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## **The Changing Face of the Real Estate Professional: Keeping Pace**

*Valerie M. Sieverling\**

### I. INTRODUCTION

Although the practical role of real estate professionals<sup>1</sup> may appear unchanged in the eyes of most consumers, the legal duties and obligations implicit in that role have been the subject of controversial change. Real estate brokers traditionally have fulfilled roles with duties and obligations determined by the common law of agency.<sup>2</sup> The courts in California have been the most aggressive in extending the duties of the real estate professional to parties involved in a real estate transaction. For example, in *Lingsch v. Savage*,<sup>3</sup> a California Court of Appeals placed the real estate professional under the same duty to the buyer that the law imposes on the seller when the real estate professional had the same knowledge as the seller, whether he acquired such knowledge from his principal or acquired it independently.<sup>4</sup>

In *Easton v. Strassburger*, a California court later relied on *Lingsch* to extend a broker's duty to a buyer of whom he was not an agent.<sup>5</sup> The court placed an affirmative duty upon the broker to conduct a reasonably competent and diligent inspection of a property listed for sale and to disclose to a prospective purchaser all facts materially affecting the value or desirability of the

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1. The term "real estate professional" is used throughout the Article to refer to any professional required to be licensed under MO. REV. STAT. §§ 339.010-339.180 (1994).

2. *Dolan v. Ramacciotti*, 462 S.W.2d 812, 816 (Mo. 1970); *Travagliante v. J. W. Wood Realty Company*, 425 S.W.2d 208, 212 (Mo. 1968); *Larner-Diener Realty Co. v. Fredman*, 266 S.W.2d 689, 690-91 (Mo. 1954); *Utlaut v. Glick Real Estate Co.*, 246 S.W.2d 760, 763 (Mo. 1952); *Mueller v. Ruddy*, 617 S.W.2d 466, 473 (Mo. Ct. App. 1981), *cert. denied*, 454 U.S. 1055 (1989); *Herb Tillman Co. v. Sissel*, 348 S.W.2d 819, 824 (Mo. Ct. App. 1961).

3. 29 Cal. Rptr. 201, 205 (Ct. App. 1963).

4. *Id.*

5. *Easton v. Strassburger*, 199 Cal. Rptr. 383, 390 (Ct. App. 1984).

property that would be revealed by such an investigation.<sup>6</sup> The *Easton* decision was not widely received, and the California legislature, echoed by the courts, reversed that decision.<sup>7</sup>

Not surprisingly, the California example, like similar decisions in other states,<sup>8</sup> has led to a rash of legislation to address the obligations the real estate professional owes to the parties to a transaction. The real estate professional's duties to the adverse party in a transaction and the potential for the creation of an unintended or undisclosed dual agency combine to create the most difficult relationship of a real estate professional.<sup>9</sup>

Unfortunately, such legislative efforts have not been particularly successful. In Minnesota, for example, a broker was found to have breached his fiduciary duties to his clients, the sellers, by failing to fully and adequately disclose that he also represented the buyer, notwithstanding the fact that the broker had provided the form of written disclosure contemplated by the Minnesota statutes.<sup>10</sup> This Article will focus on recent Missouri legislative efforts in this area.

## II. THE NEWLY ENACTED STATUTES: LIMITED AND DUAL AGENTS, DESIGNATED BROKERS AND AGENTS

In 1997, the Missouri General Assembly enacted statutes providing for limited and dual agents, as well as designated brokers and agents.<sup>11</sup> This statute expressly supersedes the common law of agency regarding to whom the real estate agent owes a fiduciary duty in a real estate transaction.<sup>12</sup> The statute provides for the appointment of a "designated broker" who is responsible for the

6. *Id.*

7. CAL. CIV. CODE §§ 2373-2382 (West Supp. 1986) (repealed 1995); *FSR Brokerage, Inc. v. Los Angeles Superior Court*, 41 Cal. Rptr. 2d 404 (Ct. App. 1995). See also *Robinson v. Grossman*, 67 Cal. Rptr. 2d 380 (Ct. App. 1997).

8. See D.P. Grawunder, Annotation, *Liability of Vendor's Real Estate Broker or Agent to Purchaser for Misrepresentation as to, or Nondisclosure of, Physical Defects of Property Sold*, 8 A.L.R. 3d 550, 552-53 (1966).

9. See Ronald B. Brown et. al., *Annual Survey of Nebraska Law, Real Estate Brokerage: Recent Changes in Relationships and a Proposed Cure*, 29 CREIGHTON L. REV. 25, 43 (1995); James A. Bryant & Donald R. Epley, *The Conditions and Perils of Agency, Dual Agency, and Undisclosed Agency*, 21 REAL EST. L.J. 117, 117-18 (1992); Katherine A. Pancak et. al., *Real Estate Agency Reform: Meeting the Needs of Buyers, Sellers, and Brokers*, 25 REAL ESTATE L.J. 345, 345 (1997).

10. *Dismuke v. Edina Realty, Inc.*, No. 92-8716, 1993 WL 327771, at \*3 (D. Minn. June 17, 1993) (the form of written disclosure contemplated by MINN. STAT. § 82.19.5 (Supp. 1998) did not satisfy the fiduciary duties of an agent under the common law).

11. See MO. REV. STAT. §§ 339.710-339.860 (Supp. 1997).

12. MO. REV. STAT. § 339.840 (Supp. 1997).

acts of the brokerage entity.<sup>13</sup> The designated broker may, in turn, appoint a “designated agent” to act as the “limited agent” for purposes of representing a client.<sup>14</sup> To the extent an agent performs any brokerage services for a buyer beyond what the statutes define as “ministerial acts,”<sup>15</sup> the agent is presumed to be the buyer’s limited agent, unless the designated broker enters into a written agreement to represent a seller or to act as a sub-agent of a seller’s limited agent.<sup>16</sup> That the buyer is obligated to compensate the agent for his services is not a factor in determining the existence of the limited agency.<sup>17</sup>

A limited agent’s duties and obligations are: “(1) to perform the terms of any written agreement made with the client; (2) to exercise reasonable skill and care for the client; and (3) to promote the interests of the client with the utmost good faith, loyalty, and fidelity.”<sup>18</sup>

A limited agent is prohibited from disclosing any confidential information<sup>19</sup> about the client, except for certain required or permitted disclosures.<sup>20</sup> The only duty that a limited agent owes to a customer is to disclose all adverse material facts<sup>21</sup> that the agent actually knows or should know.<sup>22</sup> For instance, a seller’s limited agent may be required to disclose such adverse material facts as: (1) environmental hazards affecting the property, (2) the physical condition of the property, (3) material defects in the property, (4) material defects in title to the

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13. MO. REV. STAT. § 339.710(11) (Supp. 1997).

14. MO. REV. STAT. § 339.820 (Supp. 1997).

15. MO. REV. STAT. § 339.710(15) (Supp. 1997) (Ministerial acts are “those acts that a licensee may perform for a person that are informative in nature and do not rise to the level of active representation on behalf of a person” and include such acts as responding to telephone inquiries, answering questions at open houses, setting appointments to view a property, and showing a customer through a property being sold by an owner).

16. MO. REV. STAT. § 339.720.2 (Supp. 1997).

17. MO. REV. STAT. § 339.720.3 (Supp. 1997). In addition, MO. REV. STAT. §§ 339.710-339.860 (Supp. 1997) do not obligate any buyer to pay compensation unless the buyer and broker have entered into a written agreement with terms of compensation.

18. MO. REV. STAT. §§ 339.730.1(1)-(3), 339.740 (Supp. 1997) (limited agent representing sender and buyer, respectively). Note that Section 339.730(1) assumes the existence a written agreement between agent and seller, whereas Section 339.740(1) applies to “any” written agreement.

19. MO. REV. STAT. § 339.710(8) (Supp. 1997) (defined as “information made confidential by Sections 339.710 to 339.860 or any other statute or regulation, or written instructions from the client unless the information is made public or becomes public by the words or conduct of the client to whom the information pertains or by a source other than the licensee.”).

20. MO. REV. STAT. §§ 339.730.2, 330.740.2 (Supp. 1997).

21. MO. REV. STAT. § 339.710(1) (Supp. 1997) (defined as “a fact related to the physical condition of the property not reasonably ascertainable or known to a party which affects the value of the property”).

22. MO. REV. STAT. §§ 339.730.3, 330.740.3 (Supp. 1997).

property, and (5) a material limitation on the seller's ability to perform under the terms of the contract.<sup>23</sup> A buyer's limited agent may be required to disclose adverse material facts concerning the buyer's financial ability to perform the terms of the deal.<sup>24</sup>

The seller's agent owes no duty to conduct an independent inspection of the property for the benefit of the buyer nor to verify the accuracy or completeness of any statement made by the seller or independent inspector.<sup>25</sup> Likewise, the buyer's limited agent owes no duty to conduct an independent investigation of the buyer's financial condition for the benefit of the seller and owes no duty to verify independently the accuracy or completeness of statements made by the buyer or independent inspector.<sup>26</sup> Thus, the statutes limit the agency relationship by defining the agent's duties to his client and by limiting his duty to an adverse party with whom the agent has not entered into a brokerage relationship.<sup>27</sup>

An agent may act as a "dual agent" only upon the consent of all parties to the transaction.<sup>28</sup> The dual agent is a limited agent for both parties and has the same duties and obligations, unless otherwise provided by the statutes.<sup>29</sup> Except as specifically provided, a dual agent may disclose any non-confidential information to one client that the agent gains from the other client if the information is material to the transaction.<sup>30</sup> However, a dual agent may not disclose the following information without the consent of the relevant client: (1) that a buyer is willing to pay more than the offer price; (2) that the seller is willing to accept less than the asking price; (3) a client's motivating factors for entering into the transaction; (4) that a client will agree to financing terms other than those offered; and (5) the terms of any prior offers or counteroffers made by any party.<sup>31</sup> There is no cause of action against any person making a required or permitted disclosure, and the dual agent does not terminate the dual agency relationship by making such a disclosure.<sup>32</sup>

The dual agent is not imputed with the knowledge or information of his clients, nor are persons within an entity engaged as a dual agent imputed with such knowledge.<sup>33</sup> The new provisions appear to permit licensed salespersons

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23. MO. REV. STAT. § 339.730.3 (Supp. 1997).

24. MO. REV. STAT. § 339.740.3 (Supp. 1997).

25. MO. REV. STAT. § 339.730.3 (Supp. 1997).

26. MO. REV. STAT. § 339.740.3 (Supp. 1997).

27. MO. REV. STAT. § 339.710(5) (Supp. 1997) (defining the brokerage relationship as the "relationship created between a designated broker, the broker's affiliated licensees, and a client relating to the performance of services of a broker").

28. MO. REV. STAT. § 339.750 (Supp. 1997).

29. MO. REV. STAT. § 339.750.2 (Supp. 1997).

30. MO. REV. STAT. § 339.750.3 (Supp. 1997).

31. MO. REV. STAT. § 339.750.4 (Supp. 1997).

32. MO. REV. STAT. § 339.750.5 (Supp. 1997).

33. MO. REV. STAT. § 339.750.6 (Supp. 1997).

or agents affiliated with the same broker to represent adverse interests as single limited agents without becoming dual agents.<sup>34</sup>

Although the present statutory scheme expressly supersedes common law,<sup>35</sup> the extent to which the courts will recognize the statutory preemption is questionable. The provisions state they are not to be construed to limit civil actions for negligence, fraud, misrepresentation, or breach of contract.<sup>36</sup> Has the legislature, thus, left a back door for the courts to abrogate the legislature's intent to supersede the common law governing the relationships among real estate professionals and parties to transactions?

### III. THE NEWLY PROPOSED REVISIONS: THE ADDITION OF THE TRANSACTION BROKERAGE RELATIONSHIP

With the recent proposal to further amend the newly enacted dual agency and limited agency provisions, additional issues arise.<sup>37</sup> The Missouri General Assembly has before it the opportunity to make the distinction between a dual agent and a middleman by amending the current provisions of law to provide for a "transaction brokerage relationship."<sup>38</sup> According to the proposed amendment, a "transaction broker" would assist the parties to a transaction without taking on an agency or fiduciary relationship; the transaction broker would be neutral and would serve neither as an advocate nor an advisor to either party in the absence of a specific, written agency agreement, provided that the real estate professional immediately notifies the buyer and seller of his status as a transaction broker.<sup>39</sup> In the context of a transaction, a real estate professional would be presumed to be a transaction broker, not a dual agent, provided that the real estate professional provides notice immediately upon his "default" to transaction

34. See MO. REV. STAT. § 339.820 (Supp. 1997). A designated broker shall not be considered to be a dual agent solely because such broker makes an appointment under this Section, except that any licensee who personally represents both the seller and buyer or both the landlord and tenant in a particular transaction shall be a dual agent and shall be required to comply with the provisions governing dual agents. MO. REV. STAT. § 339.820 (Supp. 1997).

35. MO. REV. STAT. § 339.840 (Supp. 1997).

36. MO. REV. STAT. § 339.840 (Supp. 1997).

37. H.B. 1094, 89th General Assembly (Mo. 1998) (proposing to repeal MO. REV. STAT. §§ 339.710, 339.720, 339.730, 339.740, 339.770, 339.780, 339.800, 339.810, 339.820 and 339.830 and to replace them with twelve new Sections to be known as MO. REV. STAT. §§ 339.710, 339.720, 339.730, 339.740, 339.755, 339.770, 339.780, 339.800, 339.810, 339.820, 339.830 and 339.855).

38. *Harper v. Fidler*, 78 S.W. 1034 (Mo. Ct. App. 1904) (establishing Missouri rule regarding "middlemen").

39. H.B. 1094, 89th General Assembly (Mo. 1998) (revising MO. REV. STAT. § 339.710(19) (Supp. 1997)).

broker status.<sup>40</sup> This notice would be confirmed in writing by the parties prior to the execution of the contract.<sup>41</sup>

The duties of the transaction broker include, but are not limited to: (1) performing the terms of any written or oral agreement made with any party to the transaction; (2) exercising reasonable skill, care, and diligence; (3) presenting all offers and counteroffers in a timely manner regardless of whether the property is subject to a contract for sale or lease or a letter of intent unless otherwise provided in the agreement entered with the party; (4) informing the parties regarding the transaction and suggesting that such parties obtain expert advice as to material matters about which the transaction broker knows but the specifics of which are beyond the expertise of such broker; (5) accounting in a timely manner for all money and property received; (6) disclosing to each party to the transaction any adverse material facts of which the licensee has actual notice or knowledge; and (7) assisting the parties in complying with the terms and conditions of any contract.<sup>42</sup>

Furthermore, the transaction broker is prohibited from disclosing particular information without the informed consent of the party disclosing such information to the broker. For example, the broker is prohibited from disclosing: (1) that a buyer is willing to pay more than the purchase price or lease rate offered for the property; (2) that a seller is willing to accept less than the asking price or lease rate for the property; (3) the motivating factors for any party buying, selling, or leasing the property; (4) that a seller or buyer will agree to financing terms other than those offered; and (5) any confidential information about the other party, unless disclosure of such information is required by law, statute, rules or regulations, or failure to disclose such information would constitute fraud or dishonest dealing.<sup>43</sup> The transaction broker would have neither a duty to conduct an independent inspection of, or to discover any defects in, the property nor to conduct an independent investigation of the buyer's financial condition.<sup>44</sup>

The statute further sets forth the acts in which the transaction broker may engage without breaching any obligation.<sup>45</sup> If a real estate professional wants to continue an existing agency relationship, the real estate professional has the right to become a designated agent or dual agent.<sup>46</sup> A real estate professional serving as a transaction broker will not be liable for a misrepresentation of his client

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40. H.B. 1094, 89th General Assembly (Mo. 1998) (revising MO. REV. STAT. § 339.710(19) (Supp. 1997)).

41. H.B. 1094, 89th General Assembly (Mo. 1998) (revising MO. REV. STAT. § 339.710(19) (Supp. 1997)).

42. H.B. No. 1094, 89th General Assembly (Mo. 1998) (revised § 339.755.2).

43. H.B. No. 1094, 89th General Assembly (Mo. 1998) (revising § 339.755.3).

44. H.B. No. 1094, 89th General Assembly (Mo. 1998) (revised § 339.755).

45. H.B. No. 1094, 89th General Assembly (Mo. 1998) (revised § 339.755).

46. H.B. No. 1094, 89th General Assembly (Mo. 1998) (revised § 339.755).

arising out of the brokerage agreement unless the real estate professional had actual knowledge of the misrepresentation.<sup>47</sup>

#### IV. COMMON LAW COMPARISON

##### *A. Creation and Scope of the Agency Relationship*

Both the existing and proposed statutory schemes depart from the common law with respect to the creation of the agency relationship. The common law of Missouri recognizes the duties of the real estate agent to his principal.<sup>48</sup> The agency relationship in a real estate transaction typically is created when the owner of a property asks the broker to find a prospective buyer.<sup>49</sup> The agency contract may be express or implied.<sup>50</sup> For example, in *Missouri Real Estate Commission v. McGrew*, a case in which a broker acted for himself in the personal business of selling his own home, the broker was found to have acted as a broker for the purchaser because he held himself out as a broker, telling the purchaser that he was a licensed real estate agent and that he would handle all of the documentation regarding the transaction.<sup>51</sup>

The parties need not consciously intend to create an agency relationship; the relationship may be determinable from the facts and circumstances of the

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47. H.B. No. 1094, 89th General Assembly (Mo. 1998) (revising § 339.810).

48. *Dolan v. Ramacciotti*, 462 S.W.2d 812 (Mo. 1970); *Travagliante v. J.W. Wood Realty Co.*, 425 S.W.2d 208 (Mo. 1968); *Cox v. Bryant*, 347 S.W.2d 861 (Mo. 1961); *King v. Pruitt*, 288 S.W.2d 923 (Mo. 1956); *Larner-Diener Realty Co. v. Fredman*, 266 S.W.2d 689 (Mo. 1954); *Utlaut v. Glick Real Estate Co.*, 246 S.W.2d 760 (Mo. 1952); *Luikart v. Miller*, 48 S.W.2d 867 (Mo. 1932); *Walters v. Maloney*, 758 S.W.2d 489 (Mo. Ct. App. 1988); *American Mortgage Inv. Co. v. Hardin-Stockton Corp.*, 671 S.W.2d 283 (Mo. Ct. App. 1984); *Adams v. Kerr*, 655 S.W.2d 49 (Mo. Ct. App. 1983); *Herb Tillman Co. v. Sissel*, 348 S.W.2d 819 (Mo. Ct. App. 1961); *Martin v. Hiekin*, 340 S.W.2d 161 (Mo. Ct. App. 1960); *Politte v. Wall*, 256 S.W.2d 283 (Mo. Ct. App. 1953); *Dittmeier v. Missouri Real Estate Comm'n*, 237 S.W.2d 201 (Mo. Ct. App. 1951), *aff'd*, 316 S.W.2d 1 (Mo. 1958), *cert. denied*, 358 U.S. 941 (1959).

49. *Dolan v. Ramacciotti*, 462 S.W.2d 812, 816 (Mo. 1970); *American Mortgage Inv. Co. v. Hardin-Stockton Corp.*, 671 S.W.2d 283, 291 (Mo. Ct. App. 1984) (finding a seller-broker contract where the principal contacted the real estate broker to list properties for sale, solicit purchasers and handle closings); *Herb Tillman Co. v. Sissel*, 348 S.W.2d 819, 824 (Mo. Ct. App. 1961) (“Unless it is otherwise understood and provided, the broker is the agent of the seller who lists property with him.”).

50. *Larner-Diener Realty Co. v. Fredman*, 266 S.W.2d 689, 690 (Mo. 1954). *See infra* notes 49-53.

51. *Missouri Real Estate Comm'n v. McGrew*, 740 S.W.2d 254, 255 (Mo. Ct. App. 1987) (this does not interpret the common law duty of the real estate agent to his principal but defines a broker as one who acts “for another” for purposes of subjecting the real estate broker to discipline by the Real Estate Commission.)



particular situation.<sup>52</sup> Such facts and circumstances typically involve a manifestation of consent consistent with the formation of an agency relationship,<sup>53</sup> as in the circumstance of services performed such that the recipient has reason to know the services are not gratuitous, but are made with the expectation of compensation.<sup>54</sup> Actual compensation for the services, however, is not a requirement.<sup>55</sup>

The authority of the agent is limited to the authority conferred upon him by his principal. His duty is "to act in accordance with authority vested in him by his principal and to follow and adhere to any instruction from his principal in accordance with the prevailing custom in the community where the broker conducts his business."<sup>56</sup> As a "special agent" for a "single object,"<sup>57</sup> he cannot bind his principal beyond the limits of the authority so conferred.<sup>58</sup> The implied agency usually consists of those "incidental powers which naturally and ordinarily attend such an act, and which are reasonably necessary and proper to carry into effect the main power conferred and which are not known to be prohibited."<sup>59</sup>

Clearly, the present statutory limited agency provisions shift the presumption from a seller-broker agency relationship to a buyer-broker agency relationship. The statute essentially eliminates the possibility of an implied contract between a party as a principal and agent.<sup>60</sup> The statute further attempts to define an agency relationship arising from the conduct of the parties as one which arises between a real estate professional and a buyer when the real estate professional performs the statutory acts of a broker, beyond those defined as ministerial acts. The proposed transaction brokerage provisions would change

52. *Lerner-Diener Realty Co. v. Fredman*, 266 S.W.2d 689, 690 (Mo. 1954). *See also Mueller v. Ruddy*, 617 S.W.2d 466 (Mo. Ct. App. 1981).

53. *Utlaut v. Glick Real Estate Co.*, 246 S.W.2d 760 (Mo. 1952).

54. *Longmire v. Diagraph-Bradley Stencil Mach. Corp.*, 176 S.W.2d 635, 644 (Mo. Ct. App. 1944) (citing *Windsor v. International Life Ins. Co.*, 29 S.W.2d 1112 (Mo. 1930)).

55. *See Hawkins v. Laughlin*, 236 S.W.2d 375 (Mo. Ct. App. 1951) (nurse held to be an agent of a hospital, notwithstanding that the patient paid the nurse separately from the payments he made to the hospital for the operation).

56. *American Mortgage Inv. Co. v. Hardin-Stockton Corp.*, 671 S.W.2d 283, 293 (Mo. Ct. App. 1984).

57. *Martin v. Hiekin*, 340 S.W.2d 161, 165 (Mo. Ct. App. 1960) (citing *Politte v. Wall*, 256 S.W.2d 283 (Mo. Ct. App. 1953)).

58. *Id.*

59. *Prior v. Hager*, 440 S.W.2d 167, 174 (Mo. Ct. App. 1969).

60. Unless a limited agency on behalf of the buyer that arises, because the real estate professional performs more than ministerial acts, can be considered a form of implied agency.

this result by also requiring the buyer to have entered into a representation agreement with the agent.<sup>61</sup>

The limitation of the scope of the agency by the present statute and the proposed statute is not necessarily contrary to the existing common law. The difference is simply that the duties are set forth by statute. Note, however, that a real estate professional and his principal may enter into written contracts containing duties additional to those specified by statute.<sup>62</sup> Presumably, the legislature did not intend to limit the scope of the agent's incidental powers reasonably necessary and proper to carry out his express authority under the statute and the written agreement with the client.

With the proposed transaction brokerage provisions, it would seem that no such incidental powers would arise, because, in theory, there is no agency relationship. However, the expectations of the parties might dictate otherwise, and the distinction between a statutory limited agency and a transaction brokerage relationship may become sufficiently blurred to require the intervention of the common law.

### *B. The Fiduciary or Professional Duty*

The fiduciary duty imposed by common law is, of course, a very high standard. As an agent, the broker has a fiduciary duty to his principal to act with the utmost fidelity and good faith, to keep his principal fully informed, to make full disclosure of all facts which materially affect a subject of his agency, and to exercise reasonable care and diligence in the performance of his duty. He also owes his undivided loyalty to his principal. He is bound by duties "as exacting as those imposed on a trustee in favor of his beneficiary."<sup>63</sup> An agent shall do nothing to make the transaction more difficult or burdensome or endanger the transaction.<sup>64</sup> An agent cannot secretly represent any adverse interest.<sup>65</sup> The relationship is one requiring an obligation to be perfectly frank and to make a

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61. H.B. No. 1094, 89th General Assembly (Mo. 1998) (revising § 339.780).

62. MO. REV. STAT. § 339.780.6 (Supp. 1997); H.B. No. 1094, 89th General Assembly (Mo. 1998) (revising § 339.780.6).

63. *Herb Tillman Co. v. Sissel*, 348 S.W.2d 819, 824 (Mo. Ct. App. 1961). *See also King v. Pruitt*, 288 S.W.2d 923 (Mo. 1956); *American Mortgage Inv. Co. v. Hardin-Stockton Corp.*, 671 S.W.2d 283, 293 (Mo. Ct. App. 1984) (an agent has a duty to use reasonable skill, diligence, and care in the handling of business given over or entrusted to him); *Dittmeier v. Missouri Real Estate Comm'n*, 237 S.W.2d 201 (Mo. Ct. App. 1951), *aff'd*, 316 S.W.2d 1 (Mo. 1958), *cert. denied*, 358 U.S. 941 (1959); *Luikart v. Miller*, 48 S.W.2d 867 (Mo. Ct. App. 1932).

64. *Adams v. Kerr*, 655 S.W.2d 49, 53 (Mo. Ct. App. 1983) (an agent has a duty of undivided loyalty and to exercise the utmost fidelity and good faith, to keep principal fully informed, to make full disclosure of all facts and to exercise reasonable care and diligence in the performance of his duty).

65. *King v. Pruitt*, 288 S.W.2d 923, 925 (Mo. 1956).

complete and full disclosure of all material facts which might affect the principal's decision to sell his property.<sup>66</sup> The duty of full disclosure not only prohibits misstatements of fact, but also requires full and complete disclosure of all material facts to the principal.<sup>67</sup>

The limited agent retains the duty to exercise reasonable skill and care and to promote the interests of his client with the utmost good faith, loyalty, and fidelity—a duty which seems to echo the common law standards. The statutes protect the limited agent by allowing him to reveal certain confidential information and defining adverse material information which he or she must disclose to an adverse party in the transaction.<sup>68</sup> All parties to the transaction are protected from liability for misrepresentations by others in the transaction except to the extent the party knew or should have known of the representation.<sup>69</sup> In other words, knowledge is not imputed among parties to a transaction. These protections of the real estate professional are not particularly offensive to the common law agency duty and, indeed, tend to reduce the potential for adverse obligations by defining the real estate professional's obligations to a customer who is not his principal.<sup>70</sup>

Not surprisingly, the more complex issues arise in the contexts of dual agency and transaction brokerage relationships.

### C. Permitted Dual Agency

Although the agent is under a strict duty of loyalty to act solely for the benefit of his principal,<sup>71</sup> and to avoid putting himself in a position antagonistic to his principal,<sup>72</sup> and although the agent assumes an "unwise" and "anomalous" position by serving as a dual agent,<sup>73</sup> the common law of Missouri does not strictly prohibit a dual agency relationship. An agent may represent an adverse party with the knowledge and consent of his principal.<sup>74</sup> Such consent may be

66. *Dittmeier*, 237 S.W.2d at 206.

67. *Id.* ("A fact is material . . . if it is one which the agent should realize would be likely to affect the judgment of the principal in giving his consent to the agent to enter into the particular transaction on the specified terms.") (omission in original).

68. MO. REV. STAT. §§ 339.710(1), 339.730, 339.740, and 339.750 (Supp. 1997).

69. MO. REV. STAT. § 339.810 (Supp. 1997).

70. The extent to which the real estate professional is relieved of his common law duties to such adverse interests is beyond the limited scope of this discussion.

71. *Cox v. Bryant*, 347 S.W.2d 861, 864 (Mo. 1961).

72. *Utlaut v. Glick Real Estate Co.*, 246 S.W.2d 760, 763 (Mo. 1952).

73. *Martin v. Hiekin*, 340 S.W.2d 161, 165 (Mo. Ct. App. 1960).

74. *Cedar Point Apartments, Ltd. v. Cedar Point Inv. Corp.*, 693 F.2d 748, 759 (8th Cir. 1982), *cert. denied*, 461 U.S. 914 (1983); *Burton v. Pet*, 509 S.W.2d 95, 100 (Mo. 1974); *Travagliante v. J.W. Wood Realty Co.*, 425 S.W.2d 208, 214 (Mo. 1968) (The disclosure of an adverse interest, "to be effective must lay bare the truth, without ambiguity or reservation, in all its stark significance."); *Mills v. Keasler*, 395 S.W.2d

implied when the parties know of the dual representation and proceed without objecting.<sup>75</sup> A dual agent “must scrupulously observe and fulfill his duties to both” parties. Among those duties is keeping his principal fully informed of all facts pertinent to the transaction.<sup>76</sup>

In *Harry M. Fine Realty Co. v. L.J. Stiers*, one of the leading Missouri cases concerning dual agency, the agent contended that he was a mere middleman and, therefore, was not subject to the rule that an agent cannot act for both parties.<sup>77</sup> The court noted the general rule that if an agent is employed merely as a broker or a middleman for the purpose of bringing the parties together, has nothing to do with setting the price or the terms of the bargain, and has no adverse interests, he may act for both principals and bargain for compensation from both of them. If, however, the principal is entitled to rely on such a broker for his skill and judgment, he is not considered a mere middleman.<sup>78</sup>

*Harper v. Fidler* sets forth the Missouri rule as to “middlemen.”<sup>79</sup> Initially, the *Harper* court noted a split in authority concerning whether a middleman is subject to the rules of double agency.<sup>80</sup> The courts in Missouri, according to *Harper*, have never recognized any distinction between real estate brokers generally and mere middlemen.<sup>81</sup> The parties to the transaction, even though they may bargain for themselves, are entitled to the “benefit of a skilled common knowledge and advice of the agent.”<sup>82</sup> The only qualification to the rule in Missouri is whether the principal knew of the dual agency and consented to it. Therefore a middleman is held to the same standard as a dual agent.

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111, 118 (Mo. 1965); *Cox v. Bryant*, 347 S.W.2d 861, 864 (Mo. 1961) (“[T]here is a natural repugnance to the practice of a broker representing both buyer and seller. . . .”); *Adams v. Kerr*, 655 S.W.2d 49, 53 (Mo. Ct. App. 1983) (undisclosed dual agency); *Martin v. Hiekin*, 340 S.W.2d 161, 165 (Mo. Ct. App. 1960); *Garner v. Woods*, 24 S.W.2d 708, 710 (Mo. Ct. App. 1930). See also *Harry M. Fine Realty Co., Inc. v. L. J. Stiers*, 326 S.W.2d 392 (Mo. Ct. App. 1959). The court noted that an agent has “the same duty to act with fairness to each principal that an agent has in dealing with his principal on his own account. That duty of fairness would require [the agent] to inform [the principal] of the best price that could be obtained and all other matter which the [principal] would think reasonably relevant. . . . [T]he fact that both principals knew of the agent’s double character does not, of itself, void the contract. There must be knowledge of all the material facts as well as knowledge of the agent’s duality to make the contract binding.” *Id.*

75. *Mills v. Keasler*, 395 S.W.2d 111, 118 (Mo. 1965); *Shepley v. Green*, 243 S.W.2d 772, 777 (Mo. Ct. App. 1951).

76. *Martin v. Hiekin*, 340 S.W.2d 161, 165 (Mo. Ct. App. 1960).

77. *Harry M. Fine Realty Co., Inc. v. L. J. Stiers*, 326 S.W.2d 392, 398 (Mo. Ct. App. 1959).

78. *Id.*

79. *Harper v. Fidler*, 78 S.W. 1034 (Mo. Ct. App. 1904).

80. *Id.*

81. *Id.*

82. *Id.*

The statutes maintain the agent's duty of undivided loyalty by continuing to require the consent of the parties to establish dual agency. A dual agency must be the subject of a written agreement which includes the duties and obligations of a limited dual agent as set forth in the statute.<sup>83</sup> Although a dual agency is not a wise undertaking by a real estate professional, it is permitted under the common law provided there is sufficient disclosure and consent.

The legislature has attempted to avoid the holding of the *Edina Realty*<sup>84</sup> case by expressly superseding the common law. If the courts respect that position, the issue of whether the statutory disclosure is sufficient may never be addressed. When the parties properly enter into the required written agreement, the required disclosure and consent will exist. A risk of unintended dual agency remains because of the presumption allowing a limited agency to arise with the buyer in the absence of a written agreement. Though the safe harbor provided by the ministerial acts doctrine helps, a seller's agent still can inadvertently find himself acting as a dual agent by performing certain acts for the buyer. Then he is in the difficult position of disclosing the situation to both buyer and seller, risking the entire transaction, or his continued participation in the transaction, if the parties choose not to accept the dual agency. Brightening the lines between agency with the non-represented party clarifies the legal position, but is not necessarily any simpler to apply in practice.

Clearly, the real estate professional in the field would prefer an arrangement that more closely reflects the practical realities, notwithstanding the legal inconsistencies that might result. The transaction brokerage relationship is the proposed practical solution. It replaces the presumption of the present statutes which favors the buyer when no written agency agreement exists with a presumption that the broker is a transaction broker; in the proposed statutes a limited agency with a buyer also requires a written agreement.<sup>85</sup>

One potential problem with the transaction brokerage relationship is that it assumes that the real estate professional can perform his activities without becoming an agent under the common law simply by abolishing the common law, notwithstanding that the broker may perform acts beyond mere ministerial acts. The proposed revisions would remove the existing clarity regarding the consequences of a broker's performing more than ministerial acts (or performing beyond the scope of a transaction brokerage relationship) but failing to enter into a written agreement. Under the proposed revisions, what relationship would arise in this circumstance? Apparently, if the broker's acts were more than ministerial, but there was no written agency agreement, then a transaction brokerage relationship would be implied. If the transaction broker then went

83. MO. REV. STAT. § 339.780 (Supp. 1997).

84. See *supra* notes 11-13 and accompanying text.

85. H.B. No. 1094, 89th General Assembly (Mo. 1998) (revising § 339.780) (before engaging in more than ministerial acts, the designated broker is required to enter into a written agency agreement with the buyer which seems to continue to permit the performance of such ministerial acts).

beyond the acts he is permitted to perform as a transaction broker, presumably he would be acting improperly as a common-law agent, representing a party without a written agency agreement. Thus, the broker would be subject to disciplinary remedies under the administrative scheme for regulating real estate professionals. However, the client could be without a private remedy because the statute expressly supersedes the common law and because a transaction brokerage is presumed and consented to by the parties.

## V. CONCLUSION

The transaction brokerage proposal challenges all real estate professionals. The common law has rejected a distinction between the duties of a mere middleman, who has no fiduciary obligations, and the role the real estate professional must play with parties seeking his advice and counsel. Thus, whether the present arrangement, which operates substantially the same as the traditional agency relationship but requires additional and more complicated disclosures, will fulfill the expectations of its proponents is unclear. Clearly, the recently enacted legislation does not remove the real estate professional from the compromising legal positions in which he frequently has found himself in the past. Even after the Missouri General Assembly has responded to the proposed transaction brokerage revisions, the state of the law pertaining to real estate professionals will remain unclear until the courts determine the role of the common law in transaction brokerage relationships. Missouri and other states waited a decade or more after the ground-breaking decisions in California to attempt a resolution. Perhaps another decade will pass before the lay of the legal landscape truly is settled.

