AGENCY, FACILITATION AND THE REALTOR

Perspectives and Perceptions

By

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Introduction; On February 4, 1993, I was invited to appear before the Presidential Advisory Group on the Facilitator Concept at its meeting on March 8th to "present [my} thoughts on the concept of agency as it has emerged and (my) thoughts on the future of agency in the real estate industry." This presentation was scheduled for the period 10:45 to 12:00 noon with 45 minutes for questions and answers from the Group Members.

In contemplating how my comments might be presented most clearly in the limited time allowed, I concluded that the Group would be best served if I provided my perspectives and perceptions in writing in advance so that the discussion could be focused on those of my views, comments or positions which are deemed most relevant to the work of the Group or which require further clarification.

At the outset it seems appropriate to state that I consider issue with which the Advisory Group is concerned to be of critical importance to the future of the real estate profession. The confusion, recriminations, ignorance, and self-interest which has characterized the discussions of the agency relationship of real estate brokers and salespersons during the past ten years has reached, what I believe to be, the crisis point. As a result of the agency debate, the real estate broker is rapidly becoming "all things to all persons" and therefore is threatened with losing his "professional identity."

"Disclosure" legislation is being promoted by NAR and State Associations before there is any clear consensus, understanding or appreciation of the full extent and implications of the agency relationships which must be disclosed. The terms of agency relationships, which are fundamentally consensual agreements, are being contorted by opportunism, and essential safeguards of agent, client, and customer are being eroded, ignored, or obscured. In this connection, it should be noted that despite the charges of exasperated Realtors, it is not a change in the law of agency which has created the liability and litigation problems confronting the profession but rather a very general and substantial change in the willingness or ability of Realtors to accept or understand the obligations and limitations of the law of agency in the litigious society in which they must function.

It is significant, in this connection, that the focus of the agency ferment has been confined almost exclusively to "residential brokerage." One looks in vain in the literature of management, appraisal, counselling, or industrial/commercial brokerage for any noticeable effort, let alone a significant demand, to redefine or repudiate traditional agency concepts or relationships. On the contrary, real estate practitioners in these areas have increasingly emphasized the imperatives of agency and sought, by Standards of Practice supplementing and amplifying the NAR Code of Ethics, to reaffirm and strengthen agency obligations and liabilities significantly beyond those imposed by law. Nor can it be contended that the application of agency law to these areas of practice is less rigorous than its application to residential brokerage.

The explanation for this striking dichotomy between the attitude towards agency of the residential brokerage practitioners and real estate practitioners in other real estate specialty areas seems to be found in the following differences in the development of the residential brokerage practice as contrasted with that in other specialties.

First, the trend in commercial/industrial real estate and real estate management as well as appraisal has been concentration and integration involving increased supervision and management control. This is in direct contrast with the trend to organizational fragmentation in residential brokerage.

Second, the number of "part-timers" in the real estate practices other than

residential brokerage has tended to decline or at worst stayed the same. This is in striking contrast to residential brokerage which continues to encourage and rely heavily on part-timers sales.

Third, while an increasing number of real estate practitioners in real estate specialties other than residential brokerage are employees, the overwhelming percentage of residential salespersons continue to be independent contractors.

Fourth, multiple listing in residential sales, which has no effective counterpart in other specialty areas, has limited the capacity of the residential salesperson to identify with, or to feel a sense of responsibility to, the listing broker or the seller providing the listing.

Fifth, the real estate specialties other than residential have not been substantially impacted by the 100% commission concept, which concept has had the practical effect of (1) discouraging brokers from investing in education and training programs for their sales force, (2) inhibiting the management control and supervision which the broker can exercise over salespersons, (3) prompting brokers to move to the "body shop" concept of operation involving minimal broker/salesperson contact, and (4) most importantly, eroding (and in some cases, breaking) the desirable, if not absolutely necessary, nexus between broker liability and responsibility.

Sixth, relocation companies which have been able to control buyer access to residential broker services, have posed potential conflicts and "identity" problems for residential practitioners not experienced by the other real estate specialties.

My emphasis on the contrast between the impact of agency concerns on residential brokerage as compared with the other real estate specialties is not intended to suggest that the residential brokerage concerns are specious or illusory. My emphasis is intended simply to focus attention on what I believe to be the fundamental causes of dissatisfaction with traditional agency concepts.

Until these causes are recognized, it will be impossible to determine whether the "facilitator" concept, or any other alternative to traditional agency, will truly address the perceived problems of traditional agency relationships.

Traditional Agency Relationships: The Basis Point.

If the purpose of the "Facilitator Concept" is to replace the traditional agency relationship or at least provide an alternative which is more advantageous to real estate practitioners and the public, it is essential to make sure that there is a thorough-going understanding of the agency relationship it is to replace and why, in the last decade, it was the foundation of the REALTOR concept of professionalism.

That it was, in fact, the very heart of the concept of Professionalism in real estate is indisputable from a historical standpoint. The careful and documented description of the origins of the National Association of Realtors in Janet Davies work entitled Real Estate in American History permits no doubt that the Founding Fathers of NAR viewed the agency relationship as the most important element distinguishing the "professional" from the pedestrian real estate practitioner.

In this connection it should be understood that prior to the organization of the National Association of Realtors the vast majority of real estate practitioners were not agents except to the extent they were involved in management. The real estate man was a "speculator," a "middleman," a "curbstoner," or a "optioneer." He involved himself in the "transaction" without a client. He would use options to tie up property which he thought he could sell; he would obtain "net listing" agreements which essentially involved him as a "middle man" seeking the lowest price from the seller and the highest price from the buyer so as to widen the spread which was his compensation. He had no obligations of loyalty, accounting, disclosure, obedience, confidentiality, or reasonable care and diligence to buyer or seller. He was, in sum, not a fiduciary.

This status, of course relieved the real estate practitioner of the legal liability to which a broker is subject when acting as an agent but it was perceived to have some significant failings;
Specifically

first, it opened the real estate business to anyone who wanted to be involved in any aspect of the real estate transaction on any terms and retarded and even foreclosed the development of meaningful license laws;

second, it attracted and encouraged self-dealers, speculators and sharp practices that abused the consumer, gave real estate practitioners an extremely poor image, and complicated real estate transactions by requiring special contracts, escrows, and explicit contractual and administrative safeguards unnecessary in agency relationships in which protections and safeguards are inherent.

third, it encouraged and perpetuated the general use of "Open Listings" and thereby discouraged marketing, exacerbated compensation disputes between real estate practitioners and between practitioners and sellers/buyers, and imposed a mandate of secrecy on real estate negotiations and transactions which seriously frustrated the ability of sellers to realize the full value of their property and of buyers to know the widest range of real estate choice;

fourth, it essentially foreclosed general cooperation/subagency between real estate practitioners because of the disparity in their ability, terms of involvement, and commitment.

But, perhaps most important, the Founding Fathers of NAR observed that every other business that aspired to be recognized as a Profession involved a "fiduciary relationship" defined by or even going beyond that defined by the law of agency. Thus they cited the relationship between physician and patient and the relationship between lawyer and client which, at that time, were perceived as the models for aspiring professions. [In this connection it should be noted that agency has been the recognized basis of other service businesses which have achieved recognition as Professions; i.e. accounting, architecture, engineering, appraisal, etc.]

Given their experience with, what might be characterized as a business peopled by persons who were their own "clients" or who were committed to the "transaction" rather than to the parties to it, the NAR Founding Fathers made acceptance of "agency" the absolute centerpiece and sine qua non for affiliation as a REALTOR.

The original membership requirements made it mandatory that REALTORS accept only "Exclusive Listings" and not involve themselves with listings which were not Exclusively Listed. This obligation continued in some areas of the country to the 1970's. Similarly, "net listing" which is an anathema to the agency relationship was categorically prohibited until anti-trust considerations forced modification albeit to the universal disadvantage of the consumer.

The NAR Code of Ethics, as originally adopted over the past eighty years, is premised on the assumption that there exists an agency relationship between broker and seller or buyer. Absent such relationship, a substantial majority of the obligations imposed by the Code can have no meaning or legitimacy, since the obligations which they impose on the REALTOR are necessarily reciprocal to, and arise from, the rights the REALTOR enjoys as an agent. Disclosure obligations, duties to arbitrate, limits on compensation from more than one party, and particularly the duty to cooperate all imply, and even mandate, the existence of an underlying agency relationship.

Of course, the NAR Founding Fathers, when they mandated exclusive agency, also mandated "cooperation" which, at that time, was understood to be "subagency." Mandatory cooperation/subagency was the mechanism by which the marketing of "exclusive listings" could be extended beyond the sales force of the listing agent. Here again, it is interesting to note that MLS originated, not as commonly believed, in the post-World War II period, but rather from the very organization of NAR.

There have been few more spectacular examples of business success in reaching the needs of the consumer than that achieved by the Founders of NAR when they coupled the advantages of the fiduciary relationship represented by exclusive agency with marketing breadth afforded by mandatory offers of subagency to other REALTORS. Within barely

a decade, agency established through Exclusive listing had gone from a rarely used relationship in real estate to an overwhelmingly dominant one. REALTORS were distinguished from other real estate practitioners by their commitment to their fiduciary relationship and started to build their image as Professionals. Not only did the law of Agency establish the premise for the Code of Ethics but the Code of Ethics increasingly became, not only, the standard of conduct recognized by the license laws, but also, the standard of conduct recognized by the courts in construing and applying the law of agency to real estate.

The early literature of the real estate business and particularly that of NAR, which generated much of what was written about the business, placed great emphasis on an understanding of agency and the obligations of agency. This emphasis was reinforced by the close supervision and involvement of the broker with his salespersons most of whom, at that time, were employees. (There being no significant tax disadvantages to that status.) It was further reinforced by the closer and more direct involvement with the listing seller permitted by the absence of communications technology which today enables remote marketing. Most of all, REALTORS saw their willingness to accept the obligations of agency as a valuable means of expanding their business and enhancing their image and prestige.

During the period from 1930 through approximately 1968, the agency status of REALTORS became universally accepted to the point that discussions of agency responsibility and liability appear to have been deemed largely superfluous. The status was recognized and generally "taken for granted" by both real estate practitioners and the public. Similarly, the status of the cooperating broker as a "subagent" of the listing broker was at least tacitly understood and then, as a consequence of the review of the real estate industry by the Federal and State Anti-Trust agencies, was explicitly articulated in NAR policy and in decisions rendered by various Courts confronted with defining the Legal standing of participants in multiple listing services.

In the literature of the industry and particularly of the NAR prior to 1985, it is difficult, if not impossible, to find any suggestion by either REALTORS, the public, or commentators that the agency relationship was unsatisfactory or that an alternative relationship should be identified and developed. On the contrary, in the extensive literature arising out of the anti-trust litigations of the 1970's, there seemed to be an unquestioned consensus that the agency/subagency relationship provided the public (sellers and buyers) alike with the safeguards of a fiduciary relationship supported by the supplemental dispute resolution mechanisms of the Code of Ethics in a marketing system (MLS) which provided optimum property choice to buyers, optimum property exposure to sellers, and optimum competition among Realtors.

Erosion of the Traditional Agency Relationship

Commencing in approximately 1985 but a year or so earlier in California, the traditional agency relationship started to come under attack. The initial point of attack involved the status of the "cooperating broker" in an MLS transaction. The traditional status of such broker, and the one acknowledged by the courts to that time, was that of a "subagent of the listing broker." The buyer in the usual residential real estate transaction was traditionally not represented by a broker but rather was considered and treated by the courts and NAR policy as a "Third Party Beneficiary" of certain agency duties owed to the seller and arising out of his obligation to successfully market the property. As a Third Party beneficiary, the buyer could receive a variety of information and assistance in the transaction free of charge and with the right to rely on honest and fair disclosure from the seller's agent. But the seller's agent or the cooperating subagent could not undertake to represent the buyer nor could he imply such representation by word or deed.

The rationale of the attack on the status of the "cooperating broker" as a subagent of the listing broker was that status was an invitation to a charge of "dual "agency and a claim for "rescission" of the transaction. This rationale was strongly asserted by a well-known California attorney in seminars throughout the state and, at a time of declining home prices in California, was used in several lawsuits against brokers. It found support in several surveys, including one by the Federal Trade Commission, suggesting that many buyers

thought, or were lead to believe, that the real estate broker was their agent. While the validity of these surveys was highly questionable, their acceptance was sufficient to require greater effort by brokers and salespersons to make clear the identity of their client and to scrupulously avoid conduct or words inconsistent with such representation.

While the National Association proposed disclosure as a solution to any concern about the potential liability of "accidental dual agency," the debate precipitated by the issue escalated and accelerated to include the issue of buyer brokerage, intentional dual agency, and ultimately, the issue of whether an alternative to agency should be recognized and developed.

In a very real sense, the present effort to identify an "alternative" to agency was almost inevitable given the problems presented by the attempts to adapt buyer brokerage and dual agency to the real estate marketplace.

To most lawyers, the simple and obvious solution to any problem of "undisclosed dual agency" is to have both parties to a real estate transaction (buyer and seller) separately represented. In the culture of the law, this creates an "adversarial relationship" which is supposed to assure that there is "parity" of professional advice and bargaining power. While such "parity" is largely illusory since it is easily "unbalanced" by disparity in the competence and resources of the respective adversarial counsel and their clients, separate representation makes it substantially impossible for any buyer or seller to claim that he thought he was represented by an agent for the other side. On the other hand, a true "adversarial relationship" applied to the residential real estate business would:

a. Make it imperative that the listing broker (or his representative salesperson) be present at all viewings of the property by the buyer and his agent and at all meetings with the seller and would severely limit lock box access:

b. Make it highly improper and probably a conflict of interest for the listing broker to pay the buyer's broker's commission; [The conflict of interest being implicit where the commission is contingent on price]

c. Discourage, if not foreclose, the disclosure of information to the buyer's broker which might, in any way, reflect or impact on the price or terms of sale not withstanding its value in promoting the sale of the property.

d. Compel a very elaborate and complicated disclosure of the limitations on the buyer's broker's capacity to deliver services and advice required by the buyer;*

e. Make it substantially impossible for a broker to sell his own listings without involving himself in a flagrant conflict of interest and, hence, would compel him to choose between representing himself in a flagrant conflict of interest and, hence, would compel him to choose between representing only buyers or only sellers; [Note: this conflict was avoided entirely by the traditional agency/subagency relationship between listing and selling broker.]

f. Would create serious administrative, organizational and disclosure problems where, entirely apart from the relationship between listing and cooperating brokers, certain salespersons licensed to a listing broker determine they desire to represent buyers while other salespersons in the same firm desire to represent sellers.

It was in recognition of the problems of disclosure and the complexities and limitations of the adversarial relationship of seller broker/buyer broker that some REALTORS have considered "dual agency" as an alternative. Under this approach, the broker resolves the issue of his right to sell his own listing by obtaining the authority to represent both buyer and seller in the same transaction. While "contractual dual agency" obviates the risk of "undisclosed dual agency," it creates a number of other problems under the law of agency as it has evolved including, but by no means limited to, (a) the problem of obtaining knowledgeable consent to such an arrangement [a problem which probably cannot be sagely solved without the retention of a lawyer to explain to buyer and seller the legal implications of their acceptance of dual agency], b) the problem of assuring that the consent is contemporaneous, that is, given at a time when all conditions which might

appropriately be considered as influencing the giving of consent are known, (c) the problem of how to treat information received from seller and buyer when, under the established rules of agency, each is entitled to full disclosure from the dual agent and at least some portion of the information which would normally be required to adequately represent either one would disadvantage the other, if revealed, (d) the right and consequences of the withdrawal of consent by either party.

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*In this connection, it is arguable that the broker is not qualified by reason of his license or especially necessary to provide the services required by the usual buyer of a residential property. Thus, he may not provide legal advice, he is not qualified to represent as to the condition of the property (as would be a home inspector or architect), his appraisal of the property would not be considered "independent" for purposes of obtaining financing, he is not qualified to search title or to provide a survey of the property, and, while he can identify sources of financing, the seller's broker has as great or greater incentive to provide such information in order close the transaction. A full and proper disclosure should certainly enumerate these limitations less the buyer fail to obtain such services from persons competent to provide them.

In a litigious society, such as we have, any perception of "dual agency" as a solution is chimerical. Dual agency presents problems which could be overcome only by constant, sophisticated, and individualized legal oversight coupled with rigorous supervision of a highly trained and legally sensitive salesforce. Even then, the risks would remain significant.

<u>The "Facilitator" as an Alternative to Agency</u>

The concept of "Facilitator," as it seems to be discussed and as it is described in the literature I have seen, would involve the rejection of any agency duties, responsibilities, or liabilities. The Facilitator would be an agent of neither the seller, the buyer or both. He would be, as his status is sometimes described, a "transaction agent" or "middleman."

This status is, of course, precisely what most real estate practitioners (outside of management) enjoyed prior to the establishment of NAR and its promotion of exclusive agency. The law relating to the conduct of "middlemen" is relatively well developed and does not include the imposition of fiduciary obligations <u>unless</u>, as most commonly occurs, the "middleman" is actually an agent. However, to truly be a "middleman" or "transaction agent" or "facilitator" the broker would have to take a position independent of the interests of either buyer or seller and in order to assure compensation, would usually have to control the subject of the sale (i.e. the property) through purchase or option in his own name or through contractual arrangements of the type used by "finders."

Moreover, and most importantly, the broker would have to make clear to all parties that he was not their agent and owed no duties or responsibilities to them and that their relationship was "at arms length."

The problems with a facilitator concept, to the extent it relies on existing "middleman" law do seem overwhelming, at least when applied to residential real estate brokerage. Thus—

1. There is the fundamental problem of "who represents the seller and buyer." If the reason espoused for "buyer brokerage" is lack of representation by the seller's broker, then such lack of representation is "compounded" by the introduction of a "facilitator/middleman" representing merely himself.

2. There is the fundamental problem of trying to explain the independent

relationship of the facilitator/middleman to the seller and buyer and to indicate not only is the facilitator/middleman free from any agency duties, obligations of liabilities but that he has an independent and potentially adversarial relationship.

3. There is the fundamental problem of determining on what basis sellers would offer their properties for sale through a facilitator/middleman, what information they would provide, and what level of trust, reliance or access they would give.

4. There is a fundamental problem of determining how and on what terms a facilitator/middleman would deal or cooperate with other brokers (facilitator/middlemen) given the almost certain absence of a commission or fee agreement settling the terms of compensation before the property is exposed especially when the compensation is likely to resemble that due on a "net listing."

5. There is a fundamental problem in the need to comprehensively change the expectations of the public, agencies of government, and the courts concerning the obligations and liabilities of real estate brokers and salespersons. It would involve the overturning of the "legal construct" developed over eighty years on which real estate license laws, financing and transactional practices, real estate education and contractual relationships have been developed. [If it has been difficult to persuade buyers that they are not represented by brokers when they have neither signed an agency agreement nor paid the broker compensation, how much more difficult will it be to persuade buyers—and sellers—that the broker they deal with represents only himself.]

6. There is a fundamental problem in adapting the existing structures and transactional processes which characterize the residential real estate market place to a "non-agency" environment. These structures and processes, which are based on the exclusive listing and include multiple listing, lock box access, cooperation without express agreement, etc., could not continue in anything approximating their present form without the underlying agency relationships to provide transactional security and broker responsibility. This is not to say that alternative arrangements might not be developed but there is serious question as to whether they would provide the market efficiency and consumer protection and satisfaction of the existing arrangements. Nor could the alternatives be developed without a prolonged period of costly and painful reorganization and revision.

The greatest problem, by far, with the facilitator/middleman concept, however, would be the effort which would be required to persuade real estate buyers or sellers to accept it. If a seller can secure a broker to serve as his agent and to accept the responsibilities and liabilities of a fiduciary, it is difficult to visualize any circumstance in which the seller would prefer a facilitator/middleman. The stated objectives of the facilitator/middleman concept of relieving the broker from the liabilities of a fiduciary are in direct opposition, and an anathema, to present and projected perceptions of and demands for "consumer protection." In fact it is hard to identify one reason which is not grossly self-serving which would justify a consumer preference for a facilitator/middleman over an agent.

Nor do I believe that NAR could successfully develop a new and original legal and transactional concept of representation which would excuse the broker from the liabilities of agency and at the same time provide some greater protection to the residential real estate seller/buyer than exists when the broker is independent of agency responsibility. To do so would require a degree of agreement on "acceptable levels of liability" which would be extremely hard to obtain on any sustained basis from NAR's membership.

But assuming that such agreement could be secured, it would then have to be translated into law in all of the states and incorporated into relevant Federal legislation. Further, even if such legislation could be secured and passed, it would then have to be interpreted and applied by a state and Federal judiciary steeped in the traditional concepts of agency and middleman relationships. And, even assuming all these initiatives were undertaken and successful, the question would still remain as to whether the "new relationship" would "sell" in competition with the agency relationship in its traditional form, especially since NAR would have no power to mandate its exclusive use by its members.

In sum, an attempt to create an original legal and transactional concept of representation would be a lawyer's dream and a Realtor's nightmare.

Alternatives To the Facilitator

I believe the "facilitator" concept would be unworkable in the marketplace and bad for the home selling and buying public. Further, I believe it would undermine any claim or aspiration of real estate practitioners to professionalism. Ultimately, it would return the Realtor to the status of a speculator or curbstoner.

There is no question that it is more difficult and demanding to be a real estate agent in today's world than it has ever been in the past. But the same can be said of every other profession or field of endeavor involving complex and important work. The residential real estate business today involves a great deal more than simply being a "tour guide to vacant houses." It requires a true marketing effort and "know how" and not merely a search of the MLS catalog of available properties. It involves a degree and breadth of knowledge of the marketplace, community trends and developments, alternative sources and forms of financing and the full range of housing alternatives which is unprecedented. It also requires a higher degree of sensitivity and knowledge of the legal obligations and implication of all aspects of residential transactions than ever before.

In sum, today's Realtor cannot merely "claim" to be a Professional. He or she must have the knowledge, skill and commitment to "be one" or accept the liability and risks which properly proceed from incompetence or default.

In my view, the pressure to "find an alternative to Agency" comes primarily from that segment of the Realtor membership who have lost faith in their ability to control their sales force, or are unwilling or unable to properly train and supervise their sales force, or are unwilling to make the personal commitment in time and money required to know how to perform reliably and competently.

This segment of the Realtor membership wants the benefits of Agency without its obligations; wants to exploit the expectations of performance and responsibility created by agency without being liable when those expectations are not fulfilled.

There are alternatives to the creation of a "facilitator relationship" which would be far less radical and disruptive to the profession but which would significantly reduce the risks of vicarious liability which it presently involves. These alternatives might include the following:

1. Single Licensure. A relatively simple legislative initiative which would significantly limit the vicarious liability of the broker for his sales force would be to eliminate separate licensing of salespersons and brokers. Under such arrangement salespersons would not have to be licensed to brokers and brokers would not have the responsibility of supervising and controlling their activities. Each licensee would be independently liable for his own misconduct or negligence. This arrangement would have the following advantages.

First, it would require a higher degree of knowledge and competence for original licensure and require a greater commitment from those desiring to enter the business;

Second, it would make it unnecessary for salespersons, in essence, to "rent a broker" in order to engage in the business. They would either practice alone as true 100% salespersons or would create a firm in which there is substantive sharing of responsibility and liability.

Third, it would eliminate the conflict between the legal obligation of the broker to supervise the salespersons licensed to him and the limitations imposed by the tax laws on such supervision of independent contractor salespersons. At a minimum this would remove a common excuse for inadequate supervision.

Fourth, it would tend to reduce the extent of turnover of sales personnel which has, for so long, been costly, destabilizing, and wasteful of human resources.

Fifth, it would compel the salesperson to accept greater personal liability for his performance, being less able to hide in the "deep pocket" of his broker.

Single licensure would have the value of being "manifestly" pro-consumer in that it would require an increased level of proven competence to be able to enter the business. And it

could inure significantly to the advantage of brokers who view their business as something other than a "body shop."

2. Abandonment of Independent Contractor Status. An approach more difficult of acceptance by NAR membership would be the abandonment of the independent contractor status in favor of employment status. Such approach would permit the type and quality of supervision, training and control which is required to minimize liability and would, at the same time, prompt brokers to more carefully screen their sales force.

The prevailing independent contractor relationship between broker and salesperson encourages "quantity" over "quality," encourages a degree of independence in salespersons which makes supervision difficult if not practically impossible, and generates a "lack of identification" with the client which encourages representational confusion and conflict. It is hard to build a responsible organization when everyone is "independent." Such arrangement has long been abandoned by most other professions in favor of relationships that provide the direct controls required to assure proper performance and adequate supervision.

3. Broadening Errors and Omissions Coverages. If liability cannot be avoided, its impact can be moderated by mandatory insurance programs with "risk based" premiums which will require salespersons to "become competent and careful" or get out of the business. Insurance programs which reward professionalism with lower premiums and "rate up" high risk practitioners can provide a system of incentives and deterrents which will preserve the values of agency and protect the real estate practitioner from everything but his own errors and negligence.

The real estate profession, like every other profession, must, by now, recognize that the costs of litigation are costs of doing business and must ultimately be reflected in the cost of service. To the extent those costs are arbitrary or excessive, the proper organizational response is not to abandon the practices and relationships which define the profession but rather to seek tort reform and other limits on liability, especially vicarious liability, which will protect the public without subjecting the service provider to legalized extortion.

Conclusion.

For all of the reasons I have outlined, I believe that the effort to identify or develop a new "non-agency" relationship is an exercise in futility. More than that, I believe it is wrongheaded. It undermines a valid, viable, responsible relationship which is the foundation of the real estate profession as it has come to be known and respected in the United States and throughout the world. Instead of seeking a relationship that will permit Realtors to avoid legitimate responsibilities incident to the performance of needed services, the National Association should be reaffirming its commitment to fiduciary responsibility.

Instead of seeking a relationship in which the incompetent and slipshod can survive and prosper, the National Association should be pressing for improved standards of performance and sanctions for failure. Instead of trying to develop a substantially new and novel body of law governing the conduct of residential real estate practitioners, the National Association should redouble its efforts to see that its members understand and observe existing law.

It is clear from the letters which have been received by Realtor News on the Agency issue that far too many Realtors and Realtor Associates simply have no concept of what an agent is, does, or cannot do or that their status as an "independent contractor" vis-à-vis their broker has nothing to do with their obligations, as an agent, to the seller or buyer. It only compounds the public confusion as to the status of a Realtor when Realtors themselves do not understand who and what they are.

Most unfortunately, I fear that much of the confusion over the status of the salesperson in a transaction arises from the salesperson's reluctance to recognize or admit the limitations of his role in the transaction. A significant portion of the liability and substantially all of the risk of undisclosed dual agency would be eliminated simply by proper and timely disclosure in a regularized and systematic form. But the solution to the problem of public confusion is not an alternative "legal construct" which further confuses consumer

expectations as to what to expect from their Realtor.

Rather, the solution is an unequivocal reaffirmation that the agency relationship is in the best interest of the profession, its members and the public they serve coupled with an unequivocal commitment to make the relationship understood and meaningful to every member of the public and the profession.