ALASKA LEGISLATURE COMMITTEE FILES, 2003-2004 8672
10776 HOUSE JUDICIARY

3. A, acting for P, takes out insurance on P's premises, advancing the amount of the premium and having the insurance taken in his own name to secure his advances. The insurance company declares a rebate or dividend upon the premiums paid. A is under a duty to credit this to P in spite of a contrary usage among insurance agents, not known to P.

Comment:

b. Gratuities to agent. An agent can properly retain gratuities received on account of the principal's business if, because of custom or otherwise, an agreement to this effect is found. Except in such a case, the receipt and retention of a gratuity by an agent from a party with interests adverse to those of the principal is evidence that the agent is committing a breach of duty to the principal by not acting in his interests.

Illustrations:

4. A, the purchasing agent for the P railroad, purchases honestly and for a fair price fifty trucks from T, who is going out of business. In gratitude for A's favorable action and without ulterior motive or agreement, T makes A a gift of a car. A holds the automobile as a constructive trustee for P, although A is not otherwise liable to P.

5. A, the purchasing agent of a large restaurant, receives gifts of packages of food for his private consumption from persons desiring to sell food to the restaurant. The owner, P, witnesses several of these transactions and says nothing. A's conduct is not a breach of duty to P, and P has no interest in the gifts.

Comment:

c. Use of confidential information. An agent who acquires confidential information in the course of his employment or in violation of his duties has a duty not to use it to the disadvantage of the principal, see § 395. He also has a duty to account for any profits made by the use of such information, although this does not harm the principal. Thus, where a corporation has decided to operate an enterprise at a place where land values will be increased because of such operation, a corporate officer who takes advantage of his special knowledge to buy land in the vicinity is accountable for the profits he makes, even though such purchases

have no adverse effect upon the enterprise. So, if he has "inside" information that the corporation is about to purchase or sell securities, or to declare or to pass a dividend, profits made by him in stock transactions undertaken because of his knowledge are held in constructive trust for the principal. He is also liable for profits made by selling confidential information to third persons, even though the principal is not adversely affected.

Comment:

d. Agent a finder. It is not within the scope of the Restatement of this Subject to state when a finder is entitled to retain lost or mislaid goods. If a finder other than a servant is entitled to retain goods lost or mislaid, a servant who finds goods on his master's premises is equally entitled, unless he has agreed otherwise with the master, as where he is employed to find such goods or to take charge of them if found. However, he may be required to surrender custody of the goods to his master temporarily.

e. Liability. For the liability of an agent for profits made by him through a violation of a duty of loyalty or through the use of the principal's assets, see Sections 403, 404, 407.

§ 389. Acting as Adverse Party without Principal's Consent

Unless otherwise agreed, an agent is subject to a duty not to deal with his principal as an adverse party in a transaction connected with his agency without the principal's knowledge.

Comment:

a. The rule stated in this Section applies to transactions which the agent conducts for his principal, dealing therein with himself, and also to transactions in which the agent deals with his principal, who acts in person or through another agent; it is applicable to transactions in which the agent is acting entirely for himself and to those in which he has such a substantial interest that it reasonably might affect his judgment. Thus, an agent who is appointed to sell or to give advice concerning sales violates his duty if, without the principal's knowledge, he sells to himself or purchases from the principal through the medium of a "straw," or induces his principal to sell to a corporation in which he has a large concealed interest. See the Restatement of Trusts, § 170.

The agent's failure to reveal that he has an interest in the transaction is sometimes spoken of as fraudulent. If the agent intends to take advantage of the principal, the epithet, with its implication of immorality, is justified. But, irrespective of the words used to characterize the agent's conduct, such a transaction can be rescinded by the principal although the agent acts in good faith and without consciousness of wrong doing.

b. Inferences as to disclosure. It may be understood at the time when the agent is appointed that he can properly buy or sell on his own account, as where the employees of a department store are permitted to buy at a discount. Unless the creation of the relation involves a peculiar trust and confidence (see Comment *e* on § 390), the agent is subject to no fiduciary duty in making the agreement by which he becomes agent and may thereafter act in accordance with its terms. Unless the terms of such an agreement provide otherwise, an agent acting as an adverse party, even though with the knowledge of the principal that he is so doing, is subject to the duty stated in Section 390 to reveal to the principal all the material facts which he knows or which he should know, and to deal fairly with the principal.

c. Where no harm to principal. The rule stated in this Section is not based upon the existence of harm to the principal in the particular case. It exists to prevent a conflict of opposing interests in the minds of agents whose duty it is to act solely for the benefit of their principals. The rule applies, therefore, even though the transaction between the principal and the agent is beneficial to the principal. Thus, in the absence of a known custom or an agreement, an agent employed to sell at the market price cannot, without disclosure to the principal, properly buy the goods on his own account, even though he pays a higher price for them than the principal could obtain elsewhere. The rule applies also although the transaction is a public sale and the price received is above that stated by the principal to be adequate. Likewise, ordinarily, an agent appointed to buy or to sell at a fixed price violates his duty to the principal if, without the principal's acquiescence, he buys from or sells the specified article to himself at the specified price, even though it is impossible to obtain more or as much. However, if a broker is employed to sell property with an agreement that he is to retain all above a specified price, it may be inferred that the transaction gives him an

option to purchase at that price without notice to the principal that he is acting for himself.

Comment:

d. Where principal has reason to know that agent has adverse interests. Failure by the agent to reveal that he is acting on his own account or that he has a personal interest in the transaction is immaterial if the principal consents to this or has manifested his consent. However, in the absence of definite knowledge that the agent is acting on his own account, the principal is not barred by the fact that he has merely reason to know that the agent is so acting. A usage of brokers or factors to buy or to sell their own chattels to the principal does not give them a privilege to do so, unless the principal knows or has reason to know of such usage or has given the agent reason to believe that he consents. Merely authorizing an agent to act in a particular market does not manifest to the agent that the principal assents to a custom of the market by which the agent can properly buy from or sell to the principal in disparagement of the fiduciary relation. If, however, the principal is adequately protected, as he is by the current rules of most stock exchanges, the custom may validate such a purchase or sale by the agent.

Illustrations:

1. A, employed by P to buy land, owns land which is in the name of T. A persuades P to buy the land at a fair price. Before the transaction is consummated, P learns that A is the owner and thereafter completes the transaction without revealing his knowledge to A. In the absence of other facts, the transaction cannot be rescinded by P.

2. P authorizes A, a stockbroker, to buy shares. Acting in accordance with the custom of the stock exchange, A sells his own shares to P who believes that A bought them for him from another. The transaction is voidable at P's election, although P had reason to know of the custom of the stock exchange, unless its rules adequately protect the interests of the purchaser.

Comment:

e. Burden of proof. The burden of proof is upon the agent to show that he has satisfied the duties required by the rules stated in this Section.

See Appendix for Reporter's Notes, Court Citations, and Cross References

Although the transaction is with a third person in form, the fact that the other contracting party is a relative or a friend of the agent may be evidence that the transaction is in effect on account of the agent in whole or in part.

f. Extrinsic matters. As to matters not connected with the agency, an agent can properly deal as freely with his principal as if he were not an agent, except to the extent that he acts because of information concerning the transaction obtained in connection with the agency (see § 395), or where the existence of the agency creates a general confidential relation between the principal and him.

Illustration:

3. A is P's bookkeeper. Learning that P desires to purchase a house, A employs B to sell P a house in which A has an interest, his interest not being revealed to P. The transaction cannot be rescinded by P because of the failure to disclose A's interest, unless A has reason to know that P would not have purchased the house if he had known of A's connection with it.

Comment:

g. Liabilities. The liabilities of an agent for a breach of the duty stated in this Section and the defenses which he may make are stated in Sections 399–421 A.

§ 390. Acting as Adverse Party with Principal's Consent

An agent who, to the knowledge of the principal, acts on his own account in a transaction in which he is employed has a duty to deal fairly with the principal and to disclose to him all facts which the agent knows or should know would reasonably affect the principal's judgment, unless the principal has manifested that he knows such facts or that he does not care to know them.

Comment:

a. Facts to be disclosed. One employed as agent violates no duty to the principal by acting for his own benefit if he makes a full disclosure of the facts to an acquiescent principal and takes no unfair advantage of him. Before dealing with the prin-

cipal on his own account, however, an agent has a duty, not only to make no misstatements of fact, but also to disclose to the principal all relevant facts fully and completely. A fact is relevant if it is one which the agent should realize would be likely to affect the judgment of the principal in giving his consent to the agent to enter into the particular transaction on the specified terms. Hence, the disclosure must include not only the fact that the agent is acting on his own account (see § 389), but also all other facts which he should realize have or are likely to have a bearing upon the desirability of the transaction from the viewpoint of the principal. This includes, in the case of sales to him by the principal, not only the price which can be obtained, but also all facts affecting the desirability of sale, such as the likelihood of a higher price being obtained later, the possibilities of dealing with the property in another way, and all other matters which a disinterested and skillful agent advising the principal would think reasonably relevant.

If the principal has limited business experience, an agent cannot properly fail to give such information merely because the principal says he does not care for it; the agent's duty of fair dealing is satisfied only if he reasonably believes that the principal understands the implications of the transaction.

Illustrations:

1. P employs A to sell Blackacre for $1,000. A, having sought a customer, is unable to find one and reports such fact to P. He then states that he is willing to pay $1,000, telling P truthfully that he believes that a better sale might be made later in view of the chance that the locality will develop. A pays P $1,000. A month later, A sells the land for $1,500. In the absence of other facts, A has violated no duty to P.

2. P employs A to purchase a suitable manufacturing site for him. A owns one which is suitable and sells it to P at the fair price of $25,000, telling P all relevant facts except that, a short time previously, he purchased the land for $15,000. The transaction can be rescinded by P.

Comment:

b. Facts which agent should know. The duty is positive so that, although the agent is inadvertent in failing to reveal rele-

vant facts in his possession, the transaction is voidable by a principal ignorant of them. Furthermore, to the extent that the agent has a duty to the principal to have or to acquire relevant information concerning the subject matter of the agency, he is not privileged to deal with the principal unless he discloses the information which he thus would have if he had been competent and attentive to his duties as agent, unless he reveals, or the principal otherwise knows of, his ignorance. These statements are subject to the limitation that if the principal manifests that he knows all material facts or, if he is a person of mature judgment, is willing to deal without knowing them, the agent is not liable if he fails to reveal them.

Illustration:

3. P, from New York, writes to A, a real estate broker in Chicago, asking him to obtain a customer for Blackacre, which is on the outskirts of Chicago, and to advise P as to what would be a fair price. A, without investigating, except by a reference to the map and his general knowledge of Chicago, fixes a price of $5,000, and so writes to P, not stating the basis of his opinion. This price would be fair were it not for the fact that a new enterprise is being conducted within a few yards of Blackacre making Blackacre worth $8,000, a fact which A would have discovered by reasonable investigation. Later, in ignorance of this, A offers P $5,000, which P accepts. This transaction can be rescinded, and A is subject to liability to P for any loss which P suffers through his belief that the transaction was at a fair price.

Comment:

c. Fairness. The agent must not take advantage of his position to persuade the principal into making a hard or improvident bargain. If the agent is one upon whom the principal naturally would rely for advice, the fact that the agent discloses that he is acting as an adverse party does not relieve him from the duty of giving the principal impartial advice based upon a carefully formed judgment as to the principal's interests. If he cannot or does not wish to do so, he has a duty to see that the principal secures the advice of a competent and disinterested third person. An agent who is in a close confidential relation

See Appendix for Reporter's Notes, Court Citations, and Cross References

to the principal, such as a family attorney, has the burden of proving that a substantial gift to him was not the result of undue influence. Even though an agent employed to sell is not in such a position, payment of less than the reasonable market value for property he buys from the principal is evidence that the bargain was unfair. If the principal is not in a dependent position, however, and the agent fully performs his duties of disclosure, a transaction of purchase and sale between them is not voidable merely because the principal receives an inadequate price or pays too great a price.

Illustrations:

4. P, a young physician with some inherited wealth and no business experience, places his property in charge of A to manage. Desiring a particular piece of land which represents a large share of P's assets, A waits until there is a slump in the price of land and, believing correctly that the slump is only temporary, suggests to P that it be sold, offering as an incentive that P's income from his profession will increase and that, although the price to be obtained is low, P can well afford to get more enjoyment from the proceeds now than from a larger amount later. P thereupon agrees to sell to A at a price which is as much as could be obtained at that time for the property. It may be found that A violated his duty of dealing fairly with P.

5. Same facts as in Illustration 4, except that A provides P with an independent experienced adviser, who gives disinterested advice, setting out the possibilities of accretion in values. It may be found that A has satisfied his duty of loyalty.

Comment:

d. Extrinsic matters. An agent is not, as such, in a fiduciary relation with the principal as to matters in which he is not employed. Thus, a factor employed to sell chattels for the principal can properly deal with him at arm's length concerning the purchase of land, except that, in so doing, he may not properly use confidential information which he has acquired and which the principal does not know him to have. However, an agent may be in such a confidential relation to the principal that he has a duty of disclosure and fair dealing as to all matters.

See Appendix for Reporter's Notes, Court Citations, and Cross References

Thus, the family solicitor, employed primarily to give legal advice, is under a duty of fair dealing in any transaction with the client.

e. Agreements for compensation. A person is not ordinarily subject to a fiduciary duty in making terms as to compensation with a prospective principal. If, however, as in the case of attorney and client, the creation of the relation involves peculiar trust and confidence, with reliance by the principal upon fair dealing by the agent, it may be found that a fiduciary relation exists prior to the employment and, if so, the agent is under a duty to deal fairly with the principal in arranging the terms of the employment.

Illustration:

6. P, an ignorant person, visits A, an attorney, asking for advice concerning the prosecution of a claim. A honestly advises P to bring suit but obtains from P a promise to pay A an exorbitant sum in compensation, representing tacitly that it is the usual fee for such services. The transaction between A and P is rescindable if A has taken advantage of his position as the adviser of P to obtain an unduly large compensation.

Comment:

f. After termination of the relation. An agent may continue in a confidential relation with the principal after his agency has terminated. If so, he is subject to the duties stated in this Section. See § 396.

g. Burden of proof. The burden of proof is on the agent to show that he has satisfied all the duties required by the rules stated in this Section.

h. Liabilities. The liabilities of an agent for a breach of the duty stated in this Section and the defenses he may make, are stated in Sections 399–421 A.

§ 391. Acting for Adverse Party without Principal's Consent

Unless otherwise agreed, an agent is subject to a duty to his principal not to act on behalf of an adverse party in a transaction connected with his agency without the principal's knowledge.

See Appendix for Reporter's Notes, Court Citations, and Cross References

Comment:

a. Effect of custom. The terms of the employment may give a privilege to the agent to act for adverse parties, and such terms may be shown by a prior course of dealing between the principal and agent or by a custom of which the principal should be aware. See §§ 34–46. A custom that an agent can properly act for an adverse party is usually so unreasonable that, in the absence of knowledge by the principal, he is not affected by it if the agent is to exercise any discretion or is employed to give advice to the principal. However, a custom of stockbrokers employed to buy or to sell at a fixed price or "at the market," by which the broker may sell on account of one client in filling the order of another, binds both customers, if the custom is sufficiently widespread so that they have reason to know of it. In thus acting for two principals, the agent is subject to the duty of fair dealing stated in Section 392.

b. Where act not inconsistent with agent's duty. An agent can properly deal with the other party to a transaction if such dealing is not inconsistent with his duties to the principal. Thus, an agent employed to sell can properly lend money to the buyer to complete the purchase or he may "split" his commission with the buyer, unless because of business policy or otherwise it is understood that he is not to do so.

c. Dealings with agents of other principals. Not only must an agent not act in the interests of other parties without the consent of all concerned, but he must not enter into transactions with agents of other principals, the effect of which may give the agent a self-interest in improperly advising his principal.

Illustration:

1. A, representing P, who desires to purchase land, agrees with C, who represents B, a seller of land, that A and C will endeavor to effect a transaction between their principals and will pool their commissions. A and C commit a breach of duty to P and B.

Comment:

d. Agent as intermediary. If a broker is employed not only to bring parties together but to arrange terms, make representations, or give advice, action for both parties without each principal's knowledge is a breach of duty to each. If, however,

he has no independent initiative and is employed only to introduce the parties to each other, or if he is entitled to retain all above a fixed sum, he has no duty to disclose that he is acting for the other party.

Illustrations:

2. P employs A to find a purchaser of his house at the highest obtainable price, A to have a commission of 5 per cent. Unknown to P, A has been employed by T to find a suitable house for him at the lowest possible price. A introduces P to T and, without disclosing his relations with T, urges P to sell at the price offered by T. This is a breach of duty to P.

3. P, wishing to sell his house, publicly offers a commission of 5 per cent. to any person who will introduce P to a person who subsequently purchases P's house at a price satisfactory to P. A, a broker, comes to P's office with T and, without disclosing that T has employed A to find a house for him, urges P to sell at the price offered by T. P sells to T. A is entitled to the commission.

Comment:

e. Evidence. The receipt of anything of a substantial nature from an adverse party to a transaction is evidence that the agent is acting on behalf of such person and is sufficient, without more, to sustain a judgment against the agent. Likewise, the promise of an indirect reward by the other party is sufficient evidence of improper conduct, as when a buyer tells a selling agent that if the sale to him is made, he will employ the agent to take charge of the premises for him.

f. Liabilities of agent. The liabilities of an agent for a breach of the duty stated in this Section, and the defenses which he may make, are stated in Sections 399–421A.

g. Liability of third persons. A person who knows that another has employed an agent to conduct a transaction with him is subject to liability to the other for secretly employing the other to act on his account in the transaction. Such an agreement is illegal and unenforceable. The defrauded principal can rescind the transaction with the other principal, or he can affirm it and recover damages from him, or damages or profits from the

See Appendix for Reporter's Notes, Court Citations, and Cross References

agent. If neither principal knows of the double employment, either can rescind. See §§ 312, 313 and 407.

§ 392. Acting for Adverse Party with Principal's Consent

An agent who, to the knowledge of two principals, acts for both of them in a transaction between them, has a duty to act with fairness to each and to disclose to each all facts which he knows or should know would reasonably affect the judgment of each in permitting such dual agency, except as to a principal who has manifested that he knows such facts or does not care to know them.

Comment:

a. Fairness. An agent employed by both parties to a transaction, with knowledge by them of his double employment, has the same duty to act with fairness to each that an agent has in dealing with his principal on his own account. See § 390. If he is employed to complete a transaction for them, he must act with consideration for the interests of each; if he is employed by each to give advice, his advice must be impartial.

b. Disclosure. One employed as agent violates no duty to the principal by acting for another party to the transaction if he makes a full disclosure of all relevant facts which he knows or should know, or if the principal otherwise knows of them and acquiesces in the agent's conduct. See Comment *a* on § 390. The agent's disclosure must include not only the fact that he is acting on behalf of the other party, but also all facts which are relevant in enabling the principal to make an intelligent determination, such as the prior relations between the agent and the other party, and the knowledge or lack of knowledge by the other party that the agent is acting for the principal. The agent, however, is under no duty to disclose, and has a duty not to disclose to one principal, confidential information given to him by the other, such as the price he is willing to pay. If the information is of such a nature that he cannot fairly give advice to one without disclosing it, he cannot properly continue to act as adviser.

Illustrations:

1. A, employed by B to sell Blackacre, is requested by P to act for him in its purchase. A agrees, after telling P

that he has been employed by B to sell it, and all other relevant facts, except the fact that B is unaware of A's employment by P. A completes the transaction to the mutual satisfaction of A and B. A has committed a breach of duty to P as well as to B and can not recover compensation from either. Since B is entitled to rescind the transaction, P does not obtain the valid transaction which he expected.

2. Same facts as in Illustration 1, except that A tells P that B does not know of the double employment. A commits no breach of duty to P, although he commits a breach of duty to B. The transaction between P and A is such a violation of business morality as to prevent A from recovering compensation from P. See the Restatement of Contracts, § 570.

§ 393. Competition as to Subject Matter of Agency

Unless otherwise agreed, an agent is subject to a duty not to compete with the principal concerning the subject matter of his agency.

Comment:

a. The reasons for the rule stated in this Section are the same as those which prevent an agent from dealing with the principal as an adverse party, and the rule stated in Section 390 as to the duties of disclosure and fair dealing is applicable.

There is no violation of the agent's duty if the principal understands that the agent is to compete; a course of dealing between the parties may indicate that this is understood. Likewise, an agent can properly act freely on his own account in matters not within the field of his agency and in matters in which his interests are not antagonistic to those of the principal, except that he can not properly thus use confidential information.

b. Principal's interests preferred to agent's. In the usual case, it is the agent's duty to further his principal's interests even at the expense of his own in matters connected with the agency. Thus, an agent to buy or to sell for the principal must not buy or sell in competition with the principal, unless it is so agreed. An agent employed to purchase a particular piece of land must not purchase it on his own account as long as it is possible to purchase it for the principal. However, it is not wrong-

See Appendix for Reporter's Notes, Court Citations, and Cross References

ful for him to purchase such land for himself if he cannot purchase it for the principal on terms which the principal is willing to make after learning the facts. An agent employed to purchase unspecified goods in the open market can properly purchase goods of the same kind for himself or for some one else, if such purchase does not affect the price or prevent the required amount from being purchased for the principal. If it does so affect the price or amount, the agent is not privileged to do this, unless it is agreed that he can act for himself or for some one else.

c. Where no use of principal's facilities. The rule stated in this Section applies although the agent does not use his employer's facilities or time. Unless otherwise understood, an agent employed to acquire information for the use of the principal is under a duty to report to the principal or to use for his benefit any information relevant to the subject matter of the agency which he acquires, unless it is obtained confidentially from another, who restricts its use. Thus, an agent, employed to act exclusively for the benefit of the principal in looking for paying mines or oil wells, who independently and out of business hours discovers one which he purchases for his own account, holds it as constructive trustee for the principal who is entitled to it upon payment of what it cost the agent. As to patentable ideas acquired by the agent, see Section 397.

The agent is entitled to use knowledge which he acquires independently for all purposes except that of competition with the principal in matters entrusted to him.

d. Where unavoidable conflict of interests. If, without the violation of a duty on the part of an agent, a situation arises in which the principal's affairs conflict with those of the agent, the agent has a duty to deal fairly in the protection of the principal's interests. Thus, if an attorney regularly employed to collect claims receives a claim for collection against a personal debtor and there is no opportunity for him to notify the client of his conflict of interests, he must not attach the debtor's goods on account of his debt to the exclusion of the principal. Likewise, if an agent, such as a factor, has a lien on his principal's goods which he can enforce by sale of the subject matter, he should exercise it with due consideration for the interests of the principal and, if reasonably possible, only after giving the principal an opportunity to take remedial action. See § 464.

See Appendix for Reporter's Notes, Court Citations, and Cross References

e. Preparation for competition after termination of agency. After the termination of his agency, in the absence of a restrictive agreement, the agent can properly compete with his principal as to matters for which he has been employed. See § 396. Even before the termination of the agency, he is entitled to make arrangements to compete, except that he cannot properly use confidential information peculiar to his employer's business and acquired therein. Thus, before the end of his employment, he can properly purchase a rival business and upon termination of employment immediately compete. He is not, however, entitled to solicit customers for such rival business before the end of his employment nor can he properly do other similar acts in direct competition with the employer's business.

The limits of proper conduct with reference to securing the services of fellow employees are not well marked. An employee is subject to liability if, before or after leaving the employment, he causes fellow employees to break their contracts with the employer. On the other hand, it is normally permissible for employees of a firm, or for some of its partners, to agree among themselves, while still employed, that they will engage in competition with the firm at the end of the period specified in their employment contracts. However, a court may find that it is a breach of duty for a number of the key officers or employees to agree to leave their employment simultaneously and without giving the employer an opportunity to hire and train replacements.

Illustration:

1. A is employed by P as manager for a year. Before the end of the year, A decides to go into business for himself; in anticipation of this and without P's knowledge, he contracts with the best of P's employees to work for him at the end of the year. At the end of the year, A engages in a competing business and employs the persons with whom he has previously contracted. A has committed a breach of his duty of loyalty to P.

Comment:

f. Liabilities. The liabilities of an agent for a breach of the duty stated in this Section and the defenses which he may make, are stated in Sections 399–421 A.

§ 394. Acting for One with Conflicting Interests

Unless otherwise agreed, an agent is subject to a duty not to act or to agree to act during the period of his agency for persons whose interests conflict with those of the principal in matters in which the agent is employed.

Comment:

a. The rule stated in this Section goes beyond that stated in Section 391, which is limited to situations in which the agent acts for an adverse party in a transaction to which the principal is a party. Under the rule stated in this Section, the agent commits a breach of duty to his principal by acting for another in an undertaking which has a substantial tendency to cause him to disregard his duty to serve his principal with only his principal's purposes in mind. Thus, an agent has a duty not to act for a competitor of his principal unless this is permitted by the understanding of the parties. This is true although the agent does not agree to give his full time to the principal's business and does not use the time paid for by the principal in acting for another. The danger that he will not be impartial and that he will use confidential information obtained in the business of one in the affairs of the other makes it improper for him to act for both.

b. When agent can properly act for competitors. The agent commits no breach of duty by acting for competitors if, at the time of his employment, the principals have reason to know that the agent believes that he is privileged to do so. However, in obtaining consent of the principals to such competition, the agent is subject to the duty of disclosure stated in Section 392.

In many cases the circumstances indicate an understanding that the agent is entitled to act for principals whose interests conflict, although none of them know that he is so acting or that he intends to do so. The constituents of a factor or a broker are normally competing with each other in the sale of goods. That one is the exclusive selling agent of his principal does not necessarily preclude him from acting for others. In the absence of a conclusive custom or a course of dealings, all facts of the situation are considered in determining the mutual understanding. It is much easier to find that an agent is privileged to act for a competitor than to find that an agent is privileged to act

See Appendix for Reporter's Notes, Court Citations, and Cross References

for an adverse party, since acting for a competitor has merely a tendency to reduce the diligence of the agent and not, as where the agent is acting for an adverse party, to cause him to give improper advice or to take improper action. Ordinarily, if the agent can properly act on his own account in competition with the principal (see § 393), he is entitled to act for others.

Illustration:

1. P, a manufacturing company, enters into a contract with A, another corporation, the business of which is representing manufacturers. By the terms of the contract A is to have the exclusive agency to sell P's products. A makes other similar contracts with competing manufacturers. In the absence of further facts, A thereby commits no breach of duty to P.

Comment:

c. Unavoidable conflict of interests. Under some circumstances, an agent may have a duty to act for persons whose interests are adverse to each other. Thus, an attorney who has agreed to accept claims for collection for two clients may simultaneously receive a claim from each against the same debtor under conditions requiring immediate action. In such case, if he cannot communicate with his clients, it would be understood that he must act with a view to protecting them equally.

d. Attorneys. Unless an attorney makes full disclosure to his client, it is improper for him, in court proceedings or otherwise, to act for two clients whose interests conflict. This statement applies to an attorney acting for an administrator and claimants against the estate; to an attorney who represents persons having disputed claims against any fund, such as that of a bankrupt estate, since, even though none of them has a preferred claim, the success of one will diminish the amount which the other may receive; and to a patent attorney whose clients may have conflicting rights. With full disclosure, and especially if there is no dispute as to the rights of the parties, it is proper, and frequently desirable in the interests of economy, for an attorney to represent clients whose claims are only theoretically adverse. Thus, it is desirable for one attorney to represent several creditors of a bankrupt estate, if there is no substantial doubt as to the validity of the claims, and if due disclosure is made.

See Appendix for Reporter's Notes, Court Citations, and Cross References

Likewise, an attorney can properly represent all the creditors of a bankrupt in proceedings after their claims have been allowed. In divorce proceedings and in other cases in which the public has an interest, it is improper for an attorney to represent even consenting clients who are adversary parties only pro forma.

e. Liabilities. The liabilities of the agent for a breach of the duty stated in this Section, and the defenses which he can make, are stated in Sections 399–421 A.

§ 395. Using or Disclosing Confidential Information

Unless otherwise agreed, an agent is subject to a duty to the principal not to use or to communicate information confidentially given him by the principal or acquired by him during the course of or on account of his agency or in violation of his duties as agent, in competition with or to the injury of the principal, on his own account or on behalf of another, although such information does not relate to the transaction in which he is then employed, unless the information is a matter of general knowledge.

Comment:

a. The relation of principal and agent permits and requires great freedom of communication between the principal and the agent; because of this, the agent is often placed in a position to obtain information of great use in competing with the principal. To permit an agent to use, for his own benefit or for the benefit of others in competition with the principal, information confidentially given or acquired by him in the performance of or because of his duties as agent would tend to destroy the freedom of communication which should exist between the principal and the agent. The agent also has a duty not to use information acquired by him as agent or by means of opportunities which he has as agent to acquire it, or acquired by him through a breach of duty to the principal, for any purpose likely to cause his principal harm or to interfere with his business, although it is information not connected with the subject matter of his agency. Thus, an agent who is told by the principal of his plans, or who secretly examines books or memoranda of the employer, is not privileged to use such information at his principal's expense.

See Appendix for Reporter's Notes, Court Citations, and Cross References

Illustration:

1. A, a reporter on a newspaper, learns by eavesdropping that his employers are about to renew the lease on the building in which the newspaper is run. He secretly visits the lessor and obtains a lease on his own account. He may be required to hold this lease as constructive trustee for the newspaper.

Comment:

b. Scope of rule. The rule stated in this Section applies not only to those communications which are stated to be confidential, but also to information which the agent should know his principal would not care to have revealed to others or used in competition with him. It applies to unique business methods of the employer, trade secrets, lists of names, and all other matters which are peculiarly known in the employer's business. It does not apply to matters of common knowledge in the community nor to special skill which the employee has acquired because of his employment. As to the obtaining and use of patents in competition with the employer, see Section 397.

c. When principal consents. In obtaining consent of the principal to use or disclose confidential information, the agent is under the duty of disclosure stated in Section 390.

d. Before and after agency. A person who, in view of a prospective agency, invites a confidence from or permits the prospective principal to reveal confidential information to him, is subject to the same duties with respect to such information as if, at the time the confidence was given, he were in fact an agent.

After the termination of the agency, an agent is entitled to use information obtained by him as agent in competition with former principals to the extent stated in Section 396.

e. Where no violation of duty or loss to the principal. Even though the agent properly acquires and uses confidential information concerning his principal's activities in the course of employment, he has a duty to account to the principal for any profits thereby made. See § 388.

f. Protection of interests of others. An agent is privileged to reveal information confidentially acquired by him in the course of his agency in the protection of a superior interest of himself or of a third person. Thus, if the confidential information is to

the effect that the principal is committing or is about to commit a crime, the agent is under no duty not to reveal it. However, an attorney employed to represent a client in a criminal proceeding has no duty to reveal that the client has confessed his guilt.

g. Liabilities. The liabilities of an agent for a breach of the duties stated in this Section, and the defenses which can be made, are stated in Sections 399–421 A. The liabilities to the principal of a third person who benefits from the misuse of confidential information are stated in Sections 311–314.

§ 396. Using Confidential Information after Termination of Agency

Unless otherwise agreed, after the termination of the agency, the agent:

(a) has no duty not to compete with the principal;

(b) has a duty to the principal not to use or to disclose to third persons, on his own account or on account of others, in competition with the principal or to his injury, trade secrets, written lists of names, or other similar confidential matters given to him only for the principal's use or acquired by the agent in violation of duty. The agent is entitled to use general information concerning the method of business of the principal and the names of the customers retained in his memory, if not acquired in violation of his duty as agent;

(c) has a duty to account for profits made by the sale or use of trade secrets and other confidential information, whether or not in competition with the principal;

(d) has a duty to the principal not to take advantage of a still subsisting confidential relation created during the prior agency relation.

Comment on Clause (a):

a. Although an agent has no duty after the termination of the agency not to compete with the principal, during the continuance of the agency he has a duty not to do disloyal acts looking to future competition. See Comment *e* on § 393.

A contract by an agent not to compete with his principal during such time as may reasonably be necessary for the protec-

tion of the employer or principal is valid if it does not impose undue hardship on the agent. See the Restatement of Contracts, § 516. Whether or not a particular contract imposes an undue hardship on the employee or is necessary for the employer's protection is a question of judgment. In some states, an agreement which imposes unreasonable restrictions upon an agent because of time or space limits can be reformed to operate within reasonable limits; in other states, if it is bad as made, it is ineffective. In a few states, statutes have been enacted having the effect of making ineffective agreements between principal and agent by which the agent agrees not to exercise his trade or profession in competition with a former principal.

Illustrations:

1. P employs A as a salesman in a mercantile business for three years. As part of the contract of employment, A promises not to compete with the employer in the same small town for two years after its termination. The restraint is reasonable.

2. P employs A, a young man, as a salesman in a mercantile business for three years. As part of the contract of employment A promises never to compete with the employer in the same town. The restraint is unreasonable.

Comment on Clause (b):

b. The duty of an agent not to compete with the principal by using for his own purposes unique assets of the business, such as trade secrets, which are frequently of great value as long as they remain secret, does not terminate with the employment. Such assets a former agent cannot properly use for his own purposes. On the other hand, during his agency, an agent frequently acquires information concerning the methods of his employer in doing business and becomes acquainted with his employer's customers and their desires. Information of this sort is barred from use in competition with his employer only to the extent that, considering all the circumstances, it would be unfair to his former employer for the agent to use it. In determining this, the desirability of permitting employees to be free to terminate the relation and the fact that often their chief assets after such termination consist of the special skill and knowledge acquired during the relation are factors to be considered. Thus, although an

agent cannot properly subsequently use copies of written memoranda concerning customers, which were entrusted to him or made by him for use in the principal's business, or processes which the employer has kept secret from other manufacturers, he is normally privileged to use, in competition with the principal, the names of customers retained in his memory as the result of his work for the principal and also methods of doing business and processes which are but skillful variations of general processes known to the particular trade.

However, it is unfair conduct to secure a position primarily for the purpose of ascertaining business methods of the employer for the use of a competitor or the memorizing of names, not as incidental to the employment, but primarily for later competition. If the principal's business consists primarily of gathering information and selling it to others, a manager who consciously memorizes this information, its sources, and the names of persons likely to use it, is not permitted to compete after leaving the employment.

c. A former agent cannot properly use in competition with the principal information acquired from the principal by a breach of duty as agent. Thus, his use of information acquired by eavesdropping or by the unpermitted examination of the records of his employer is a breach of duty to the principal.

d. The duty of the former agent is not only not to compete with the principal by the unfair use of information, but also not to use such information to the principal's disadvantage, as where he sells it to a third person, or gives it general circulation.

e. The liabilities of an agent for a breach of the duty stated in this Section, and the defenses which he may make, are stated in Sections 399–421 A.

f. The liability of a third person to whom, in violation of his duty, a former agent conveys information or on whose account he acts is the same as in other cases in which the agent violates a fiduciary duty in dealing with him. See §§ 311–314. An injunction, with or without damages, is the usual remedy.

Comment on Clause (c):

g. Trade secrets and other similar private information constitute assets of the principal. Their subsequent use by a former agent is as improper as the use of other assets, and, whether or

not the use is in competition, it is the basis for a restitutional claim, as is the use of a patent for noncompetitive purposes. Thus, a servant who is given confidentially a secret method of compounding an alloy, used by his employer only in manufacturing automotive parts, is liable to him for profits made by him after termination of his employment in manufacturing noncompetitive commodities or in selling the information to noncompetitors.

h. Although a servant is not entitled to use secret methods disclosed to him by the master, he is entitled to utilize either in competition or otherwise any skill which he may have acquired in service. Thus the skill with which an iron worker can determine the exact moment for pouring molten iron, and the skill of the glass moulder in handling his tools, although the result of the master's directions, become part of the personality of the servant which he is entitled to use freely. Likewise the skill which comes from aptitude plus training in selling goods becomes the agent's to use for himself, unless prevented by his agreement not to do so.

i. Attorneys. An attorney who has been employed to advise, or to represent a client in actions against others, is not entitled subsequently to advise or represent other clients as to matters in which a knowledge of the first client's affairs can be used to his disadvantage. To prevent the attorney from acting for another it is not necessary for the former client to prove that the attorney will use such information; it is sufficient to prove that the attorney had acquired confidential information which might be used.

Comment on Clause (d):

j. An agent may become one to whom the principal looks for advice outside the matters on which he is employed, and, although the formal relation of principal and agent has ceased, there may remain a confidential relation. This is likely to be true where an agent is employed sporadically in individual transactions, each one of which is a unit. Thus, one who customarily buys or sells property through a broker can properly assume that the broker will keep confidential information given him in matters connected with dealings in such property, although not in connection with a transaction in which he is employed. Even more readily does one who employs an attorney become entitled

See Appendix for Reporter's Notes, Court Citations, and Cross References

to regard the attorney as one to whom information can be given freely and as one who will not use for his own advantage or that of others information thus given. Further, in dealings between the parties, the existence of the confidential relation creates the same duties of disclosure and advice as those required when an agent is dealing with his principal. See §§ 390 and 391.

Where there is a misuse of the confidence reposed by a person in such a confidential relation, an action of tort or for restitution lies.

§ 397. When Agent Has Right to Patents

Unless otherwise agreed, a person employed by another to do noninventive work is entitled to patents which are the result of his invention although the invention is due to the work for which he is employed.

Comment:

a. A person who has discovered a principle or device for which a patent is issued is entitled to the ownership of the patent unless, at the time of the employment or subsequently, he agrees to convey it to another. Such an agreement may be found in specific terms in a contract of employment or from the circumstances surrounding the employment, the nature of the work done, and the relations of the parties during the employment. For the employer to be entitled to a patent it is not necessary that the contract should specifically so provide. Whether or not the inventions of the employee are to belong to the employer is a question to be decided upon all the facts of the individual case. There is no inference from the mere fact of employment that an employee agrees that his employer is to own patentable ideas which are discovered in the course of or as a consequence of the work which the employee is employed to do. This is true although the employee uses the tools and facilities of the employer in developing the idea. If, however, one is employed to do experimental work for inventive purposes, it is inferred ordinarily, although not so specifically agreed, that patentable ideas arrived at through the experimentation are to be owned by the employer. This is even more clear where one is employed to achieve a particular result which the invention accomplishes. On the other hand, if one is employed merely to do work in a particular line

See Appendix for Reporter's Notes, Court Citations, and Cross References

in which he is an expert, there is no inference that inventions which he makes while so working belong to the employer.

b. License to use patent. Although the facts do not show an agreement that the employer is to own a patent which is the result of the employee's invention, if the invention is made by an employee using the employer's facilities for the purpose of experimentation and invention in connection with the work for which he is employed, it is the reasonable inference that the employer is to have, without charge, a nonexclusive license to manufacture and use the patented device or process in the regular course of the business in which the employee is employed at the time of the invention.

c. Use of employer's time or facilities. The fact that an employee uses time which he should have devoted to his employer's affairs in perfecting a patent does not entitle the employer to the patent. This is true even though, in addition, the employee has used improperly the employer's tools. However, if the employer's time or facilities are used without his permission, and the employee invents a device which can be used in the regular business of the employer, the latter is given a nonexclusive license to manufacture and use it.

Illustrations:

1. A, employed as a shop foreman by P, improperly uses his own time and the tools of his employer in perfecting a device not used in the employer's business, and obtains a patent. P is not entitled to an assignment of the patent or to manufacture or use the device. He is entitled to compensation for the use of the tools.

2. Same facts as in Illustration 1, except that the device is an improvement on a machine manufactured by the employer. The employer is entitled to manufacture and use the device.

§ 398. Confusing or Appearing to Own Principal's Things

Unless otherwise agreed, an agent receiving or holding things on behalf of the principal is subject to a duty to the principal not to receive or deal with them so that they will appear to be his own, and not so to mingle them with his own things as to destroy their identity.

See Appendix for Reporter's Notes, Court Citations, and Cross References

Comment:

a. Duty to act in principal's name. Unless the circumstances indicate otherwise, it is inferred that an agent employed to act for the principal is to act in the principal's name (see § 40), and is to have the title to anything obtained for the principal vested in the principal's name. The requirement that the agent shall act in the principal's name is of especial importance in transactions by the agent with third persons who would have a right of set-off if the transaction were on the agent's own account and in the purchase of property, in which case, if title were in the agent's name, the property would be subject to attachment by the agent's creditors.

Illustration:

1. A, P's agent, sells goods for P on credit, taking a note payable to himself for the whole amount. Unless A is a del credere agent or there are other circumstances justifying the receipt of a note in this form, he is subject to liability to P for any loss caused by having the note made in his name.

Comment:

b. Money received. Ordinarily, an agent who receives money on account of the principal cannot properly place it to his own credit in a bank, where it may be subject to a set-off or lien by the bank, or so mingle it with his own that there may be difficulty in tracing it. Unless so understood, an agent receiving money either as a trustee or a bailee is not privileged to change the right of the principal in the specific moneys received, or his right against a bank if they are deposited, into a debt claim against himself. The principal's trust is in the honesty and not necessarily in the solvency of the agent. See § 427 and also the Restatement of Trusts, §§ 179, 180.

c. Effect of custom; fungibles. In the case of certain professional agents, such as auctioneers and factors, it is customary, and hence ordinarily understood, that the agent can properly mingle his funds with those of his principal. The business expediency of so doing is especially clear where the amounts received by the agent are small or where there is a series of transactions, in which cases it is usually inconvenient for the agent to keep the fund separate either in specie or by a separate account in a bank. If the funds are properly mingled, the inference is that

See Appendix for Reporter's Notes, Court Citations, and Cross References

the agent becomes a debtor to the amount received for the principal, but that he agrees to maintain enough in the fund to pay the principal, who has a charge upon the fund to the amount of the debt. It may be understood that an agent is privileged to mingle the funds or fungible goods of various principals, as where a collecting agent has an account with a bank in which he keeps the funds of all of his clients, or where a depository of grain mingles that of all the owners. In these situations, the principals at any given moment are tenants in common of the claim against the bank or of the grain.

Illustrations:

2. P employs A, an auctioneer, who, after the sale of P's goods, collects the amount due, receiving a check therefor from the debtor. A deposits the check to his own account in the bank. It may be found that A has committed no breach of duty to the principal.

3. P, an installment house, employs A as a collector. During the course of the day, A collects $150, which he places to his own account in the bank, substituting therefor his personal check. Unless otherwise agreed, A has committed a breach of duty to P.

Comment:

d. Liability. If the agent violates his duty to keep the funds of the principal distinct from his own, he becomes a debtor, and the principal has an equitable lien upon the agent's funds to the extent that they are thereby increased. See the Restatement of Restitution § 209. If the agent improperly acquires property in his own name or improperly deposits money in his own name, he is liable to the principal for any loss thereby caused. Even if the loss is not due to the improper use of his name, the agent is liable if he acted for his own purpose and not merely because of an error of judgment or mistake of law. See the Restatement of Trusts, § 179.

Illustrations:

4. A receives money for P which it is his duty to put into the T bank in P's name. Instead he puts it into the Y bank under his own name. The Y bank becomes insolvent. A is liable to P for the amount lost.

See Appendix for Reporter's Notes, Court Citations, and Cross References

5. A receives money for P which it is his duty to put into the T bank in P's name. In order to secure greater credit with the bank, A deposits the money in his own name. The T bank becomes insolvent. A is liable to P for the loss.

6. Same facts as in Illustration 5 except that A deposited the money in his own name merely because he did not know that this was improper. A is not liable to P for the loss.

TOPIC 2. LIABILITIES

§ 399. Remedies of Principal

A principal whose agent has violated or threatens to violate his duties has an appropriate remedy for such violation. Such remedy may be:

(a) an action on the contract of service;

(b) an action for losses and for the misuse of property;

(c) an action in equity to enforce the provisions of an express trust undertaken by the agent;

(d) an action for restitution, either at law or in equity;

(e) an action for an accounting;

(f) an action for an injunction;

(g) set-off or counterclaim;

(h) causing the agent to be made party to an action brought by a third person against the principal;

(i) self-help;

(j) discharge; or

(k) refusal to pay compensation or rescission of the contract of employment.

Comment on Clause (a):

a. The liability of an agent in an action brought upon the contract of service, insofar as such liability is dealt with in the Restatement of this Subject, is stated in Section 400.

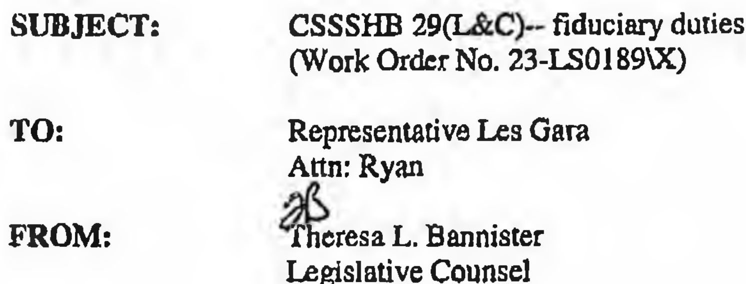
LEGAL SERVICES

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

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM February 20, 2004



SUBJECT: CSSSHB 29(L&C)-- fiduciary duties
(Work Order No. 23-LS0189\X)

TO: Representative Les Gara
Attn: Ryan

FROM: Theresa L. Bannister
Legislative Counsel

You have asked what are the fiduciary duties recognized by the Alaska courts as related to agents. This memo provides some very limited information that I have found to this point on what the Alaska courts have said about fiduciary duties. Please keep in mind that the common law on fiduciary duties that is not inconsistent with the state or federal constitution and state law passed by the legislature is the law in this state.[1]

1. Duty regarding care and skill. Unless otherwise agreed, a paid agent is subject to a duty to the principal to act with standard care and with the skill that is standard in the locality for the kind of work that the principal is employed to perform. Shields v. Cape Fox Corp., 42 P.3d 1083, 1091 (Alaska 2002).

2. Duty regarding extent of duties. Where an agency relationship exists, the extent of the duties of the agent to the principal are determined by the terms of the agreement between the parties, as interpreted in the light of the circumstances under which the agreement is made. Manes v. Coats, 941 P.2d 120, 123 - 124 (Alaska 1997).

3. When fiduciary duty can arise. A fiduciary relationship will arise where a person voluntarily acts as an agent of another, as when one offers to purchase real estate for another. Carter v. Hoblit, 755 P.2d 1084, 1086 (Alaska 1988).

4. Nature of the fiduciary duty owed by a real estate agent to client. The Alaska court has quoted the following from the Washington Supreme Court:

> From this agency relationship springs the duty and the obligation upon the part of the listing broker, as well as on the part of his subagents, to exercise the utmost good faith and fidelity toward his principal, the seller, in all matters falling within the scope of his

[1] AS 01.10.010.

> employment.
>
> Furthermore, there flows from this agency relationship and its accompanying obligation of utmost fidelity and good faith, the legal, ethical, and moral responsibility on the part of the listing broker, as well as his subagents, to exercise reasonable care, skill, and judgment in securing for the principal the best bargain possible; to scrupulously avoid representing any interest antagonistic to that of the principal in transactions involving the principal's listed property, or otherwise self-dealing with that property, without the explicit and fully informed consent of the principal; and to make, in all instances, a full, fair, and timely disclosure to the principal of all facts within the knowledge or coming to the attention of the broker or his subagents which are, or may be, material in connection with the matter for which the broker is employed, and which might affect the principal's rights and interests or influence his actions.

>*
>*

Black v. Dahl, 625 P.2d 876, 881 (Alaska 1981).

5. Duty to disclose. The fiduciary has a duty to fully disclose information which might affect the other person's rights and influence his action. See Carter v. Hoblit, 755 P.2d 1084, 1086 (Alaska 1988).

If I can be of further assistance, please advise.

TLB:lmb
04-048.lmb

MEMORANDUM

Date : 2/18/04

To : The Honorable Representatives of the House Judiciary Committee

From : Linda Garrison

RE ; SSHB 29 – SPONSOR – ROKEBERG

The attached newspaper article was in this morning's Anchorage Daily News.

THE DESIGNATED AGENCY POSITION IS EXACTLY AS ONE SCENARIO COMMON WITH DUAL AGENCY – TWO AGENTS OF THE SAME BROKERAGE WORKING WITH A BUYER AND A SELLER –

DESIGNATED AGENCY IS UNDISCLOSED DUAL AGENCY – JUST A DIFFERENT LABEL. THE PUBLIC NEEDS TO BE PROTECTED – JUST LIKE THIS ARTICLE SAYS.

THANK YOU.

2/18/04

State goes hard on dual agent

Real estate agent Bonnie Mehner should be punished "to protect the public as well as to preserve the integrity of the real estate profession," a state hearing officer said.

■ REAL ESTATE: Hearing officer pushes suspension, fine for Bonnie Mehner.

By RICHARD RICHTMYER
Anchorage Daily News

A state hearing officer has recommended that prominent Anchorage real estate agent Bonnie Mehner have her license suspended for 120 days followed by a year's probation, pay a $20,000 fine, and be required to take continuing education classes in ethics and dual agency.

The recommendation Tuesday follows a court verdict against Mehner stemming from the sale of a West Anchorage house for which she represented both the buyer and seller, without notifying the buyer as required by law that she was on both sides of the deal.

In a 60-page opinion sent to state real estate officials, hearing officer David Stebing called the punishment "necessary to protect the public as well as to preserve the integrity of the real estate profession."

At the heart of Mehner's case is a fairly common practice in the real estate business known as "dual agency." That's when a single agent, or two agents of the same brokerage, works both sides of the deal, representing the buyer and the seller. At issue is the way Mehner conducted herself during the sale of a $584,000 Arcadia Street house in 1999.

Joseph Columbus, the buyer, sued Mehner in July 2000, and a state Superior Court judge in 2002 found that she violated Alaska real estate laws and industry ethics by improperly encouraging him to pay full asking price for the house. The judge also ruled that Mehner had pinched Columbus, a first-time home buyer, from his original real estate agent.

Mehner and her agency, Prudential Jack White Real Estate, her codefendant in the lawsuit, shared the full $35,040 commission on the sale. Columbus settled with Mehner and Prudential Jack White for $200,000 prior to a hearing to award him punitive damages.

The court ruling shook up the real estate industry, which scrambled to make sure agents know the dual agency law and promptly disclose when they represent both buyer and seller.

Rep. Norm Rokeberg, R-Anchorage, working with the Alaska Association of Realtors, has introduced a bill that would more clearly define when an agent needs to disclose dual agency to buyers and sellers.

Under the current law, disclosure is required when an agent provides "specific assistance" to a client, but it does not define what specific assistance is, Rokeberg said. His bill would define what specific assistance is. The definition includes when an agent shows a piece of real estate, Rokeberg said Tuesday.

The state Division of Occupational Licensing last March asked the state Real Estate Commis-

See Page F-3, DUAL AGENT

TWO AGENTS IN THE SAME OFFICE = DESIGNATED AGENTS = UNDISCLOSED DUAL AGENCY

SPOTLIGHT: WORKPLACE

National Petroleum Reserve-Alaska

DUAL AGENT: *Hearing officer suggests penalty*

Continued from F-1

sion — which oversees licensing matters — to revoke or suspend Mehner's associate broker license or impose other sanctions.

The licensing division, among several other charges, claims that Mehner failed to timely disclose her dual agency representation in the Columbus deal and did not obtain written consent to act as a dual agent before showing him houses for which she also represented the seller. That violated Alaska real estate law, the division said.

At the administrative hearing, Mehner said she was unaware that the law required such written consent up front, and the standard practice in the industry was to obtain that consent at the time the agent prepares an offer.

Jeff Feldman, an Anchorage attorney who represented Mehner during a five-day hearing in October, said he was disappointed in Stebing's opinion, particularly in its finding that Mehner had violated the dual agency law.

He said substantial evidence was presented during the hearing showing that real estate agents across the community were doing the same thing in the same way.

Stebing, however, said that was not a good excuse. "The current dual agency law is not broken or impossible to comply with, as Mehner argues. Rather, the evidence establishes that choices were made not to follow the letter of the law," Stebing wrote.

He called all of Mehner's violations serious and said the dual agency issue presents the potential for the broadest threat to the public.

"Sanctions in this case will set a clear standard for conduct, and they will communicate the message that when real estate licensees take on the role of a dual agent, they must strictly comply with applicable legal requirements," he wrote.

In its eight-count accusation, the licensing division also charged Mehner with several other violations related to the Columbus deal, including making "substantial misrepresentations" to her client.

Stebing said that the evidence presented during the hearing supports those accusations.

In his opinion, Stebing also stressed that, from Mehner's testimony and comportment at both the hearing and at trial, she does not appear to have accepted responsibility for her actions.

"She testified that in her personal struggle with the aftermath of the lawsuit, 'I didn't feel that I had done anything wrong.' She also indicated that she is 'still upset' at what Columbus did in this transaction," Stebing wrote.

"Mehner implies that the goals of protecting the public and deterring wrongful conduct have already been met by virtue of the lawsuit she endured and the adverse publicity she received," Stebing wrote. "However, the Real Estate Commission has primary responsibility to discipline licensees for civil violations ... not the courts."

The state Real Estate Commission, which consists of five real estate brokers or associate brokers and two public members, is expected to take up the recommendation during its meeting on March 4.

■ Daily News reporter Richard Richtmyer can be reached at rrichtmyer@adn.com or 257-4344.

Memorandum

To: Representative Lesil McGuire, Chair
House Judiciary Committee

From: Representative Norman Rokeberg

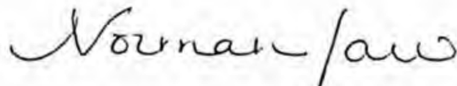
Date: February 5, 2004

Re: HB 29

I would appreciate it if you could schedule HB 29 for a hearing before the House Judiciary Committee on Wednesday, February 18, 2004. A bill packet will be delivered to your office shortly.

If you have any questions please contact my office.

Sincerely,



Representative Norman Rokeberg

ALASKA STATE LEGISLATURE
House of Representatives

COMMITTEE ASSIGNMENTS

RULES COMMITTEE, CHAIRMAN
LABOR & COMMERCE COMMITTEE, MEMBER
LEGISLATIVE COUNCIL, MEMBER
SPECIAL COMMITTEE ON OIL & GAS, MEMBER
LEGISLATIVE ETHICS COMMITTEE, MEMBER

website: http://www.akrepublicans.org/rokeberg/

INTERIM
716 WEST 4TH AVENUE SUITE 300
ANCHORAGE AK 99501
PHONE (907) 269-0117
FAX (907) 269-0119

SESSION
ALASKA STATE CAPITOL
JUNEAU AK 99801-1182
PHONE (907) 465-4966
FAX (907) 465-2040

Representative Norman Rokeberg

e-mail: Representative_Norman_Rokeberg@legis.state.ak.us

SPONSOR STATEMENT FOR HB 29
BY: Representative Norman Rokeberg

Alaskan consumers and our state's real estate industry have not been well served by the current agency provision of the real estate statute. Practical application of this statute is unworkable.

At issue in HB 29 is the interpretation of AS 08.88.396, Disclosure of Agency to Prospective Buyers and Sellers. As we take a closer look at agency, one thing is clear: this law, as currently written, is vague, confusing and results in a large number of differing views on how to comply with the statute.

In order to address this confusion, the real estate industry formed an Agency Task Force. This task force worked incredibly hard over the last two years, developing suggested changes to the regulations and statutes that would give real estate licensees some guidelines and standards for operating procedures. HB 29 is the product of their hard work.

HB 29:

- Replaces "agency" with the types of relationships a licensee may have with a buyer and/or seller.
- Allows for a licensee to work with both the buyer and seller in the same transaction as a neutral licensee. This replaces "dual agency" and sets forth the duties of a neutral licensee explicitly.
- Specifies the duties owed by a real estate licensee in all relationships, as well as the duties owed by a licensee when representing an individual.
- Clarifies what acts do not constitute a conflict of interest.
- Allows for a buyer and seller to be represented by different licensees within the same office, without creating a dual agency transaction.
- Sets forth provisions regarding compensation.
- Clarifies the duration of the licensee/licensor relationship.
- Limits the recovery to actual damages for failure to comply with these new provisions.
- Requires a broker to adopt a written policy identifying and describing the relationships into which their licensees may enter.
- Requires the Real Estate Commission to adopt regulations that establish:
    - Guidelines to assist brokers in adopting their written policies
    - A written pamphlet outlining the duties of the types of licensee relationships
    - Requirements for broker supervision of real estate licensees who work for the broker
- Government agencies, businesses whose net worth was over $2,000,000 in the last calendar year and publicly held corporations are exempt from the signature requirements found in the new provisions.
- Provides definitions for terms.

This legislation informs and protects consumers and assists the commerce of our state. It will shield the public from vicarious liability inherent in our current law and protects small brokers in small communities. This bill is fully endorsed by the real estate community.

ED 1: 12/10/03

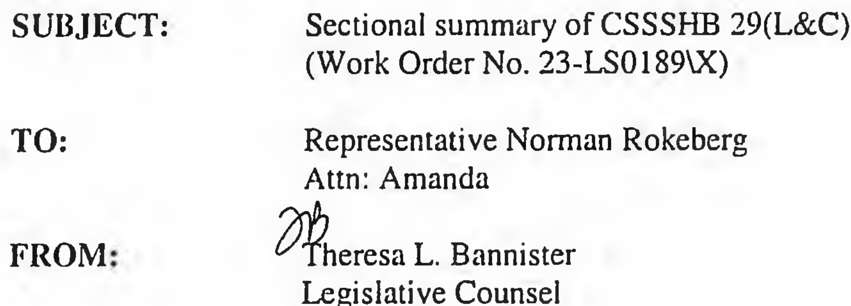
LEGAL SERVICES

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

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

<u>MEMORANDUM</u> February 16, 2004



SUBJECT: Sectional summary of CSSSHB 29(L&C)
(Work Order No. 23-LS0189\X)

TO: Representative Norman Rokeberg
Attn: Amanda

FROM: Theresa L. Bannister
Legislative Counsel

You have requested a sectional summary of the above-described bill. As a preliminary matter, 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.

<u>Section 1.</u> Provides legislative findings and intent for the bill.

<u>Section 2.</u> Authorizes the real estate commission to investigate and take administrative action when there is a violation of the new article proposed by this bill.

<u>Section 3.</u> Requires a licensee with a conflict to disclose the conflict to persons adversely affected by the conflict and their licensees and to confirm the conflict in writing to the persons or their licensees as soon as possible after identification of the conflict.

<u>Section 4.</u> Limits the application of AS 08.88.396 to acts that occur before the effective date of this new subsection.

<u>Section 5.</u> Removes AS 08.88.396 from the list of sections whose violation triggers a misdemeanor penalty.

<u>Section 6.</u> Establishes a new article relating to licensee relationships and duties.

Sec. 08.88.600. Identifies the types of relationships a licensee may have with parties to real estate transactions.

Sec. 08.88.605. Allows for a licensee to have different licensee relationships with a party in separate transactions if the licensee complies with the new article when establishing the relationships.

Sec. 08.88.610. Allows a licensee to obtain preauthorization to act as a neutral licensee. Requires a licensee to obtain written consent to act as a neutral licensee in certain circumstances before the licensee shows the real estate.

Sec. 08.88.615. Identifies the duties that a licensee owes to each person to whom the licensee provides specific assistance.

Sec. 08.88.620. Identifies the duties that a licensee owes to a person whom the licensee represents.

Sec. 08.88.625. With two exceptions, prohibits a licensee or a person to whom a licensee provides specific assistance from waiving the duties identified under secs. 08.88.615 and 08.88.620.

Sec. 08.88.630. Describes the duties that a licensee does not owe to a person.

Sec. 08.88.635. Describes certain acts that do not amount to adverse or detrimental acts by a licensee or to conflicts of interest for the licensee.

Sec. 08.88.640. Provides some guidelines for the designated licensee relationship. Limits the persons to whom the duties, obligations, and responsibilities of the relationship extend and to whom knowledge is imputed. Allows a broker to have different designated licensees working for different parties in the same transaction. Allows a designated licensee to represent or provide specific assistance to the same person in different transactions even though the person has a different interest in each transaction.

Sec. 08.88.645. Identifies the duties of a neutral licensee.

Sec. 08.88.650. States that a neutral licensee's knowledge or information about one client is not imputed to other clients or to other licensees working for the same broker.

Sec. 08.88.655. Establishes certain rules relating to the compensation received by a broker. Allows a broker to be compensated by any party to a transaction, by a third party, or by parties splitting the compensation. States that payment will not be construed as establishing a relationship. In specified circumstances requires a licensee to disclose which party is anticipated to compensate the brokers. Requires the contract to indicate who is compensating the brokers.

Sec. 08.88.660. Establishes when a licensee relationship begins and ends, the effect of termination on other contractual rights, and the licensee's duties after termination.

Sec. 08.88.665. States that a seller, buyer, lessor, or lessee is not liable for an act, error, or omission of a licensee that arises out of the licensee relationship, except in two described circumstances.

Sec. 08.88.670. Establishes that, unless agreed to otherwise in writing, a seller, buyer, lessor, or lessee is not considered to know a fact known by the person's licensee unless the fact is actually known by the person. Establishes that, unless agreed to otherwise in writing, a licensee does not have knowledge or notice of a fact that is not actually known by the licensee.

Sec. 08.88.675. States that the new article abrogates the common law of agency in real estate transactions to the extent the common law is inconsistent with the new article.

Sec. 08.88.680. Prohibits a person from bringing an action against a neutral licensee for making a required or permitted disclosure. Addresses a plaintiff's remedy in a civil action against a licensee for failing to comply with the new article.

Sec. 08.88.685. Requires a broker to adopt a written policy identifying and describing the relationships the broker and the broker's licensees may engage in. Directs the real estate commission to adopt regulations relating to broker guidelines, the commission's pamphlet on licensee duties, and a broker's supervision of licensees.

Sec. 08.88.690. Establishes three exemptions from the article's signature requirements.

Sec. 08.88.695. Defines certain terms for the new article.

Section 7. Provides authority for the real estate commission to adopt regulations before the rest of the Act takes effect (because this section take effect before the rest of the Act; see bill sec. 9).

Section 8. Makes most of the bill effective January 1, 2005.

Section 9. Gives sec. 7 of this Act an immediate effective date.

If I may be of further assistance, please advise.

TLB:med
04-192.med

Your rights when dealing with a real estate licensee.

Adopted by the (date)

DRAFT Alaska Real Estate Commission **DRAFT**

The real estate industry has a significant effect on the economy of Alaska; therefore it is in the best interest of the public to put into law the relationships between real estate licensees and people who wish to use their services.

This brochure describes your legal rights in dealing with a real estate licensee. Please read it carefully before signing it or any document.

First, a definition for **specific assistance**:
Includes but is not limited to, a) asking questions regarding confidential information for a real estate transaction; b) showing property selected for your specific needs or desires; c) preparing a written offer; d): entering into a personal services contract. Specific assistance does not include: a) hosting an open house; b) casual conversation regarding real estate; c) receiving calls and electronic inquires on the licensee's advertisements; d) providing information regarding a piece of real estate; e) setting an initial appointment to show a piece of property; f) receiving unsolicited information from a buyer or lessee before or after disclosure of a real estate relationship.)

Duties owed to you by the licensee in all relationships:
Unless additional duties are agreed to by you and the licensee in a written, signed document, and regardless of the type of licensee relationship, a licensee owes the following duties to each person to whom the licensee provides **specific assistance**

1 The exercise of reasonable skill and care
2 Honest and good faith dealing
3 The presentation of all written offers and other written communication in a timely manner. This is regardless if the real estate is subject to an existing contract, or if the person is already a party to an existing contract
4 Except as provided elsewhere in the law, the disclosure of all material information known by the license and not apparent or readily ascertainable to you regarding the physical condition of real estate if the information substantially adversely affects the real estate or your ability to perform your obligations in the real estate transaction or if the information would materially impair or defeat the purpose of the real estate transaction. *This disclosure requirement does not require the licensee to disclosure a fact or suspicion that the real estate or neighboring real estate is or was the site of a murder, suicide, or other death, rape or other sexual crime, assault or other violent crime, burglary, illegal drug activity, gang-related activity, political activity, religious activity, anticipated development, alleged supernatural activity, or another act, occurrence, or use that*

(Continued on page 2)

(Continued from page 1)

does not adversely affect the physical condition or title to the real estate. These disclosure requirements may not be considered to imply a duty to investigate a matter that the licensee has not agreed to investigate.

5 Accounting in a timely manner for all money and other property received from or on your behalf
6 Before the licensee provides specific assistance, they must obtain from you a signed document that discloses your relationship with that licensee
7 In addition to the above document, the licensee must provide you, when you sign an offer in a real estate transaction, a written statement that states who the licensee represents. That statement must be written in the contract.

Duties owed by the licensee when they are representing you:

Unless you both agree to additional duties in writing, the licensee who represents you, owes you the following duties. And they may not waive these duties to you.

1 Not taking action that they know is adverse or detrimental to your interest
2 Disclosure of a conflict of interest to you in a timely manner (Note: a conflict of interest is not showing you real estate not owned by you, or listing competing properties, the representation of more than one person by the same licensee or by different licensees working for the same broker; showing a property that you are interested in to others; acting as a neutral licensee; disclosing confidential information to the licensee's broker for the purpose of seeking advice or assistance)
3 Advising you to obtain expert advice on a matter that relates to the real estate transaction that is beyond their expertise
4 Not disclosing confidential information from or about you without your written consent, except under subpoena or another court order, even after termination of the relationship with you
5 If you are the seller or lessor, unless you agree in writing, making good faith and continuous efforts to find a buyer or lessee for the property, except that the licensee is not required to seek additional offers while the property is subject to an existing contract
6 If you are a buyer or lessee, unless you otherwise agreed to in writing, making a good faith and continuous effort to find real estate to buy or lease, except that the licensee is not obligated to seek additional property for you while you are a party to an existing contract or are they obligated to show you property for which there is not a written agreement to pay the licensee

I have read and acknowledge the above paragraph: _________ / _________
Date: ____________________ ***Time:*** _________________

(Continued on page 3)

(Continued from page 2)

Duties not owed by the licensee:

Unless otherwise agreed, a real estate licensee does not owe a duty to a person with whom the licensee has establish a license relationship to:

1 Conduct an independent inspection of the real estate that is the subject of your relationship
2 Conduct and independent investigation of a person's financial condition
3 Independently verify the accuracy or completeness of a statement made by a party to a real estate the transaction or by a person reasonably believed by the license to be reliable

I have read and acknowledge the above paragraph: _________ / _________
Date: ____________________ Time: __________________

Designated licensee relationship:

A broker may have a different designated licensee working for the seller or lessor, and for the buyer or lessee in the same real estate transaction without creating dual agency or a conflict of interest. Unless the broker is a designated licensee, the relationship established between you and designated licensee does not extend to the broker. The extent of the relationship between the designated licensee must be disclosed to you in the real estate transaction.

Duties of a neutral licensee:

Unless additional duties are agreed to in a written document signed by the neutral licensee and all parties, the duties of a neutral licensee (*when one licensee is working with both sides in the transaction*) are limited to the duties already established for a licensee and the following duties:

1 Not to take action that the neutral licensee knows is adverse or detrimental to the parties to the transaction or to whom the neutral licensee provides services
2 To disclose a conflict of interest in a timely manner
3 To advise all parties to obtain expert advice on a matter relating to the transaction that is beyond their expertise
4 Not to disclose without written consent confidential information to another party to whom the licensee is providing specific assistance (except under a subpoena or another court order, even after the relationship terminates)
5 Not to disclose without the consent of the person to whom the information relates, that someone is willing to pay more, or sell for less, or accept financing terms other than what is offered. A neutral licensee does not violate their duties if, with written consent, engages in the following conduct in a good faith effort to assist in reaching final agreement in a real estate transaction: a) analyzing, providing information on, or reporting on the merits of the transaction to each party;

(Continued on page 4)

(Continued from page 3)

b) discussing the price, terms, or conditions that each party would or should offer or accept; or c) suggesting compromises in the parties respective bargaining positions.]

In a neutral licensee relationship, the knowledge of information of the licensee about one client <u>is not</u> imputed to other clients or to other licensees who work for the same broker.

I have read and acknowledge the above paragraphs: _________ / _________
Date: ____________________ Time: __________________

Compensation:

A broker may be compensated by any party to a transaction, by a third party, or by one or more of the parties to the transaction splitting or sharing the commission. Compensation <u>does not</u> establish a relationship between the broker and the party who pays. Licensees must inform all parties to a transaction who is paying within the real estate contract.

Duration of the relationship:

A licensees relationship with you begins when they provide specific assistance and continues until the earliest of the following events:

1 They complete the specific assistance
2 The relationship terms that you agreed to terminates
3 You and the licensee terminate by mutual agreement
4 One party gives notice to the other party terminating the relationship

The termination does not affect other contractual rights of the parties. And, except as otherwise agreed to in writing, after termination the licensee still has the duties for accounting for all money and other property received during the relationship and not disclosing confidential information.

Vicarious liability:

You are not liable for an act, error, or omission of a licensee that arises out of the licensee relationship unless you participated or authorized the act, error or omission and then only to the extent of the participation or authorizations and, except to the extent that you benefited for the act, error, or omission, and the court determines that it is highly probably that the person claiming damages would be unable to enforce a judgment against the licensee.

Imputed knowledge and notice:

Unless otherwise you agree in writing, you are not considered to have knowledge or notice of a fact known by a licensee of the other party, and conversely unless otherwise agreed to in writing, the licensee does not have knowledge or notice of a fact

(Continued on page 5)

(Continued from page 4)

that is not actually known by the licensee.

Causes of action:

No one can bring an action against a neutral licensee for making a disclosure that is required or permitted by law. In a civil action for the failure of a licensee to comply with the provisions of these laws, the plaintiff's remedy is limited to the recovery of actual damages. You may still take any other action or purse any other remedy to which you may be entitled under law.

Policies, guidelines, and requirements:

A broker must have a written policy that identifies and describes the relationships in which the broker and the licensees who work for them, practice. The broker has the policy available to the Real Estate Commission and to the public upon request.

Exemption:

When a licensee proceeds specific assistance to a governmental agency or to a corporation that issues publicly traded secures, the licensee is exempt from obtaining signatures called for within this law.

I hereby acknowledge receiving and reading this pamphlet on the type of relationships I may have with a real estate licensee (including a broker).

I understand and acknowledge that ______________________ (licensee) of ______________________ (agency) will be working with me as a ______________________, until and unless the relationship is terminated or the status changes by prior mutual agreement.

Signature: ______________________

Signature: ______________________

Date: ______________________ Time: ______________________

THE L•A•W OF REAL ESTATE AGENCY

This pamphlet describes your legal rights in dealing with a real estate broker or salesperson. Please read it carefully before signing any documents.

THE FOLLOWING IS ONLY A BRIEF SUMMARY OF THE ATTACHED LAW:

SECTION 1. DEFINITIONS. Defines the specific terms used in the law.

SECTION 2. RELATIONSHIPS BETWEEN LICENSEES AND THE PUBLIC. States that a licensee who works with a buyer or tenant represents that buyer or tenant — unless the licensee is the listing agent, a seller's sub-agent, a dual agent, the seller personally or the parties agree otherwise. Also states that in a transaction involving two different licensees affiliated with the same broker, the broker is a dual agent and each licensee solely represents his or her client — unless the parties agree in writing that both licensees are dual agents.

SECTION 3. DUTIES OF A LICENSEE GENERALLY. Prescribes the duties that are owed by all licensees, regardless of who the licensee represents. Requires disclosure of the licensee's agency relationship in a specific transaction.

SECTION 4. DUTIES OF A SELLER'S AGENT. Prescribes the additional duties of a licensee representing the seller or landlord only.

SECTION 5. DUTIES OF A BUYER'S AGENT. Prescribes the additional duties of a licensee representing the buyer or tenant only.

SECTION 6. DUTIES OF A DUAL AGENT. Prescribes the additional duties of a licensee representing both parties in the same transaction, and requires the written consent of both parties to the licensee acting as a dual agent.

SECTION 7. DURATION OF AGENCY RELATIONSHIP. Describes when an agency relationship begins and ends. Provides that the duties of accounting and confidentiality continue after the termination of an agency relationship.

SECTION 8. COMPENSATION. Allows brokers to share compensation with cooperating brokers. States that payment of compensation does not necessarily establish an agency relationship. Allows brokers to receive compensation from more than one party in a transaction with the parties' consent.

SECTION 9. VICARIOUS LIABILITY. Eliminates the common law liability of a party for the conduct of the party's agent or sub-agent, unless the agent or sub-agent is insolvent. Also limits the liability of a broker for the conduct of a sub-agent associated with a different broker.

SECTION 10. IMPUTED KNOWLEDGE AND NOTICE. Eliminates the common law rule that notice to or knowledge of an agent constitutes notice to or knowledge of the principal.

SECTION 11. INTERPRETATION. This law replaces the fiduciary duties owed by an agent to a principal under the common law, to the extent that it conflicts with the common law.

Windermere

Section One

18.86.010. Definitions.

Unless the context clearly requires otherwise, the definitions in this ... apply throughout this chapter.

... ncy relationship" means the agency relationship created un... this chapter or by written agreement between a licensee and a buyer and/or seller relating to the performance of real estate brokerage services by the licensee.

(2) "Agent" means a licensee who has entered into an agency relationship with a buyer or seller.

(3) "Business opportunity" means and includes a business, business opportunity, and goodwill of an existing business, or any one or combination thereof.

(4) "Buyer" means an actual or prospective purchaser in a real estate transaction, or an actual or prospective tenant in a real estate rental or lease transaction, as applicable.

(5) "Buyer's agent" means a licensee who has entered into an agency relationship with only the buyer in a real estate transaction, and includes sub-agents engaged by a buyer's agent.

(6)"Confidential information" means information from or concerning a principal of a licensee that:

(a) Was acquired by the licensee during the course of an agency relationship with the principal;
(b) The principal reasonably expects to be kept confidential;
(c) The principal has not disclosed or authorized to be disclosed to third parties;
... uld, if disclosed, operate to the detriment of the ... cipal; and
(e) ... ne principal personally would not be obligated to disclose to the other party.

(7) "Dual agent" means a licensee who has entered into an agency relationship with both the buyer and seller in the same transaction.

(8) "Licensee" means a real estate broker, associate real estate broker, or real estate salesperson, as those terms are defined in Chapter 18.85 RCW.

(9) "Material fact" means information that substantially adversely affects the value of the property or a party's ability to perform its obligations in a real estate transaction, or operates to materially impair or defeat the purpose of the transaction. The fact or suspicion that the property, or any neighboring property, is or was the site of a murder, suicide or other death, rape or other sex crime, assault or other violent crime, robbery or burglary, illegal drug activity, gang-related activity, political or religious activity, or other act, occurrence, or use not adversely affecting the physical condition of or title to the property is not a material fact.

(10) "Principal" means a buyer or a seller who has entered into an agency relationship with a licensee.

(11) "Real estate brokerage services" means the rendering of services for which a real estate license is required under Chapter 18.85 RCW.

... al estate transaction" or "transaction" means an actual or prospective transaction involving a purchase, sale, option, or exchange of any interest in real property or a business opportunity, or a lease or rental of real property. For purposes of this chapter, a prospective transaction does not exist until a written offer has been signed by at least one of the parties.

(13) "Seller" means an actual or prospective seller in a real estate transaction, or an actual or prospective landlord in a real estate rental or lease transaction, as applicable.

(14) "Seller's agent" means a licensee who has entered into an agency relationship with only the seller in a real estate transaction, and includes sub-agents engaged by a seller's agent.

(15) "Sub-agent" means a licensee who is engaged to act on behalf of a principal by the principal's agent where the principal has authorized the agent in writing to appoint sub-agents. ■

Section Two

18.86.020. Agency Relationship.

(1) A licensee who performs real estate brokerage services for a buyer is a buyer's agent unless the:

(a) Licensee has entered into a written agency agreement with the seller, in which case the licensee is a seller's agent;
(b) Licensee has entered into a sub-agency agreement with the seller's agent, in which case the licensee is a seller's agent;
(c) Licensee has entered into a written agency agreement with both parties, in which case the licensee is a dual agent;
(d) Licensee is the seller or one of the sellers; or
(e) Parties agree otherwise in writing after the licensee has complied with RCW 18.86.030(1)(f).

(2) In a transaction in which different licensees affiliated with the same broker represent different parties, the broker is a dual agent, and must obtain the written consent of both parties as required under RCW 18.86.060. In such a case, each licensee shall solely represent the party with whom the licensee has an agency relationship, unless all parties agree in writing that both licensees are dual agents.

(3) A licensee may work with a party in separate transactions pursuant to different relationships, including, but not limited to, representing a party in one transaction and at the same time not representing that party in a different transaction involving that party, if the licensee complies with this chapter in establishing the relationships for each transaction. ■

Section Three

18.86.030. Duties of a Licensee.

(1) Regardless of whether the licensee is an agent, a licensee owes to all parties to whom the licensee renders real estate brokerage services the following duties, which may not be waived:

(a) To exercise reasonable skill and care;
(b) To deal honestly and in good faith;
(c) To present all written offers, written notices and other written communications to and from either party in a timely manner, regardless of whether the property is subject to an existing contract for sale or the buyer is already a party to an existing contract to purchase;
(d) To disclose all existing material facts known by the licensee and not apparent or readily ascertainable to a party; provided that this subsection shall not be construed to imply any duty to investigate matters that the licensee has not agreed to investigate;
(e) To account in a timely manner for all money and property received from or on behalf of either party;
(f) To provide a pamphlet on the law of real estate agency in the

form prescribed in RCW 18.86.120 to all parties to whom the licensee renders real estate brokerage services, before the party signs an agency agreement with the licensee, signs an offer in a real estate transaction handled by the licensee, consents to dual agency, or waives any rights, under RCW 18.86.020(1)(e), 18.86.040(1)(e), 18.86.050(1)(e), or 18.86.060(2)(e) or (f) [illegible]chever occurs earliest; and

([illegible]) [illegible]isclose in writing to all parties to whom the licensee renders [illegible] estate brokerage services, before the party signs an offer in a real estate transaction handled by the licensee, whether the licensee represents the buyer, the seller, both parties, or neither party. The disclosure shall be set forth in a separate paragraph entitled "Agency Disclosure" in the agreement between the buyer and seller or in a separate written document entitled "Agency Disclosure."

(2) Unless otherwise agreed, a licensee owes no duty to conduct an independent inspection of the property or to conduct an independent investigation of either party's financial condition, and owes no duty to independently verify the accuracy or completeness of any statement made by either party or by any source reasonably believed by the licensee to be reliable. ■

Section Four

18.86.040. Seller's Agent — Duties.

(1) Unless additional duties are agreed to in writing and signed by a seller's agent, the duties of a seller's agent are limited to those set forth in RCW 18.86.030 and the following, which may not be waived except as expressly set forth in (e) of this subsection:

([illegible]) [illegible]be loyal to the seller by taking no action that is adverse or [illegible]mental to the seller's interest in a transaction;
(b) [illegible]mely disclose to the seller any conflicts of interest;
(c) To advise the seller to seek expert advice on matters relating to the transaction that are beyond the agent's expertise;
(d) Not to disclose any confidential information from or about the seller, except under subpoena or court order, even after termination of the agency relationship; and
(e) Unless otherwise agreed to in writing after the seller's agent has complied with RCW 18.86.030(1)(f), to make a good faith and continuous effort to find a buyer for the property; except that a seller's agent is not obligated to seek additional offers to purchase the property while the property is subject to an existing contract for sale.

(2)
(a) The showing of properties not owned by the seller to prospective buyers or the listing of competing properties for sale by a seller's agent does not in and of itself breach the duty of loyalty to the seller or create a conflict of interest.
(b) The representation of more than one seller by different licensees affiliated with the same broker in competing transactions involving the same buyer does not in and of itself breach the duty of loyalty to the sellers or create a conflict of interest. ■

Section Five

18.86.050. Buyer's Agent — Duties.

(1) Unless additional duties are agreed to in writing signed by a buyer's agent, the duties of a buyer's agent are limited to those set forth in RCW 18.86.030 and the following, which may not be waived except as expressly set forth in (e) of this subsection:

(a) To be loyal to the buyer by taking no action that is adverse or detrimental to the buyer's interest in a transaction;
(b) To timely disclose to the buyer any conflicts of interest;
(c) To advise the buyer to seek expert advice on matters relating to the transaction that are beyond the agent's expertise;
(d) Not to disclose any confidential information from or about the buyer, except under subpoena or court order, even after termination of the agency relationship; and
(e) Unless otherwise agreed to in writing after t[illegible] buyer's agent has complied with RCW 18.86.030(1)(f) of this act, to make a good faith and continuous effort to find a property for the buyer; except that a buyer's agent is not obligated to: (i) Seek additional properties to purchase while the buyer is a party to an existing contract to purchase; or (ii) show properties as to which there is no written agreement to pay compensation to the buyer's agent.

(2)
(a) The showing of property in which a buyer is interested to other prospective buyers by a buyer's agent does not in and of itself breach the duty of loyalty to the buyer or create a conflict of interest.
(b) The representation of more than one buyer by different licensees affiliated with the same broker in competing transactions involving the same property does not in and of itself breach the duty of loyalty to the buyers or create a conflict of interest. ■

Section Six

18.86.060. Dual Agent — Duties.

(1) Notwithstanding any other provisions of this chapter, a licensee may act as a dual agent only with the written consent of both parties to the transaction after the dual agent has complied with RCW 18.86.030 (1) (f), which consent must include a statement of the terms of compensation.

(2) Unless additional duties are agreed to in writing signed by a dual agent, the duties of a dual agent are limited to those set forth in RCW 18.86.030 and the following, which may not be waived except as expressly set forth in (e) and (f) of this subsection:

(a) To take no action that is adverse or detrimental to either party's interest in a transaction;
(b) To timely disclose to both parties any conflicts of interest;
([illegible]) To advise both parties to seek expert advice on matters relating to the transaction that are beyond the dual agent's expertise;
(d) Not to disclose any confidential information from or about either party, except under subpoena or court order, even after termination of the agency relationship;
(e) Unless otherwise agreed to in writing after the dual agent has complied with RCW 18.86.030 (1)(f), to make a good faith and continuous effort to find a buyer for the property; except that a dual agent is not obligated to seek additional offers to purchase the property while the property is subject to an existing contract for sale; and

(f) Unless otherwise agreed to in writing after the dual agent has complied with RCW 18.86.030 (1)(f), to make a good faith and continuous effort to find a property for the buyer; except that a dual agent is not obligated to: (i) Seek additional properties to purchase while the buyer is a party to an existing contract to purchase; or (ii) show properties as to which there no written agreement to pay compensation to the dual agent.

(a) The showing of properties not owned by the seller to prospective buyers or the listing of competing properties for sale by a dual agent does not in and of itself constitute action that is adverse or detrimental to the seller or create a conflict of interest.
(b) The representation of more than one seller by different licensees affiliated with the same broker in competing transactions involving the same buyer does not in and of itself constitute action that is adverse or detrimental to the sellers or create a conflict of interest.

(4)
(a) The showing of property in which a buyer is interested to other prospective buyers or the presentation of additional offers to purchase property while the property is subject to a transaction by a dual agent does not in and of itself constitute action that is adverse or detrimental to the buyer or create a conflict of interest.
(b) The representation of more than one buyer by different licensees affiliated with the same broker in competing transactions involving the same property does not in and of itself constitute action that is adverse or detrimental to the buyers or create a conflict of interest. ■

Section Seven

18.86.070. Duration of Agency Relationship.

(1) The agency relationships set forth in this chapter commence at the time that the licensee undertakes to provide real estate brokerage services to a principal and continue until the earliest of the following:

(a) Completion of performance by the licensee;
(b) Expiration of the term agreed upon by the parties; or
(c) Termination of the relationship by mutual agreement of the parties; or
(d) Termination of the relationship by notice from either party to the other. However, such a termination does not affect the contractual rights of either party.

(2) Except as otherwise agreed to in writing, a licensee owes no further duty after termination of the agency relationship, other than the duties of:
(a) Accounting for all moneys and property received during the relationship; and
(b) Not disclosing confidential information. ■

Section Eight

18.86.080. Compensation.

(1) In any real estate transaction, the broker's compensation may be paid by the seller, the buyer, a third party, or by sharing the compensation between brokers.

(2) An agreement to pay or payment of compensation does not establish an agency relationship between the party who paid the compensation and the licensee.

(3) A seller may agree that a seller's agent may share with another broker the compensation paid by the seller.

(4) A buyer may agree that a buyer's agent may share with another broker the compensation paid by the buyer.

(5) A broker may be compensated by more than one party for real estate brokerage services in a real estate transaction, if those parties consent in writing at or before the time of signing an offer in the transaction.

(6) A buyer's agent or dual agent may receive compensation based on the purchase price without breaching any duty to the buyer.

(7) Nothing contained in this chapter negates the requirement that an agreement authorizing or employing a licensee to sell or purchase real estate for compensation or a commission be in writing and signed by the seller or buyer. ■

Section Nine

18.86.090. Vicarious Liability.

(1) A principal is not liable for an act, error, or omission by an agent or sub-agent of the principal arising out of an agency relationship:

(a) Unless the principal participated in or authorized the act, error, or omission; or
(b) Except to the extent that: (i) The principal benefited from the act, error, or omission; and (ii) the court determines that it is highly probable that the claimant would be unable to enforce a judgment against the agent or sub-agent.

(2) A licensee is not liable for an act, error, or omission of a subagent under this chapter, unless the licensee participated in or authorized the act, error, or omission. This subsection does not limit the liability of a real estate broker for an act, error, or omission by an associate real estate broker or real estate salesperson licensed to that broker. ■

Section Ten

18.86.100. Imputed Knowledge and Notice.

(1) Unless otherwise agreed to in writing, a principal does not have knowledge or notice of any facts known by an agent or sub-agent of the principal that are not actually known by the principal.

(2) Unless otherwise agreed to in writing, a licensee does not have knowledge or notice of any facts known by a sub-agent that are not actually known by the licensee. This subsection does not limit the knowledge imputed to a real estate broker of any facts known by an associate real estate broker or real estate salesperson licensed to such broker. ■

Section Eleven

18.86.110. Application.

This chapter supersedes only the duties of the parties under the common law, including fiduciary duties of an agent to a principal, to the extent inconsistent with this chapter. The common law continues to apply to the parties in all other respects. This chapter does not affect the duties of a licensee while engaging in the authorized or unauthorized practice of law as determined by the courts of this state. This chapter shall be construed broadly. ■

REALTOR ®

ALASKA ASSOCIATION OF REALTORS, INC.
741 Sesame Street, Suite 100 • Anchorage, Alaska 99503
Telephone 907-563-7133 • Fax 907-563-8476

February 3, 2004

The Honorable Norm Rokeberg
Alaska House of Representatives
State Capitol Building
Juneau, Alaska 99801

RE: House Bill 29, relating to real estate licensee and real estate transactions

Dear Representative Rokeberg,

The Alaska Association of REALTORS and the following member Boards;

Anchorage Board of REALTORS
Greater Fairbanks Board of REALTORS
Kachemak Board of REALTORS
Kenai Peninsula Board of REALTORS
Kodiak Board of REALTORS
Southeast Board of REALTORS
Valley Board of REALTORS

supports House Bill 29, which would update the agency statute to conform to current real estate business practices.

The Association is in favor of this proposed legislation that would standardize the disclosure form that is used by real estate licensees statewide. It would define specific duties of licensees that are not currently in the statute, giving the consumers clearer expectations and guidelines.

The Alaska Association of REALTORS encourages the passage of House Bill 29.

Sincerely,

Kathryn Clark

Kathryn Clark
President

ANCHORAGE BOARD OF REALTORS® INC.

REALTOR® *The Voice for Real Estate*™ in Anchorage

741 Sesame Street
Suite #100
Anchorage, Alaska 99503
(907) 561-2338
(907) 563-8476 Fax

Tuesday, February 10, 2004

The Honorable Lesil McGuire
Chairwoman, Judiciary Committee
Alaska House of Representatives
State Capitol Building
Juneau AK. 99801

RE: House Bill 29, relating to real estate licensees and real estate transactions.

Dear Chairwoman McGuire,

The Anchorage Board of Realtors Supports HB 29, which would update the agency statute to conform to current real estate business practices.

This legislation will standardize the disclosure forms and requirements through out the state.

Agents in all over the state would be required to use the same format for disclosure of duties to the parties involved in a real estate transaction.

This will give the public more protection in real estate transactions, by providing clearer expectations and guidelines.

The Anchorage Board of Realtors, Board of Directors unanimously encourages passage of House Bill 29.

Please feel free to contact me should you have further questions.

Sincerely

Eva Loken
President

cc: The Honorable Tom Anderson
The Honorable Les Gara
The Honorable Max Gruenberg
The Honorable Jim Holm
The Honorable Dan Ogg
The Honorable Norm Rokeberg
The Honorable Ralph Samuels

REALTOR® is a registered collective membership mark which may be used only by real estate professionals who are members of the NATIONAL ASSOCIATION OF REALTORS® and subscribe to its strict Code of Ethics.

Prudential Vista Real Estate
4241 B Street
Anchorage, AK 99503
Bus 907 562-6464
Fax 907 562-5485
www.alaskahousehunters.com

Representative Tom Anderson
State Capitol, Room 432
Juneau, AK 99801-1182

Dear Representative Anderson,

I am writing to you in support of HB 29. I have been in the real estate industry over 20 years and have seen the agency laws change from traditional agency where all brokers in the transaction represent the seller and the buyer is left with no representation at all to buyer, seller, and dual agency. Although that was a step in the right direction for the consumer, the way the law was written required a very cumbersome ritual for the real estate salesperson to go through and it was a law that was little understood by both the salesperson and the client. Most times the client would sign documents after having agency explained by the salesman as just another document that must be signed to complete the transaction. They did not care about agency as such unless there was a problem, then they hired an attorney and tried to unravel the contract any way they could and agency was a weak link that they could fall back on. We have never acted as agents in the sense of the definition, "acting on behalf of another." To do that would be more like acting as an attorney in fact, which broker typically does not allow their salespeople to do.

HB 29 was created over many hours by many people looking for a way to complete a transaction being fair to the parties and leaving less liability for the parties on the table. Attorneys have a hard time understanding that in a real estate transaction, both parties can win. There does not have to be an adversarial position between the buyer and seller to conclude a successful transaction. HB 29 builds on this concept by allowing the salesperson to act as a buyer licensee, seller licensee or neutral licensee. The salesperson's job is to help a buyer and a seller close a transaction that both parties have agreed to.

I ask that you and our other legislators heartily support this bill to passage early in the 2004 session.

Sincerely,

Denny Wood, ABR, CRS, GRI
Sales Manager, Associate Broker
President Elect Alaska Association of Realtors

An independently owned and operated member of The Prudential Real Estate Affiliates, Inc.

ALASKA ASSOCIATION OF REALTORS, INC.
741 Sesame Street, Suite 100 • Anchorage, Alaska 99503
Telephone 907-563-7133 • Fax 907-563-8476

February 3, 2004

The Honorable Tom Anderson
Alaska House of Representatives
State Capitol Building
Juneau, Alaska 99801

RE: House Bill 29, relating to real estate licensee and real estate transactions

Dear Representative Anderson,

The Alaska Association of REALTORS with over 1,100 members statewide supports House Bill 29, which would update the agency statute to conform to current real estate business practices.

The Association is in favor of this proposed legislation that would standardize the disclosure form that is used by real estate licensees statewide. It would define specific duties of licensees that are not currently in the statute, giving the consumers clearer expectations and guidelines.

The Alaska Association of REALTORS encourages the passage of House Bill 29.

Sincerely,

Kathryn Clark

Kathryn Clark
President

Cc; Representative Norm Rokeberg

The Voice for Real Estate™ in Alaska

REALTOR® is a registered mark which identifies a professional in real estate who subscribes to a strict Code of Ethics as a member of the NATIONAL ASSOCIATION OF REALTORS®

Subject: RE: Be it resolved
Date: Wed, 04 Feb 2004 13:05:26 -0900
From: PeggyAnn McConnochie <peggyann@gci.net>
To: "'Shawn C. Paul'" <shawn@alaska.com>
CC: Sandy Eherenman <seherenman@alaskarealtors.com>, Amanda_Wilson@legis.state.ak.us, Dave Feeken <dfeeken@alaska.net>

Thank you.

-----Original Message-----
From: Shawn C. Paul [mailto:shawn@alaska.com]
Sent: Wednesday, February 04, 2004 11:45 AM
To: PeggyAnn McConnochie
Subject: Be it resolved

On behalf of the Southeast Board of Realtors and it's governing board I offer our strong support for HB 29. A thorough examination of agency law in Alaska has been long overdue. We feel this provides a much greater level consumer protection and clarifies what has been heretofore an unwieldy law which expert and layman alike had trouble understanding. We ask that the members of the Labor and Commerce Committee of the Alaska State Legislature stand with us in supporting this bill to their colleagues in both houses. We have asked statewide leadership to represent us in answering any questions that may arise. If there are specific colleagues which the members would like us to ask for support from in the Southeast districts we would be happy to do that as well.

Respectfully,
Shawn C. Paul
SEBR President

Subject: Letter of Support HB 29
Date: Mon, 19 Jan 2004 20:17:14 -0900
From: "David Feeken" <dfeeken@alaska.net>
To: "Amanda Wilson" <amanda_wilson@legis.state.ak.us>, "wendy mulder" <wendym@gci.net>

Honorable Representative Norman Rokeberg:

RE: Substitute HB 29

This proposed legislation will modernize and bring the statute in line with current real estate business practices in this state and throughout the nation.

The current statute was put in place in 1990 in response to the public's demand for buyer representation. Prior to 1990, due to common law and common business practice all real estate licensees represented the seller, and the seller was responsible for the actions of all licensees in the transaction. The buyers had no representation in the transaction. The seller knew that the licensee was working on their behalf; but few buyers understood that they were not represented or worse thought the licensee was representing them. The buyers wanted representation, and the seller did not want to be responsible for the actions of the licensee working with the buyer. This practice was called Subagency. Subagency is not allowed in most MLS systems today. The current statute simply informs the seller and the listing agent that the buyers' agent is representing the buyer, and the potential of dual agency when the listing brokerage firm is facilitating the purchase with the buyer.

The industry and the public, through education have grown in the last 13 years. The proposed legislation will standardize the disclosure requirements and provide a relationship disclosure form that will be used statewide by all licensees. The public and licensee will have written in statute, the basic duties and responsibilities of all licensees throughout the state. This will protect the public, giving the consuming public clear expectations and guidelines.

The proposed legislation will also require brokers to have clear office policies in place as guides to all agents within their offices. These policies will spell out the way all representation will be done, and the procedures used to protect the

confidentiality of the transaction. The proposed legislation will require the policy be available for the public to view, in order to make informed decisions when choosing a licensee.

Our goal with this legislation is to make the industry consistent throughout the state, enabling the consuming public to make knowledgeable, informed decisions, and provide a more efficient way for licensees to provide services to the public.

The proposed legislation will standardize the disclosure form that is used statewide by all licensees. The public will see the duties and responsibilities of a licensee or broker before looking at properties or giving confidential information. The proposed legislation defines specific duties of licensees that are not current in statute, therefore giving the consuming public clear expectations and guidelines.

Proposed legislation gives brokers the option of using designated agency to prevent dual agency. When the listing agent is a different person than the buyers' agent within the same firm, the broker can designate an agent representing the seller and a different agent representing the buyer. Neutral Agency (Dual Agency) would only occur when the listing agent is facilitating the transaction with the buyer. Most brokerage firms currently have firewalls in place to control confidential information.

The members of our legislative committee would be happy to meet with you to answer your questions and address any concerns you may have with this legislation.

Sincerely,

Dave Feeken

907-283-5888 O 907-252-0348 Cell

Industry Issues, Chairman

Legislative Committee, Chairman

Alaska Association of REALTORS®

Prudential

Prudential Vista Real Estate
4241 B Street
Anchorage, AK 99503
Bus 907 562-6464
Fax 907 562-5485
www.alaskahousehunters.com

Representative Norm Rokeberg
State Capitol, Room 214
Juneau, AK 99801-1182

Dear Representative Rokeberg,

I am writing to you in support of HB 29. I have been in the real estate industry over 20 years and have seen the agency laws change from traditional agency where all brokers in the transaction represent the seller and the buyer is left with no representation at all to buyer, seller, and dual agency. Although that was a step in the right direction for the consumer, the way the law was written required a very cumbersome ritual for the real estate salesperson to go through and it was a law that was little understood by both the salesperson and the client. Most times the client would sign documents after having agency explained by the salesman as just another document that must be signed to complete the transaction. They did not care about agency as such unless there was a problem, then they hired an attorney and tried to unravel the contract any way they could and agency was a weak link that they could fall back on. We have never acted as agents in the sense of the definition, "acting on behalf of another." To do that would be more like acting as an attorney in fact, which broker typically does not allow their salespeople to do.

HB 29 was created over many hours by many people looking for a way to complete a transaction being fair to the parties and leaving less liability for the parties on the table. Attorneys have a hard time understanding that in a real estate transaction, both parties can win. There does not have to be an adversarial position between the buyer and seller to conclude a successful transaction. HB 29 builds on this concept by allowing the salesperson to act as a buyer licensee, seller licensee or neutral licensee. The salesperson's job is to help a buyer and a seller close a transaction that both parties have agreed to.

I ask that you and our other legislators heartily support this bill to passage early in the 2004 session.

Sincerely,

Denny Wood, ABR, CRS, GRI
Sales Manager, Associate Broker
President Elect Alaska Association of Realtors

An independently owned and operated member of The Prudential Real Estate Affiliates, Inc.

January 19, 2004

The Honorable Norman Rokeberg
Alaska House of Representatives
State Capitol Building
Juneau, Alaska 99801

Dear Representative Rokeberg;

House Bill 29 is probably the most important piece of legislation affecting the real estate brokerage industry in over a decade. It is supported almost unanimously by REALTORS ®, the Alaska Real Estate Commission and real estate licensees throughout the State. I also support this legislation.

The present statutes regarding real estate licensee disclosure of duties and responsibilities became effective in January of 1991. There has been only minor modification to the laws since then and the way real estate is transacted has changed considerably. Most other states have modified their laws to reflect these changes but Alaska has not.

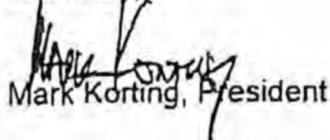
In June of 2002 the Alaska Association of REALTORS ® formed a Task Force, of which I was a member, to address this situation. After over a year of extensive research, review and debate along with the input and consultation of the Alaska Real Estate Commission, a consensus was reached. The result is HB 29 along with some Regulation changes that have been approved and are in the process of being adopted.

This legislation will benefit the public as well as the industry in that it more clearly and concisely defines the duties, responsibilities and disclosures of all the parties to a real estate transaction.

Again, I support HB 29 and would be glad to try to answer any questions you or any of your colleagues may have.

Thank you for your efforts and thank you for serving in the Legislature. I understand and appreciate the sacrifice you have to make.

Sincerely,



Mark Korting, President

RE/MAX of alaska, inc.
2600 cordova street, suite 100
anchorage, alaska 99503
phone: (907) 276-2761

1 PAGE SUMMARY ON SSHB 29

MEMORANDUM

Date : 2/15/2004

To : The Honorable Representative Lesil McGuire
Chair-Judiciary Committee

From : Linda Garrison–Owner-Broker AAR #1 Buyers Agency

RE : SSHB 29/SPONSOR-REPRESENTATIVE ROKEBERG

SSHB 29 is slated for hearing Wednesday, 2/18/04 in Judiciary. SSHB29 deals with the largest sale or purchase most people ever make. General background information is attached regarding areas of concern (designated agency-undisclosed dual agency/curtailing of Common Law of Agency/neutral facilitator, etc.) ; however there are three concerns that are predominant..

1. During the hearing in Labor and Commerce, it was indicated that THERE HAS NEVER BEEN A PUBLIC FORUM WHERE THE CONSUMERS OF ALASKA COULD HEAR WHAT THIS BILL WILL DO TO REPRESENTATION FOR THE PUBLIC/CONSUMER THE CONSUMER HAS HAD NO OPPORTUNITY TO EXPRESS COMMENTS, CONCERNS OR ASK QUESTIONS.

During the hearing at L&C, AKPIRG INDICATED SOME CONCERNS ON SSHB 29 AND REPRESENTATIVE ROKEBERG, AS THE SPONSOR OF SSHB 29 INDICATED THAT HE WOULD BE WILLING TO WORK WITH AKPIRG ON CONCERNS ON SSHB29. Consequently, since it was Representative Rokeberg's suggestion himself, SSHB 29's passage out of Judiciary should be held until Representative Rokeberg and AKPIRG meet and consumer concerns can be addressed. There is absolutely no rush to move such a critical bill so quickly and, in fact, said quick movement flies in the face of consumer protection and the promise made by the bill's sponsor himself.

2. For the public's protection, we should not give up Common Law of Agency. Common Law of Agency should be maintained in its' totality.

3. Although there is a notation of a zero fiscal note, the preparation of a pamphlet for the consumer certainly would have some costs. And, in SSHB 29 each office would have its' own policy and procedure manual on how consumer representation would be dealt with in each office. Certainly, said manuals need to be reviewed by the Real Estate Commission (or the Real Estate Investigator) and the state Legal Department for adherence to the statute and to avoid consumer confusion with different proposals made by the many real estate offices.

Thank you
I can be reached at 272-8937 for questions

ADDITIONAL BACKGROUND INFO - ON SSHB29

MEMORANDUM

Date : 2/14/2004

To : Honorable Representative Lesil McGuire
Chair - Judiciary Committee

From : Linda Garrison
Consumer/Concerned Citizen
Owner/Broker – AAR #1 Buyers Agency

RE : HB 29 - SPONSOR – REPRESENTATIVE ROKEBERG

ARE YOU AWARE THAT A HAIRDRESSER IS REQUIRED TO HAVE 1650 HOURS OF TRAINING (CLASSROOM AND "HANDS ON" EDUCATION) IN ORDER TO CUT YOUR HAIR? ARE YOU AWARE THAT REAL ESTATE AGENTS ONLY NEED 20 EDUCATION HOURS TO GET THEIR REAL ESTATE LICENSE AND TO WORK WITH CONSUMERS ON WHAT IS PROBABLY THE LARGEST PURCHASE OR SALE OF THEIR LIVES?

MANY PEOPLE BELIEVE THAT HB 29 IS HARMFUL TO THE CONSUMERS AND TO THE BUYING AND SELLING PUBLIC. HB 29 (which is scheduled in Judiciary on Friday 2/18/04) is tainted with protections for real estate practitioners and is harmful to the consumers. I respectfully request that you evaluate the points of HB 29 as indicated below prior to the 2/18/04 teleconference and respectfully request that HB 29 not be passed out of committee. I have a suggestion for this committee that has come from talking with the general public. I would hope that you seriously look at their comments and recommendations.

HB 29 abrogates most of the common law of Agency – to the detriment of the consumer.

HB 29 weakens and, in some cases, eliminates fiduciary duties such as loyalty, accountability, obedience, confidentiality, diligence, and other fiduciary duties – to the detriment of the consumer.

HB 29 establishes designated agency (a broker can designate one agent/licensee in the office to represent the seller and another to represent the buyer.) DESIGNATED AGENCY IS NOTHING LESS THAN UNDISCLOSED DUAL AGENCY AND IS A SEMANTIC SMOKESCREEN TO PROTECT AGENTS – TO THE DETRIMENT OF THE CONSUMER. Designated agency (undisclosed dual agency) also opens up damaging conflicts to the consumer – for example, what if one of the agents so designated is experienced and the other agent designated is a new agent – the consumer (buyer or seller) is negatively affected. How does a Broker determine "equal agents." All information of the buyer or seller would need to be kept under lock and key; no discussing at sales meetings, no discussion around water coolers. Not feasible and definitely – a detriment to the consumer.

HB 29 establishes another type of relationship - the neutral licensee relationship. Establishing a "neutral" licensee regarding the largest purchase or sale of someone's life – is ludricous – to the detriment of the consumer.

RE : HB 29 – SPONSOR – REPRESENTATIVE ROKEBERG

HB 29 calls for creation of a "pamphlet," by the Real Estate Commission to be used to inform the public of their options – a cost that doesn't need to exist as long as the current Alaska statutes are enforced. (HOWEVER, IT IS NOTED THAT THIS IS A ZERO FISCAL NOTE).

HB 29 does not adequately define actions that create a conflict of interest – to the detriment of the consumer.

I am sending just the initial pages signed by consumers indicating their concern on HB 29. Additional sheets will be forthcoming.

From those consumers, I have received the following recommendation:

* DO NOT SUPPORT HB 29 – DO NOT PASS HB 29 OUT OF JUDICIARY

* INCREASE EDUCATIONAL HOURS NEEDED TO SECURE A REAL ESTATE LICENSE – A MINIMUM OF 200 HOURS PRIOR TO ISSUANCE OF A LICENSE.

* INCREASE EDUCATION NEEDED FOR RENEWAL OF LICENSE TO A MINIMUM OF 50 HOURS EVERY TWO YEARS.

* DO NOT ALLOWING GRANDFATHERING OF EDUCATION HOURS.

*AT A MINIMUM, THIS BILL SHOULD ENCOMPASS THE WORDING THAT IF THIS BILL IS IN CONFLICT WITH THE COMMON LAW OF AGENC, THE COMMON LAW OF AGENCY IS TO PREVAIL.

Any bill regarding real estate should strongly involve increased responsibility and education placed on real estate agents/licensees – not less responsibility.

My clients consider the ramifications of this bill to be extremely negative towards the consumer. Thank-you for taking the time to evaluate this bill. As always, should you have questions, I may be reached in Anchorage at 907-272-8937.

common about courtesy in today's world of instant gratification.

It takes just a few minutes to pick up the phone to call a colleague and provide feedback after a showing. In addition, as Aydt indicates, no rule requires us to acknowledge receipt of calls and faxes, but common courtesy dictates otherwise. It never ceases to amaze me when salespeople take shortcuts in representing the public.

Today, we're all reachable by the click of a mouse. Still, nothing can take the place of human courtesy, which is best expressed by the human voice.

Anita Farr, CRB, CRS, Anita M. Farr Real Estate, El Paso, Texas

Dual agency in disguise

On Nov. 10, REALTOR® Magazine Online covered an agency panel that I participated in during the REALTORS® Conference & Expo. In the article, "Buyer's Rep Models Still Contentious Issue," I feel my opinion was misstated. The quote attributed to me was: "We need a new model for agency in this country. Designated agency is a baby step in the direction we need to go."

Although the portion addressing the need for a new model for agency is true, the last portion concerning designated agency is completely contrary to what I believe. Designated agency is camouflage for dual agency, nothing more, nothing less. The idea that a brokerage can transfer the agency relationships created by the contractual agreements it has with consumers down the line to licensees, who are agents of the brokerage and not the consumer, is ridiculous and will never stand up in a courtroom.

Tom Early, ABR®, ABRM®, The Buyer's Real Estate Brokerage, Westerville, Ohio

Correction

In our "25 Most Influential People in Real Estate" *(December 2003, page 41)*, the names of Assist-2-Sell co-founder Mary LaMeres-Pomin, marketing gurus Greg Herder and Don Hobbs, and architect Peter L. Pfeiffer were incorrectly referenced. We regret the errors.

Letters are edited for space and clarity. Publication of a letter doesn't constitute an endorsement of the writer's views by the NATIONAL ASSOCIATION OF REALTORS® or REALTOR® Magazine.

Advertisement

Who Else Wants To Be A Millionaire Agent?

I Built A Multi-Million-Dollar Real Estate Income With Over 83% of My Production Coming From An Ingeniously Simple, Yet Virtually-Unknown Prospecting, Referral and Follow-Up Tool. Here's Why I'm Sharing My Stunning Marketing Discovery For The First Time Ever...

This could be the biggest money-making secret ever revealed to our industry. The client flow from this simple tool is huge, automatic, and consistent as the sunrise. Best of all it's based on old-fashioned relationships and will create clients for life for as long as you practice real estate. Let me explain...

My name is Linda Fogarty, and I'm a REALTOR® in Orland Park, IL. In January 1999 an agent-friend invited me to become a "beta tester" for a marketing genius who created a wildly-innovative "relationship marketing" tool for another industry and wanted to quietly apply it to real estate. I cautiously agreed and what happened next shocked even me.

My first year using this tool I produced over $16 million, and in just over 3 years I've made $1,124,049.00 in real estate commissions. Because of this one tool, generating quality clients has become almost effortless. I never cold prospect. I never "sell" or face any form of rejection in my business. And because of the way this tool works, I often snare clients before other agents know they exist!

This one simple tool takes me less than 30 minutes a month to use. Most of my business comes by friendly relationship, so my net profits are some of the highest in the industry. I now work a low-stress 40-hour week, and I've created almost effortless growth in my business.

I realize all this sounds unbelievable, and quite frankly, I never intended to reveal it to other agents. But it doesn't make sense for the marketing genius (who invented it) to spend his valuable time creating it each month for just me and a few lucky agents. And no one else knows the secrets that make it work. So we've agreed to share it, but only with the most serious agents outside my market - first come, first serve.

If you're serious about building a world-class real estate practice, working with "the cream" of clients, and creating a life of true freedom, I'll share with you 1) a FREE SAMPLE of this tool, 2) a 16-page Special Report titled, *"FastTrack To $50 Million"*, and 3) Undeniable proof of its success from a small group of agents currently using it - some doing better than me.

Simply call my 24-hour Toll-Free voice message at **(800) 541-2177**, and leave your name and address at the tone. OR visit **www.SixFigureReferrals.com** to also receive an amazing Free Relationship Marketing e-Course titled, *"Six-Figure Referral Marketing Secrets."*

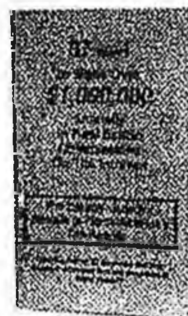
©2003 FCI, Inc.

Advertisement

FREE BOOK:

Top Agents Reveal 87 Ways To Make Over $1 Million In Commissions On The Internet

How would you like a unique opportunity to "peek" inside the businesses of the top agents and mortgage brokers in North America to study how they are achieving very real and incredible success using the Internet? Now you can and it won't cost you a penny!



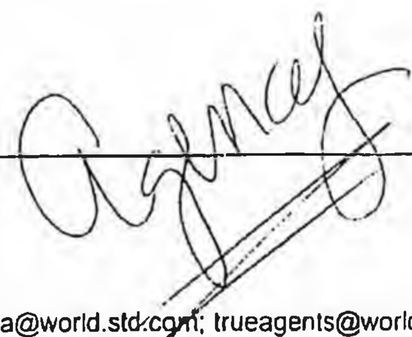
In this book, you'll learn the closely-guarded Internet marketing secrets and proven moneymaking strategies of North America's top agents and mortgage brokers.

As part of a limited pre-publication run, we're giving away copies of the new book, ***87 Ways to Make Over $1,000,000 Annually in Real Estate Commissions on the Internet.***

Whether you currently have your own website or not, these strategies are sure to dramatically increase your income. The best part is that they are easy and inexpensive to implement and many of them will put your marketing on autopilot so that you have more time for other things.

While supplies last, this book is **ABSOLUTELY FREE.** We'll even pay to have it shipped to you.

To order your free copy, visit **www.87ways.com** or call our 24-hour toll-free voice message at 1-888-932-6309 **ID#411** and leave your name and address at the tone.



Linda S Garrison

From: Roy Flanders [flanders@probuyer.com]
Sent: Sunday, August 24, 2003 3:12 AM
To: RealAgency@yahoogroups.com
Cc: EBAForum-list@exclusivebuyersagents.com; maba@world.std.com; trueagents@world.std.com
Subject: [EBAForum-list] BankRate.com article / also pitfalls of "Designated Agency"

Writer Chris Cruise with one of the better articles yet on Buyer Agency; it's on the "Real Estate Buying Guide" at Bankrate.com. It's well worth a link on our sites.

Couple excerpts below.

NEUTRAL LICENSEE = "NEUTERED" LICENSEE

Roy
--

<http://www.bankrate.com/brm/news/real-estate/agency1.asp>

Is 'your' agent really working for you?

By Christopher Cruise * Bankrate.com

You wouldn't -- for a lot of good reasons -- go into a contested divorce proceeding without an attorney, or worse, take the advice of your spouse's attorney.

Why, then, would you buy a home -- an adversarial process regardless of how friendly everyone involved in the transaction seems -- without someone on your side?
Oh, you think home buyers have always had representation? Well, think again.

[CLIPPED FOR BREVITY - ARTICLE GOES ON TO DEAL WITH "DESIGNATED AGENCY" WHERE FLANDERS GETS HIS LICKS IN.]

both that the agent is not in a fiduciary relationship with either party.

Perhaps the best way out of this dilemma is simply to terminate your agreement with that buyer agent and find another buyer agent not affiliated with that firm, according to exclusive buyer agent Roy Flanders, owner of ProBuyer Associates of Nantucket, Mass.

"Designated agency is a loser for consumers," says Flanders, who has been licensed for 25 years and an exclusive buyer agent for the past 10.

The designated agency or transaction broker concept, Flanders says, "is being pushed by the mega-brokers who want to keep both sides of the transaction," and works to the detriment of both seller and buyer. He says keeping information private within an office is too difficult.

"Designated agency is nothing but a new way to describe disclosed dual agency," he says. "It's really nothing more than a more lofty sounding name to still allow the mega brokers to capture a buyer and still do an in-house sale and keep both sides of the transaction and all of the commission. It is designed to circumvent the potential loss of a buyer who wants true fiduciary representation."

my 18 years' experience, the NAR, state and local Realtor associations have always strongly advocated their position against antitrust activities by their members.

Remember there are more than 900,000 Realtors at present. To imply that the few incidences you cited are a condemnation of our industry, and that NAR is not concerned is a bit farfetched.

Warren J. Taubman
Coldwell Banker
Residential Brokerage
Schaumburg, Ill.

Dear Editor:

NAR's silence is clearly a policy that has been dictated down to the local board level. "Entry Only" or "Limited Service" brokers do a disservice to everyone. To the public, they offer the illusion of a qualified broker, while offering none of the skill or regulatory oversight to which real brokers subscribe. The practice cheapens the value of brokers' services in the eyes of the public and provides no value or accountability. It is a scam, but apparently one that is condoned by NAR.

When I complained at the local level, I was informed that the local MLS rules & regulations committee adopts rules sent by

its brokerage laws in 1994, when the transaction brokers, sub-agency, single agency and dual agency were first recognized. Its statutes were changed again earlier this year, when the state created designated agency.

According to NAR, designated agency allows brokers to designate one agent to represent the seller and another to represent the buyer without creating a dual agency relationship and theoretically without creating a conflict of interest.

Prior to the designated agency law, if a Colorado consumer hired an agent in a broker's office, all the agents in the office owed the consumer a fiduciary duty to represent his or her interests, said Fran Winston, chief enforcement officer for the Colorado Real Estate Commission.

"Designated brokerage allows me to enter into a brokerage relationship with a given licensee," Winston said. "The employing broker designates that agent as my agent. The relationship begins and ends with that agent and does not extend to the other agents in the office or that broker."

When Colorado enacted designated agency, it also eliminated dual agency as an option, Winston said. But it doesn't stop one agent from handling both sides of a real estate transaction, as long as the proper disclosures are made to both parties.

If Winston were an agent, "I can maintain my agency relationship with the seller and treat the buyer as a customer," she said. "The customer relationship is a non-brokerage relationship." Colorado's recent changes to real estate brokerage laws and dual agency stem from the belief that dual agency is impossible. One person can't serve two masters, or in this case, the buyer and the seller.

Designated agency, however, has plenty of opponents. Consumer advocate Ralph Nader recently tried to stop Connecticut from enacting designated agency, arguing that it was a "a blatant attempt by the real estate industry to dilute its obligations and loyalty to consumers while still charging the same commissions."

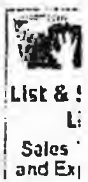
A similar fight is going on in Massachusetts, where the National Association of Exclusive Buyer Agents is among the leading opponents of that state's proposed designated agency law. NAEBA's Wemett thinks strong grassroots opposition will successfully defeat it.

The mainstream real estate industry understands dual agency is under attack and just "wants it to go away" by creating designated agency laws.

"Because real estate companies recognize the dangers of dual agency, they're trying to, in essence, get out of the liability aspect of it by calling it something else," he said. "That something else is designated agency, and designated agency is still dual agency."

Another problem with designated agency is that, in many real estate offices, agents work very closely together and will often overhear details or information involving a colleague's client.

"The only way that designated agency works is if there's protection of the information," Wemett said. "You can't have open telephone conversations, shared faxes...you have to protect all the information, and that's simply not happening."



Inman News

HOME | NEWS | MEMBERSHIP | PRODUCTS | CONFERENCES | ADVERTISE | ADVICE | AB
CONTACT US

Member Resources
Members Home
Edit your Account
Search Inman News
Weekly Newsletter
Special Reports
Streaming Audio
Inman Blog
Feedback
Connect Registration

FREE DAILY NEWS
Enter e-mail address
Submit

Dual agency under attack

DESIGNATED AGENTS/AGENCY

More states attempt designated agency amid protests

Story Tools
E-mail Story
Printable Version
Comment on Story
Reprint Rights

Sponsored by
THE BEST CMA

Thursday, November 13, 2003

Inman News

IS UNDISCLOSED DUAL AGENCY

The concept of dual agency could be dying a slow death nationwide as more states reconfigure laws involving relationships between real estate brokers and consumers. But some of those new laws don't prevent agents from the same brokerage from handling opposite ends of real estate deals, and some observers say consumers are still being hurt in the deal.

The new legislation has been prompted by concerns over dual agency and what is perceived as an inherent conflict of interest when one real estate broker represents both the buyer and the seller in a real estate transaction.

According to a recent National Association of Realtors survey, 90 percent of U.S. states have changed their laws on real estate agency since 2000, with 69 percent making "substantive changes" in the past year. The laws involved everything from consumer disclosures to confidentiality rules to inspection duties and other issues.

Dual agency is among the top reasons state laws are being changed and it has been outlawed in several states already.

Colorado, Florida and Kansas recently outlawed dual agency, which NAR thinks could be a new trend. In its place, some states are enacting designated agency laws. In fact, nearly half of all states have provisions involving designated agents. Yet disagreement continues over what this term does and doesn't mean.

"It's smoke and mirrors," said Thomas Wemett, a Rochester, N.Y., buyer's agent and president of the National Association of Exclusive Buyers Agents, which is one of a number of industry and consumer groups fighting designated agency bills in several states.

One of those states is Colorado, which began making significant changes in

Become a Member of Inman News

- Access 30,000 articles
- Weekly print newsletter
- Special reports
- Reprint rights
- Audio content
- Members discounts

Sign up now!

LETTERS TO THE EDITOR

NAR quashes competition

Re: 'Realtors should speak out against antitrust violations' (Nov. 25)

Dear Editor:

Enough is enough!

I'm beginning to become quite annoyed with *Inman News* and its continued Realtor bashing. You appear to have a hidden agenda that is both self-serving to you and other non-real estate companies that are making every effort to gain a larger portion of our market share. In

Linda S Garrison

From: Sandy Jurich [Sandy@BuyersChoiceRealtyMichigan.com]
Sent: Friday, November 14, 2003 10:08 AM
To: EBAForum-list@exclusivebuyersagents.com
Subject: Re: response. Dual Agency Under Attack:

Steele:
I doubt we'll ever find an attorney or enough buyers, or sellers for that matter, to bring down the house. Why? Simply because Designated Agency is all done "in house" and there is no way to get it outside the walls of the big firms. Of course, you and I know that the mutated names of agency have not necessarily changed the behaviors of the so called agents. This is where the dam might be a bit shaky. A good lawsuit that is allowed outside the walls of the large brokerage house that is not fed $S by other local mega brokers, and maybe the tide will change. In the interim, it's just another form of dual agency. After all, follow the commissions. If the buyer met the listing Realtor at an open house and spilled all their financial and motivational guts first, then is turned over to another agent, the Des Agent, whay bother???

Sandy

>>Ok article, but not strong enough on the perils of designated agency. IF more people understood it, it would never have gotten as far as it has. Unfortunately, we, as Realtors, tend to take care of our own pockets well before the public's.

I do have to give Inman credit for even letting Tom get some points in. And quoting Ralph Nader was good as well. Of course, they let Colorado's yesperson get in the last word. And Co isn't even a "normal" form of designated agency. It's a mutation of a mutation of a mutation.

Interestingly enough I find the arguments for designated agency nothing more than the recycled arguments used for disclosed dual agency 10 years ago. But at least disclosed dual agency had/has a legal basis. Designated Agency did not exist in the real world of business or Common Law. It was made up.

It's so hard to show the public that DA is not a good alternative. How can we better show that it is ultimately harmful to their pocketbook?

And I still say legal attacks could bring this down like a house of cards. Too bad we don't have any lawfirms that would like to make some serious money:>)

Steele V. Propp,

Common Law of Agency Must Be Maintained

FISCAL NOTE

STATE OF ALASKA	Fiscal Note Number:
2004 LEGISLATIVE SESSION	Bill Version: SSHB 29
	() Publish Date:

Revision Date/Time (Note if correction):

Title	Real Property Transactions/Licensees	Dept. Affected:	DCED
		RDU	Occupational Licensing (117)
		Component	Occupational Licensing
Sponsor	Representative Rokeberg		
Requester	House Labor and Commerce	Component No.	2360

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2004) cost: 0.0

Mark this box (X) if funding for this bill is included in the Governor's FY 2005 budget proposal: [ ]

POSITIONS

Full-time						
Part-time						
Temporary						

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

SSHB 29 makes changes to practices conducted by real estate licensees. New funds are not required to implement these changes.

Prepared by:	Jennifer Strickler, Administrative Manage	Phone	(907) 465-2144
Division	Occupational Licensing	Date/Time	2/2/04 1:42 PM
Approved by:	Edgar Blatchford, Commissioner	Date	2/2/2004
Agency	Department of Community & Economic Development		

(Revised 9/2003 OMB)

HB
31

HOUSE COMMITTEE REPORT

(7)
Date Referred to Committee: March 31, 2003

FURTHER REFERRALS:

Date of Committee Action: April 23, 2003

The JUDICIARY Committee considered: HB 31

HOUSE BILL NO. 31 — 1 INITIATIVE/REFERENDUM PETITIONS

"An Act relating to initiative and referendum petitions; and providing for an effective date."

Recommends it be replaced with [ ] HCS *or* [ ] CS *for* ____________________(________)
*For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR*_______ [ ] Same Title [ ] New Title

[ ] attach amendments
[ ] add new referral to ___________Committee
[ ] Letter of Intent___________Committee

List of Abbrev for Depts.:
ADM
CED
COR
CRT
EED
DEC
DFG
GOV
HSS
LEG
LAW
LWF
MVA
DNR
DPS
REV
DOT
UA

NEW FISCAL NOTES *Assigned by Chief Clerk's Office				
List by Dept(s):	*FN#	Fiscal	Indet.	Zero

PREVIOUS FISCAL NOTES				
List by Dept(s):	FN#	Fiscal	Indet.	Zero
GOV	1			✓

Signing with recommendations	Printed Last Name	DP	DNP	NR	AM
[signature]	SAMUELS	✓			
[signature]	Holm			✓	
[signature]	GARA		✓		
[signature]	Ogg	✓			
Tom Anderson	ANDERSON	X			
Chair: [signature]	McGuire	✓			
Chair:					

HOUSE COMMITTEE REPORT

(7) 3-31-03

Date Referred to Committee: January 21, 2003 FURTHER REFERRALS: Judiciary

Date of Committee Action: March 25, 2003

The STATE AFFAIRS Committee considered: HB 31

HOUSE BILL NO. 31 INITIATIVE/REFERENDUM PETITIONS

"An Act relating to initiative and referendum petitions; and providing for an effective date."

Recommends it be replaced with [ ] HCS *or* [ ] CS *for* ____________ (________)

*For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR*________ [ ] Same Title [ ] New Title

[ ] attach amendments
[ ] add new referral to ____________Committee
[ ] Letter of Intent ____________Committee

List of Abbrev for Depts.: ADM CED COR CRT EED DEC DFG GOV HSS LAA LAW LWF MVA DNR DPS REV DOT UA

NEW FISCAL NOTES *Assigned by Chief Clerk's Office

List by Dept(s):	*FN#	Fiscal	Indet.	Zero
Gov	1			✓

PREVIOUS FISCAL NOTES

List by Dept(s):	FN#	Fiscal	Indet.	Zero

Signing with recommendations	Printed Last Name	DP 2	DNP	NR 4	AM
Paul K. Seaton	Seaton			✓	
Max F. Gruenberg	Gruenberg			✓	
[signature]	HOLM	✓			
[signature]	LYNN			✓	
[signature] Dahlstrom	Dahlstrom			✓	
Chair: B. Weyhrauch	Weyhrauch	✓			
Chair:					

FROM AL Anders 4/30/03
For meetings on 4/4 + 4/23

An Initiative Petition Allowing Those Items Used with Marijuana Legal as Medicine or a Right To Privacy

WHEREAS, in 1998, the Alaska voters overwhelmingly passed an initiative to allow the use of marijuana as medicine (Nov. 3, 1998 - Bill allowing medical use of marijuana [97PSDM], 131,586 voting yes versus 92,701 voting no);

WHEREAS, in 1975, the Alaska Supreme Court unanimously ruled that the Alaska constitutional right to privacy, Article 1, Section 22, included the right to use marijuana in one's home (Ravin v. State);

WHEREAS, in 1993, the Alaska Superior Court ruled that the Alaska constitution cannot be amended by initiative and that the right to privacy still included the right to use marijuana (McNeil v. State);

WHEREAS it is in the best interests of the residents of the Municipality of Anchorage to use law-enforcement resources to pursue violent crime and to combat the growing threat of terrorism;

THEREFORE, We, the undersigned registered voters of the Municipality of Anchorage, direct the Municipal Assembly to put the following charter amendment before the voters at the next regular municipal election:

THE PROPOSITION: Shall Article II of the Municipal Charter be amended to add the following section:

(14) The right to buy, sell, or possess those items which could be used to consume, grow or process marijuana for medicine, or as is in accord with the right to privacy protected by Article 1, Section 22 of the Alaska Constitution.

DATE	PRINTED NAME	ADDRESS RESIDENCE - MAILING	VOTER ID #, or SS #, OR Date of Birth	SIGNATURE	EMAIL/PHONE

The date of first circulation of this petition is November 16, 2001. The signatures on this petition must be secured within 90 days from the date of first circulation.

Please return petitions to Free Hemp In Alaska, 2603 Spenard Road, Anch., AK 99503 or 278-4367(hemp).

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

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM March 3, 2003

SUBJECT: Initiative and Referendum Petitions
(HB 31, Work Order No. 23-LS0201\A)

TO: Representative Bill Williams
Attn: Tim Br y

FROM: Kathryn L. Kurtz KK
Legislative Counsel

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

As a preliminary matter, 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. If you would like an interpretation of the bill as it may apply to a particular set of circumstances, please advise.

Section 1. Changes the statutory signature requirements for filing an initiative petition with the lieutenant governor. Requires that the petition be signed by residents of at least three-fourths of the house districts in the state (an increase from two-thirds), and requires that the number of signatures from voters in each of those house districts be equal to at least seven percent of the number of people who voted in that district in the preceding general election.

Section 2. Makes the same changes as in section one to the corresponding statute relating to referenda.

Section 3. Makes the act effective only if a constitutional amendment to the same effect is passed by the voters at the 2004 general election.

Section 4. Makes the act effective the same date as the constitutional amendment, if the act takes effect.

KLK:lmb
03-059.lmb

Alaska State Legislature

Co-Chair
House Finance Committee
Subcommittee Chair
Environmental Conservation
Courts

During Session:
State Capitol
Juneau, AK 99801-1182
(907) 465-3424
Fax (907) 465-3793

In Ketchikan:
50 Front Street, Suite 203
Ketchikan, AK 99901
(907) 247-4672
Fax (907) 225-8546

Representative William K. Williams

April 23, 2003

MEMO

TO: Chair, Rep. McGuire & Members, House Judiciary Committee

FROM: Representative Bill Williams / Aide Randy Ruaro

RE: CS for HB 31

The citizen initiative process is an important part of the Alaska scheme of government. Because the initiative process is important, the Alaska Legislature has broad authority to enact laws protecting its integrity and reliability. Biddulph v. Mortham, 89 F.3d 1491, 1500 (11th Cir. 1996), cert denied, 519 U.S. 1151 (1997) (A state has ***"broad discretion in administering its initiative process***); Buckley v. American Const'l Law Found, Inc., (States "***have considerable leeway to protect the integrity and reliability of the initiative process, as they have with respect to election processes generally.***" Citing Biddulph with approval).

The Alaska legislature has exercised its broad authority to enact laws regarding initiatives through 23 different sections of Article 1 in Title 15 of the Alaska statutes. Passage of the CS for HB 31 would simply be another example of Alaska protecting the integrity of the initiative process.

In this instance, the Alaska Constitution is silent as to whether an initiative petition must be signed by a certain number of qualified voters in each house district. The Legislature is free to exercise its discretion to impose such a requirement in the CS for HB 31.

The CS for HB 31 protects the integrity and reliability of the initiative process through an increase in the amount of voter education and support

that must occur before an initiative is placed on the ballot. Yet, the CS does not require signatures from a greater number of districts than is already set out in the Alaska Constitution.

As a final note, Alaska's constitutional convention delegates were ambivalent about direct democracy. They authorized its use on one hand but limited its use on the other hand.

The initiative cannot be used to: amend the Constitution (Article XIII, Section 1); dedicate revenues, make or repeal appropriations, create courts, or enact local or special legislation (Article XI, Section 7); the legislature is given an opportunity to pass its own version of an initiative proposal (Article XI, Section 4); and the legislature may amend an initiated law after it is adopted by the voters (Article XI, Section 6). These Constitutional hedges on the exercise of the initiative show a faith by the delegates in the efficiency of the legislative process with open public hearings and debate and a concern that the initiative would be exploited by special interests.

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

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM February 17, 2003

SUBJECT: Initiative Petition Requirements and the Constitution (HJR 5 (Work Order 23-LS0202\A))

TO: Representative Bill Williams
Attn: Tim Barry

FROM: Kathryn L. Kurtz KLK
Legislative Counsel

You asked whether a constitutional amendment is necessary to effect the changes proposed in this resolution.

You suggested that perhaps the constitutional requirements relating to the distribution of the required signatures on an initiative petition among districts could be seen as a floor that could be supplemented by additional statutory requirements. There is a reasonable legal argument that leads to the opposite conclusion, that such additional statutory requirements would not be permissible.

First, the Alaska Supreme Court has held that the right of initiative should be liberally construed to permit exercise of that right. Thomas v. Bailey, 595 P.2d 1, 3 (Alaska 1979). Although that case dealt with appropriate subject matter for initiatives, the same principle could be applied here to argue that increasing the requirements for filing an initiative petition is an unconstitutional restriction of the right of initiative.

Second, the Alaska Supreme Court has held that the legislative qualifications provisions of the state constitution are exclusive, and cannot be supplemented by statute. Alaskans for Legislative Reform v. State, 887 P.2d 960 (Alaska 1994) (invalidating an initiative proposing term limits). The court's decision in this case was based in part on comments by delegates to the constitutional convention indicating that they thought the qualifications established in the constitution would be exclusive. By analogy, one could argue that the signature requirements spelled out in the constitution for initiative petitions are exclusive.

Finally, the framers of the constitution considered imposing more stringent signature requirements, but did not adopt this course. The convention considered and rejected the idea of requiring signatures from more than one voter in each of two-thirds of the election districts. *Id.* at 1180-1183. There was also considerable debate devoted to the percentage of districts signatures must be obtained from:

> Kilcher: ...If Mr. Johnson's amendment[1] should be adopted, would that leave enough power to the legislature later on to determine the percentage of signatures require in each of the two-thirds of the legal subdivisions?
>
> Johnson: Offhand, I would say no, but it seems to me that it might be construed that if the legislature should determine later that each voting precinct would have to produce a proportionate share of the signatures, that might be in contravention of the constitutionality. I am not enough of a constitutional lawyer to know, but my offhand opinion is that this provision as it is now before us would make it flexible, and if the legislature attempted to put any restrictions on that flexibility, that it would not be improper.
>
> President Egan: Mr. Kilcher.
>
> Kilcher: Personally I think that the legislature would be entitled to make further specifications that are not limited by any of the constitutional sections, and I hope that it will, and provided that I am right in my assumption, I am in favor of Mr. Johnson's amendment.

Proceedings, Alaska Constitutional Convention, part II, page 1012 - 1013 (December 16, 1955). To put this discussion into context, apparently the committee that drafted the section on initiatives initially proposed leaving any requirements for the geographic distribution of signatures up to the legislature. *Id.* at 1008.

Delegate Kilcher subsequently argued for less rigorous requirements:

> Kilcher: ...it is only fair that we reduce the 'two-thirds' to 'one-half' because if those that are opposed now and in the future to the initiative will have their way, they will have the legislature immediately to go about and have strict procedures established, for instance that in two-thirds of all the election districts we will have to have the full 15 per cent of signatures prorated in each district. I think the legislature will try to do that, and if they try to do it, if it is unconstitutional, it will have to be the people who go to the court and prove that such an act by the legislature would be unconstitutional. I think the legislature would get away with it and I wouldn't blame them for trying.

Id. at 1074.

---

[1] Mr. Johnson's amendment added the sentence "[t]he petition shall contain signatures from at least two-thirds of the election districts of the State." Proceedings, Alaska Constitutional Convention, part II, page 1008 (December 16, 1955).

Clearly, the framers anticipated that the legislature might at some point attempt to impose more restrictions on the right of initiative. But the comments of Delegates Johnson and Kilcher are rather equivocal as to the propriety of legislative action in this area.

An effort to impose additional signature requirements on the initiative process by statutory means rather than constitutional amendment could well face a legal challenge, and it is far from clear that it would survive. Hence my recommendation that you pursue a constitutional amendment.

KLK:lmb
03-033.lmb

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

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM April 23, 2003

SUBJECT: Constitutionality of Changing Initiative Signature Requirements without Amending the Constitution (House Bill 31, Work Order 23-LS0201\D)

TO: Representative Bill Williams
Attn: Tim Barry

FROM: Kathryn L. Kurtz KK
Legislative Counsel

You asked whether the \D draft of the above noted bill would be constitutional without a constitutional amendment.

Article XI, sec. 3, Constitution of the State of Alaska provides:

> SECTION 3. Petition. After certification of the application, a petition containing a summary of the subject matter shall be prepared by the lieutenant governor for circulation by the sponsors. **If signed by qualified voters, equal in number to ten per cent of those who voted in the preceding general election and resident in at least two-thirds of the house districts of the State,** it may be filed with the lieutenant governor.

(emphasis added).

In my opinion, the \D draft still adds an additional requirement for initiative petitions. The phrase "at least" in art. XI, sec. 3 refers to the number of house districts, not the number of voters in each of those districts as in your bill. Although there is no Alaska case law directly on point, and I can not predict with any certainty how an Alaska court would rule on the issue, for the reasons outlined in my memo of February 17 relating to HJR 5, I would still recommend pursuing a constitutional amendment in order to effect the change in the bill draft, as a statutory change alone may prove insufficient.

KLK:med
03-413.med

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

Frank H. Murkowski, Governor

P.O. BOX 110300
123 4TH ST., DIMOND COURT HOUSE
JUNEAU, ALASKA 99811-0300
PHONE: (907)465-3600
FAX: (907)465-2520

April 14, 2003

Tim Barry
Aide to Representative William K. Williams
State Capitol
Juneau, Alaska 99801

Re: Request for Opinion on HB 31, and HJR 5

Dear Mr. Barry:

Thank you for your letter dated April 1, 2003, to Deputy Attorney General Scott Nordstrand on the above matter. The Deputy Attorney General has asked that I respond to your request.

In your letter you asked for a legal opinion as to whether it is necessary to amend the Alaska Constitution to accomplish the changes proposed by HB 31, and HJR 5. You provided us with various materials in association with your request, including

1. a report and recommendations entitled "Initiative and Referendum in the 21st Century," prepared by the Initiative and Referendum Task Force of the National Conference of State Legislatures;
2. excerpts of the minutes of the Alaska Constitutional Convention concerning initiatives and referendum matters that you secured;
3. a memorandum that you prepared providing annotations for the excerpts from the Constitutional Convention minutes;
4. a copy of a page numbered 175 that you identified as from "Alaska's Constitution – a Citizen's Guide" by Gordon Harrison; and
5. a memorandum from Legislative Counsel Kathryn Kurtz, dated February 17, 2003, to Representative Bill Williams concerning initiative petition requirements and the constitution.

We have reviewed the materials that you have provided and considered your request. On balance, we believe that it is necessary to amend the Alaska Constitution in order to accomplish the changes proposed by the bills in question.

It appears that the February 17, 2003, memorandum from Legislative Counsel to Representative Williams addresses the same question that you have raised in your

April 1, 2003, letter to Deputy Attorney General Nordstrand. We believe that the memorandum prepared by Legislative Counsel on this matter sets out the correct analysis and the correct answer to the question you pose.

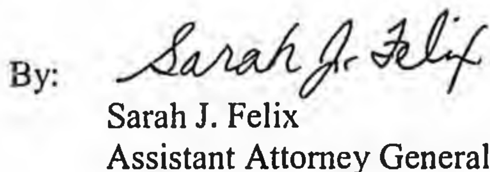
The Alaska Supreme Court has held that the right of initiative should be liberally construed to permit exercise of that right. *See Thomas v. Bailey,* 595 P.2d 1, 3 (Alaska 1979). In light of the *Thomas* case, we are concerned that the Court would view an increase in the requirements for filing an initiative petition such as those proposed in HB 31, as an unconstitutional restriction of the right of initiative. Therefore, it would be necessary to amend the Alaska Constitution in order to effect the changes set out in HB 31.

The constitutional convention minutes contain a large body of discussions on the constitutional provisions concerning initiative and referendum. We do not view the minutes from the convention as clearly establishing the right of the legislature to impose additional requirements for filing an initiative petition such as those set out in HB 31.

Thank you for providing us with the opportunity to express our opinion on this matter. Please do not hesitate to contact me if you have further questions on this matter.

Sincerely

GREGG D. RENKES
ATTORNEY GENERAL

By: 
Sarah J. Felix
Assistant Attorney General

SJF/sro

cc: Mike Tibbles, Legislative Director
Office of the Governor

Scott Nordstrand, Deputy Attorney General

David Marquez, Assistant Attorney General
Legislative Liason

Deborah Behr, Legislation and Regulations Attorney
Department of Law

23-LS0201\D
Kurtz
4/7/03

CS FOR HOUSE BILL NO. 31( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-THIRD LEGISLATURE - FIRST SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVES WILLIAMS, Meyer

A BILL

FOR AN ACT ENTITLED

1 **"An Act relating to initiative and referendum petitions; and providing for an effective**
2 **date."**

3 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

4 * **Section 1.** AS 15.45.140 is amended to read:
5 **Sec. 15.45.140. Filing of petition.** (a) The sponsors must file the initiative
6 petition within one year from the time the sponsors received notice from the lieutenant
7 governor that the petitions were ready for delivery to them. The [, AND THE]
8 petition **may be filed with the lieutenant governor only if it meets all of the**
9 **following requirements: it is** [MUST BE] signed by qualified voters
10 (1) equal in number to **at least** 10 percent of those who voted in the
11 preceding general election;
12 (2) [AND] resident in at least two-thirds of the house districts of the
13 state; and
14 **(3) who, in each of the house districts described in (2) of this**

1 **subsection, are equal in number to at least seven percent of those who voted in**
2 **the preceding general election in the house district**.
3 (b) If the petition is not filed within the one-year period provided for in (a) of
4 this section, the petition has no force or effect.
5 * **Sec. 2.** AS 15.45.370 is amended to read:
6 **Sec. 15.45.370. Filing of petition.** The sponsors may file the petition
7 (1) only within 90 days after the adjournment of the legislative session
8 at which the act was passed; and
9 (2) only if it is signed by qualified voters
10 (A) equal in number to **at least** 10 percent of those who voted
11 in the preceding general election;
12 (B) [AND] resident in at least two-thirds of the house districts
13 of the state**; and**
14 **(C) who, in each of the house districts described in (B) of**
15 **this paragraph, are equal in number to at least seven percent of those who**
16 **voted in the preceding general election in the house district**.
17 * **Sec. 3.** This Act takes effect immediately under AS 01.10.070(c).

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

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

M E M O R A N D U M March 3, 2003

SUBJECT: Initiative and Referendum Petitions
(HB 31, Work Order No. 23-LS0201\A)

TO: Representative Bill Williams
Attn: Tim Barry

FROM: Kathryn L. Kurtz KK
Legislative Counsel

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

As a preliminary matter, 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. If you would like an interpretation of the bill as it may apply to a particular set of circumstances, please advise.

Section 1. Changes the statutory signature requirements for filing an initiative petition with the lieutenant governor. Requires that the petition be signed by residents of at least three-fourths of the house districts in the state (an increase from two-thirds), and requires that the number of signatures from voters in each of those house districts be equal to at least seven percent of the number of people who voted in that district in the preceding general election.

Section 2. Makes the same changes as in section one to the corresponding statute relating to referenda.

Section 3. Makes the act effective only if a constitutional amendment to the same effect is passed by the voters at the 2004 general election.

Section 4. Makes the act effective the same date as the constitutional amendment, if the act takes effect.

KLK:lmb
03-059.lmb