

CHRONOLOGY OF CONFUSION – Brokerage Relationships In Real Estate

By Robert Delmar

The following chronology highlights events relating to what is often described as “chaos and confusion” among real estate licensees and consumers over Brokerage relationships throughout the U.S., with focus on Florida. It is hoped that this information will help industry leaders develop solutions to historic and ongoing problems.

Prior to 1983--

Licensed real estate salespeople developed the habit of calling themselves “Agents” and purportedly “represented” only Sellers as the Sellers’ Agents or Sub-Agents. Caveat Emptor, “Buyer Beware” was the rule.

December 1983--

Following a 4 year investigation, the Federal Trade Commission (FTC) reported that 71% of buyers believed “their” Agents represented them [the buyers] when, in fact, the buyers’ “Agents” were contractually obligated to represent the sellers. The FTC also found: “There is reason to believe that many brokers [‘Agents’] may, directly or indirectly, encourage such assumptions.” Sellers and buyers alike were confused, if not deliberately misled, about who represented whom.

1986--

In efforts to solve what National Association of Realtors (NAR) described as an identity crisis among real estate “Agents,” NAR published [Who Is My Client](#) by William D. North. The Preface proclaimed: “It is the nature and function of the real estate broker, appraiser and manager to be an Agent [fiduciary].” In 1986, NAR regarded disclosed Dual Agency as the only alternative to Agency or Sub-Agency and, in paragraph IX of the pamphlet, cautioned: “A real estate broker who attempts to conduct his day-to-day affairs as a disclosed Dual Agent is playing the professional equivalent of Russian roulette.” (Court decisions in following years showed that wisdom to be consistently correct).

1986-1988--

A number of real estate practitioners and attorneys recognized the inherent pitfalls of disclosed Dual Agency in relation to biblical and common law precepts that “no man can serve two masters.” *They observed that a great majority of residential transactions did not actually need and seldom actually received true fiduciary representation from self-described real estate “Agents.” Instead, they observed that most licensees did a very good job of “bringing buyers and sellers together to facilitate sales.” That’s Brokering, NOT Agency.* IF true fiduciary Agent/Agency representation was to remain an option for real estate practitioners and consumers, they reasoned that a viable Non-Agent/Non-Fiduciary alternative had to be adopted. Transaction Brokerage a/k/a Facilitator relationships between licensees and consumers was conceived. Transaction Brokerage and Facilitator relationships are now authorized in at least 10 states for use by approximately 1/3 of licensees in the U.S.

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1988--

California, soon followed by almost every state, became one of the first states to authorize disclosed Dual Agency as a brokerage relationship. Disclosed Dual Agency had long been recognized under common law for use in rare and unusual circumstances, but Realtor sponsored statutes attempted to abrogate common law by allowing disclosed Dual Agency to become “standard” practice. Disclosed Dual Agency—as practiced in real estate—has now been outlawed in Florida, Colorado and several other states.

1992--

Florida and Colorado, soon followed by several states, authorized Transaction Brokerage as an alternative to Agency or Dual Agency. That was about the time Minnesota’s Edina Realty reached multi-million dollar settlements of state and federal class-action lawsuits for practicing undisclosed Dual Agency. Unfortunately, Florida’s statutory definition provided that a Transaction Broker worked for “the buyer or seller or both.” Such vague statutory language—together with so-called “Agency” disclosures promulgated by zealous state regulators—confused licensees and consumers alike. Since disclosed Dual Agency was also an authorized relationship, confusion compounded. Perhaps even worse, state Realtor associations lobbied statutory language in almost every state which enabled licensees to promise full fiduciary Agent/Agency representation and then automatically transition downward (a/k/a “renege”) to function as Dual Agents or Transaction Brokers.

1993--

National Association of Realtors published “AGENCY Choices, Challenges & Opportunities.” NAR persistently referenced real estate “Agents” and recommended disclosed Dual Agency for in-house sales. NAR’s publication barely mentioned Transaction Brokerage in the Glossary as an a/k/a for Facilitator (intermediary, mediator or non-agent). To this day NAR rarely acknowledges Transaction Brokerage or Facilitator relationships.

1997--

Disclosed Dual Agency was outlawed in Florida, but Dual Agency’s ill-conceived concept of “limited representation” was made part of the revised definition of Transaction Broker/age. Despite learned attorneys pointing out that “*representation*” is a function of Agent/Agency relationships and not a function of Broker/age, traditional Realtor thinking was: “We have to ‘represent’ someone!” (Five years later, in 2002, Florida’s 4th district court of appeals refused to award attorney fees to a RE/MAX broker who had used the state mandated forms describing “limited representation.” The [appellate court](#) reasoned that “representation” provided some justification for the original lawsuit and, thereby, initial litigation was not deemed to be frivolous.

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1999—

Oklahoma lawmakers outlawed Agent/Agency relationships in real estate while Colorado progressed with phasing-in what is now called [“Broker-only” licensure](#), enabling all licensees to call themselves Brokers when providing Non-Agent/Non-Fiduciary services.

1999’s real estate headlines were dominated by the Florida Association of Realtors. FAR lobbied unanimous passage of legislation to rescind all requirements for what were then called “Agency” disclosures. FAR’s [“Non-Disclosure” law](#) was described in the press as “the most unfriendly blow to consumer-friendly legislation yet on record.” Department of Business and Professional Regulation (DBPR) and concerned Realtors appealed to the Florida Real Estate Commission (FREC) who remanded FAR’s bill back to the legislature for repeal.

2000—

FAR’s “Non-Disclosure” law was reversed by legislators who then held [House Committee hearings](#) where Realtors and attorneys pleaded for [“No More Band-Aid Legislation!”](#) Click here to view a summary of the [House Committee Report](#).

2003—

FAR again initiated legislation (SB 1266) to “modernize” real estate statutes. In what was described as “sheer hubris” during Senate Committee hearings, FAR’s #1 priority was the same as in 1999: “Non-Disclosure.” DBPR reacted by insisting that existing disclosures (substantially unchanged since 1992) be retained. FAR had also proposed “Broker-only” licensure—already adopted in Colorado, Oregon and South Dakota—but FAR quickly backed away in order to reach compromises with DBPR for removing requirements for consumer disclosures five years later, in 2008. As often happens with compromised legislation, 2003 revisions to Chapter 475 f.s. resulted in many dichotomies. (Interested parties may learn more from the notes on page 4 of this article).

2004—

NAR sponsored nationwide ads asking prospective sellers and buyers: “Is your Agent a Realtor?” A more valid question would be: “Is your Realtor your Agent?” NAR seems completely oblivious to the fact that a large majority of sellers and buyers are *not represented* by “Agents” because a great majority of transactions, including most in-house sales, involve self-described “Agents” who are actually functioning as Dual Agents or Transaction Brokers. Also, recent NAR surveys of sellers and buyers found that 74% were quite satisfied with the services of their Agent. It appears that NAR and day-to-day practices of real estate haven’t changed much in the 21 years since the FTC report.

2005—

NAR and state Realtor associations may finally tell dues-paying members to STOP confusing consumers by calling themselves “Agents” when providing less than full fiduciary services and when functioning as Dual Agents or Transaction Brokers. That’s not likely to happen until “Broker-only” licensure is adopted in more states. Only then might self-described “Agents” be more honest with consumers and reduce their potential liabilities by calling themselves “Brokers.”

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Notes regarding dichotomies in Florida's real estate statute:

In 2003, Transaction Brokerage was made the “presumed” (default and required) relationship between Florida licensees and consumers and Agent/Agency relationships were required to be in writing. However, the compromised statute also requires that consumers be provided a “No Brokerage Relationship Disclosure” which enables licensees to provide substantially reduced services than those required of Transaction Brokers. Many licensees are taking advantage of the conflicting statutory requirements and are establishing “No Brokerage Relationship” with the buyer or seller or both. *So-called “limited service” or “non-represented” or “entry-only” listings in MLS are causing concerns. Legislative intent for the 2003 revisions appears to have been to make services required of Transaction Brokers the “minimum” level of services provided to consumers, but statutory wording enables many licensees to use much lower standards.*

Logically, “No Brokerage Relationship” should be the default between an Agent (under written agreement) and the party whom s/he does not represent. Logically, services required of Transaction Brokers should be “minimum” services provided to consumers by real estate licensees. After all, Transaction Brokerage is now the “presumed” (default and required) relationship in the absence of a written Agency agreement or No Brokerage Relationship Disclosure. (Chapter 475.278 (1)(b))

Unfortunately, logic is difficult to discern in existing statutory verbiage; i.e., “A Transaction Broker provides limited ‘representation’ to a buyer or seller or both.” Changing that to “A Transaction Broker provides limited ‘services’ to both the seller and the buyer” should minimize confusion. A Transaction Broker can transition upward at any time by entering into a written agreement to function as an Agent for one party and providing written No Brokerage Relationship Disclosure to the other party or that party’s Transaction Broker or Agent. (This is a reversal of established practices by which licensees use listing and buyer broker agreements which promise Agent/Agency representation but allow them to automatically transition downward, a/k/a “renege” to function as Transaction Brokers, primarily for in-house sales).

Suggestions to cure confusion in Chapter 475 f.s. are too numerous for this article. Time is too short for revisions in 2005 but might readily be made in 2006. There is a standing Realtor/Attorney subcommittee comprised of six attorneys and six Realtors whose time, talents and objective efforts produce the FAR/BAR contract for sale and purchase. If asked by DBPR or FREC or FAR, possibly all three, that FAR/BAR subcommittee might readily develop revisions to Chapter 475 which are long overdue and which should be acceptable to all parties.

The FAR/BAR subcommittee convenes in Orlando at 9:00 a.m. January 20, 2005. If this objective group would agree to confront the challenge of “simplifying” Brokerage Relationship statutes, their proposals would likely be finalized for review at the FAR convention in August, 2005, then submitted for passage in the 2006 legislative session.

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As a former member of the Realtor/Attorney joint committee and FAR/BAR subcommittee and as the person who supplied the majority of authoritative source material to legislative staff for House committee hearings in 2000, I volunteer to assist in every way possible. With the slightest degree of cooperation between DBPR, FREC and FAR, historic problems can be corrected. Florida might end this chronology of confusion.

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Links to internet articles (copy link and paste it into address bar of your web browser):

Who Is The Client: <http://tinyurl.com/5qkfk>

Broker-Only Licensure: <http://tinyurl.com/4rmjm>

FAR's "Non-Disclosure" law: <http://tinyurl.com/5g6ah>

2000 House Committee Hearings: <http://tinyurl.com/5ew38>

No More Band-Aid Legislation: <http://tinyurl.com/55lsj>

Summary Of House Committee Report: <http://tinyurl.com/4phu2>