not require that it be shown that the leg was whole before the injury. *Alaska Packers Ass'n v. Alaska Indus. Bd.*, 12 Alaska 465 (1949).

"Unscheduled" loss. - Fact that economic impairment from injury exceeded the benefits provided for in the schedule did not enable the employee to have his injury classified as "unscheduled," so that he can obtain benefits reflecting this greater economic impairment. *Ratliff v. Alaska Workers' Comp. Bd.*, 721 P.2d 1138 (Alaska 1986).

In a case where the loss was unscheduled there was no fixed number of weeks during which compensation shall be paid. *Absher v. State, Dep't of Hwys.*, 500 P.2d 1004 (Alaska 1972), overruled on other grounds, *Bailey v. Litwin Corp.*, 713 P.2d 249 (Alaska 1986).

It may be inferred that computation was left to discretion of board. - While the legislature did not adopt a formula for computing lump-sum payments, it could reasonably be inferred that this was left to the discretion of the Workmen's Compensation Board. *Absher v. State, Dep't of Hwys.*, 500 P.2d 1004 (Alaska 1972), overruled on other grounds, *Bailey v. Litwin Corp.*, 713 P.2d 249 (Alaska 1986).

Law prior to enactment of former subsection (b). - See *Sherman v. Holiday Constr. Co.*, 435 P.2d 16 (Alaska 1967).

Amendment of benefit schedule between time of injury and time condition rated. - For a discussion of the application of repealed provision AS 23.30.172 to a case where the former benefit schedule of this section was increased by amendment between the time of injury and the time the condition was rated, and a resolution of which schedule applied, see *Hood v. State, Workmen's Comp. Bd.*, 574 P.2d 811 (Alaska 1978).

Where the law (AS 23.30.172, repealed) pertaining to compensation at the time of the employee's injury provided that compensation would be paid at the rates effective at the time the injury was rated, that statutory scheme was incorporated into the workers' compensation insurance contract. In view of this, an increase in compensation rates made after the injury but prior to its rating cannot have impaired the contract. *State Workmen's Comp. Bd. v. Delaney*, 615 P.2d 5 (Alaska 1980).

Time period for payment. - The time periods in AS 23.30.155(b) and (c), providing for

installment payments within 14 days and penalties if the payment is over 7 days late, are applicable to a case involving permanent partial injury payments under this section. *Sumner v. Eagle Nest Hotel*, 894 P.2d 628 (Alaska 1995).

Criteria for judicial review. - While the Alaska Workmen's Compensation Board is a quasi-judicial agency, the same criteria for judicial review of any administrative action should apply. *Hood v. State, Workmen's Comp. Bd.*, 574 P.2d 811 (Alaska 1978).

Award upheld. - Since provisions limiting recovery for permanent partial and temporary total disability to \$30,000 were repealed at the time of rating of appellee's injury, his employer's liability was not limited by those provisions and the Alaska Worker's Compensation Board's decision awarding appellee an increase of benefits over and above \$30,000 payable by the employer was upheld. *Arctic Structures v. Hardcastle*, 660 P.2d 449 (Alaska 1983).

Lump sum payment not merited. - A lump sum award is not merited because claimant is receiving benefits at a weekly rate substantially smaller than her rate of loss nor because inflation creates a financial need for a lump sum. *Fairbanks N. Star Borough Sch. Dist. v. Crider*, 736 P.2d 770 (Alaska 1987).

Applied in *J.B. Warrack Co. v. Roan*, 418 P.2d 986 (Alaska 1966); *Haman v. Allied Concrete Prods., Inc.*, 495 P.2d 531 (Alaska 1972); *Bignell v. Wise Mechanical Contractors*, 651 P.2d 1163 (Alaska 1982); *Bailey v. Litwin Corp.*, 713 P.2d 249 (Alaska 1986).

Quoted in *Foster v. Wright-Schuchart-Harbor*, 644 P.2d 221 (Alaska 1982).

Stated in *Wilson v. Erickson*, 477 P.2d 998 (Alaska 1970).

Cited in *Alaska Pac. Assurance Co. v. Brown*, 687 P.2d 264 (Alaska 1984); *Municipality of Anchorage v. Leigh*, 823 P.2d 1241 (Alaska 1992); *Sulkosky v. Morrison-Knudsen, Sup. Ct. Op. No. 4363 (File No. S-6317)*, P.2d (1996).

08 AAC 045.0122

**RATING PERMANENT IMPAIRMENT.**

(a) Permanent impairment ratings must be based upon the American Medical Association Guides to the Evaluation of Permanent Impairment, Fourth Edition (1994), and it is presumed that the AMA Guides address the injury. If the board finds the presumption is overcome by clear and convincing evidence and if the permanent impairment cannot, in the board's opinion, be determined under the AMA Guides, then the impairment rating must be based on American Academy of Orthopedic Surgeons Manual for Evaluating Permanent Physical Impairments (AAOS), First Edition (1965). If a rating under the AAOS is not of the whole person, the rating must be converted to a whole person rating under the AMA Guides.

(b) A rating of zero impairment under the AMA Guides is a permanent impairment determination and no determination may be made under the AAOS Manual.

**History -**

Eff. 12/14/86, Register 100; am 3/16/90, Register 113; am 4/21/96, Register 138

**Authority -**

AS 23.30.005

AS 23.30.095

AS 23.30.190

**Editor's Notes -**

Copies of the publications mentioned in 8 AAC 45.122 are available for reference at the offices of the division of workers' compensation.

AMENDMENT

OFFERED IN THE HOUSE LABOR & COMMERCE COMMITTEE BY: \_\_\_\_\_

TO: HB 41

*Page 4 - 15 - delete all material*

Page 1, following line 13:

Insert a new bill section to read:

*insert new bill section to read*

\*\* Sec. 1. AS 23.30.190 is amended by adding a new subsection to read:

(d) When a new edition of the American Medical Association Guides described in

(b) of this section is published, the board shall hold an open meeting under AS 44.62.310 to

select the date on which the board will begin using the new edition. After the meeting, the

board shall issue a public release announcing the date. The requirements of AS 44.62.010

44.62.300 do not apply to the selection or announcement of the date under this subsection."

*Meeting under this subsection shall be held not later than the end of the month of publication*

**HB**

**49**

# HOUSE COMMITTEE REPORT

(7)

Date Referred to Committee: March 26, 1997

FURTHER REFERRALS:

Judiciary  
Finance

Date of Committee Action: 2/18/98

The LABOR AND COMMERCE Committee considered:

SSHB 49

SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 49      ESTABLISH CONSUMER PROTECTION DIVISION

"An Act establishing and relating to a consumer protection section in the Department of Law; increasing penalties for violation of laws relating to consumer protection; requiring special accounting for money from certain actions related to consumer protection; and providing for an effective date."

recommends it be replaced with the following committee substitute CS SSB 49 (LAC)  the same title  a new title

additional referral to \_\_\_\_\_ Committee  
 attached amendment(s)

ADOPTS: \_\_\_\_\_ Letter of Intent

ATTACHES NEW FISCAL NOTE(S): (Dept) \_\_\_\_\_ APPROVES PREVIOUS: (Dept/Date) \_\_\_\_\_  
 fiscal note(s) DOL  fiscal note(s) \_\_\_\_\_

zero fiscal note(s) \_\_\_\_\_  zero fiscal note(s) \_\_\_\_\_

SIGNING WITH RECOMMENDATIONS	DP	DNP	NR	AM
<i>Nancy Rokley</i>	✓		<del>NR</del>	
<i>Bill Hudson</i>	✓			
<i>Joe Ryan</i>			✓	
<i>Steve Kukera</i>	✓			
<i>Tom Bissell</i>	✓			
<i>John J. Concedery</i>	✓			

CHAIR'S SIGNATURE *Nancy Rokley* 2-18-98

# FISCAL NOTE

02-18-98P03:55 RCVD

BILL NO. HB 387

STATE OF ALASKA  
1998 LEGISLATIVE SESSION

Revision Date: \_\_\_\_\_  
Title: An Act relating to dentists.

Department: Commerce and Economic Development  
BRU: Occupational Licensing  
Component: Operations

Sponsor: Rep. Therriault  
Requestor: House Labor & Commerce

COMPONENT SERIAL NO. 1844

**Expenditures/Revenues**

(Thousands of Dollars)

OPERATING EXPENDITURES	FY 99	FY 00	FY 01	FY 02	FY 03	FY 04
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES	0.0	0.0	0.0	0.0	0.0	0.0
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**FUND SOURCE**

(Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 General Fund						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
<b>TOTAL</b>	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY 98) cost: \$ 0.0

**POSITIONS**

FULL-TIME						
PART-TIME						
TEMPORARY						

**ANALYSIS:** (Attach a separate page if necessary)

HB 387 amends dental statute AS 08.36.070(a). New funds are not required to implement this bill.

Prepared by: Jennifer Strickler, Administrative Manager  
Division: Occupational Licensing  
Approved by Commissioner: Deborah B. Sedwick  
Agency: Commerce and Economic Development

Phone: 465-2144  
Date: 2/18/98  
Date: 2-18-98

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COMMITTEE:

~~House Labor & Commerce Standing Committee~~

DATE: February 18, 1998

Subject of meeting:

HB 49 - CONSUMER PROTECT.: DIVISION & PENALTIES

SIGN-IN

PLEASE PRINT!

NAME

ADDRESS (MAILING / ZIP)

PHONE

REPRESENTING

DO YOU WANT TO TESTIFY?

NAME	ADDRESS (MAILING / ZIP)	PHONE	REPRESENTING	DO YOU WANT TO TESTIFY?
<del>BRUCE SCHACTER</del>	<del>Box 2257 Kodiak</del>	<del>486-4688</del>	<del>UNITED SALMON ASSOC.</del>	<del>YES</del>
Engene E. Dixon	Box 20995 Juneau 99802	586-3816	AARP	yes
Rea Shepard		789-7354	JCo Aging	No
Ray Mulligan	Box 240335 Douglas 99824	364-3144	AARP-SC	?
Maria Lawlin	415 Willoughby St 506 99801	586-3637	NARFE	yes
Crystal Smith	PO Box 110300, Juneau 99811-0300	465-2132	Dept of Law	YES needed
Alfreda Dore	PO Box 240636, Douglas 99824-0636	364-3485	Chap 865, AARP, Juneau	no

He some 1200 members of the National Assoc. of Retired  
 Federal Employees meeting here in Alaska although  
 endorse the intent of HR 49. We believe greater protection  
 is needed for the elderly so that they may feel more  
 secure in being able to avoid fraudulent practices, and  
 if they are unable to avoid such practices to understand  
 that such perpetrators will be brought to justice.



Alaska State Federation of Chapters  
**NARFE**  
 National Association of Retired Federal Employees

DONALD C. PEACOCK  
 5797 E President

8623 Fairweather Drive  
 Anchorage, AK 99518-2225

(907) 349-1714

TC 80297  
 (H) Labor & Commerce

- mm mm mm  
 know that we in all good now

URGENT

MUSTAPHA DANBABA  
TEL/FAX: 234-90-408605  
LAGOS - NIGERIA.

Dear Sir,

**BUSINESS PROPOSAL STRICTLY CONFIDENTIAL**

I am a member of the Federal Government of Nigeria Contract Award and Monitoring Committee in the Nigeria National Petroleum Corporation (NNPC).

Sometime ago, a contract was awarded to a foreign firm in NNPC by my committee. This contract was over-invoiced to the tune of US\$21.5M. This was done deliberately. The over-invoicing was a deal by my committee to benefit from the project. We now desire to transfer this money which is in a suspense account with NNPC in any Overseas Account which we expect you to provide for us.

**SHARE:**

For providing the account where we shall remit the money, you will be entitled to 25% of the money, 70% will be for me and my partners while 5% has been mapped out from the total sum to cover any expenses that may be incurred by us during the course of this transaction, both local and international expenses.

*I would require the following from you:*

1. **Bankers Name and Address**
2. **Telephone and Fax number of Bankers**
3. **Sort/ABA/Routing Number of Bankers**
4. **Account Number**
5. **Name of Beneficiary/Company Name.**

The above information would be used to make formal applications as a matter of procedure for the release of the money and onward transfer to your account.

It does not matter whether or not your company does contract projects of the nature described here, the assumption is that your company won the major contract and sub-contract it out to other companies. More often than not, big trading companies or firms of unrelated fields win major contract and sub-contracts to more specialized firms for execution of such contracts.

We have a strong and reliable connections and contacts at the **Apex Bank** of Nigeria and federal Ministry of Finance and we have no doubt that all this money will be released and transferred if we get the necessary foreign partner to assist us in this deal. Therefore, when the business is successfully concluded we shall through our same connections withdraw all documents used from all the concerned Government Ministries to avoid any trace either now or in future for 100% security.

We are civil servants and we will not want to miss this opportunity. We want this money to be transferred to the Overseas Account for us, before the present Military Government hands over to Democratically Elected Government.

Please contact me immediately through Tel/Fax message whether or not you are interested in this deal. If you are not, it will enable me scout for another foreign partner to carry out this deal. But where you are interested, send the required documents aforementioned herein through **MY ABOVE TEL/FAX NUMBER** as time is of the essence in this business.

I wait in anticipation of your fullest co-operation.

Yours faithfully,

  
MUSTAPHA DANBABA



# NARFE

National Association of Retired Federal Employees

Resolution passed at Alaska NARFE Federation Convention

Wasilla, AK May 3, 1997

Re-establish a Consumer Protection Office in the Department of Law.

WHEREAS:

Alaska is the only state with no functional Consumer Protection Office and Alaskans lose ten million per year to fraud, and retirees and seniors are most vulnerable to this type of fraud and in dire need of a fully staffed Consumer Protection office, therefore

BE IT RESOLVED:

The NARFE Alaska Federation request that the Legislature hold public hearings on bills related to this issue during the interim, and

That the Governor and Legislature reconsider their budget actions on the Consumer Protection funding, and instead consider their responsibility to the citizens of Alaska.

TO 1998 NARFE CONVENTION APRIL 25-26

Whereas-

HB 49 was introduced last session to once again create a Consumer Protection Section within the Attorney General's Office, and no hearings were held on the bill during the interim between sessions, and

Whereas -

the public has become very aware of telemarketing and other consumer fraud issues with at least 50% receiving unwanted calls, and

Whereas -

Alaskans lose over ten million dollars per year to fraud

Therefore, be it resolved -

That the Alaska Federation of NARFE again asks the Alaska Legislature to establish a Consumer Protection Section within the Attorney General's office to begin meeting their responsibility to the citizens of Alaska.

*Amendment No 1  
Kubben  
to change  
effective dates  
Hudson  
now*

0-LS0279\F

SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 49  
IN THE LEGISLATURE OF THE STATE OF ALASKA  
TWENTIETH LEGISLATURE - FIRST SESSION

BY REPRESENTATIVE CROFT

Introduced: 3/26/97

Referred: Labor and Commerce, Judiciary, Finance

A BILL

FOR AN ACT ENTITLED

1 "An Act establishing and relating to a consumer protection section in the  
2 Department of Law; increasing penalties for violation of laws relating to consumer  
3 protection; requiring special accounting for money from certain actions related to  
4 consumer protection; and providing for an effective date."

5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

6 \* Section 1. AS 44.23.020(b) is amended to read:

7 (b) The attorney general shall

8 (1) bring, prosecute, and defend all necessary and proper actions in the  
9 name of the state for the collection of revenue;

10 (2) represent the state in all civil actions in which the state is a party;

11 (3) prosecute all cases involving violation of state law, and file  
12 informations and prosecute all offenses against the revenue laws and other state laws  
13 where there is no other provision for their prosecution;

14 (4) administer state legal services, including the furnishing of written

1 legal opinions to the governor, the legislature, and all state officers and departments  
 2 as the governor directs; and give legal advice on a law, proposed law, or proposed  
 3 legislative measure upon request by the legislature or a member of the legislature;

4 (5) draft legal instruments for the state;

5 (6) make available a report to the legislature, through the governor, at  
 6 each regular legislative session

7 (A) of the work and expenditures of the office; and

8 (B) on needed legislation or amendments to existing law;

9 (7) perform all other duties required by law or which usually pertain  
 10 to the office of attorney general in a state; and

11 (8) prepare, publish, and revise as it becomes useful or necessary to do  
 12 so an information pamphlet on landlord and tenant rights and the means of making  
 13 complaints to appropriate public agencies concerning landlord and tenant rights; the  
 14 contents of the pamphlet and any revision shall be approved by the Department of  
 15 Law, [DIVISION OF] consumer protection section, before publication.

16 \* Sec. 2. AS 44.23 is amended by adding a new section to read:

17 Sec. 44.23.022. Consumer protection section. (a) There is created in the  
 18 Department of Law the consumer protection section. The head of the consumer  
 19 protection section is appointed by the attorney general and serves at the pleasure of the  
 20 attorney general.

21 (b) The consumer protection section shall

22 (1) carry out the duties of the attorney general under AS 45 and other  
 23 laws relating to consumer affairs and consumer protection; and

24 (2) annually make recommendations to the governor and the legislature  
 25 for statutory changes that are needed to ensure adequate protection of consumers in  
 26 this state.

27 \* Sec. 3. AS 45.50.551(b) is amended to read:

28 (b) In an action brought under AS 45.50.501, if the court finds that a person  
 29 is using or has used an act or practice declared unlawful by AS 45.50.471, the attorney  
 30 general, upon petition to the court, may recover, on behalf of the state, a civil penalty  
 31 of not more than \$10,000 [\$5,000] per violation.

1 \* Sec. 4. AS 45.50.551 is amended by adding a new subsection to read:

2 (d) The commissioner of administration shall separately account for money  
3 received under this section that the attorney general deposits in the general fund,  
4 including money received for attorney fees in an action, or from settlement of an  
5 action, under this section. The annual estimated balance in the account may be  
6 appropriated by the legislature for the expenses of the consumer protection section  
7 established under AS 44.23.022.

8 \* Sec. 5. This Act takes effect July 1, 1997.

1998

# ACROSS THE STATE

## Vermont Telemarketing Fraud Law

Vermont is one of the first states in the nation to enact a state law that provides increased protections for consumers against telemarketing fraud, a \$40 billion per year criminal industry that disproportionately targets older persons. H 226 places a ban on courier or other pick-up services for use in collecting pay-



ment from consumers, and requires the express written authorization from consumers to gain access into their checking, savings, share or other depository accounts. These sections of H 226 are based on model legislation developed by AARP; the Act was co-authored by AARP and the attorney general's office.

"AARP has conducted extensive research into the behavior, attitudes, and values of telemarketing fraud victims," explained AARP State President Lloyd A. "Pete" Kelley, Jr. "Through this research, we learned that it is difficult for victims and potential victims to identify telemarketing fraud. H 226 protects and helps consumers by defining specific telemarketing activities as illegal."

"Fraudulent telemarketers can no longer use legitimate channels—courier pick-ups and bank demand drafts—to achieve illegitimate ends," commented Attorney General William Sorrell. "Under the new law, if a telemarketer calls and offers to send a courier or delivery company to pick up a consumer's money, this is a clear sign of fraudulent activity." Vermont is the first state in the nation to legislate a ban on courier pick-ups in attempt to combat telemarketing fraud.

"In addition," Attorney General Sorrell continued, "Vermont now requires express written authorization before anyone gains access to a consumer's bank or savings account. No longer can a fraudulent telemarketer talk a consumer into revealing the encoded numbers on the bottom of his/her checks and then make up an unsigned demand draft that the bank clearing process treats like a personal check. For older persons on fixed incomes this kind of raid on a bank account can be devastating."



# Legislative Research Services

Alaska State Legislature  
Legislative Affairs Agency  
Division of Legal & Research Services

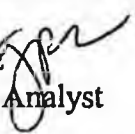


130 Seward Street, Suite 218  
Juneau, Alaska 99801-2196  
Phone: (907) 465-3991  
Fax: (907) 462-3351

April 22, 1997

## MEMORANDUM

TO: Representative Eric Croft

FROM: Gina Spartz   
Legislative Analyst

RE **The Number of Better Business Bureaus in Alaska and State Funding for Consumer Protection Services (FY86-FY97)**  
Research Request 97.085

You wanted to know how many Better Business Bureaus are currently operating in Alaska. You also asked for a breakdown of funding for consumer protection services within the state Department of Law from FY86 through FY97. The following is a brief description of state Better Business Bureaus. In addition we provide background on state funding for consumer protection services along with a table and chart illustrating this funding history.

### Better Business Bureaus in Alaska

The National Better Business Bureau is a private nonprofit organization began over 80 years ago. Business leaders join the organization by paying a membership fee and agreeing to respond to any complaints filed by consumers against their businesses. The Bureau does not enforce laws but rather mediates disputes between consumers and businesses. Consumers may file complaints against any business through the BBB. But nonmembers are not obligated to respond to these complaints. All complaints are kept on file and are open to the public, making the local chapters of the Bureau an excellent resource for consumers.

According to Blair Schaad, a representative of the Fairbanks Better Business Bureau, Alaska has four BBB offices, located in Anchorage, Kenai, Fairbanks, and the Matanuska-Susitna Valley (Wasilla). Currently only the Fairbanks and Kenai offices have a director. The former director of the Anchorage BBB, Rick Gilmore, is no longer working for the organization. That office is currently going through an internal reorganization but is still taking complaints from consumers. In addition, the Matanuska-Susitna office is working closely with the Anchorage office staff to assist consumers and is also concentrating on building its own membership in the Mat-Su Valley. Ms.

Representative Croft  
April 22, 1997  
Page 2

Schaad said that her office handles roughly 600 consumer complaints per month and that statewide the BBB offices handle over 3,000 consumer complaints per month.

### **Consumer Protection Services in the Department of Law**

The attached chart and table illustrate the history of state funding for consumer protection services from FY86 through FY97. The information for the table and chart was provided by the Department of Law, Division of Administrative Services.

The Consumer Protection Division in the Department of Law was established in 1973 and functioned as its own division through most of the 1970s and early 1980s. In the mid-1980s, the consumer protection functions and funding were shared with the DOL's Antitrust Section. In FY93, the two divisions were combined into the Fair Business Practices Division. In FY97, the Fair Business Practices Division was subsumed under the General Legal Services component of the budget.<sup>1</sup>

Daveed Schwartz, one of two full-time attorneys working on consumer fraud within the Fair Business Practices Division, said that his office does not take consumer complaints. Under an information sharing agreement, the BBB refers consumer fraud cases and provides information on scams to the DOL. The department then litigates the most egregious consumer fraud cases. Mr. Schwartz said his office litigates cases involving many consumers involved in a scam.

We have attached a previous research memorandum which contains a number of articles and editorials concerning consumer protection in Alaska.<sup>2</sup> We hope this information is useful to you. If you have any further questions please don't hesitate to call this office.

Attachment

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<sup>1</sup>The funding listed on the attached table and chart for FY97 is DOL's estimated budget projection since there was no Fair Business Practices component within the Department of Law's FY97 budget.

<sup>2</sup>Legislative Research Agency Memorandum 96.045, "Consumer Protection Services in Alaska," is included as Attachment A.

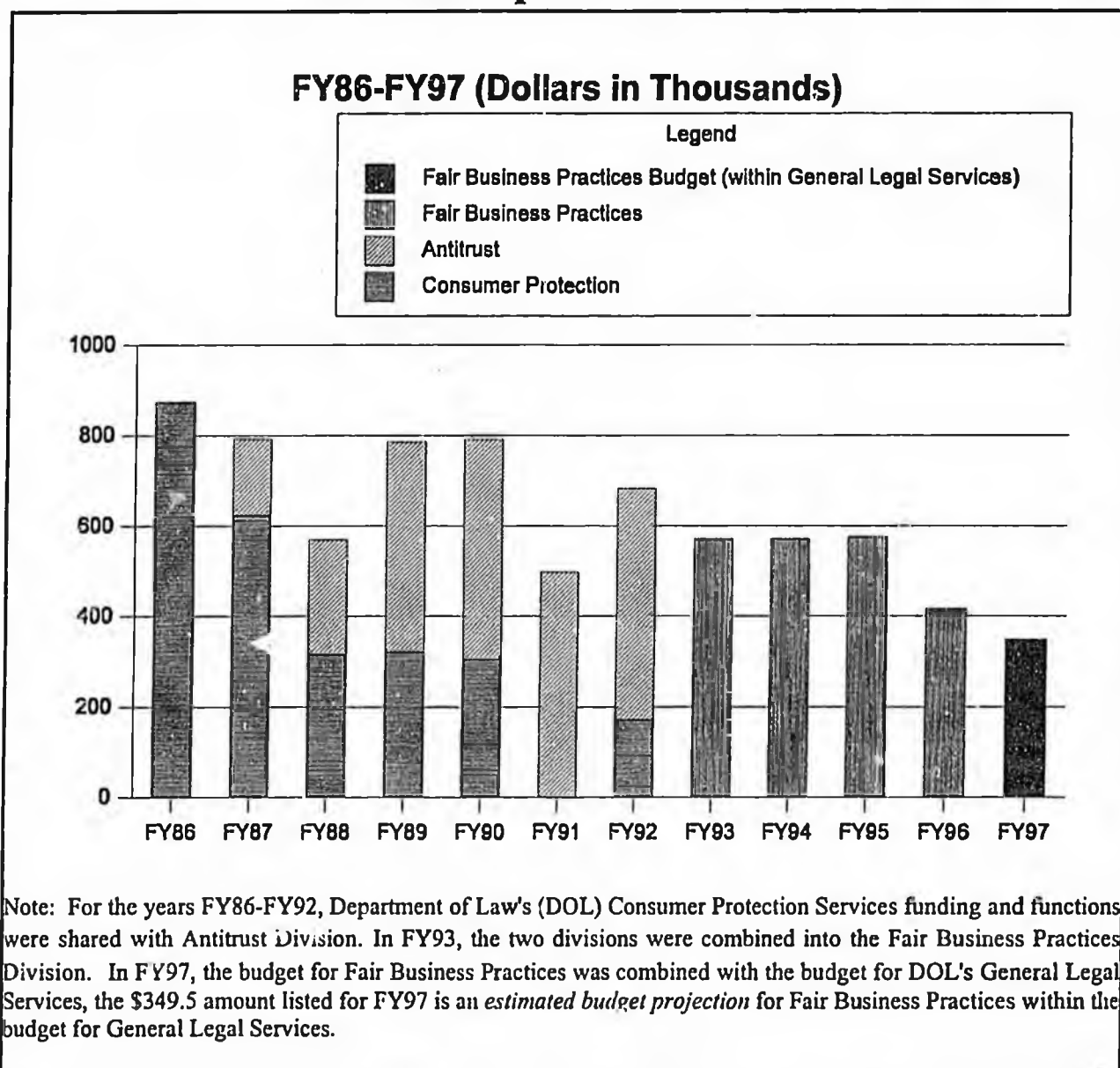
**Table 1**  
**Authorized Appropriations for Consumer Protection,**  
**Alaska Department of Law (FY86-FY97)**  
**(dollars in thousands)**

Year	Consumer Protection Division	Antitrust Division	Fair Business Practices Division	Fair Business Practices Budget within General Legal Services	Total
FY86	873.9				873.9
FY87	623.9	168.3			792.2
FY88	316.2	252.8			569.0
FY89	321.5	463.6			785.1
FY90	304.9	485.6			790.5
FY91	0	497.5			497.5
FY92	171.6	511.5			683.1
FY93			571.4		571.4
FY94			571.4		571.4
FY95			575.6		575.6
FY96			415.6		415.6
FY97				349.5	349.5

Sources: Legislative Finance Division, *Operating Budget for Department of Law*, for FY86-FY96. Funding for FY97 provided by Division of Administrative Services, Department of Law.

Note: For the years FY86-FY92, Department of Law's (DOL) Consumer Protection Services funding and functions were shared with Antitrust Division. In FY93, the two divisions were combined into the Fair Business Practices Division. In FY97, the budget for Fair Business Practices was combined with the budget for DOL's General Legal Services. The \$349.5 figure for FY97 is an *estimated budget projection* for Fair Business Practices within the budget for General Legal Services.

**Figure 1**  
**Authorized Appropriations for Consumer Protection,**  
**Alaska Department of Law**



Sources: Legislative Finance Division, *Operating Budget for Department of Law*, for FY86-FY96. Funding for FY97 provided by Division of Administrative Services, Department of Law.

## REPRESENTATIVE ERIC CROFT

### House Bill 49 Consumer Protection

#### Sponsor Statement

Alaska's consumer protection effort has shrunk dramatically.

Since the Dept. of Law's Consumer Protection Section was eliminated in the late 1980's, Alaska has lagged far behind other states in providing protection to its consumers. Lack of adequate enforcement invites shysters and scam artists to cheat Alaskans. We enjoy a dubious reputation as easy targets. Telemarketing fraud alone costs Alaskan consumers an estimated \$10 million a year.

Our Attorney General's office lacks the resources necessary to respond to the many thousands of individual consumer complaints Alaskans lodge each year.

Even as the state's population has increased, the budget for the Fair Business Practices section in the Dept. of Law has shrunk from \$477,500 in FY94 to \$254,000 in FY96. All of the consumer protection function is dependent upon General Fund monies, making it vulnerable to further budget cuts.

Such cuts have forced the AG to rely on the Better Business Bureau to screen all individual consumer complaints. The DOL hears no individual complaints. None.

An essential government service is lacking when we cannot provide protection for Alaskan consumers. Citizens rightfully expect their government to protect them from shysters. Elderly Alaskans are especially vulnerable.

To guard against further erosion in protection, HB49 would:

- re-establish a separate consumer protection section in the DOL,
- raise (from its original 1978 level) the fines our AG can pursue,
- and attempt to secure a funding stream via separate accounting.

Please help protect Alaskan consumers by supporting HB49.



# LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES  
LEGISLATIVE AFFAIRS AGENCY  
STATE OF ALASKA

APR 14 1997

(907) 465-3867 or 465-2450  
FAX (907) 465-2029  
Mail Stop 3101

130 Seward Street, Suite 409  
Juneau, Alaska 99801-2105

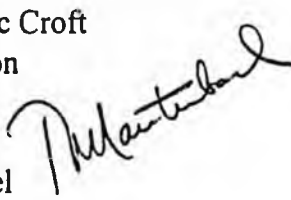
## MEMORANDUM

April 9, 1997

**SUBJECT:** Sectional Summary of SSHB 49. (Consumer protection)

**TO:** Representative Eric Croft  
Attn: Tom Atkinson

**FROM:** Terri Lauterbach  
Legislative Counsel



You have requested a sectional summary of the above-described bill.

As a preliminary matter, please note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents. You have not asked any specific questions about the bill, so this summary is brief. If you would like an interpretation of the bill as it may apply to a particular set of circumstances, let me know.

**Section 1.** Makes a technical change to reflect sec. 2.

**Section 2.** Establishes a consumer protection section in the Department of Law.

**Section 3.** Increases the civil penalty for violation of consumer protection laws.

**Section 4.** Indicates a legislative intent that the proceeds from consumer protection actions be appropriated for the expenses of the consumer protection section.

**Section 5.** Gives a July 1, 1997, effective date to the bill.

TML:jdr  
97-255.jdr

STATE OFFICE  
**ALASKA PEACE OFFICERS ASSOCIATION**

P.O. Box 240106 Anchorage, Alaska 99524-0106 Phone (907) 277-0515 Fax (907) 272-5355

January 17, 1997

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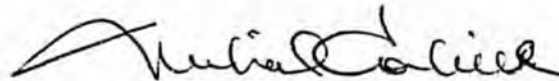
Representative Eric Croft  
Alaska State Legislature  
State Capitol (MS 3100)  
Juneau, Alaska 99801-1182

Dear Representative Croft,

On behalf of the Alaska Peace Officers Association, I would like to thank you for introducing House Bill 49 relating to the establishment of a division of consumer protection in the Department of Law. At a recent meeting of the APOA State Board, we decided unanimously to support this legislation. We believe that consumer fraud and other related crimes are a problem in Alaska and need enforcement and investigative attention.

We encourage you to call on us when there are hearings on this bill, so that we may testify about the need for this legislation. If you need assistance as you shepherd this bill through the legislative process, please call me at 451-5316, or our business manager, Joseph Young at 277-0515.

Sincerely,



Michael Corkill  
APOA State President

INTERNET ADDRESS:  
acoa@admin.state.ak.us



APR 04 1997

P.O. BOX 110209  
JUNEAU, AK 99811-0209  
(907) 465-3250  
FAX: 465-4716

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## Alaska Commission on Aging

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April 4, 1997

The Honorable Norman Rokeburg  
Chair  
House Labor and Commerce Committee  
State Capitol, Room 24  
Juneau, AK 99801-1182

Dear Mr. Chair:

On March 10, 1996 the Alaska Commission on Aging transmitted Resolution 97-5 (copy attached) to the House Labor and Commerce committee. The resolution requested a committee hearing in support of the need to establish a Consumer Protection Division as stated in SB 6 and HB 49. Since then, HB 203 has been introduced by Representatives Croft and Dyson. The Commission again recently stated its interest in a committee hearing. Consumer protection is of increasing interest to seniors of the State of Alaska in that citizens of this state lose an average of \$10 million per year to telemarketing fraud alone and a great proportion of these victims are Alaska's elderly. The Commission feels that creation of a Consumer Protection Division would save the State money by making it more difficult for fraudulent solicitors to do business in the State of Alaska.

Please consider again the urgency in holding a hearing concerning HB 49. Thank you for your attention to this.

Sincerely,

A handwritten signature in cursive script that reads "Donald M. Hoover".

Don Hoover  
Chair

DH/nl  
Attachment



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## Alaska Commission on Aging

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### RESOLUTION 97-5

*In support of holding a hearing concerning the need for a consumer protection division  
within the Department of Law*

**WHEREAS**, consumer protection is of particular importance to seniors; and

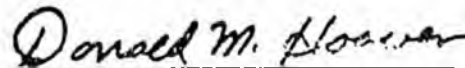
**WHEREAS**, fraudulent acts victimizing seniors and people of all ages in Alaska is occurring with increasing frequency; and

**WHEREAS**, there is a need to hear from the public on issues concerning fraudulent solicitations; and

**WHEREAS**, citizens of the State of Alaska would benefit from a consumer protection division;

**THEREFORE, BE IT RESOLVED** that the Alaska Commission on Aging requests the Labor and Commerce Committee hold hearings on this subject.

Adopted this 4th day of March, 1997.



Donald Hoover, Chair

# STATE OF ALASKA

DEPARTMENT OF LAW  
OFFICE OF THE ATTORNEY GENERAL

TONY KNOWLES, GOVERNOR

APR 14 1997

P.O. BOX 110300  
JUNEAU, ALASKA 99811-0300  
PHONE: (907) 465-3600  
FAX: (907) 465-2075

April 13, 1997

The Honorable Eric Croft  
Alaska State House of Representatives  
State Capitol  
Juneau, Alaska 99801-1182

Re: Consumer Protection

Dear Representative Croft:

Thank you for your interest in the Department of Law's consumer protection function, staffing levels, and enforcement efforts. This letter will summarize the current situation with regard to these issues.

## Consumer Protection Staffing and Budget Constraints

As you know, because of declining budgets over the past ten years, Alaska's consumer protection staffing has shrunk dramatically. For the last six or seven years, the Attorney General's Office has, regrettably, not had the resources necessary to handle the many thousands of individual consumer complaints each year from Alaskans. In this last year we have shifted assignments to add one additional attorney position for antitrust and consumer protection litigation, which brings us to a total of two assistant attorneys general and a part-time paralegal focusing on this work. However, this compares unfavorably with 5 attorneys and 8 paralegals that were dedicated to consumer protection and antitrust litigation in the early to mid-1980s.

The Department of Law has experienced a substantial reduction in general fund funding in recent years, and this has negatively affected our ability to do consumer protection work. For FY 97, only 32 percent of the Civil Division's funding is unrestricted general fund. The majority of the work of assistant attorneys general is funded through reimbursable services agreements (RSAs) with client agencies. RSA funds

from these agencies may only be expended for legal services for those agencies. Aside from the consumer protection/antitrust staff, virtually all of the attorney positions in the Fair Business Practices and Commercial sections are RSA-funded positions. Since no one agency is responsible for consumer protection and antitrust investigation and enforcement, there is no source other than the general fund to support this type of work directly. I would point out, however, that a number of the functions of the agencies that have RSAs for legal services provided by the Fair Business Practices and Commercial sections do, in fact, involve consumer protection matters. These include occupational licensing cases, rate proceedings before the Alaska Public Utilities Commission, enforcement actions against insurance companies, proceedings against licensees before the Alcoholic Beverage Control Board, and charitable gaming licensing issues. This is in addition to our direct consumer protection enforcement efforts, which, as noted above, are supported by the general fund.

The Fair Business Practices and Commercial sections provide legal services for the following client agencies:

1. Department of Commerce & Economic Development
  - a. Division of Occupational Licensing
  - b. Alaska Public Utilities Commission (APUC)
  - c. Division of Insurance
  - d. Division of Investments
  - e. Division of Banking, Securities & Corporations
  - f. Division of Measurement Standards
  - g. Other agencies within the Department of Commerce & Economic Development.
2. Department of Education
  - a. Professional Teaching Practices Commission
  - b. Commission on Postsecondary Education
3. Department of Labor
  - a. Employment Security Division
4. Department of Natural Resources
  - a. Division of Agriculture / Agricultural Revolving Loan Fund (ARLF)
5. Department of Revenue
  - a. Alaska Housing Finance Corporation (AHFC)
  - b. Alcoholic Beverage Control Board (ABC)

- c. Income and Excise Audit Division (I&E)
  - d. Permanent Fund Dividend Division
  - e. Charitable Gaming Division
- 6. Department of Law
    - a. Antitrust
    - b. Consumer Protection
  - 7. Executive Branch Ethics Act for all departments

### **How We Stretch Our Enforcement Dollars**

Although our consumer protection/antitrust staffing is limited, through creative use of resources the department has been able to stretch its enforcement dollar significantly beyond current staffing levels. One prime example of our efforts in this regard is the close cooperative relationship between the Department of Law and the Better Business Bureau of Alaska. The State has an excellent working relationship with the Better Business Bureau and relies heavily on it for investigative leads on a whole host of consumer protection violations.

The Attorney General's Office began referring consumers to the Better Business Bureau in 1989, shortly after the virtual elimination of the department's individual complaint mediation function, which had been handled by paralegals. While it is extremely effective in resolving many consumer matters on an informal basis, the BBB has no enforcement powers and is, therefore, powerless to deal with fraudulent businesses bent on bilking consumers unless and until ordered by a court to cease operating illegally. In recognition of this fact, the Legislature restored a modest amount of consumer protection funding in FY 1991. With this new funding, the Attorney General's Office was able to hire one attorney and one investigator devoted to pursuing a few of the most serious fraud cases where a pattern of consumer fraud was identified. And, as noted above, during FY 97 we have been able to devote an additional attorney position for consumer protection. However, our resources still do not allow us to handle the complaints of individual consumers.

In order to make the most of the department's modest consumer protection resources, the Attorney General's Office entered into a complaint referral and information sharing agreement with the BBB in September 1991. The BBB receives and processes thousands of consumer complaints from Alaskans each year. Under the agreement between the department and the BBB, the Attorney General's Office refers consumer

complaints from individuals to the BBB for informal resolution. The BBB, from its complaint files, identifies serious patterns of consumer fraud and refers these matters to this department for enforcement. The department files enforcement actions in Superior Court in appropriate cases:

- that affect large numbers of consumers;
- where the victims are without adequate means to solve the problem on their own;
- where the magnitude of actual or potential financial loss to the consumers supports the expenditure of scarce state enforcement resources;
- where enforcement action is likely to do some good; (e.g., where obtaining injunctive relief is a distinct possibility, and/or where the defendant is financially solvent); and
- where the victims are not also violators.

The agreement with the BBB has been renewed annually, and it is in effect today because our resources remain insufficient to handle the complaints of individual consumers. Given recent reductions in funding for state agencies, and particularly in the department's general fund funding, the Attorney General's Office would not be able to handle the thousands of telephone calls from the public concerning consumer fraud and deception and have personnel resources available to enforce the law in larger cases where a widespread pattern of serious violations has occurred. This arrangement is, therefore, a way of providing the most critical consumer protection service -- law enforcement, through prosecution of lawsuits by an attorney -- while keeping costs down by privatizing other consumer protection services, such as the complaint processing function formerly handled by paralegals.

Since 1991 when we privatized the individual complaint mediation function, the department has used its paralegals in the consumer protection area only to assist the attorney responsible for litigating consumer protection lawsuits. Since we no longer handle individual consumer complaints, we refer individual complainants to the BBB as a matter of routine practice. Many consumers are quite surprised and disappointed to learn that Alaska -- unlike virtually every other state -- does not handle individual consumer complaints. These consumers often demand to know what they can do to restore the department's capability to handle consumer complaints.