

Facilitator Facts

A Synopsis of the
NAR Presidential Advisory Group (PAG) Findings
1993

OF THE 418 BUYERS & 403 SELLERS POLLED:

- 59% of buyers and 70% of sellers said they would be LESS LIKELY TO USE A FACILITATOR;
- 34% of buyers and 72% of sellers felt that facilitators should be COMPENSATED LESS than a traditional agent;
- 34% of buyers and 46% of sellers said facilitators would be PERCEIVED AS LESS PROFESSIONAL.

SELLER FACTS:

OUT OF INQUIRIES TO 403 SELLERS:

- 76% rated "exclusive representation acting only in the seller's best interest" as THE MOST IMPORTANT SERVICE;
- 44% of sellers thought using an agent would LESSEN THEIR LIABILITY in representing the property to buyers;
- 75% of sellers WOULD CHOOSE A CONVENTIONAL AGENT AGAIN to represent them.

BUYER FACTS:

OUT OF INQUIRIES TO 418 BUYERS:

- 69% rated "finding homes that suit our needs" as the MOST IMPORTANT SERVICE;
- 60% of buyers rated "fiduciary service" as VERY IMPORTANT;
- 71% WOULD CHOOSE A BUYER'S AGENT because "he or she would work for me";
- 30% SAID THEY USED A BUYER'S AGENT.

**PRESIDENTIAL ADVISORY GROUP
REPORT ON FACILITATOR/NON-AGENCY**

October 1993

In response to growing interest among some of its members in exploring the possibility of a non-agency real estate brokerage relationship (frequently referred to as a "facilitator"), the NATIONAL ASSOCIATION OF REALTORS® ("NAR") Presidential Advisory Group on the Facilitator Concept (the "PAG") was formed. Essentially, the PAG's charge was to study the concept and its potential implications to consumers and to licensees, and to recommend whether it should be developed and promoted by NAR.

After careful consideration of all aspects of a non-agency brokerage relationship, which assessment included interviewing subject matter experts, analyzing new and proposed state legislation addressing brokerage relationships, evaluating market research conducted expressly for the PAG concerning the views of consumers and REALTORS® and a variety of other information, the PAG issued this Report to share its findings and recommendations.

Recommendation Number 1:

NAR should not further develop or promote the pure non-agency facilitator concept. It is not the intent of NAR to characterize the facilitator concept as unprofessional.

Recommendation Number 2:

NAR shall suggest elements for a legislative framework which would clarify the law of agency as applied to real estate brokerage.

1. The legislation should include well-defined duties for each type of brokerage relationship.
2. The legislation should clarify the common law of agency as applied to real estate brokerage relationships by creating a statutory agency relationship and by creating a presumption that the relationship is one of statutory agency unless the licensee and the client enter into an agreement specifically providing for a different type of representation.
3. The legislation should contain clear guidance on disclosed dual agency.
4. The legislation should provide for the ability on the part of a broker in an in-company transaction to designate an individual

licensee within the broker's company to represent the seller, and to designate another individual licensee within the company to represent the buyer, without creating a dual agency relationship.

5. The legislation should eliminate or modify the consumer's vicarious liability for the acts of the licensee.

6. The legislature (or the state's real estate commission) should promulgate mandatory agency disclosure forms and rules providing for meaningful, timely and mandatory written disclosure.

7. The legislation should specify how brokerage relationships end and describe the licensee's duties upon the termination of a client relationship.

8. The legislation should address the licensee's disclosure duties with respect to property condition and address broker liability issues.

9. The legislation specifically should state that it abrogates the common law as applied to real estate brokerage relationships.

Recommendation Number 3:

That the Multiple Listing Policy Committee review current policies regarding the communication of offers of compensation from the listing broker to cooperating brokers to assure that the policies accommodate the new statutory agency concept.

Recommendation Number 4:

That NAR provide staff resources to assist state associations which desire to modify their state laws addressing brokerage relationships.

The PAG's underlying rationale for each of these recommendations is set forth in section VI of this Report. A variety of resource materials, including copies of the new and proposed state statutes addressing brokerage relationships, are contained in the appendices to this Report.

In November 1992, the NATIONAL ASSOCIATION OF REALTORS® ("NAR") formed a Presidential Advisory Group on the Facilitator Concept (the "PAG"), to conduct an in-depth study of the concept of non-agency brokerage relationships between real estate licensees and consumers. For the purposes of the PAG, this non-agency relationship was termed "the facilitator concept". The study was to include an evaluation of the concept, assessing its

possible benefits and drawbacks to consumers and to licensees, and a recommendation as to whether the concept should be developed and promoted by NAR, either in lieu of or in addition to traditional agency representation. This Report details the PAG's findings with respect to the concept of a non-agency brokerage relationship and offers several recommendations.

The members of the PAG were selected with the goal of creating a group comprised of individuals possessing a strong understanding of the intricacies of agency relationships and current types of brokerage representation being practiced in the marketplace today.

The PAG received staff support from NAR's Legal Affairs, Research and State and Municipal groups.

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The members of the Presidential Advisory Group on the Facilitator Concept are:

Earl Espeseth (WI), Chairman
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In 1983, the Federal Trade Commission (FTC) issued a survey that showed that 70% of home buyers believe that the real estate broker working with them was actually working for them. The industry reviewed this information and acknowledged that the typical practice at that time was that brokers worked as either the seller's agent or as the seller's subagent, and there appeared to be a need for mandatory agency disclosure rules at the state level.

In fact, NAR appointed an Agency Task Force to provide the association with an in-depth analysis in 1985. That group's report encouraged state REALTOR® associations to pursue mandatory agency disclosure rules from their state regulatory bodies or legislatures. Between 1986 and today, 44 states have achieved mandatory agency disclosure rules for real estate licensees. As this practice grew and consumers began to understand clearly who the agent represented, and whether or not they actually were being represented, demand for buyer representation grew within the marketplace. As the demand grew, licensees began to offer agency representation to buyers as well as to the sellers whom they had traditionally represented. With this change in traditional practice came concerns and confusion over cooperation, compensation and liability issues.

In 1991, NAR appointed a Presidential Advisory Group on Agency to look at this evolving agency issue and make recommendations which would help guide the association and its members during this transition. The Agency PAG's recommendations were received and adopted in 1992. These recommendations included making subagency optional in REALTOR® Multiple Listing Services, establishing corresponding standards of conduct for buyer's agents in the REALTORS® Code of Ethics, having NAR provide extensive training, education and information to its members on a variety of agency issues and encouraging state associations to seek mandatory, written, timely and meaningful agency disclosure in their respective states.

As this debate worked through our association, the industry and the media, some felt that agency had become so confusing for the average practitioner that there needed to be an easier solution to the issues being faced in the marketplace. Many were concerned about the liability which a licensee faces in even the simplest residential transaction. The argument was made that "all licensees really want to do is to bring a buyer and seller together" and we shouldn't need an agency relationship to do that. Many believed that if they eliminated the agency relationship, they would limit much of the potential liability facing licensees today. This led to the birth of the idea of the facilitator concept.

In 1992, as the Presidential Advisory Group on the Facilitator Concept was formed and began its work, it is important to note that much had been accomplished during the preceding 10 years, from the time of the FTC study. A Gallup poll commissioned by NAR in 1993 showed that now a greater percentage of home buyers understood who the broker represented in the transaction and 65% were told at first contact or already had the knowledge. We had seen a major shift in the information and knowledge in the marketplace and greater acceptance of varying agency practices. Indeed, states which early on had established agency disclosure rules and laws now were seeking to update those rules and make the disclosure more meaningful. Consumer groups which had been vocal opponents of NAR's policies now were forging coalitions to work with our association.

Additionally, many of our state associations were working on drafting legislation in an attempt to clarify agency issues. The PAG discovered that these ideas ranged from simply clarifying the basic application of the common law of agency, to redefining the common law of agency to better fit the practice of real estate brokerage, to eliminating agency altogether

and replacing it with a non-agency relationship between the consumers and the licensees. The Facilitator PAG began its work as this non-agency concept was being tested theoretically in many marketplaces and by many authorities such as state legislatures, state real estate commissions, consumer groups and by real estate practitioners themselves. The PAG believes that this Report presents the best knowledge they have garnered from the various groups working, studying and developing answers to the questions being raised by the agency/non-agency debate.

Information Gathering

The PAG decided that in order to answer its charge, a valuable aspect of its information gathering process would be conducting interviews of a variety of industry experts who have studied the possibility of non-agency relationships in the real estate industry, and who would represent all sides of the issue.

The PAG conducted interviews of various subject matter experts in late 1992 and early 1993. The interviewees were from various parts of the country, and included real estate practitioners, attorneys and other experts. The views expressed by the interviewees were diverse, ranging from those who strongly supported the concept of a non-agency brokerage relationship to the exclusion of traditional agency representation to those who strongly denounced the idea and encouraged reaffirming the importance of traditional agency representation.

Legal Analysis

The PAG recognized the need for legal opinion and analysis of many of the issues surrounding the debate. They sought opinions from outside sources as well as from NAR's Legal Affairs. The group also obtained and carefully reviewed new and proposed legislation from states that were considering or had considered and rejected the concept of a non-agency real estate brokerage relationship. At the PAG's request, NAR staff provided the PAG with a legal analysis of several of the new statutes as well as an evaluation of general liability issues in relation to the facilitator concept (see Appendix A).

Research

To enable it to responsibly answer its charge, the PAG felt it was very important to understand the needs and desires of consumers as well as the needs and desires of NAR members with respect to the facilitator concept and traditional agency representation. To meet this need, in the Spring of 1993, the PAG commissioned the Gallup Organization to conduct an extensive market research analysis of recent home buyers and sellers. The PAG also commissioned Market Facts, another national market research firm, to conduct a survey of REALTORS[®] with the goal that the results of their survey would reflect the thoughts of a representative sample of NAR members.

A summary analysis of the research is found in Appendix B.

When the PAG began its work, the word "facilitator" was most commonly used to describe a pure non-agency brokerage relationship. The word was defined as "a person who assists the parties to a real estate transaction to reach agreement between them without being an advocate for the interest of either party." But during the past year, as states have considered new rules or legislation, various new words have emerged, all with different definitions, all prompted by the original facilitator concept. Some of these terms are as follows:

"Limited Agent" - Under the new Georgia law, this term is defined to mean a broker who is working under an agreement on behalf of a client in a real estate transaction, but the broker is not subject to the control of the client except as to the end result. The statute also specifies a limited agent's duties. While these duties include some of the traditional common law fiduciary duties (disclosure, accounting and reasonable skill and care) the list does not include all of them.

"Independent Contractor" - The Virginia Association of REALTORS® and other commentators propose changing the relationship between a licensee and his client from agent/principal to that of independent contractor/employer. The idea is that an independent contractor's duties would be statutorily defined, and would not include all of the fiduciary duties owed by a licensee to his client under the common law of agency. Since the brokerage relationship no longer would be one of agent/principal, presumably, the common law of agency would not govern the relationship (unless, of course, the broker created an implied agency through his acts). Instead, the body of common law of independent contractors would govern the relationship.

"Transaction-Broker" - Under the new Colorado law, this term means a person who assists one or more parties to a transaction but is not an agent or advocate for the interests of any of the parties. A transaction-broker's duties are specified in the statute, and among other things, a transaction-broker's duties include some of the traditional common law fiduciary duties such as the exercise of reasonable skill and care, accounting, and disclosure of adverse material facts.

The PAG recognizes that any meaningful discussion of agency and non-agency relationships needs to clearly define the meaning of the terminology being used and hopes that the reader will carefully assess the opinions in this Report in the context in which they are given.

The recommendations contained in these reports do not necessarily reflect the official positions or policies of the Association. They were developed to provide advice to NAR's President and Leadership. Some recommendations have not been acted upon and others have been modified before being adopted by NAR.

The PAG was charged with making recommendations on the facilitator concept. By original definition, this was a pure, non-agency, non-fiduciary facilitator. During the time of the PAG's deliberations, many people have put forward differing variations of this definition of facilitator by adding one or more of the traditional fiduciary duties to this concept and/or by using other words (such as transaction-broker, independent contractor and limited agent) to define some derivative of this concept.

Therefore, it is important to understand as you read the PAG's recommendations that we are using the pure definition of the word facilitator, meaning non-agency, non-fiduciary. In your state, there may be consideration of a concept similar, but different from the concept being discussed. We will try to differentiate wherever possible and explain when a definition other than ours is being used in our analysis and opinion.

After careful consideration and analysis of all aspects of a non-agency brokerage relationship, the PAG makes the following recommendations:

Recommendation Number 1:

NAR should not further develop or promote the pure non-agency facilitator concept. It is not the intent of NAR to characterize the facilitator concept as unprofessional.

One of the PAG's goals was to find a way to bring the perspectives of the legal and regulatory communities into accord with the realities of the marketplace and common practices, thereby reducing the potential liabilities of real estate brokerage practitioners. After careful consideration of all aspects of the issue, the PAG reached the conclusion that the promotion of the facilitator concept would not be in the best interests of consumers or real estate licensees. Attached as Appendix C is a list of potential benefits and disadvantages which were most frequently discussed during the PAG's research. The PAG believes that much of the recent interest expressed by some members of the real estate community in the creation of non-agency brokerage relationships between licensees and consumers is the outgrowth of dissatisfaction with aspects of the common law of agency as it is applied to the real estate industry, and the resulting imposition of responsibilities and liabilities on consumers and real estate professionals that neither intend nor desire.

The PAG has developed what it believes to be a better way to address some of the underlying problems which seemed to be generating the interest in a non-agency brokerage relationship. Consequently, with the encouragement of NAR leadership, the PAG expanded its charge to include a response to the question: Is there a better solution than the creation of a non-agency brokerage relationship? The PAG's answer is found in Recommendation Number 2.

Historically, the relationship between real estate licensees and their clients has been defined by the traditional agency relationship in which the licensee owes the principal (the client) fiduciary duties. In turn, the principal may be held vicariously liable "Vicarious Liability" means the legal liability of a principal for misrepresentations made by the

principal's agent or subagent to the other party to the transaction. In the context of a real estate transaction, if the principal is the seller, such misrepresentations would be regarding the home or the seller. If the principal is the buyer, such misrepresentations would be regarding the buyer. for misrepresentations made by their agent. The traditional common law fiduciary duties are: loyalty, obedience, disclosure, confidentiality, reasonable care and diligence and accounting.

In a pure non-agency facilitator relationship, a licensee acting as a facilitator would not owe any of these fiduciary duties to the consumer. In addition, a facilitator would not be able to act as an advocate for the interests of any party to a transaction, except for the mutual interest of all of the parties to reach an agreement. This means that a facilitator would no longer be an advocate and would not be able to negotiate for the benefit of either of the parties, would not advise the buyer about the price or terms of the offer for the property, and would not advise the seller about what price or terms to accept for the property. As there would be no duty of confidentiality, some argue that a facilitator would be free to disclose to all parties everything they knew about each of the parties, even to their detriment.

The PAG believes it is not in the best interests of consumers or real estate practitioners for NAR to promote the development of the facilitator concept, and particularly not to the exclusion of agency representation. The PAG feels that this would be an extreme step which would address only a few of the current problems confronting real estate practitioners and consumers while having the potential to create a whole new set of undesirable circumstances.

If all of the traditional fiduciary duties were eliminated from brokerage relationships, consumers would not have the representation of an agent. One of the findings of the market research which was conducted for the PAG was that consumers clearly want licensees to provide them with representation. Of the home sellers surveyed, 76% stated that it was **very important** to them that the agent exclusively represent them and act only in their best interests, and 71% of the sellers also said that it was **very important** to them that the agent owe fiduciary duties to them. Of the home buyers surveyed, 60% said that it was **very important** to them that the agent owe fiduciary duties to them. As for the discrepancy between buyers' and sellers' feelings on the topic of the importance of fiduciary duties (60% compared to 76%), the PAG thinks that this may be due to the fact that buyer representation is relatively new to the residential real estate industry. Since historically buyers have not been represented in residential real estate transactions, the PAG concludes that perhaps they do not, at the present, place as much emphasis on fiduciary duties as do home sellers who have experienced the benefits of agency representation.

Use of Attorneys

Another result of eliminating fiduciary duties from brokerage relationships would be that consumers would seek out representation from other sources. Understandably, if consumers are not being represented by the licensee with whom they are working, many would feel the need for representation and would hire an attorney to represent them even in relatively straightforward real estate transactions. According to the market research conducted for the

PAG, 74% of the sellers and 57% of the buyers felt that it would be more important for them to have an attorney involved in a transaction if they used a facilitator instead of an agent. This need for increased involvement by attorneys easily could add to the consumer's overall transaction costs.

Freedom of Choice

NAR has historically supported freedom of choice for consumers as well as for its members, and promoting the facilitator concept to the exclusion of agency representation would only serve to remove choices. The PAG acknowledges that there may be a place for facilitation, and that in certain limited situations it might be an appropriate arrangement to consider. Such a situation might be where all of the parties to a particular transaction are sophisticated with respect to real estate and do not require the advice or guidance of a real estate professional.

According to market research conducted for the PAG, 61% of sellers, and 47% of buyers said they would be less likely to use a facilitator for their next transaction. After being reminded a facilitator would not owe them fiduciary duties, 70% of sellers and 59% of buyers said they would be less likely to use a facilitator next time.

Potential Liabilities

Case Law: Licensees who desire to act as facilitators, however, should proceed with extreme caution. As of the date of this Report, most state statutes are silent on the issue of non-agency real estate brokerage relationships. While this silence could be interpreted as not specifically precluding such activity, at present no case law exists on the subject. This means that it is uncertain how a court would interpret such a relationship. There always is the possibility that a court could find that an agency relationship existed even though the parties intended a non-agency relationship. This is especially the case if the licensee in any way acted as if he were the agent of one of the parties (such as by negotiating or otherwise advocating on behalf of one of the parties). Under such circumstances, an implied agency relationship could be determined to exist due to a facilitator's actions even if that person did not intend to create an agency relationship and regardless of any signed disclosures to the contrary.

For these reasons, until state statutes and case law specifically address non-agency real estate brokerage relationships, it could be highly risky for a licensee to attempt to act as a facilitator and attempt to create a non-agency relationship. Even in Colorado, which recently created a statutory transaction-broker option (a variation on the pure, non-agency facilitator concept), the new legislation does not eliminate all of the traditional fiduciary duties from a transaction-broker's duties. The same is true of the new Georgia legislation, which states that a limited agent does not have fiduciary duties, but then imposes by statute several of the traditional fiduciary duties (disclosure, accounting, reasonable care and diligence) in its listing of brokers' duties. While these new statutes have generated much interest because it is thought by some that they eliminate a broker's fiduciary duties, neither of these new statutes

create the option of a brokerage relationship completely devoid of all of the traditional fiduciary duties.

Code of Ethics: It also is important for members to remember that the NAR Code of Ethics applies to all NAR members, including those who might choose to act as facilitators, and the Code imposes standards of conduct which must be met no matter what the licensee's relationship with consumers. It is possible that these standards of conduct imposed by the Code of Ethics are standards associated with a level of service commonly provided by agents.

State Licensing Laws/Rules: State licensing laws and rules also impose certain standards of care upon licensees. It would seem unlikely that state regulatory agencies would be willing to reduce the obligations or standards of care for licensees who choose to practice in a non-agency relationship. This could lead to situations where courts would imply an agency relationship.

Recommendation Number 2:

NAR shall suggest elements for a legislative framework which would clarify the law of agency as applied to real estate brokerage.

Rather than abandon the law of agency in real estate practice, the PAG believes that a legislative solution would address many of the problems encountered by both consumers and real estate professionals when the common law of agency is applied to the real estate industry. These same problems have prompted the facilitator concept. The PAG identified the important elements for a legislative framework. The essential aspect of these elements is the clarification of the common law of agency as applied to real estate brokerage relationships, and the modification of some aspects of agency law which are not workable and not desired by consumers or by real estate professionals.

The following elements are recommended for a legislative framework:

1. The legislation should include well-defined duties for each type of brokerage relationship.

The specific duties and responsibilities of brokers to the various parties should be specified as clearly as possible for all types of brokerage relationships. For example, the specific duties and responsibilities of a broker to the seller whom he is representing should be enumerated, as well as the duties and responsibilities of that broker (who is acting as a seller's agent) to the buyer in the transaction. The duties and responsibilities of a broker to the buyer whom he is representing should also be specifically defined along with the duties and responsibilities of that broker (who is acting as a buyer's agent) to the seller in the transaction.

The legislation should include a clear description of the services that may be provided to customers (meaning parties to the transaction whom the licensee does not represent) by licensees without the licensee breaching his duty to his client. Examples of legislation containing well-defined duties and responsibilities are the new Colorado law (Appendix D, pages 3-10) and the new Georgia law (Appendix E, pages 5-14). The proposed Wisconsin law (Appendix I, pages 6-7) also addresses this issue by describing a broker's duties to all parties to a transaction as well as a broker's duties to clients.

2. The legislation should clarify the common law of agency as applied to real estate brokerage relationships by creating a statutory agency relationship and by creating a presumption that the relationship is one of statutory agency unless the licensee and the client enter into an agreement specifically providing for a different type of representation.

It would be very helpful both to licensees and to consumers if legislation would clarify the common law of agency as applied to real estate brokerage relationships by creating the framework for a statutory agency relationship, and further, by providing that the relationship between a real estate licensee and his client would be one of statutory agency unless the parties specifically create a different type of relationship. This arrangement gives the parties the most freedom of choice as far as what type of relationship they want, and allows them to add additional duties and responsibilities to those enumerated in a statutory definition if they desire.

The new Georgia statute does just this (Appendix E, page 4). The preamble to this legislation states in part that: "application of the common law of agency to the relationships between real estate brokers and persons who are sellers [and] buyers...has resulted in misunderstandings and consequences that have been contrary to the best interests of the public..." The PAG agrees with this general statement regarding the difficulties inherent in applying the common law of agency to real estate brokerage relationships, as well as with the Georgia legislature's approach to resolving this problem.

The new law modifies the common law of agency slightly by creating a new type of agent, a "limited agent". A limited agent is a licensee who "acting under the authority of a brokerage engagement, solicits offers to purchase, sell, lease, or exchange real property without being subject to the control of the client except as to the result of the work." Equally important, the law provides that a broker who is performing services under a brokerage engagement is a limited agent "unless a different legal relationship between the broker and the person for whom the broker performs the service is intended and is reduced to writing and signed by the parties." Examples of such different legal relationships include acting as a middleman, which would substantially decrease the duties owed to the consumer, or acting as a traditional agent, which would increase the duties owed to the consumer.

Another important feature of the law is that it creates the presumption that, unless a licensee enters into a brokerage engagement with a person, that person is presumed to be a customer of the licensee, not a client. It also clarifies that, except as specified in the statute, a limited agent does not have a fiduciary relationship with any party, and is responsible for exercising ordinary care in the performance of his duties.

3. The legislation should contain clear guidance on disclosed dual agency.

While disclosed dual agency with informed consent is lawful in every state (with the possible exception of Arkansas, due to an Arkansas supreme court decision), it would be helpful if state statutes specifically acknowledge the permissibility of disclosed dual agency in the context of real estate brokerage relationships. In addition, the steps that a broker must take in order to act as a disclosed dual agent should be clearly enumerated, such as exactly what must be addressed in disclosure forms for them to constitute sufficient disclosure. The common law requires that there be informed consent prior to dual agency representation, but statutes could provide valuable guidance if they would specify what actions are necessary to constitute informed consent.

An example of this is the Texas law (see Appendix H). This statute explains that a written agreement is required in which all of the parties to the transaction consent to the broker representing more than one of the parties to the transaction. The new Georgia legislation lists exactly what must be contained in a dual agency disclosure form (Appendix E, pages 15-16). Among other things, the disclosure must include statements concerning the fact that the licensee represents both parties and that their interests may be different or adverse, and how confidential information will be handled.

Another important aspect of the Georgia legislation is it provides that a written instrument which includes all of the listed items creates the presumption that informed written consent to dual agency has been given (Appendix E, page 15). An even stronger presumption could be created if legislation provided that the signing of such a disclosure document by a consumer creates a conclusive presumption of the clients' informed consent.

4. The legislation should provide for the ability on the part of a broker in an in-company transaction to designate an individual licensee within the broker's company to represent the seller, and to designate another individual licensee within the company to represent the buyer, without creating a dual agency relationship.

Both the new Illinois law and the new Georgia law provide a new option. The Illinois law (see Appendix F) specifically permits a broker to designate which licensees in his company will act as agents of the seller, and which licensees in his company will act as agents of the buyer in the same transaction. Provided that the designated licensees do not represent more than one party to a particular transaction,

under this law, the broker will not be considered a dual agent. The Georgia law (Appendix E, page 16) also permits a broker to assign different licensees who are affiliated with that broker to represent different clients in the same transaction.

Neither of these laws specifically address the broker's responsibilities when he chooses to designate different licensees to represent different parties to the same transaction. It would be important for the broker to have the same responsibilities of supervision with respect to the designated licensees in this transaction as he would in any other supervisory transaction.

As a caveat, the concept of designating licensees to represent both parties in the same transaction is in its infancy. The Illinois law is very new, only in effect since the spring of 1993, and the Georgia law is effective January 1, 1994. The workability of making such designations will require testing, and there are a variety of practical issues which will need to be dealt with. In addition, it is far too soon for there to be any case law in either of these jurisdictions interpreting the licensee designation provisions, so there is no guidance as to how the courts might treat these arrangements.

While the licensee designation concept has the potential to reduce some of the difficulties faced by brokerages which offer both buyer and seller representation, guidance is needed about how to accomplish the designations. Legislation providing for licensee designation by brokers should clearly address some of the intricacies of the designation concept. Namely, how a broker should go about making the licensee designations, how the broker should supervise the designated licensees, how involved the broker may become in these transactions, and how the designated licensees should behave, including specifics regarding what information may and may not be shared.

5. The legislation should eliminate or modify the consumer's vicarious liability for the acts of the licensee.

One problem with the application of the common law of agency to real estate brokerage relationships is the common law theory of vicarious liability (also known as "*respondeat superior*"). Under this legal theory consumers may be held liable for the acts of their agents and subagents. This means that a seller may be held liable for misrepresentations with respect to the property made by his agent or by subagents even though the seller was not aware that such misstatements were made. This also means that a buyer may be held liable for misrepresentations made by his agent or by subagents with respect to the buyer's financial circumstances even if the buyer was not aware that such misstatements were made.

It is not only consumers who may be held liable for the acts of their agents and subagents under the theory of vicarious liability. A listing broker also may be liable for the acts of their subagents. This means that if a listing broker made an offer of subagency, such as through a multiple listing service, and a licensee accepted this

offer of subagency by showing the property to a buyer, and if that subagent made a misrepresentation regarding the property to the buyer, the listing broker also could be liable to the buyer. Where there are many licensees in a market area and the licensees are not able to know each other personally, a listing broker takes the potential risk of vicarious liability for the actions of people he may not even know whenever he makes an offer of subagency.

The PAG believes that many consumers do not realize their potential for vicarious liability when they list their home with a broker or employ a buyer's agent. According to the market research performed for the PAG, 44% of the sellers believed that their potential liability regarding misrepresentations made to the buyer was lessened when they used a broker to sell their home as opposed to selling it themselves without a broker's assistance.

It would be in the best interests of consumers if the concept of vicarious liability specifically is eliminated from real estate brokerage relationships via legislation, or at the least if the theory is modified to exclude a consumer's vicarious liability for misstatements of his broker if the consumer had no knowledge of the misrepresentation. Wisconsin's proposed legislation contains a modification of the theory of vicarious liability and provides that the consumer will not be held liable for damages resulting from misrepresentations of the broker unless the consumer "knows or should have known of the misrepresentation." (Appendix I, page 11)

6. The legislature (or the state's real estate commission) should promulgate agency disclosure forms and rules for meaningful, timely and mandatory written disclosure.

It would be very helpful to licensees and consumers if either the state legislatures or the state real estate commissions would promulgate agency disclosure forms for use in all types of brokerage relationships and adopt rules and regulations regarding the timing of such disclosures. This would help licensees by providing them with language they know constitutes legally sufficient agency disclosure. The more concrete the guidance, the easier it will be for licensees to comply with what the states deem adequate and timely disclosure. It also would help consumers because with state approved forms, it is likely that disclosures would become more uniform and easier to understand.

The existence of state mandated forms also would be very beneficial to state associations and local boards/associations which want to provide forms for their members' use. It is much easier for the members if their local association is able to provide forms for them, as opposed to each member crafting their own forms. Without state sanctioned disclosure forms, the state and local associations run the risk of potential liability for any forms they create and make available to their members which are subsequently declared deficient by a court of law.

The new Minnesota law includes sample disclosure forms (Appendix G, pages 10-15) for use in the following situations: as an addendum to a listing agreement, as an addendum to a buyer representation agreement, a disclosure to a customer when the licensee represents the seller, and a disclosure to the buyer and the seller at the time of the offer to purchase (dual agency disclosure). As discussed more in-depth later in this Report, the creation of these forms by the Minnesota legislature is a positive step, however, the value of having state sanctioned forms is diminished seriously because the statute specifically states that it only establishes a minimum standard for agency disclosure and does not supplant the common law. Unfortunately, this statement removes any certainty that a licensee who uses the forms set out in the statute will be considered to have provided sufficient agency disclosure.

Depending upon the state, it might be preferable if agency disclosure forms are promulgated by the state's real estate commission instead of by its legislature. This is because some state legislatures convene less frequently than others, and in those situations, if changes need to be made to the forms, there might be a significant delay in effecting the necessary changes if legislative action is required, while the changes might be accomplished quickly if the forms are created and adopted by the state's real estate commission. Some states may choose to have enabling language in their legislation which specifically authorizes their real estate commission to promulgate a mandated form and rules for its use.

7. The legislation should specify how brokerage relationships end and describe the licensee's duties upon the termination of a client relationship.

The PAG is aware of a variety of questions which easily could be resolved for licensees if legislation would clarify how brokerage relationships terminate and provide guidance as far as a licensee's duties to a former client once the brokerage relationship has ended. One of these difficult situations occurs when a listing expires, the seller lists the property with another brokerage company and a buyer client of the former listing broker is interested in the seller's house.

The answers to these questions already exist, and some of them can be found in NAR's Code of Ethics (see Standard of Practice 7-8 in Appendix J), however, it would be helpful to both licensees and to consumers if these issues also were addressed through legislation or rule.

The new Georgia legislation addresses these issues (Appendix E, pages 13-14) by setting out in detail when a brokerage relationship ends. The law also includes valuable guidance as to the duties a broker still owes to a former client after the brokerage relationship has ended. In particular, the remaining duties include: accounting for all money and property and keeping confidential the confidential information which was learned during the relationship unless the former client

permits the disclosure of the information, the law requires its disclosure, or it becomes public information from another source.

The proposed Wisconsin statute also provides that the duty to keep confidential information confidential survives the closing of the transaction. (Appendix I, page 6). It also provides that a licensee owes the duty of confidentiality to all parties to a transaction, not just to a licensee's client.

8. The legislation should address the licensee's disclosure duties with respect to property condition and address broker liability issues.

Much of the impetus during the early development of the Facilitator concept was prompted by concerns regarding the increasing potential of broker liability. Many felt that the agency relationship was a major factor creating this liability and believed that by eliminating agency, they could eliminate much of the liability. In fact, research shows that most of a licensee's liability comes not from agency, but instead from claims of misrepresentation regarding property condition.

At present, approximately two-thirds of the lawsuits brought against licensees are brought by residential home purchasers who allege that the licensee failed to disclose or misstated a material fact regarding the property which affected the value or desirability of the real estate. For the most part, statutes do not address a licensee's duty with respect to property condition disclosure, so it is through case law that licensees' duties have been established in this area. In most states, a licensee has the duty to disclose known property defects. Article 9 of NAR's Code of Ethics obligates REALTORS® to "avoid exaggeration, misrepresentation, or concealment of pertinent facts relating to the property or the transaction. REALTORS® shall not, however, be obligated to discover latent defects in the property, to advise on matters outside the scope of their real estate license, or to disclose facts which are confidential under the scope of agency duties owed to their clients." In several jurisdictions, more stringent disclosure duties are imposed on licensees. In a few states, the common law rule is caveat emptor, and the buyer is on his own.

It would be very helpful if legislation listed a licensee's duties with respect to property condition disclosure. The new Georgia statute specifically states that a broker shall treat all customers "honestly and shall not knowingly give them false information." A seller's broker must disclose to a buyer customer "all material adverse facts pertaining to the physical condition of the property...which are actually known by the broker..." In addition, in situations of seller financing or a loan assumption, a buyer's broker must disclose to a seller customer "all material adverse facts actually known by the broker concerning the buyer's financial ability to perform the terms of the sale... and the buyer's intent to occupy the property as a principal residence."

The Georgia law also clarifies that a broker will not be liable to a customer for providing that person with false information if such false information was provided to the broker by the broker's seller-client or buyer-client if the broker "did not have actual knowledge that the information was false." Similar language would be helpful in limiting a broker's liability.

9. The legislation specifically should state that it abrogates the common law as applied to real estate brokerage relationships.

It will be very important that the legislation specifically state that it abrogates the common law with respect to the topics covered by the statute. If the legislation does not specifically state that it abrogates the common law on the subject, then it is conceivable that a broker could comply with the letter of the law and still find himself open to litigation.

This is what happened in the recent Minnesota decision Dismuke et al v. Edina Realty, Inc. (No. 92-8716 Minnesota District Court, Fourth Judicial District, June 17, 1993), in which the brokerage attempted to act as a disclosed dual agent for in-company transactions. The brokerage referred to the Minnesota statute for guidance with respect to agency disclosure. The statute which was in effect at that time required an affirmative written disclosure as to agency representation. The brokerage then placed language in its purchase contracts explaining which licensee represented which party to the transaction. Basically, the lawsuit challenged the adequacy of the disclosure used by Edina in dual agency transactions and whether it constituted informed consent. In response to Edina's motion for summary judgment, the court found that: "while the disclosure statement appeared to comport with statutory requirements, the statute did not abrogate common law disclosure requirements..." Then, in response to the plaintiff class' motion for summary judgment, the court ruled that: "while this disclosure statement appears to satisfy Edina Realty's statutory disclosure obligation to plaintiffs...it cannot be characterized as either a full or adequate disclosure of all the facts under common law." So even though the court found that Edina had complied with the state's disclosure statute, this court ruled that compliance with the statute was not enough because the statute did not abrogate the common law.

While the newly revised Minnesota law is significantly more detailed and gives licensees much more guidance than its earlier version, including sample disclosure forms for use in various situations, it negates much of its usefulness by stating: "The requirements for disclosure set forth in this chapter are intended only to establish a minimum standard for regulatory purposes, and **are not intended to abrogate common law.**" (page 10 of Appendix G) In effect, this means that a licensee could comply with the letter of the law, including using the disclosure forms provided in the statute, and still run the

risk that if a lawsuit is brought against him, the court might find that the disclosure was insufficient.

None of the finalized statutes which are included in Appendices C through H to this Report specifically state that their provisions abrogate the common law, however, the proposed Wisconsin legislation does address this important issue. It specifically provides that the sections of the statute which enumerate the duties brokers owe to all parties and the duties brokers owe to their clients "supersede any fiduciary duties of a broker to a party based on common law principles of agency to the extent those common law fiduciary duties are inconsistent with the duties specified in this chapter or in rules promulgated under this chapter." (Appendix I, pages 10-11). Given the recent Minnesota ruling in the Edina case, we expect more states will see the need for language similar to Wisconsin.

Recommendation Number 3:

That the Multiple Listing Policy Committee review current policies regarding the communication of offers of compensation from the listing broker to cooperating brokers to assure that the policies accommodate the new statutory agent concept.

Current multiple listing policy provides that a listing broker may offer compensation to subagents, buyer's agents or both. Additionally, in states where real estate brokers are authorized by law to act in a defined non-agency capacity, such as "facilitators" or "intermediaries," multiple listing services may enable listing brokers to offer compensation to individuals or firms acting in non-agency capacities. The current policy should be reviewed by the Multiple Listing Policy Committee with a goal of assuring simplified communication of offers of compensation to cooperating brokers, including cooperating brokers who may be functioning as "statutory agents" pursuant to a state statute.

Recommendation Number 4:

That NAR provide staff resources to assist state associations which desire to modify their state laws addressing brokerage relationships.

Many state associations are reviewing their state statutes to determine how the portions which address brokerage relationships may be clarified to more accurately reflect actual practices. NAR can assist these states in their studies and legislative activities by developing reference information incorporating the suggested legislative elements contained in this Report and distributing the information to the state associations. When requested by state associations, NAR staff can assist further by meeting with state staff to provide further understanding of the suggested elements.

The PAG carefully studied new legislation recently enacted (and in one case, proposed) by several states which have considered the facilitator concept and related issues. The full text of the statutes referred to below are attached to this Report in Appendices D through I. Highlights of the legislation which the PAG evaluated follows:

Colorado's new statute, Senate Bill 93-223, was signed into law on June 2, 1993 and goes into effect on January 1, 1994. This law creates a new type of brokerage relationship called a **transaction-broker**. Under the Colorado law, a transaction-broker is defined as a "broker who assists one or more parties throughout a contemplated real estate transaction with communication, interposition, advisement, negotiation, contract terms, and the closing of such real estate transaction without being an agent or advocate for the interests of any party to such transaction."

Under this law, the presumption is that a broker is acting in the capacity of a transaction-broker unless a single or dual agency relationship is established by means of a written agreement between the parties, or unless the broker expressly has agreed to act as a subagent of the seller, or has impliedly agreed to act as a subagent of the seller by accepting the sellers' offer of subagency.

The law also clearly states that sellers' agents and buyers' agents are **limited agents**, and the duties and obligations of sellers' agents and of buyers' agents specifically are enumerated. These duties and obligations of sellers' and buyers' agents are very similar, and include exercising reasonable skill and care, and the promotion of the client's interests with the "utmost good faith, loyalty, and fidelity" with respect to, among other things, the price, presenting offers, disclosing adverse material facts which actually are known by the client, and accounting. In addition, this legislation requires that both sellers' and buyers' agents inform the seller or the buyer, respectively, that they may be held vicariously liable for the acts of the agent. It continues by enumerating specific information that may not be disclosed by sellers' agents and buyers' agents without the client's informed consent, such as that a seller is willing to accept less than the asking price, or that a buyer is willing to pay more than the purchase offer price.

The statute also clearly outlines the duties and obligations of an agent acting as a dual agent, as well as specific information which may not be disclosed by a dual agent without the parties' informed consent.

The law states that a transaction-broker is not an agent of either party and that a principal is not vicariously liable for the acts of a transaction-broker. It also outlines the duties and responsibilities of a licensee acting as a transaction-broker, including: the exercise of reasonable skill and care, including with respect to presenting offers, accounting, disclosing any adverse material facts actually known by the broker, and informing the parties that they shall not be held vicariously liable for the actions of the broker. It also lists types of information which a transaction-broker may not disclose without the parties' informed consent. This list is virtually identical to the

information that may not be disclosed by sellers' agents and buyers' agents without informed consent.

The law does not preclude other types of brokerage relationships between licensees and their clients which provide for additional duties, obligations or responsibilities, as long as such agreements are in writing.

The law contains some additional important elements. It requires brokers to adopt written office policies describing the possible relationships with clients that the broker offers. In addition, it goes into detail regarding what the various disclosures must contain. It also states that: "Disclosures made in accordance with this Part 8 shall be sufficient to disclose brokerage relationships to the public." The law also addresses the duration of the brokerage relationship, and the broker's responsibilities after termination of the agreement, including the preservation of confidential information.

In April, 1993, Georgia enacted comprehensive legislation addressing the relationships between real estate brokers and consumers. This new legislation is effective January 1, 1994. Part of the findings contained in the legislation include a statement that "application of the common law of agency to the relationships between real estate brokers and (various types of consumers) has resulted in misunderstandings and consequences that have been contrary to the best interests of the public..."

The law creates a "**limited agent**" relationship, meaning that the broker is not "subject to the control of the client except as to the result of the work". The law creates a presumption that the consumer is a customer unless a brokerage engagement is entered. If a brokerage engagement is entered, the law presumes a limited agent relationship unless the parties establish a different type of relationship which is put in writing and signed by the parties. It states that a limited agent does not have fiduciary duties to any party but shall be "responsible for exercising ordinary care in the discharge of its specified duties under the brokerage engagement."

Under the Georgia law, limited agents still owe many duties to their clients, including many of the traditional fiduciary duties. These duties include:

- Performing the terms of the listing or buyer broker agreement;
- Seeking a sale at the price and terms sought by the seller (if representing the seller);
- Seeking a property at the price and terms acceptable to the buyer (if representing the buyer);
- Timely presenting all offers;
- Disclosing all known material facts of which the broker has actual knowledge;
- Timely accounting for all money and property in which the client may have an interest; and
- Exercising reasonable skill and care.

Georgia's law describes the specific duties of a seller's agent and of a buyer's agent. These duties are very similar and, when representing a seller, include seeking a sale at the price and terms contained in the listing agreement, and when representing a buyer, seeking a property at a price and on terms acceptable to the buyer, and in each case, disclosing material facts of which the broker has actual knowledge, accounting, and the exercise of reasonable skill and care. The statute also sets forth the duties of a broker to a customer (as opposed to a client) when the broker is acting as a seller's agent and when the broker is acting as a buyer's agent. This includes honest treatment and the disclosure of known material adverse facts.

The statute specifically protects from liability a broker who provides false information if such false information was provided to the broker by his client "and the broker did not have actual knowledge that the information was false."

In addition, the statute specifies the timing for the commencement and termination of brokerage relationships as well as the duties owed by a broker following the termination of the relationship (accounting and confidentiality). It also specifies the disclosure which must be made to consumers prior to the establishment of a brokerage relationship, including the broker's cooperation and compensation practices.

The law also specifies that a broker may act as a dual agent only with the written consent of all clients, and it sets out what the written consent must contain. An important aspect of this provision is that a document containing the listed elements which is signed by a client creates the presumption that the client gave their informed consent.

This legislation also permits a broker to assign different licensees affiliated with that broker "to represent exclusively different clients in the same transaction."

Effective as of April 2, 1993, a new Illinois statute permits a broker who enters into an agreement to represent a seller or a buyer to designate which salespeople in his company will act as the agent of the seller, and which salespeople in his company will act as the agent of the buyer in the same transaction. As long as the salespeople so designated do not represent more than one party in a transaction, the broker shall not be considered a dual agent.

On May 20, 1993, the Minnesota legislature adopted substantial amendments and additions to the statute addressing agency disclosure and dual agency. Most of the changes are effective October 1, 1993. The law specifies what dual agency means, when it occurs, what dual agency disclosures must contain, and the timing with respect to when disclosures must be given. The disclosures must include a clear explanation of how the broker will represent the interests of the principal and how that representation would be altered in a dual agency situation. The law also specifies that the forms must require that the principal (whether a buyer or a seller) choose

whether to authorize the broker to initiate a transaction which would give rise to dual agency.

The law provides that agency disclosures shall be made "in substantially the form set forth", and it provides sample forms to be used in a variety of situations, however, it specifically states that: "The requirements for disclosure of agency relationships set forth in this chapter are intended only to establish a minimum standard for regulatory purposes, and are not intended to abrogate common law."

In May, 1993, the Texas legislature passed amendments to that state's real estate license act which, effective September 1, 1993, specify the conditions which a broker must meet in order to act as a dual agent. The law sets forth the nature of, and timing for the delivery to consumers of an agency disclosure form, what constitutes sufficient written consent for a broker to act as a dual agent, and the duties and limitations placed on brokers who function as dual agents.

While Wisconsin has not yet adopted a new statute specifically addressing agency relationships and licensees, the Wisconsin Legislative Reference Bureau recently drafted proposed legislation. The PAG reviewed the proposed legislation as well as the Report on Agency prepared by the Wisconsin REALTOR[®] Attorney task force with great interest, because the task force originally had planned to propose the creation of a non-agency legislative framework. After the group had thoroughly studied the issue, it decided instead that consumers and real estate practitioners would be better served by the creation of a statutory agency framework, so the group did not recommend the creation of a non-agency brokerage relationship.

Of special interest to the PAG were the sections of the Report which detailed the group's findings that just as there are different types of brokers in different industries (such as stock brokers and yacht brokers, for example), different types of brokers owe different types of fiduciary duties to their principals appropriate to the particular industry. The group found that this was the case because this is a flexible area of the law which has been adapted to fit the many different relationships which are governed by agency principles.

Among other things, the proposed Wisconsin legislation specifically sets out the duties of brokers to all parties to a transaction, including the exercise of reasonable skill and care, disclosure of material adverse facts, **confidentiality** (which survives the closing of the transaction), and accounting. It also specifies the duties of brokers to their clients, including loyalty and the disclosure of material information other than confidential information.

An important change provided in the proposed legislation that would be very beneficial to consumers is a modification of the principal's vicarious liability for misrepresentations made by his agent. This legal principle of vicarious liability also is known as "respondeat superior", and it is a basic tenet of agency law. It is under this theory that a seller or buyer may be found liable for the actions of his agent. The

proposed Wisconsin statute modifies the theory of vicarious liability and provides that: "a client is not liable for a misrepresentation made by a broker in connection with the broker providing brokerage services, unless the client **knows or should have known of the misrepresentation or the broker is repeating a misrepresentation made to him or her by the client.**"

Another important element of this proposed legislation is that it specifically states that the duties specified **supersede the common law fiduciary duties** to the extent that they are inconsistent with the duties set forth in the law.

NAR's policy on agency, which was adopted by its Board of Directors in April of 1992 (see Appendix K), is based on the principles of informed consent and freedom of choice. Throughout the PAG's study of the non-agency concept, this policy was foremost in their thoughts and guided their decisions. Also of paramount importance to the PAG was NAR's obligation to provide guidance which is both in the best interests of consumers and in the best interests of NAR's members. REALTORS[®] are justified in their expectation of recommendations from NAR which respond to members' needs and which have been developed with a vision of the future while insuring the members' rights and legal protection.

As practitioners, REALTORS[®] usually view the brokerage practice as it occurs in the marketplace and often find that the legal and regulatory communities view their practice quite differently. One of the PAG's goals was to find a way to bring the perspectives of the legal and regulatory communities into accord with the realities of the marketplace and common practices, thereby reducing the potential liabilities of real estate brokerage practitioners.

The past few years have seen significant change in the day-to-day practice of real estate brokerage: changes brought about by technology, and changes brought about by agency issues. It is understandable that there is confusion and resistance to these changes in some sectors. The PAG hopes that this Report will help clarify the issues, review the possible solutions and recommend the best choices for the future needs of NAR's members. It is our hope that, with time, confusion will fade and understanding will prevail.