A Reassessment of the Selling Real Estate Broker's Agency Relationship with the Purchaser

Joseph M. Grohman
A REASSESSMENT OF THE SELLING REAL ESTATE BROKER'S AGENCY RELATIONSHIP WITH THE PURCHASER

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I. INTRODUCTION

Real property sellers have traditionally utilized real estate brokerage services to sell their properties.¹ Typically, the seller and broker enter into a listing agreement which expressly authorizes the broker to act as the seller's exclusive agent² in selling the specified property.³ This broker is commonly referred to as a listing broker.⁴ One of the listing broker's responsibilities is to inform others of the seller's desire to convey the property. The listing bro-

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¹ See FEDERAL TRADE COMMISSION STAFF REPORT, THE RESIDENTIAL REAL ESTATE BROKERAGE INDUSTRY 7 (1983) [hereinafter FTC REPORT]. The Federal Trade Commission ("FTC" or "Commission") undertook this report beginning in 1978 in response to criticisms of the brokerage industry. Id. at 1. The purpose of the report was "to explain how competition works in [the] industry and how the consumer is served in the real estate brokerage process." Id.

² See FTC REPORT, supra note 1, at 4 (defining an exclusive agent). See, e.g., SNML Corp. v. Bank of N.C., 41 N.C. App. 28, 37, 254 S.E.2d 274, 279 (1979) (a person who, through another's authority, undertakes to conduct or manage another's business or affairs is an agent); Stephenson v. Golden, 279 Mich. 710, 735, 276 N.W. 849, 858 (1937) (brokers included as agents).

³ See FTC REPORT, supra note 1, at 10. This form of a listing contract may provide the broker with an "exclusive right-to-sell" the listed property. Id. Under this popular type of agreement, if anyone other than the listing broker locates a buyer — even the seller — the broker is still entitled to the commission. See G. SIEDEL, REAL ESTATE LAW 157 (1979). See also Comment, Broker's Fiduciary Duties, supra note 1, at 147-49 (contrast of different listing contracts).

⁴ See FTC REPORT, supra note 1, at 7.
broker often accomplishes this by registering the property with a multiple listing service ("MLS"). This service aids the listing broker in informing other MLS members of the pertinent facts regarding the property and the sale. As a result, access to the MLS is one of the most important services a broker could offer to a client. Usually, when a cooperating MLS member, working with a potential purchaser, prepares to make an offer on the listed property, the cooperating or selling broker is deemed a subagent of the listing broker. Generally, subagents are in a fiduciary relationship with their principals. As a result, they owe their principal — the seller

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5 Id. As set forth in the FTC Report, a multiple listing service ("MLS") is one "operated by a local group of brokers [as] an information sharing or exchange mechanism" for the listing service's members only. Id. Of those sellers using brokers, ninety-two percent have their properties listed with a MLS. Id. at 8.

6 See id. at 29. Access to the MLS is limited almost universally to brokers who have become MLS members. The public is restricted from having direct access to the MLS. See also Rohan, Goldstein & Boris, supra note 1, § 2.04 (overview of the MLS system's history and development, including analysis of the 1983 FTC Report).

7 For this discussion's purposes, a selling or cooperating broker is one who has no prior relationship with the seller regarding the subject property. Their activity regarding the subject property arises from a prospective purchaser's interest, and any cooperation with another broker would involve a broker who has a listing agreement with the seller — the listing broker.

8 See RESTATEMENT (SECOND) OF AGENCY § 5(1) (1957). The Restatement defines a subagent as "a person appointed by an agent empowered to do so, to perform functions undertaken by the agent for the principal, but for whose conduct the agent agrees with the principal to be primarily responsible." Id. See also H. ReuShlein & W. Gregory, HANDBOOK ON THE LAW OF AGENCY AND PARTNERSHIP § 2, at 4-5 (1979) (nature of principal, agent and subagent relationship).

As a result of the subagent relationship, the agent will usually be liable to the principal for the subagent's actions regarding agency matters. See, e.g., Demian, Ltd. v. Frank AssoCS., 671 F.2d 720, 723 (2d Cir. 1982); Rayden Eng'g Corp. v. Church, 337 Mass. 652, 661, 151 N.E.2d 57, 62 (1958). See also RESTATEMENT (SECOND) OF AGENCY § 406 (1957) (absent agreement to contrary, agent responsible to principal for subagent's conduct with reference to principal's affairs). There are courts, however, which hold that a subagency under a MLS agreement is not a subagency for such liability. See, e.g., Wise v. Dawson, 353 A.2d 207, 209 (Del. Super. Ct. 1975).

The subagent either may be the agent's employee or one who is not the agent's employee but who is engaged by the agent for a specific undertaking. See RESTATEMENT (SECOND) OF AGENCY § 5(1) comment c (1957).

9 See FTC Report, supra note 1, at 18.

10 See RESTATEMENT (SECOND) OF AGENCY § 5(1) comment d (1957); see also Kruse v. Miller, 143 Cal. App. 2d 656, 660, 300 P.2d 855, 857-58 (1956) (cooperating broker who had no relationship with principal regarding the listing or sale of a property was subagent since he was acting with listing agent's permission); Rayden Eng'g, 337 Mass. at 661, 151 N.E.2d at 63 (application of subagency doctrine); W. Seavey, HANDBOOK OF THE LAW OF AGENCY § 3B (1964) [hereinafter Seavey, AGENCY HANDBOOK] ("[A] principal is one who has permitted or directed another to act for his benefit and subject to his direction or control."). See generally Seavey, Subagents and Subservants, 68 HARV. L. REV. 658, 666-67 (1955).
the same duties as those which an agent owes the principal.\footnote{See Rayden Eng'g, 337 Mass. at 661, 151 N.E.2d at 62-63 (citing Restatement of Agency § 5 comment c (1957)). A subagent has the same duties to a principal as an agent if the subagent knows of the ultimate principal. Restatement (Second) of Agency § 428(1) (1957). The subagent's duties to the principal, however, do not include those agent duties dependent upon a contractual obligation. Id.}

Without expressly agreeing to retain a broker as their agent, purchasers may also utilize a broker's services to locate property which they may opt to purchase. The real estate broker, in many cases, is the purchaser's sole source of expertise and material information regarding real property purchases.\footnote{See North, Identity Crisis Realtors Style, Real Est. Today (Nov.-Dec. 1973). See also Comment, Dual Agency in Residential Real Estate Brokerage: Conflict of Interest and Interests in Conflict, 12 Golden Gate U.L. Rev. 379, 381 (1982) (broker often gives purchaser financial advice as well); Comment, A Reexamination of the Real Estate Broker-Buyer-Seller Relationship, 18 Wayne L. Rev. 1343, 1343 (1972) (suggesting that purchaser-broker relationship is similar to attorney-client relationship as one relies on another's acquired skill and expertise) [hereinafter Comment, A Reexamination].} Often, this broker is not the same as the seller's listing broker.\footnote{See FTC Report, supra note 1, at 8. According to the FTC Report and the survey conducted by the National Family Opinion, Inc. ("NFO"), of those real estate sales involving brokers, sixty-six percent involved a selling or cooperating broker. Id. Therefore, in no more than one-third of residential brokerage transactions would there be a single broker.} First, the broker will attempt to interest the purchaser in property listed with his office. If successful, he will not have to share the sales commission with an outside broker. If unsuccessful, the broker will try to interest the purchaser in property listed with the MLS. If successful in this attempt, the broker will be referred to as the "selling" or "cooperating" broker for that property even though another broker's office had originally listed it.\footnote{See id. at 7.} As a result, the brokers will share the commission.\footnote{See id. For a discussion of Commission rates and split schedules, see id. at 133-37.} Once the buyer has located a property in which he is interested, the selling broker normally aids the buyer in determining the terms of his offer and then assists the buyer in presenting the offer to the seller, usually through the listing broker.\footnote{See id. at 7, 9.}

A clear distinction exists between the listing broker and the selling broker. It is the seller of real property who usually initiates the relationship with the listing broker. It is the purchaser who typically initiates the relationship with the selling broker. For some time, federal courts, state courts, professional real estate organizations, sellers, and purchasers have questioned the status of the selling broker's relationship and his duties to the real estate
purchaser. Absent a specific contractual relationship, case law generally concludes and authors opine that the selling broker is the seller's subagent and not the purchaser's agent. Therefore, he has little, if any, fiduciary obligation to the purchaser. Therefore, he has little, if any, fiduciary obligation to the purchaser.

The real estate broker's primary obligation to the purchaser is to deal honestly and fairly with him. This obligation, rather than emanating from an agency relationship, arises, at least partially, from the position of public trust which brokers occupy, and is supported by their virtual monopoly in real estate sales. As a result, the purchaser, without an attorney, is the least protected and most vulnerable party in a real estate transaction. The primary exception to this principle is reflected in case law regarding brokers' liability to purchasers.

Authors, however, have come to criticize this conclusion. See, e.g., Currier, Finding The Broker's Place In The Typical Residential Real Estate Transaction, 33 U. FLA. L. REV. 655, 673-81 (1981) (stressing necessity of evaluating alternative methods of dealing with the legal relations among all parties); Comment, A Reexamination, supra note 12, at 1362 (concluding there should be a reexamination of the agency doctrine because of fiduciary nature of broker-buyer relationship). But see Romero, Theories of Real Estate Broker Liability: Arizona's Emerging Malpractice Doctrine, 20 ARIZ. L. REV. 767, 773 n.33 (1978) (noting seller is agent of buyer).

17 See Fennell v. Ross, 289 Ark. 374, 379, 711 S.W.2d 793, 796 (1986); Santaniello v. Department of Professional Regulation, 432 So. 2d 84, 85 (Fla. Dist. Ct. App. 1983); cf. Frisell v. Newman, 71 Wash. 2d 520, 569, 429 P.2d 864, 869 (1967) (selling broker is subagent of listing broker). In Santaniello, the court stated that the selling broker was the seller's agent even though the broker and the seller never met before the broker presented the buyer's offer to the seller. Santaniello, 432 So. 2d at 85. The court seemed to predicate its conclusion on the seller's responsibility to pay the broker's commission. Id. at 85. See also Sinclair, The Duty of the Broker to Purchasers and Prospective Purchasers of Real Property in Illinois, 69 ILL. B.J. 260, 260 (1981) (broker traditionally owes fiduciary duty only to seller).


20 See Funk v. Tifft, 515 F.2d 23, 25 (9th Cir. 1975); Zichlin v. Dill, 157 Fla. 96, 97, 25 So. 2d 4, 5 (1946); Sawyer, 89 Ill. 2d at 386, 432 N.E.2d at 852; Amato v. Latter & Blum, Inc., 227 La. 537, 542, 79 So. 2d 873, 876 (1955).

21 Zichlin, 157 Fla. at 98, 25 So. 2d at 4.

22 See Harney, Is the Real Estate Agent on the Buyer's Side?, Miami Herald, July 20, 1986, at (9H), (1-5); Comment, A Reexamination, supra note 12, at 1343; Comment, Caveat Emptor! The Doctrine's Stronghold, 1 WILLAMETTE L.J. 369, 369 (1960) ("The doctrine of caveat emptor, while nearly abolished so far as the sale of personal property is concerned, continues to exist and to thrive in the law of real estate.").
chasers for misrepresenting matters regarding the sale or for failing to disclose defects in the property.

After reviewing agency principles in light of the modern real estate transaction, it is opined that the selling broker is, under many circumstances, the purchaser's agent. Although it may be that various issues raised in this article apply to real estate brokers other than the selling or cooperating broker, the discussion will focus solely on the question of whether, in a typical real estate transaction involving a selling or cooperating broker, there are enough facts to establish the legal criteria for determining that an agency relationship exists between the selling broker and the purchaser.

To analyze this question, this Article will review existing agency law most applicable to real estate transactions generally and to selling brokers specifically. Next, it will analyze principal and agency elements reflected in the selling broker's relationship with the purchaser. Finally, it will propose appropriate legal analyses, based upon agency law, for the selling broker's relationship with the purchaser. It shall be noted that these analyses include but also extend beyond those circumstances which establish a selling broker's liability for misrepresenting or not disclosing defects in the property.

II. REVIEW OF EXISTING CASE LAW

A. Selling Broker's Relationship With Seller and Purchaser

Generally, the case law holds that, unless special factors exist

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23 See, e.g., Ward v. Taggart, 51 Cal. 2d 736, 742, 336 P.2d 534, 538 (1959) (fraudulent misrepresentations to purchaser rendered broker liable); Zichlin, 157 Fla. at 98, 25 So. 2d at 4-5 (action may be maintained by purchaser against broker for misrepresentations).

24 Lingsch v. Savage, 213 Cal. App. 2d 729, 736, 29 Cal. Rptr. 201, 204 (1963) (broker may be jointly liable with seller if he knows of defects which buyer cannot diligently discover, and such defects are not revealed).


25 See, e.g., Comment, Broker's Fiduciary Duties, supra note 1, at 154-76 (analysis and evaluation of broker-buyer relationships and suggestions for change); Comment, A Reexamination, supra note 12, at 1343-54 (same).
to determine otherwise, the selling broker is the seller's agent. As a result of this agency relationship, the selling broker owes a fiduciary duty to the seller. It is interesting to note that this view is consistent with that of the National Association of Realtors ("NAR").

Courts have based their decisions regarding subagency in real estate transactions on two different theories. Some courts have stated that a real estate broker exercises discretionary functions on the seller's behalf and, therefore, the broker may delegate his duties to a subagent only if the seller has given specific authorization. Other courts have stated that because the real estate broker's functions are ministerial, the broker may delegate his duties to a subagent unless the seller specifically directs him not to do so. At least one author has suggested that since it is common practice for real estate brokers to authorize other brokers to cooperate with them, one should presume authorization to delegate exists absent a clear indication by the seller to the contrary.

The Colorado Supreme Court best expressed the majority position in Stortroen v. Beneficial Finance Co. In Stortroen, the court, in determining the time sequence of acceptances and counteroffers, was presented with the issue of whether a cooperating broker under an MLS was the listing broker's subagent and, therefore, the seller's agent. The court gave several traditional reasons for finding the selling broker to be the seller's agent. The court reasoned that where a listing agreement would allow the listing broker to register the property with a multiple listing service, the listing broker, by placing the property with a MLS, offers a subagency to any selling or cooperating broker who can procure a pur-

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26 See FTC REPORT, supra note 1, at 180.
27 See generally Comment, A Reexamination, supra note 12, at 1356-57 (fiduciary duties to seller from broker arise from listing contract as well as from broker's position of trust and confidence).
28 See FTC REPORT, supra note 1, at 14. The NAR is the country's largest professional association in real estate brokerage and operates approximately ninety-five percent of the MLSs in the United States. Id. at 15.
30 Id. at 53 n.81.
31 Id.
32 736 P.2d 391 (Colo. 1987) (en banc). For a case holding similarly where there was no MLS listing involved, see Kruse v. Miller, 143 Cal. App. 2d 656, 659, 300 P.2d 855, 857-58 (1956) (cooperating broker acted at listing broker's request).
33 See Stortroen, 736 P.2d at 395.
The court relied on the fact that the entire business structure of a real estate transaction would emanate from the agreement between the listing broker and all of the other members in the MLS.

A second reason advanced by the court was that if one were to find indicia of an agency relationship between the selling broker and the purchaser, one inevitably would find a dual agency relationship involving the seller and purchaser as the principals and the selling broker as the dual agent. The Stortroen court stated that a dual agency in such transactions is fraught with potential conflicts of interest.

Finally, the court reasoned that a finding of an agency relationship between the selling broker and the purchaser based solely on the parties' interactions may not, in actuality, act to benefit the purchaser. To support this conclusion, the court proffered two examples. Traditionally, a purchaser may rescind an agreement with the seller because of the seller's agent's misrepresentation if the seller ratified the agent's acts. If the selling broker is deemed the purchaser's agent, but is also the party responsible for such misrepresentation, the purchaser would have no such remedy against the seller since the reclassification of the parties would render the ratification doctrine inapplicable.

Secondly, agency law provides that if an agent breaches a duty to the principal, the principal may, as one remedy, require the agent to return all compensation that the agent received for the particular transaction. However, the Stortroen court noted that as the purchaser does not pay the real estate commission, the purchaser's legal position would not be enhanced by the finding of an

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34 Id. at 397.
35 Id. The court realized that the business relationship between the seller, listing broker, and MLS members is derived from the listing contract, whereas the purchaser is bound by no such relationship. Id. at 397-98. See also Note, Ellsworth Dobbs, Inc. v. Johnson: A Reexamination of the Broker-Buyer-Seller Relationship in New Jersey, 23 Rutgers L. Rev. 83, 99-100 (1968).
36 Stortroen, 736 P.2d at 398.
37 Id. The court noted that under the Colorado law, a real estate broker is prohibited from acting for both the buyer and seller in the same real estate transaction absent consent. Id. (construing Finnerty v. Fritz, 5 Colo. 174, 175-76 (1879)).
38 Id.
39 Id. at 399 (citing Romero, supra note 17, at 773 n.33). Note, however, that this does not mean that the purchaser would have no action against the broker for the misrepresentation. Id. See also Restatement (Second) of Agency § 100 (1957) (effects of ratification).
agency relationship.\textsuperscript{40} 

Therefore, based on the above, the \textit{Stortroen} court refused to find an agency relationship between the selling broker and the purchaser without an express written agreement.\textsuperscript{41} To reach this conclusion, the court reasoned that “[t]he prevailing perception of the broker as an agent of the seller is too firmly imbedded in the real estate business to permit such a finding [of agency between the selling broker and the purchaser] on the basis of conduct alone.”\textsuperscript{42}

Certainly, some courts have accepted the proposition that a real estate broker has a duty to exercise reasonable care so as to protect the interests of those whom the broker is attempting to persuade to enter into the contemplated transaction.\textsuperscript{43} However, this duty falls short of that which is owed by an agent to his principal.\textsuperscript{44} Therefore, these holdings do not afford the purchaser the same protection that the seller typically receives from an agent.

\textbf{B. Creating the Agency Relationship}

The existence of an agency relationship is a question of fact, unless the facts can be interpreted in only one way.\textsuperscript{45} It arises, generally, where one person manifests his intention that another shall act on his behalf, the other person consents to such, and the party for whom the other acts has the right to control the ultimate direction of the cooperative effort.\textsuperscript{46}

Thus, there are three elements necessary to create this relationship.\textsuperscript{47} The first is the principal’s manifestation of his intent

\textsuperscript{40} \textit{Stortroen}, 736 P.2d at 399 (citing Romero, supra note 17, at 773 n.33).

\textsuperscript{41} \textit{Stortroen}, 736 P.2d at 400.

\textsuperscript{42} Id.


\textsuperscript{44} See infra notes 65-71.


\textsuperscript{46} See \textit{Restatement (Second) of Agency} § 1 (1957). See also Brown v. Schmitz, 237 Iowa 418, 424, 22 N.W.2d 340, 343 (1946) (insufficient evidence to warrant finding agency relationship); \textsc{W. Seavey, H. Reuschlein & L. Hall, Cases on Agency and Partnership} 1-4 (1962) (scope and purpose of agency).

\textsuperscript{47} See \textit{Restatement (Second) of Agency} § 1 comment b (1957).
that the agent shall act for him.\textsuperscript{48} Except for consent to execute instruments under seal or to conduct transactions as applicable statutes specify, one may authorize another to act on his behalf either by written or spoken words or by conduct through which another may reasonably believe that such authorization to act was given.\textsuperscript{49}

The second element is that the agent accepts the responsibility.\textsuperscript{50} As with the principal's consent, no specific words are necessary to find such an acceptance. Where one finds that the principal communicated to the purported agent his desire that the agent act on his behalf and the agent proceeded to act as requested without communicating to the principal by words or action that he did not intend to act on the principal's behalf, the principal may reasonably infer from the agent's performance that he performed on the principal's behalf.\textsuperscript{51}

The final element dictates that the principal has the right to control the venture. In considering this aspect, one must note that control does not necessarily extend to the agent's specific acts. The principal may exercise his right to control before the agent acts, at the time the agent acts, at both times, or he need not even exercise this control.\textsuperscript{52} For an agency relationship to exist, the principal needs only to establish the right to control the ultimate direction in which business is conducted, not the act itself. Therefore, the principal may have no control over the physical acts of an agent.

\begin{itemize}
\item \textsuperscript{48} See id. \textsection 15. Such manifestation by the principal is essential to creating an agency relationship. Id. See id. at comment a for a further discussion of manifestation. See also Schroeder v. Mauzy, 16 Cal. App. 443, 449, 118 P. 459, 462 (1911) (agent transacts another's business or manages another's affairs through the other's authority to do so, and accounts to the other for such).
\item \textsuperscript{49} See \textit{Restatement (Second) of Agency} \textsection 26 (1957). The primary aspect is the act of manifestation by the principal that the agent shall act on his account. Id. at comment a. What the principal intends is not important in deciding whether there is a principal and agency relationship. Id. Silence may also be a manifestation. See id. at comment d.
\item The Restatement's comments explain that authority to act, as an element of a principal and agency relationship, arises from the principal's express statement of such authority to the agent; from the principal's directing the agent to perform acts that include those acts in question; or from the principal's behaving in such a way that the principal should reasonably know that he is indicating to the agent that the agent is to perform on the principal's behalf. Id. at comment c.
\item \textsuperscript{50} See id. \textsection 15 comment c. See also H. Henn, \textit{Agency, Partnership and Other Unincorporated Business Enterprises} 19 (1972) (rules on creation of agency).
\item \textsuperscript{51} See \textit{Restatement (Second) of Agency} \textsection 15 comment b & illustration 3 (1957).
\item \textsuperscript{52} See id. \textsection 14 comment a.
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such as a broker or others similarly employed.\textsuperscript{53} As long as the agency agreement does not specify exactly how the agent is to perform and the extent to which the agent must obey the principal, the principal may not interfere with how the agent conducts the actions which are customarily within the agent's control.\textsuperscript{54}

It is to be noted that these elements do not include the parties' intent to create an agency.\textsuperscript{55} Rather, they require the parties' consent that the relationship's consequences will be binding. Also, a belief by the parties that they have created an agency is not necessary. There need only be the manifestation of an agreement, not necessarily a contract, to which the legal consequences of an agency may attach.\textsuperscript{56} If such manifestations exist, an agency relationship is formed\textsuperscript{57} even though neither the principal nor the agent receives consideration.\textsuperscript{58} An agency relationship may also arise where the agent acts gratuitously. To determine whether a gratuitous agency exists, two essential elements must be found. First, the purported agent must have expressly promised to act on the principal's behalf or must have behaved in such a way that the principal should have reasonably inferred that the agent would act for the principal.\textsuperscript{59} Second, the agent's promise or actions must

\textsuperscript{53} See id. But see id. § 385(1) (agent under duty to obey all of principal's reasonable directions); id. § 220(3)(a) (factor in determining whether relationship is principal-agent or master-servant is degree of control over work details). It must be noted, however, that to determine the work direction we must look to business custom. Id. § 385(1) comment a.
\textsuperscript{54} See id. § 14 comment a.
\textsuperscript{56} See Restatement (Second) of Agency § 1(1) comment c (1957). See also In re Shulman Transp. Enter., 744 F.2d 293, 295 (2d Cir. 1984) (quoting Restatement (Second) of Agency § 1(1) (1957)); Huckabee, 8 F.2d at 45; Standford v. Kuwait Airways Corp., 648 F. Supp. 1158, 1162 (S.D.N.Y. 1986); Brown v. Schmitz, 237 Iowa 418, 424, 22 N.W.2d 340, 343 (1946).
\textsuperscript{57} See Restatement (Second) of Agency § 1(1) comment b (1957).
\textsuperscript{58} See id. § 16. See also Thorton v. Budge, 74 Idaho 103, 106, 257 P.2d 238, 240 (1953) (quoting Gorton v. Doty, 57 Idaho 792, 792, 69 P.2d 136, 136-37 (1937)).

In Estes, a real estate broker promised to arrange to have the seller's fire insurance transferred into the purchaser's name. However, the broker negligently failed to do so before fire damaged the property. Recognizing that the undertaking was gratuitous, the court found that the promise to act rendered the broker the purchaser's agent for the limited purpose of transferring the insurance. Estes, 8 Wash. App. at 25, 503 P.2d at 1151. Since the purchaser relied on the broker's gratuitous promise, and as a result, suffered damages, the broker was held liable for failing to act. See id.
have caused the principal to refrain from acting on his own, or from having a third person perform on his behalf.\textsuperscript{60} Once an agency relationship arises under these facts, the agent is obligated to perform within the accepted standard of care\textsuperscript{61} or advise the principal, at such a time when the principal may obtain alternative representation, that he will not act on the principal's behalf.\textsuperscript{62}

C. The Agent's Powers and Duties

Once an agency relationship exists, the agent is empowered to bind the principal to third parties and to alter the principal's relationships with them.\textsuperscript{63} In a real estate transaction, however, even the listing broker does not usually have the power to bind the seller by signing the contract of sale on behalf of the seller.\textsuperscript{64}

The agent's duties are readily apparent. He is in a fiduciary relationship with the principal with respect to those matters which fall within the agency's scope.\textsuperscript{65} The agent must act, as to those

\textsuperscript{60} See Restatement (Second) of Agency § 378 comment a (1957); supra note 57.

The purported agent may be liable in contract or in tort. See Restatement (Second) of Agency § 379(2) and comment e (1957). Contractually, a promisor is bound by a promise which is reasonably expected to induce the promisee to act or refrain from acting and where nonenforcement of the promise would result in an injustice. See Restatement (Second) of Contracts § 90 (1982). A promise may be inferred from the purported promisor's conduct. See id. § 4.

Under tort principles, if the recipient of a gratuitous promise relies on such promise to his detriment, and the promisor should have known of the reliance, the promisor will be liable for any resulting harm. See Restatement (Second) of Torts § 323 (1965).

\textsuperscript{62} See Restatement (Second) of Agency § 378 (1957). See, e.g., Simmerson, 149 Ga. App. at 479, 254 S.E.2d at 718 (quoting Restatement (Second) of Agency § 378 (1957)).
\textsuperscript{63} See Restatement (Second) of Agency § 12 comment a (1957). The agent's exercise of his power to bind may result in the principal's acquisition of new interests, as where the agent has the authority to purchase goods on the principal's behalf. See id.
\textsuperscript{64} See, e.g., Holland v. Hannan, 456 A.2d 807, 817 (D.C. 1983) (well-settled principle that broker cannot bind seller to contract of sale); Carroll v. Action Enter., Inc., 206 Neb. 204, 208, 292 N.W.2d 34, 36 (1980) (broker has no authority to enter binding contract of sale).
matters within the agency, primarily for the principal's benefit. This obligation includes: making reasonable efforts to accomplish the objectives of the agency;\(^6\) exercising the standard of care and skill common to the locality for the matters within the agency and utilizing any special skill that the agent possesses;\(^7\) accounting for profits arising from the agency’s activities;\(^8\) not acting for or on account of one whose interests are adverse to the principal's;\(^9\) not competing with the principal for the agent's benefit or for a third party's benefit with respect to matters within the agency;\(^7\) dealing fairly with the principal in all matters between them; not acting contrary to the principal's reasonable instructions in agency matters;\(^7\) not disclosing confidential information given to him by the principal or with respect to matters within the agency's scope;\(^7\) and disclosing to the principal all facts within the agent’s knowledge or which the agent may discover that may be material to agency matters.\(^7\) The gratuitous agent has the same scope of duties to the principal as does a compensated agent.\(^7\)

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\(^6\) See Restatement (Second) of Agency § 377 comment b (1957).

\(^7\) See id. § 379 (1). See also I. Cohen Sons, Inc. v. Dowd, 103 Colo. 211, 214, 84 P.2d 830, 831 (1938); Northern Ry. Co. v. Minnesota Transfer Ry. Co., 219 Minn. 8, 12, 16 N.W.2d 894, 896 (1944).

\(^8\) See Restatement (Second) of Agency § 382 (1957).

\(^9\) See id. § 381. See also MacGregor v. Florida Real Estate Comm’n, 99 So. 2d 709, 712 (Fla. 1958) (duty to inform principal of all pertinent facts); Santaniello v. Department of Professional Regulation, 432 So. 2d 84, 85 (Fla. Dist. Ct. App. 1983) (principal must be informed of all facts within agent’s knowledge).

\(^7\) Restatement (Second) of Agency § 385(1) comment a (1957). To determine what is reasonable, one must look to business custom. Id.

\(^3\) Id. § 395. There are matters requiring such confidentiality even after the agency relationship has terminated. See id. § 396.

\(^7\) See id. § 381. See also MacGregor v. Florida Real Estate Comm’n, 99 So. 2d 709, 712 (Fla. 1958) (duty to inform principal of all pertinent facts); Santaniello v. Department of Professional Regulation, 432 So. 2d 84, 85 (Fla. Dist. Ct. App. 1983) (principal must be informed of all facts within agent’s knowledge).

\(^7\) See Restatement (Second) of Agency § 383 comment e (1957); id. § 387 comment c. See, e.g., Northern P. Ry. Co. v. Minnesota Transfer Ry. Co., 219 Minn. 8, 12, 16 N.W.2d 894, 896 (1944) (agent not relieved of liability for wrongful acts because he acted gratuitously). However, a gratuitous agent is under no duty to obey the principal’s instruction that he remain the principal’s agent. See Restatement (Second) of Agency § 383 comment d (1957); id. § 385 comment c (1957).
III. AGENCY LAW APPLIED TO SELLING BROKER AND PURCHASER

A. Elements of an Agency for Hire

With the foregoing in mind, the question is whether an agency relationship develops between a purchaser and a selling broker in a modern real estate transaction. Since the existence of an agency relationship is generally a question of fact, this Article will presume the existence of the more common selling broker's and purchaser's activities in a real property sale when analyzing the elements of an agency relationship. It is fairly well recognized that brokers' functions are rather similar throughout the country.

The first question is whether the purchaser manifests an intent that the selling broker shall act for him. There is usually no formal agreement between the purchaser and the selling broker that the latter shall act for the purchaser. One, therefore, must look to the selling broker's and purchaser's activities to determine whether an agency relationship exists between them.

Case law has identified several informal manifestations by principals that may constitute an expression of this intent. In Duffy v. Setchell, the court noted that, where a purchaser requests the broker's assistance in obtaining a particular piece of property, the broker is the purchaser's agent for that purpose and those activities involved in that transaction, even though it is the seller who will pay the broker's fee. In determining that the broker was the purchaser's agent in this case, the court relied on the following factors: the purchaser initiated the contact with the broker; the purchaser asked the broker to approach the property owners to see if they would sell the parcel at the offered price; the broker had no prior relationship with the sellers regarding the property; the purchaser considered the broker to be her agent; the broker approached the sellers as the purchaser requested; and the broker negotiated the terms of the sale until the parties agreed.

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76 See supra note 45 and accompanying text.
77 FTC REPORT, supra note 1, at 9.
79 See id. at 149, 347 N.E.2d at 221.
80 See Duffy, 38 Ill. App. 3d at 148, 347 N.E.2d at 221.
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In a modern real estate transaction there are numerous acts by the purchaser from which one may reasonably infer that the purchaser intends for the selling broker to act on his behalf. Usually it is the purchaser who approaches the broker, informing him of a specific property which interests the purchaser or discussing generally with the broker the purchaser's desires and needs. The purchaser seeks the selling broker's assistance in acquiring the information about the specific property or in locating property. The purchaser seeks the selling broker's assistance in determining the fair market value of the property. Also, the purchaser relies on the selling broker's expertise in determining what to include in the offer, such as financing terms, inspection and repair procedures, and other contingencies. In doing so, the purchaser reveals to the selling broker some of the most personal aspects of his financial condition and needs. Thereafter, the purchaser authorizes the selling broker to deliver the offer to the seller on the purchaser's behalf. Once the seller accepts the offer, the purchaser often seeks and relies on the selling broker's advice as to whom to contact for title examination, \footnote{FTC REPORT, supra note 1, at 29 n.14.} financing, inspections, and the like. Further, the purchaser relies on the selling broker's assistance as he "walks through" the property on or about the sale date to determine the property's condition for the last time before sale. \footnote{Id. at 182.} Thus, the purchaser's actions reasonably permit one to infer that the selling broker is to act on the purchaser's behalf. \footnote{See supra note 17, at 772-73.} More often than not, both the seller and the purchaser presume from these circumstances that the selling agent is representing the purchaser. \footnote{See G. BUTTERS, CONSUMER EXPERIENCES WITH REAL ESTATE BROKERS: A REPORT ON THE CONSUMER SURVEY OF THE FEDERAL TRADE COMMISSION'S RESIDENTIAL REAL ESTATE BROKERAGE INVESTIGATION 24-26 (1983) [hereinafter BUTTERS REPORT], reprinted in FTC REPORT, supra note 1, at 14.}

The second question is whether the selling broker acts in such a way as to indicate reasonably to the purchaser that he is consenting to act for the purchaser or on his behalf. One may determine from existing circumstances whether such consent exists. \footnote{See supra note 45.}

Courts have identified various circumstances under which one may reasonably determine that an agent has impliedly accepted
the principal’s offer for the agent to act on the principal’s behalf.\textsuperscript{88} Duffy \textit{v. Setchell}\textsuperscript{87} addressed this issue where the broker’s actions clearly manifested his consent to act on the purchaser’s behalf.

Like the agent in \textit{Duffy}, the selling broker’s involvement in a modern real estate transaction often begins with the purchaser contacting the broker; the broker arranging and negotiating the sale; and generally conducting himself in such a way as to lead the purchaser to believe that he is acting for the purchaser’s benefit.

Additional acts of the selling broker indicate to the purchaser that he is acting as the purchaser’s representative. As previously noted, the selling broker makes every effort to determine the purchaser’s wants and needs and attempts to match them with available property.\textsuperscript{88} Nevertheless, the broker, unbeknownst to the purchaser, often attempts to direct him first to property listed with the broker.\textsuperscript{89} In so doing, however, the broker creates the impression that he is attempting to help the buyer find what he needs. When he finally does move to the MLS, the broker again is indicating to the purchaser that he is attempting to locate a property that meets the purchaser’s needs. If the purchaser and broker locate a property, the broker provides the purchaser with all available information posted with the MLS. If requested by the purchaser, the broker will inform him of pertinent data concerning recent properties sold.\textsuperscript{90} The selling broker generally advises the purchaser as to how to include terms in his offer, such as those relating to financing, conditions of title, inspections and repairs, and the like. At the purchaser’s direction, the selling broker presents the offer to the listing broker and seller. In so doing, he negotiates with them in order to establish terms under which the seller and purchaser may reach an agreement. Once the parties enter into a purchase and sale agreement, the selling broker advises the purchaser of the financing available in the community, the prevailing interest rates, and any other relevant information. The selling broker advises the purchaser of available and reputable inspection companies and title agents.\textsuperscript{91} Finally, he accompanies


\textsuperscript{89} Id. at 14.

\textsuperscript{90} \textit{FTC Report}, supra note 1, at 9, 26, 70.

\textsuperscript{91} Id. at 28, 29.
the purchaser when he conducts the final “walk through.”

In determining the existence of an agency relationship, the final question is whether an understanding exists between the purchaser and the selling broker concerning the purchaser’s right to control the venture. Such control does not necessarily include supervision or direction over the specific steps in the process. In a circumstance where there is an agency relationship with a broker traditionally having more knowledge than the purchaser in this field, it would be ludicrous to presume that the principal will direct the broker’s actions in detail. To find an agency relationship, the control need only relate to the general course or direction of the agency, and, unless agreed otherwise, the principal need only have the right to terminate the agency relationship. In a real estate transaction, the seller retains the right to control the relationship in that he has the right to revoke his offer to sell prior to an unconditional acceptance.

Likewise, the purchaser has the right to control the relationship with the selling broker. From the outset, the purchaser’s goals provide the selling broker with direction, whether it involves a specific property or a search of property in a MLS. The purchaser decides which property to investigate, whether to make an offer, and the offer’s terms. Furthermore, the purchaser may withdraw the offer before the seller accepts it or may accept or reject any counteroffer. Therefore, by exercising or failing to exercise approval of the agreements, the purchaser exerts his right to control the relationship in the same manner as the seller would.

The question of the extent to which one needs to retain the right to control the venture for purposes of agency was addressed in Fort Myers Airways, Inc. v. American States Insurance Co. The court recognized that the principal must only retain the right to control the relationship and not the agent’s specific and actual

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92 See supra note 55 and accompanying text.
95 See Smith, 231 Cal. App. 2d at 552, 41 Cal. Rptr. at 909.
96 See id. at 553, 41 Cal. Rptr. at 910.
actions. To determine whether an agency existed, the court noted that the principal: determined when the purported agent’s actions would occur on his behalf; received the benefits of the agent’s actions; and retained the power to revoke the authority he extended to the agent. Thus, the court concluded that the flying instructor was the airplane owner’s/flying student’s agent while instructing the owner/student in his airplane. The court emphasized that, in light of the agent’s superior skill and knowledge, it would be a “folly” to have expected the principal to exert significant control over the agent’s specific actions.

The purchaser, however, usually is not present when the selling broker presents the offer. The purchaser does not make the appointment for the presentation nor does he take part in the discussion during the presentation. The selling broker traditionally does this on his own, with or through the listing broker. Nevertheless, the purchaser, as principal, does determine the time when the selling broker, as agent, may initiate the activities to make the presentation. Also, the purchaser receives the benefits of the selling broker’s actions. Further, unless he is legally prohibited, the purchaser can terminate the relationship. As noted, throughout the real estate transaction, the purchaser retains sufficient power to control the direction of the relationship with the selling broker to find a non-gratuitous agency.

B. A Gratuitous Agency

Throughout the transaction, the selling broker encourages the purchaser to rely on the broker’s apparent expertise. He inquires into the purchaser’s personal preferences and financial restraints, directs the purchaser to available properties within his price range, and counsels the purchaser on how to structure the offer’s terms. The selling broker conducts the transaction in such a way that it is natural for the purchaser to rely on him.

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88 See id. at 886.
89 See id.
90 See id.
91 See id. (citation omitted).
92 See text accompanying supra note 99 (discussing analogous control in Fort Myers Airways).
93 See Comment, Broker's Fiduciary Duties, supra note 1, at 156 (“the very nature of the relationship between a purchaser and a broker invokes a purchaser's reliance and trust”).
94 See FTC REPORT, supra note 1, at 183.
Even if one were to view the transaction provincially and assert that the selling broker is acting gratuitously towards the purchaser, it appears that the selling broker's actions encourage the purchaser to refrain from acting independently with the listing broker or the seller. His actions also encourage the purchaser to refrain from obtaining alternative counselling and expertise at least until the parties have signed the contract, and it is then too late to obtain expert assistance in negotiating and finalizing the contract. It must be readily apparent to the broker that this is the likely result, even if the selling broker is not intentionally encouraging the purchaser to refrain from such activity, since so many purchasers sign purchase and sale agreements without seeking alternative counselling and advice. Therefore, as long as the selling broker continues to act in such a fashion without advising the purchaser that he is not acting on his behalf, he appears to do so as the purchaser's agent.\textsuperscript{105}

In \textit{Groh v. Shelton},\textsuperscript{106} the court found an agency relationship involving purchasers and one who was to assist them in locating property.\textsuperscript{107} The Grohs initiated contact with Shelton, who, although not a real estate agent, agreed to assist them in finding some farm property. After rejecting one parcel which Shelton found and after being advised that another one which interested them was unavailable, the Grohs decided to purchase a parcel recommended by Shelton. To enhance their interest in the property, Shelton took the Grohs to the property to see it. After they expressed interest in the property, the Grohs and Shelton discussed the price and payment terms to offer the sellers. Shelton and his wife drafted the purchase contract. Notably, there was no evidence that the purchasers were to compensate Shelton for his efforts. However, there was some evidence that Shelton told the Grohs that the seller was going to pay him $100.00 for selling the place.\textsuperscript{108}

The actual transactions created the need to determine

\textsuperscript{105} See Rohan, Goldstein & Boris, supra note 1, § 3.07[1], at 3-43. See also Eskridge, One Hundred Years of Ineptitude: The Need for Mortgage Rules Consonant with the Economic and Psychological Dynamics of the Home Sale and Loan Transaction, 70 Va. L. Rev. 1983, 1194-96 (1984) (discussing minimal use of "buyers' agents" by purchasers because of increased costs and "professional resistance"); Comment, Broker's Fiduciary Duties, supra note 1, at 156 (added cost and failure to realize they are underrepresented deters purchasers from hiring separate agents).

\textsuperscript{106} 428 S.W.2d 911 (Mo. Ct. App. 1968).

\textsuperscript{107} See id. at 916.

\textsuperscript{108} See id. at 914.
whether Shelton acted as the Grohs’ agent. The sellers were willing to sell the property for $2,500.00. Shelton told the Grohs that the price was $3,500.00. Since the Grohs did not have the cash necessary to purchase the property, Shelton agreed to lend the Grohs the difference in exchange for a promissory note and a deed of trust. At the closing, after the Grohs had executed and delivered the documents, they discovered the price differential.\textsuperscript{109} Afterwards, the Grohs refused to pay any part of the promissory note that constituted a payment of more than $2,500.00 as a purchase price. Shelton advertised the farm for sale under the deed of trust and the Grohs instituted an action to enjoin the foreclosure.\textsuperscript{110}

In determining whether to enjoin the foreclosure, the court analyzed the dealings between Shelton and the Grohs to ascertain whether there was an agency relationship. If so, Shelton breached his duty of advising his principals as to all material facts and to refrain from competing with them when it came to the agency’s subject matter.\textsuperscript{111} As a first step, the court considered the general principle that an agency results from one’s manifestation to another that the other is to act on his behalf, subject to his control, and from the other’s consenting to act under those circumstances.\textsuperscript{112} The court also recognized that one may infer such manifestation and consent from the parties’ words and actions.\textsuperscript{113} On the facts given, the court found Shelton to be the Grohs’ agent even though neither party may have intended to create the relationship.\textsuperscript{114}

A gratuitous agency relationship involving a purchaser, his attorney and a seller has arisen under unlikely circumstances. In Simmerson v. Blanks,\textsuperscript{115} the court found there were sufficient facts to send to the jury the question of whether the purchaser’s attorney was the seller’s agent for limited purposes.\textsuperscript{116} After the closing, the purchaser’s attorney gratuitously volunteered to file the financing statement for the seller. Unfortunately, he misfiled the paper.\textsuperscript{117} As a result of the attorney’s promise and the seller’s detri-

\textsuperscript{109} See id. at 915.
\textsuperscript{110} See id.
\textsuperscript{111} See id. at 916-17.
\textsuperscript{112} See id. See also Restatement (Second) of Agency § 1 (1957) (defining agency).
\textsuperscript{113} See Groh, 428 S.W.2d at 916.
\textsuperscript{114} See id.
\textsuperscript{116} See id. at 479, 254 S.E.2d at 717.
\textsuperscript{117} See id. at 478-79, 254 S.E.2d at 717-18.
mental reliance on that promise, the court recognized an agency relationship between the purchaser's attorney and the seller as to the filing of the financing statement.\footnote{See id. at 479, 254 S.E.2d at 718. See also RESTATEMENT (SECOND) OF AGENCY § 378 (1967) (discussing gratuitous undertaking).}

If one can determine that, as a result of a gratuitous promise and reliance thereon, a gratuitous agency relationship would exist between an attorney and one whose interests are adverse to his client, one should be able to identify the same relationship between the selling broker and the purchaser where the broker undertakes to act in such a way as to cause the purchaser to rely on the broker's acts. At least one commentator has recognized the similarities between the broker/buyer relationship and the attorney/client relationship.\footnote{See Comment, A Reexamination, supra note 12, at 1343.} In each situation, the client and the purchaser rely significantly on the attorney's or the broker's perceived expertise and, as a result, a relationship of "trust and confidence" arises.\footnote{Id.}

C. Agency for Hire Versus a Gratuitous Agency

It is important to note that, in order for an agent to be a non-gratuitous agent, one need be acting as another's agent merely for consideration.\footnote{See H. Reuschlein & W. Gregory, HANDBOOK ON THE LAW OF AGENCY AND PARTNERSHIP 140-41 (1979); RESTATEMENT (SECOND) OF AGENCY § 16 (1957).} There appears to be no prerequisite for the principal to pay the agent in order to find an agent to be acting for consideration, although this certainly would be one of several facts to consider in determining whether the agency exists. In the usual modern real estate transaction, the selling broker works for a commission. Therefore, there is evidence that the selling broker is acting as a non-gratuitous agent.

Even if one were to require that the principal compensate the agent for his acts on the principal's behalf, one must recognize that the purchaser indirectly pays some, if not all, of the broker's commission.\footnote{See BUTTERS REPORT, supra note 83, at 21, reprinted in FTC REPORT, supra note 1. Comment, Broker's Fiduciary Duties, supra note 1, at 155. "The purchase price that the buyer pays more often than not comprises some, if not all, of the commission fee charged." Id. (emphasis in original).} Sellers expect often to sell for more and purchasers expect to pay more for real property transactions involving a bro-
By agreeing to pay more than one normally would for the property, the purchaser agrees, in effect, to compensate the broker. Furthermore, because the broker receives a commission based on the purchase price, there is some motivation for the broker to facilitate the contract execution and the closing. The broker, therefore, aids the purchaser’s ability to close in order to receive his full commission.

It should also be noted that regardless of whether one finds the agency relationship to be non-gratuitous or gratuitous, the finding of an agency relationship between the selling broker and the purchaser arises, at least partially, from the realization that the agent’s power to alter the principal’s relationship with third parties exists between a selling broker and purchaser as well as between a listing broker and a seller. When delivering the purchaser’s offer to the seller and listing broker, the selling broker places the purchaser in the position of being bound to the seller who accepts the offer as tendered and in the required manner. On the other hand, even if the listing broker delivers to the seller an offer identical to the terms under which the seller listed the property, the seller may refuse to accept the offer. The seller would be liable for the broker’s commission but would not be bound to the prospective purchaser.

D. The Statute of Frauds Question

Some jurisdictions require by statute that agreements employing real estate brokers to sell or purchase real estate for compensation must be in writing and executed by the party against whom it

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123 See Comment, Broker’s Fiduciary Duties, supra note 1, at 155 (analyzing FTC REPORT and buyers’ expectations).

124 Certainly, there is divided case law as to whether the broker may receive the commission once the parties sign the contract of sale or whether they must wait until the parties close the sale. This question is more relevant to circumstances where it is the seller who is in default, rather than the buyer. For example, closings in some locales involve purchase and sale agreements providing that, in the event the buyer defaults and the seller retains the deposit as liquidated damages, the broker receives one-half of the deposit not to exceed the full commission due. However, the practical effect is that the broker is still likely to receive more commission if the parties close the sale.

The majority rule holds that the broker earns his commission by producing “a ready, able and willing customer on the principal’s terms . . . .” ROHAN, GOLDSTEIN & BOBIS, supra note 1, § 4.02[1], at 4-4 (footnote omitted). The minority rule, announced in Ellsworth Dobbs, Inc. v. Johnson, 50 N.J. 528, 236 A.2d 843 (1967), requires a successful closing as a prerequisite to the receipt of a commission. Ellsworth Dobbs, 50 N.J. at 551, 236 A.2d at 855.
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is enforced. However, it appears that the primary purpose of such a requirement is to regulate the brokers' activities rather than to bar an agency relationship from forming unless there is a writing signed by the party to be charged. Therefore, this type of statutory requirement should not inhibit a court's finding that the selling broker would be the purchaser's agent under the appropriate circumstances.

E. The MLS and Subagency Question

If the elements of an agency are present in the typical real estate transaction involving a selling broker and a purchaser, a problem arises in a situation involving the MLS where it is generally recognized that the selling broker acts as a subagent of the listing broker. The problem involves the effect to be given to this subagency proposition. The NAR, through its MLS program, urges this subagency theory and courts have recognized it. Despite its support, accepting this proposition without challenge is suspect. There appears to be no basis in law to apply such a theory to the typical modern real estate transaction involving a selling broker. In fact, there are significant reasons for finding that such is not the case.

First, the MLS's development had as its primary goals the stabilization of broker's commission schedules and the enhancement of sale prospects by informing other brokers of property availability. In the early part of the twentieth century, real estate brokers regularly cut commissions to induce sellers to list with them. The MLS encouraged the brokers to cooperate rather than com-

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125 See, e.g., PMH Properties v. Nichols, 263 N.W.2d 799, 802 n.3 (Minn. 1978) and statutes cited therein; Carnell v. Watson, 176 Mont. 344, 347, 578 P.2d 308, 310-11 (1978).
126 See PMH Properties, 263 N.W.2d at 802 n.3.
127 FTC Report, supra note 1, at 15.
129 Although in the minority, there have been challenges to the general proposition. See Wise v. Dawson, 353 A.2d 207, 210 (Del. Super. Ct. 1975); Blocklinger v. Schlegel, 88 Ill. App. 3d 324, 326, 374 N.E.2d 491, 493 (1978); Comment, A Reexamination, supra note 12, at 1353.
130 Nat'l Ass'n of REALTORS, HANDBOOK on MULTIPLE LISTING POLICY (3d ed. 1975) [hereinafter NAR HANDBOOK]. See FTC Report, supra note 1, at 17.
131 See FTC Report, supra note 1, at 110.
pete once a broker obtained a listing. To accomplish this task, the MLS required all members to obtain only exclusive rights to sell, rather than open listings. This resolved inherent competition from sellers as well because this listing gives the broker the right to a commission even if the seller finds the buyer during the listing. Therefore, the MLS boards were designed to assure cooperation among their participants rather than protection of the seller and purchaser. It is noteworthy that present MLS rules no longer require minimum commission rates.

Second, to permit a subagency relationship to exist for the seller's benefit where the majority of the purchasers believe that the selling broker represents the purchaser is unacceptable as a matter of public policy. As noted above, the subagency relationship primarily facilitates forced cooperation among brokers and exists basically for the brokers' convenience. In the current real estate setting, the subagency relationship encourages the purchaser to reveal material information to the agent of another who is likely to benefit from these revelations. Ultimately, it runs contrary to the buyers' perceptions which have been fostered by the brokers' actions.

It has been recognized that the subagency theory applied to the relationship involving the seller, the listing broker, and the selling broker is an artificial one. Notably, in the usual subagency relationship, the agent is responsible to third parties harmed as a result of the subagent's negligence occurring in furtherance of the agency's purposes.

132 See Alleman, Exclusive Listings, CALIF. REAL. EST. (Sept. 1952).
133 See FTC REPORT, supra note 1, at 111.
134 See Austin, Real Estate Boards and Multiple Listing Systems as Restraints of Trade, 70 COLUM. L. REV. 1325, 1329 (1970).
135 This must result, at least in part, from the antitrust actions and Justice Department investigations of the 1960's and 1970's. See FTC REPORT, supra note 1, at 109. Current listing information, however, still includes a reference to what percentage commission a cooperating broker will receive. See NAR HANDBOOK, supra note 130, at 11-12.
136 See FTC REPORT, supra note 1, at 182-84.
137 See id. 111-12; Austin, supra note 134, at 1325.
138 See FTC REPORT, supra note 1, at 23.
139 See id. at 23-24. Seventy-three percent of the purchasers surveyed said they advised the broker of the highest price at which they would purchase. Of those, eighty-three percent thought that the broker would keep the information confidential. Sixty-six percent of the sellers surveyed said that the brokers advised them of what they thought was the highest price at which the purchaser would contract to purchase. Id. at 24.
140 See Romero, supra note 17, at 773 n.33 (citing RESTATEMENT (SECOND) OF AGENCY §§ 82, 92, 93, 98-100, 218 (1957)).
It is interesting to note that in Wise v. Dawson, which reflects the Delaware minority rule, the court refused to hold the listing broker liable to the purchasers for the selling broker’s misrepresentations on an agent-subagent theory. Both brokers were members of the local MLS. The selling broker assisted the purchasers in finding the property through the MLS book. The court, however, held that “a multi-list arrangement between listing and selling agents is not an agency relationship unless clearly proven otherwise.” The court reasoned that a significant feature of agency relationships was missing in the typical MLS arrangement. The listing broker had no control over the selling agent, and by splitting fees, the agents merely recognized their mutual efforts and cooperation. Furthermore, it is submitted that perhaps even the NAR impliedly recognizes the lack of validity in the subagency notion. In its “Fourteen Points” relating to the MLS, the NAR prohibits the MLS from granting blanket consent for a selling broker to negotiate directly with the seller.

Real estate brokers exert great influence in the market. Both purchasers and sellers rely heavily upon their expertise. The existing confusion about the selling broker’s role often results in the purchaser unwittingly providing the selling broker with material information that the selling broker must disclose to the seller. Naturally, the seller will use this information to his advantage and to the buyer’s detriment. If the broker fails to advise the seller of such material information, the selling broker has breached one of his duties as the seller’s agent. As a result, he may have lost his right to receive his commission and created tort or contractual liability for himself. Therefore, to continue to foster the theory that the selling broker is solely the seller’s subagent merely perpetuates an anachronistic system that encourages mis-

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142 Id. at 209.
143 Id.
144 NAT’L ASS’N OF REALTORS, FOURTEEN POINTS, at point 9 (Nov. 15, 1971).
145 See supra notes 103-04 and accompanying text.
146 Id.
147 See supra note 139 and accompanying text.
148 Id.
149 See ROHAN, GOLDSTEIN & BOBIS, supra note 1, § 3.05[4], at 3-32. “A broker is under a duty to make full, fair, and prompt disclosure to his client of all material facts within the broker’s knowledge that might affect his client’s rights, liabilities or course of action.” Id. (footnote omitted).
leading the public. There is little justification for continuing this arrangement.

Furthermore, some case law and commentators have indicated that although brokers may have a primary obligation to sellers, this shall not interfere with their duty to exercise good faith and to encourage disclosure of material facts to potential purchasers. An overriding public policy fuels this desire for ethical behavior and disclosure. However, in light of possible uncertainties in the area, an actual agency relationship must be recognized between purchasers and selling brokers since some courts are still reticent about protecting purchasers absent a clear agency relationship.

IV. AVAILABLE ALTERNATIVES

A. Mandatory Duty to Disclose Subagency to Purchaser

One of the reactions to the assertion that the current system misleads the real property purchaser is to proffer the idea that the selling broker must advise the purchaser that he will be acting solely as the seller’s agent. Such a proposition would prove fruitless for two reasons.

First, brokers are reluctant to disclose such information to purchasers. Psychologically, it is to the broker’s and seller’s advantage to get the buyer committed in writing as soon as possible. Advising the purchaser in advance that neither broker represents him most likely would encourage him to seek alternative representation and delay the process. This is the antithesis of the sales concept. It is unlikely that many brokers would encourage such activity. Disclosures probably would be infrequent. This presumption

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164 See FTC REPORT, supra note 1, at 186.

165 See id.
follows from the brokers' past failures in being open with purchasers and sellers where it appears that such openness in disclosure would be contrary to the brokers' best interests. For example, brokers have failed to disclose to real estate participants how negotiable real estate commissions might be. Also, they have failed to advise the parties about each participant's role in the real estate transaction. Consequently, the purchaser is virtually unaware that the person upon whom he is relying may actually have interests adverse to his. So, too, brokers frequently fail to show prospective purchasers homes listed with other brokers who discount their commissions. There is little reason, therefore, to believe that brokers would be any more informative in disclosing their subagency relationship than they are presently in disclosing other information.

Second, a mere revelation that a subagency relationship exists still fails to provide the purchaser with what he needs. It is necessary to recognize that an agency relationship exists and this will provide the purchaser with the same advocacy and protection that the seller receives.

B. Dual Agency

Another response to the problem is to propose the dual agency theory whereby the selling broker would be the agent for both the seller and the buyer. Again, this theory is unlikely to provide adequate protection for purchasers.

First, in all but the most basic transactions, there are conflicts inherent in a dual agency. The dual agent owes both principals the same degree of care and duty as if he represented each alone. He must, as to both, act loyally, act in good faith and fairly, and openly and fully disclose all relevant facts known to him or which he should have discovered in carrying out his duties. In many

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166 Sellers are woefully unaware of the negotiability of brokers' fees. Perhaps brokers are reluctant to inform them so as to avoid confronting educated sellers and buyers looking to negotiate fees. See FTC REPORT, supra note 1, at 68.
167 Id. at 77.
168 Id. at 159.
169 See Comment, Broker's Fiduciary Duties, supra note 1, at 162-64.
171 See Investment Exch. Realty, Inc. v. Hillcrest Bowl, Inc., 82 Wash. 2d 714, 717, 513 P.2d 282, 284 (1973) (en banc). "A broker so unwise as to place himself in the anomalous position of representing adverse parties must scrupulously observe and fulfill his duties to
real estate dealings this is an impossibility because of the contrasting motivations of the seller and purchaser,\textsuperscript{162} and the selling broker's duty to disclose to each. Likewise, he would have to disclose to the purchaser the seller's need for sale proceeds.

Moreover, where there are conflicts between the two principals, the dual agent must obtain the consent of each principal before embarking on the dual agency.\textsuperscript{163} The basic principle underlying this requirement is "to prevent the agent from putting himself in a position in which to be honest must be a strain on him, and to elevate him to a position where he cannot be tempted to betray his principal."\textsuperscript{164} Defining the selling agent as a dual agent in a transaction that is fraught with inherent conflicts, places a strain on him to be honest and enhances the difficulty of not betraying his principal, even though he may betray the principal negligently. The broker's falling prey to such temptation has resulted in courts referring to it without citation.\textsuperscript{165}

Unfortunately, because of the nature of agency relationships, one can infer such a relationship in many transactions solely from the parties' actions. Therefore, the agent may have acted already without obtaining the necessary consents. Doing so gives each principal who did not have prior knowledge of the dual representation the right to void the agency and the transaction.\textsuperscript{166} As a result, a broker acting in this fashion may have already breached his fiduci-
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ary obligations and lost his right to a commission by the time he attempts to obtain each party's consent. It is important to note that the primary exception to the general dual agency rule is where the broker acts as a middleman.

A third problem with the dual agency theory is that the dual agent must withdraw from representing the principals when a conflict between the two arises because he is unable to represent adequately each principal's interests. By the selling dual agent's withdrawal from the agency, the purchaser loses the affirmative representation he sought and expected. The seller, on the other hand, may still have the listing broker acting as his agent. Therefore, such a theory fails to remedy the inequities inherent in the current system.

C. Purchaser's Agent

Another way to deal with the question is to recognize that elements already exist in the typical relationship between a purchaser and a selling broker which make the selling broker the purchaser's agent. As a result, the purchaser has the agent that he needs and that both he and the seller already expect him to have. The purchaser's agent would be better able to serve the purchaser without fear of conflicts of interest or fear of losing his right to reimbursement for failure to obtain the necessary consents for dual agency. The agent would no longer be faced with the problem of trying to determine what to disclose and when to withdraw when conflicts arise in dual agencies. The purchaser then has an agent who will assist him in determining the best price at which he can obtain the property, in determining the most favorable terms under which the seller is willing to convey, in deciding what inspections to have, and, generally, in taking all usual steps inherent in the prudent

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167 Where the dual agent acts without the principal's consent, the principal has the right to void the transaction. See Taborsky v. Mathews, 121 So. 2d 61, 62 (Fla. Dist. Ct. App. 1960); PMH Properties v. Nichols, 263 N.W.2d 799, 799 (Minn. 1978); Anderson v. Anderson, 293 Minn. 209, 216, 197 N.W.2d 720, 724 (1972).

168 See McConnell v. Cowan, 44 Cal. 2d 805, 285 P.2d 261, 265 (1955). See also Comment, supra note 18, at 160 (although courts reluctant to treat broker as deal agent, if broker merely brings parties together and lets them conclude matter, can be agent of both).

169 See SEAVEY AGENCY HANDBOOK, supra note 10, § 150.

170 See Fennell v. Ross, 289 Ark. 374, 379, 711 S.W.2d 793, 796 (1986) (Hays, J., dissenting). "In the absence of a listing agreement between the broker and the seller, the broker should be deemed the agent of the buyer and not the subagent of the listing broker." Comment, A Reexamination, supra note 12, at 1353.
purchase of real property.

In recognizing and applying agency principles to the selling broker-purchaser relationship, the law would balance inequities inherent in the existing system. Presently, the seller knows the most about his property. The broker is expert in comparing the property in question with similar properties and in discovering material information about the property for sale. The typical purchaser not only does not have the seller's information about his home, but, also, is without the broker's general expertise. Presumably, the purchaser represented by a broker should fare better in negotiations for the purchase of property.

V. THE NEED FOR LEGISLATIVE INTERVENTION

The court's reasoning in Stortroen v. Beneficial Finance Co. evidences the willingness of a majority of courts to apply general agency propositions to the modern real estate transaction. As a result, a system is perpetuated that fails to protect a significant number of participants in the market and encourages actions which are detrimental to them. For example, the Stortroen court based its opinion partially on the proposition that the MLS creates a relationship among the parties that is unchangeable unless the parties agree to do so expressly in writing. However, when one considers that the primary purposes in forming MLS boards is to encourage fee regulation and anticompetitive cooperation among brokers, one must question whether the law should permit a system to dictate the parties' relationships when it creates a system that provides the purchaser with minimal protection and permits its members to mislead the public. Also, the Stortroen court predicated its opinion on the belief that the real estate community's prevailing perception is that the broker is the seller's agent. When considering the selling broker, however, the court's supposition can be considered contrary to the beliefs of the majority of the

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171 The purchaser may not necessarily gain through the recognition of the selling broker as his agent. See Romero, supra note 20, at 773 n.33 (cited with approval in Stortroen v. Beneficial Fin. Co., 736 P.2d 391, 398-99 (Colo. 1987) (en banc)). The author suggests that the buyer will lose remedies presently available to him. See id.

172 The FTC Consumer Survey indicated that buyers who felt the broker represented only the seller were much less successful in obtaining a significant decrease between the seller's asking price and the actual purchase price. FTC REPORT, supra note 1, at 187, n.554.

173 736 P.2d 391 ( Colo. 1987) ( en banc).

174 Id. at 400.

175 Id.
sellers and buyers involved. Given the tremendous volume of real estate transactions annually, and the courts’ tendency to change the law slowly, it seems appropriate for legislatures to act to protect real estate purchasers. However, because an agency relationship more often than not is a fact question, it appears to be impossible for one to legislate a selling broker-purchaser agency. On the other hand, and most importantly, both sellers and purchasers are misled by the subagency concept involving the seller and the selling broker. Therefore, the public needs legislation directed to the subagency purportedly arising from MLS services. The legislation needs to preclude a subagency relationship between a selling broker and the seller and the listing broker. Also, it needs to void as a matter of public policy existing agreements for such agency and subagency arrangements. Finally, the legislation must provide that it is void as a matter of public policy to preclude a selling broker from being a purchaser’s agent absent an express agreement otherwise.

VI. Conclusion

Most courts find that, in multiple listing arrangements, a selling broker is the seller’s agent through a subagency with the listing broker. This, however, is contrary to the perceptions of a majority of purchasers.

The question arises as to whether the premises for the majority’s position are founded on sound legal bases. When one examines the legal principles for finding an implied agency in the typical real estate transaction, one recognizes that all of the elements necessary for an agency relationship exist between the selling broker and the purchaser. As a result, the purchaser usually reveals to the broker material information which the broker is obligated to disclose to the seller. Consequently, the seller maintains an unfair advantage and the purchaser receives little or no real representation.

It is appropriate, therefore, to analyze the relationship between the selling broker and the purchaser. In so doing, one must examine also the MLS requirement that the selling broker act as the seller’s agent through a subagency with the listing broker. Since this requirement is completely contrary to the evidence of an agency relationship that appears between the selling broker and

See supra notes 81-84 and accompanying text.
the purchaser, and the participants’ actions in the typical transaction encourage the purchaser to act to his detriment, legislation is needed to void the attempt to establish the selling broker’s sub-agency relationship where it purports to arise merely as a result of his membership with a multiple listing service.