REALTOR AS “SUPERBROKER”: GREAT EXPECTATIONS UNREALIZED?

by

RENE SACASAS* AND DON WIESNER**

While sitting out the French Revolution, Talleyrand, the 18th century French diplomat/negotiator, found sanctuary in upper New York State. Without funds, he appropriately applied himself to employment within his interests and talents; he sold real estate. The biographers do not report what success he had selling wilderness parcels of New York but three years later he returned to France and lived famously, dying in 1838 at age eighty-four.1

Despite Talleyrand’s impressive background, education and talents, it is offered that he would have been hard pressed to honor the contemporary demands fixed upon real estate brokers and, as a keen negotiator, be less than willing to answer for the liabilities now placed on his early profession. This article explores the public policy and expectation issues surrounding the qualifications and liabilities of realtors.2 It is a premise of this article that two phenomena, the expectation that the realtor is a “superbroker” and the application of the law of fiduciaries, are making the practice unstaffable. This collection of society’s needs and biases, it is offered, naturally followed land as a product and its transfer.

UNIQUENESS OF LAND AS A “PRODUCT”

Land as a saleable product is not only unique at law3 but in practice has been dealt with uniquely. From the ceremonial delivery of a clump of dirt at dawn in the English countryside to the delivery of a modern warranty deed, the sale and transfer of real property never was nor is now uncomplicated.4 In-

* Rene Sacasas is an Assistant Professor of Business Law, School of Business Administration, University of Miami, Florida. Prior to his appointment, he was in private practice specializing in the legal aspects of international finance and commercial real estate. Earlier in his career, he was an International Territorial Representative for a New York City commercial bank. He holds a J.D. from Emory University. His most recent article entitled Comfort Letters: The Legal and Business Implications was published in the July/August issue of the BANKING LAW JOURNAL.

** Don Wiesner is a Professor and the Chairman of the Business Law Department, School of Business Administration, University of Miami, Florida. His many publications appear in law reviews and business journals. He is the author of two books on business law (McGraw-Hill 1985) and holds a J.D. and LL.M. from the University of Miami.


2 In this context, realtor means to describe all such parties involved in the brokerage of real property transaction, including brokers, salespersons and others who may place legal liability upon the realtor by reason of respondiat superior. While the cases treat the term broadly, “Realtor,” is a proprietary term describing membership in the National Association of Realtors.

3 Its singularity is well recognized in equity, classically set forth in Kitchen v. Herring, 42 N.C. 137, 138 (1851), where the court said: “The principle is, that land is assumed to have a peculiar value, so as to give an equity for a specific performance, without reference to its quality or quantity.”

4 In land transactions we see a delay between contract formation and title passage involving a ritual so complex and dependent on conditions and exceptions that the “sticks” are never easily “bundled.”
to this involved ritual we have inserted an institutionalized intermediary, the real estate broker.

This product, real property, unlike fabricated goods, is not originally manufactured by the seller; it is the "original" used product. As such, transactions involving realty are encumbered by circumstances that are inherent to its relationship with the earth: soil conditions, geography, topography, and former uses. Unfortunate beneficiaries of the effects of these conditions are real estate brokers.

Example #1: A $170,000 home was located on a foundation whose fill had not been properly engineered and compacted. It collapsed causing cracks in the walls and warped doorways. The buyer of this property sought relief from a number of parties, including the real estate brokers who handled the transaction. The buyer won and obtained a portion of his relief from the brokers, who were not informed of the property’s defects, on the grounds of the brokers’ failure to investigate and disclose defects in property they list for sale.

Further, the improvements on the land ultimately erode, becoming vulnerable, deteriorated, and a principal concern of the real estate broker.

Example #2: Plaintiff purchased an office building from Johnson. After the purchase, latent defects in the air conditioning and heating system were discovered. Broker had knowledge of the defects prior to the sale and misrepresented its condition to the plaintiff at the time of purchase. Plaintiff/Buyer recovered from the Broker.

*Easton v. Strassburger, 152 Cal. App. 3d 90, 96-97, 199 Cal. Rptr. 383, 385-86 (1984). The facts in this example are the same as this highly publicized decision which is the cutting edge of real estate broker litigation. This decision has substantially enlarged the scope of potential responsibility of this third party to the real estate sales transaction.*

In court decisions spanning the last two decades, brokers have been held liable for not only the unmistakable acts of commission occasioning fraud and breach of contract but also for acts of omission where liability has been historically reserved for professionals entrusted with the highest social responsibilities, education and training.


*In Neff v. Bud Lewis Company, 89 N.M. 145, 146, 148, 548 P.2d 107, 108, 110 (1976), the plaintiff purchased an office building from Johnson. After the purchase, latent defects in the air conditioning and heating system were discovered. Defendant had knowledge of the defects prior to the sale and misrepresented its condition to the plaintiff at the time of purchase. Although the court spoke to the issue of the broker’s breach of an alleged fiduciary duty to the plaintiff, it was comfortable in finding the broker liable purely under a theory of misrepresentation. The finding of a “special relationship” and a breach of that relationship was unnecessary.*

In Berman v. Watergate West, Inc., 391 A.2d 1351 (D.C. 1978), the court imposed liability on the real estate broker for failing to advise the buyers of a defective air conditioning system which damaged floors, walls and a rug.

Additionally, society may have, through its use of the police power and the enforcement of prior private agreements, an interest in the land's current and future use.

Example #3: Buyer was moving to the suburbs of a major city from rural Iowa. He and his wife had always operated a small business out of their home. He advised the broker that he wanted to purchase a home where they could continue to operate their small business. The broker sold them a home in a suburb which was zoned non-commercial and buyer could not operate his business. Broker never checked the zoning.7

The case law reflecting potential real estate broker liability for an assortment of miscues is extensive and, on occasion, even macabre as in the case where a cause of action was found to lie against a broker for failure to disclose to the purchaser that the house had been the scene of a grisly multiple murder.8 These three simple case illustrations reveal the scope and present an overview of the uniqueness of land as a product. They also show the manner in which the courts and legislatures have responded to land’s disposition and use.

UNIQUENESS OF LAND IN ITS TRANSFER

The difficulties flowing from the inherent nature of land are exacerbated by the highly ritualistic transfer procedures in which many real estate brokers must involuntarily participate. Involuntarily, because the broker has no real interest in the transfer process, but the fact remains that many brokers either prepare the real estate sales contract or participate in its drafting and execution.

Yet, the broker’s role in the transfer process, though unassigned, is a real one. Because the contract for purchase and sale is the master document, its meaning and effects command much of the litigation involving real estate broker liability.9

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In Mattieligh v. Poe, 57 Wash. App. 203, 356 P.2d 328 (1960), an elderly unschooled foreign-born farmer alleged that a broker prepared a real estate contract at variance with the farmer’s clear instructions. The
More importantly, few real property transactions are for cash. Accordingly, it is a rare transaction involving real property which does not have critical financing components. These components include the amount, tenor, method of repayment, type, cost and other terms of the financing arrangements.

Traditionally, this financing was arranged through local financial institutions. Commercial real estate loan arrangements have always been individually negotiated by the parties. Potential home buyers/borrowers, however, would apply to their neighborhood savings and loan association for a thirty (30) year fixed rate mortgage in a principal amount not to exceed 80% of assessed value, payable in equal monthly installments of principal and interest. Depending upon the buyer/borrowers' credit worthiness and the value of the property, a mortgage loan would be approved containing terms and conditions which rarely were negotiated or modified by the institution. For decades, the ordinary American residential mortgage loan transaction was static.10

This is no longer the case.

The prevailing real estate market requires more flexible and innovative methods of solving the dilemma of how the buyer will pay for the property. All players within the transaction have become more sophisticated and more involved. The bank or savings and loan association rarely holds residential mortgage loans in portfolio but rather packages and sells them to FNMA, other pseudo/governmental intermediaries, or private interests. Those who invest in the loans require adjustable rates to cover movements in the interest market or fixed rate loans at interest premiums. Buyers seek cheaper money and the seller is often the provider of that financing.11 In order to bring buyer and seller together, the broker will often be the party who suggests and structures owner financing arrangements, including assessing the buyer's financial condition. In fact, many brokers promote the impression that they can facilitate your financ-

9Kratovil and Werner, REAL ESTATE LAW (8th ed. 1983). A brief description of these new forms of mortgages may be found in Chapter 16, pp. 314-339.
ing through “creative and innovative” methods.

Example #4: Real estate broker recommended and Buyer agreed to offer $90,000 as long as Seller gave her a $10,000 second mortgage at 6% interest payments only for five years. Broker conveyed the offer to Seller with a recommendation that he “... take it or lose the deal.” Seller questioned the $10,000 second mortgage. Broker retorted, “You’re getting your full purchase price. The buyer’s good for it. You just have to wait a little time for a part of it.” Seller accepted the offer. Market interest rates for similar loans were 9%. Buyer, who had a history of poor credit, defaulted.12

In this simple example, it is easy to see that the real estate broker, under the current trend of broker liability law, may be exposed to the seller not only for failing to assess the buyer’s credit-worthiness but also for the representations made regarding the value of the financing. Elementary financial analysis demonstrates that if less than the market interest rate is paid on an outstanding principal, that principal is depreciating in absolute value. Simply, the principal that will be repaid will not be worth what it was when it was loaned to the buyer. Hence, seller is not “... getting his full purchase price,” but rather something less. The broker may well have owed the seller a duty to disclose this information whether the broker was a financing expert or not.

ROLE AND LIABILITY OF THE FACILITATOR — INTRODUCTION

The prior sections are a sampling of potential liability for the real estate broker as a result of the uniqueness of the product in which they deal and its transfer. This does not tell the complete story. In order to fully understand, it must be recalled that their fundamental mission is finding an interested and qualified buyer. All entrepreneurial effort is directed toward this search, with their fee dependent upon a suitable match. In the not so distant past, this was the broker’s only significant role. This was the time before mass media, one hundred (100) page real estate classified sections in the newspapers of every major city, “for sale by owner” companies, multiple listing services, and cable

television programs advising all who will listen and send the speaker $399 that making money in real estate is simple and trouble free.\textsuperscript{13}

With the proliferation of new methods of bringing sellers in contact with willing buyers and increased client expectations, it is offered that real estate brokers had to do what all successful businesspersons understand: differentiate their product or perish. And differentiate they did. Real estate brokers were no longer "only" salespersons, they touted their increased levels of professionalism, they promoted themselves, in some instances, as advisors regarding financing, the quality and market value of property, the legal ramifications of a sales contract, current and potential land use, and a myriad of other areas. The public and courts listened. It should not surprise real estate brokers that they are now being held to the standards they advertised.

\textbf{LIABILITY OF REAL ESTATE BROKERS — GENERALLY}

The issue of liability intrinsically turns on the successful quest for an appropriate defendant. In buying and selling, the law of contract together with its grafted tort aspects (fraud, duress, mistake) provide adequate standards for the settlement of the buyer's and seller's disputes.\textsuperscript{14} Since sales transactions involving real property are particularly tripartite (owner/seller, buyer and real estate broker) and the contracts involve an interest which society has judged critical, the conduct of the third-party/broker, in what is essentially a two-party contract, is meticulously scrutinized.

Despite the reality that fact patterns giving rise to controversies involving real estate brokers exhibit the same venality and legally pathological behavior as all others, they have been treated differently by the courts. Although brokers have been found liable to their clients and third parties under traditional tort and contract liability theories, including (1) misrepresentation and

\textsuperscript{13}For example, in the city of Miami, Florida, there are two companies specializing in "For Sale by Owner" programs, several neighborhood advertising "flyers" and weekly real estate supplements in both daily newspapers.

\textsuperscript{14}See generally, LEVINE, M.L., REALTOR'S LIABILITY, (John Wiley & Sons, Inc. 1979).
LIABILITY OF REAL ESTATE BROKERS — “THE AGENCY GRAFT”

Of course, real estate brokers, like all other contractors, are held responsible for breaches of contract and tortious behavior associated with the transaction. Nevertheless, the courts further enlarged the real estate broker’s potential for liability by labelling him a fiduciary by virtue of his role as a special agent. This imposition of fiduciary duties presents complications when examining cases involving real estate brokers.

The term “fiduciary” is rooted in Roman or civil law and connotes the idea of trust and confidence, contemplating good faith rather than legal obligation as the basis of the relationship. The term, it is important to note, describes the integrity and fidelity of the party trusted and not their credibility or ability. This distinction is not always clearly evident in the judicial opinions ruling on the liability of real estate brokers.


upon real estate broker liability.  

When real estate brokers lie to those who hired them or anyone else involved in the transaction, the law does not require proof of a fiduciary relationship to impose liability. There are sufficient legal grounds, i.e. fraud and misrepresentation, to police this behavior. However, when they withhold information or act in their own self-interest, generally pardonable behavior in the population as a whole, the fiduciary principle plays a role in establishing real estate broker liability.

What is important to recognize is that the imposition of fiduciary duties operates at two levels. At one level it compels candor and circumscribes self-interest on the part of the real estate broker in his dealings with his employer, the seller. It then extends them, if the trend in recent case law is to be accepted, to others in the real estate transaction. It is not surprising, therefore, to read case law stating that real estate brokers owe these duties of total candor and denial of self-interest to the purchaser as well as the seller.

The original imposition and current extension of this fiduciary role may be a product of sound public policy. Certainly, the statutes regulating real estate brokers and their own self-imposed canon of ethics reflect this concern. However, the real estate broker's relationships and position within the sales transaction have particular characteristics that fit uneasily in the fiduciary standard. A fiduciary relationship has been traditionally established when one party justifiably reposes confidence, faith and reliance on another whose aid, advice or protection is sought in some matter. The fiduciary relationship is fixed when good conscience requires the party relied on to act at all times for the sole benefit and interest of the other. The classic examples of attorney-client and master-servant relationships reveal no discomfort with this "single master" requirement, the cornerstone of fiduciary theory; not so for the contemporary real estate broker's relationships.

If the real estate broker represents either the buyer or seller, he has found his master. Fidelity easily follows. In examining contemporary real estate broker practice, however, the case decisions indicate that the real estate broker


may be held responsible to more than one master.\textsuperscript{20} Fidelity then does not easily follow but rather becomes a choice of whom to serve first and best.

It is offered that successful negotiations between buyers and sellers require a professional third party, who, having made the judgment that the buyer and seller are a potential match, indirectly seeks compromise from both parties to effect the sale. This demand breeds conflict for the institutionalized middleman, the real estate broker.

Further, consider the real estate broker hired by the seller to find a buyer. This real estate broker "... knows or should have known" certain negative facts about the property. Owing a duty to his seller, he must only, under traditional legal rules, practice no fraud upon nor make any active misrepresentations to the potential buyer. Nonetheless, if current case law is to be believed, this real estate broker may well have breached a duty to disclose unfavorable information regarding the property to the buyer if he remains silent. This requirement to reveal negative information has, again, as its legal bottom, the fiduciary principle.\textsuperscript{21}

This two or multiple master dilemma is not solely restricted to the possible court imposed fiduciary relationship between the real estate broker and the purchaser. Consider the issue of the real estate broker's inventory. If he has more than one property listed for sale it is not unreasonable that a prospective buyer may be a fit for several properties owned by different sellers represented by the same real estate broker. The real estate broker's canon of ethics addresses the problem by instructing that all possible properties be shown to the potential buyer. Yet to which master does the broker owe her "best efforts:" the first in time of listing, the most expensive, the easiest to sell, the hardest to sell, the highest rate of commission, the best for the prospective buyer? If the fiduciary doctrine applies it offers no practical instruction in this area.

Accordingly, it can be argued that the prospective buyer is a fungible economic resource permitting the real estate broker to direct funds in any direction. The seller, however, is single-minded: selling her unique property at the best price possible. The conflict is obvious. The real estate broker is employed by the seller but is ultimately driven by the buyer's demands. In practice, the real estate broker must, in order to serve the consummation of the deal and validate his presence in an otherwise two party negotiation, sacrifice certain of his seller's wants.

Viewed in this manner, the otherwise honorable and natural response by the real estate broker to competing interests runs contrary to the spirit and letter of the fiduciary rules. If the fiduciary doctrine is truly grounded upon the single master theory, it does not well serve the complex contemporary relation-


\textsuperscript{21}Id.
ships among real estate brokers, buyers and sellers.

**ANALYSIS OF BROKER LIABILITY**

If the charges of malfeasance against real estate brokers are fueled largely from the nature of the product, i.e., the land itself, and the peculiar transactional position in which brokers find themselves, it may be useful to identify which particular patterns of behavior must be modified to reduce the public's claims.

Because the real estate broker is engaged in a highly competitive business, in which material interests are substantial, it is not unlikely that there will always exist a large number of dissatisfied customers, whether justified or not. A survey of the numbers and types of complaints would reveal the territory but this paper must be satisfied by offering some insight into the pathology by viewing the reported case decisions of appellate courts for the past eleven (11) years.\(^2\)

These decisions may not be statistically representative of the quantity or quality of complaints against real estate brokers but do reflect dissatisfaction by the most serious of the complainants: those who not only instituted suit but persisted to the (expensive) appellate level.

Of the over one hundred cases examined, the majority have as their undercurrent and, at least thirty percent (30%) detail, an apparent breach of elementary ethics, i.e., the things all of us were taught at mother's knee: do not lie, do not cheat. Given the tremendous temptation to make a sale, to satisfy the vendor in finding a buyer, and to satisfy the buyer in finding the property he wants, it is not surprising that claims of fraud and misrepresentation abound in the case law. Accordingly, it is obvious that the real estate codes and regulations properly highlight general ethical duty.\(^3\) To identify the culprit, temptation, however, is not to solve the problem.

It is offered that the temptation to speak authoritatively in areas where even prudent experts only cautiously conjecture, could be reduced if certain subjects were removed from the real estate broker's jurisdiction. If the real estate broker admitted his pardonable incompetence to the parties and they accepted these limitations in regard to the areas or disciplines classified in the bar chart below, the brokers would not be so easily tempted to give it their best shot nor be penalized for their silence. Our survey revealed the following pro-

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\(^3\) Broad legal characterizations found in real estate licensing statutes tend to be of questionable assistance to the broker. Instructing the broker/licensee, for example, that she should not commit fraud, misrepresentation, or self-dealing, as found in these statutes, would seem to be less effective than a specific instruction. An example of such specificity is found in **FLA. STAT. § 475.25 (1985)** which proscribes conduct such as rendering "... an opinion that the title to any property sold is good or merchantable, except when correctly based upon a current opinion of a licensed attorney-at-law...."
file of fields of knowledge which played a role in the real estate broker liability cases.  

*The assignment of every case within these groupings was not always made with complete confidence. The courts use different legal language when examining the alleged conduct of the broker. For example, it is possible that some of the cases identify fraudulent or negligent behavior yet really resolve the dispute under fiduciary theories.*
REAL ESTATE BROKER LIABILITY CASES
1976 - 1987

FINANCE & CREDIT

SURVEY

LEGAL

CONDITION OF IMPROVEMENT

CONDITION OF LAND

ZONING & USE

APPRAISAL

FRAUD

BREACH OF FIDUCIARY DUTY

MISCELLANEOUS

NUMBER OF CASES EXAMINED

AREA/DISCIPLINE WHERE ERROR ALLEGED

GRAPH 1
This bar chart reveals not an unexpected profile of charges made against real estate brokers over a wide range of substantive problems in buying and selling real estate. Legal questions and the condition of the improvement lead the pathology list, with finance/credit issues and survey disputes following. Observe that the types of technical and professional knowledge apparently required were raised in areas initially foreign to any real estate broker. These fields and the questions asked about them contributed to the issue of liability in a majority of the cases reviewed.

Consider the not-so-simple matter of a property’s square footage. Even an expert has difficulty with this finding. To place a broker as an expert in this area is unrealistic and expensive. Or, for another example, consider the law; legal questions in preparing contracts for buying and selling real estate are many times subtle. How many brokers know how to prepare a valid condition precedent clause, or frame a liquidated damage provision which reflects a particular need of the situation? Real estate contracts are not adhesive contracts, no matter how many bar and realty associations prepare the “perfect form.” Unfortunately for the realtor, many real estate contracts must be tailor-made to the situation.

The argument may be made that today’s realtors are better educated and more sophisticated. That may be but it is doubtful that they possess the necessary expertise or are willing to learn the many technical facets upon which they are being asked to comment and advise. The case law is replete with the issue of “... what the broker knew, or had reason to know.” This “... reason to know” refers to the body of knowledge and expertise imputed to the broker and his agents. Now position that fact against the admitted educational background of both the real estate broker and salesperson as reflected in graphs 2 and 3.


The graphs were prepared by the authors, who express their appreciation to the National Association of Realtors for the data provided in their Membership Profile 1984 (Wash. D.C. 1984).
GRAPH 2

FORMAL EDUCATION OF REAL ESTATE BROKERS

- College Graduate 36.7%
- Some College 34.5%
- High School Graduate 17.7%
- Some High School 1.9%
- Graduate Degree 9.2%

Data Source: NAR Membership Profile 1988
FORMAL EDUCATION OF REAL ESTATE SALESPERSONS

- High School Graduate: 24%
- Some High School: 1.6%
- Graduate Degree: 10.3%
- Some College: 37.8%
- College Graduate: 26.3%

Data Source: NAR, Membership Profile 1988
Over 80% of real estate brokers and nearly 75% of salespersons have had college training, a rather remarkable fact when it is realized that up until recently no such training was either legally required nor professionally expected.

While in college, those surveyed reported having concentrated or majored in a wide variety of fields. The specifics are identified in graphs 4 and 5.28

28Id.
UNDERGRADUATE SPECIALIZATION OF
REAL ESTATE BROKERS WHO
HAVE ATTENDED COLLEGE

GRAPH 4

Data Source: NAR, Membership Profile 1984

- Business Administration: 37.2%
- Liberal Arts: 12.9%
- Agriculture: 2.1%
- Social Sciences: 9.8%
- Other: 3.8%
- Physical Sciences: 9.7%
- Education: 9.2%
- Real Estate: 4%
- Economics: 6.6%
- Engineering: 4%
- Law: 0.7%
UNDERGRADUATE SPECIALIZATION OF REAL ESTATE SALESPERSONS WHO HAVE ATTENDED COLLEGE

- Business Administration 31.4%
- Physical Sciences 22.1%
- Liberal Arts 17.3%
- Education 14.1%
- Law 1%
- Engineering 4.2%
- Economics 3.2%
- Real Estate 1.2%
- Other 4.5%

Data Source: NAR, Membership Profile 1988
Given the types of legal complaints made against real estate brokers and salespersons reported in graph 1, it is interesting to juxtapose their formal educational training against the areas where error was alleged. The sale of real estate is historically one of the basic business transactions, and approximately one-third (1/3) who have gone to college have concentrated on the study of business, though the brokers were 15% more likely to have had this type of training than the salesperson. Of course, as to the total, nearly 27% of all brokers have had college business training. On the other hand, college training in real estate, disciplines which would give insight into the condition of the improvement or land, finance, and the law, areas of major pathological involvement, are represented by less than 9% of those college trained brokers and slightly more than 7% of salespersons.

Some might press the thought that a real estate broker's skills are field-learned or acquired in allied occupations rather than in a formalized educational format. In the “School of Hardknocks,” the matriculation appears as follows:\textsuperscript{29}

\textsuperscript{29}Id.
GRAPH 6

PRIOR OCCUPATIONS OF REAL ESTATE BROKERS

- Insurance: 4.4%
- Secretarial/Bookkeeping: 10%
- Building/Construction: 2.7%
- Education: 7.9%
- Retailing: 5.7%
- Armed Forces: 5%
- Agriculture: .9%
- Engineering: 2%
- Government: 3.6%
- Accounting: 3.7%
- Law: .5%
- Management: 10%
- Communications: 2.5%
- Sales/Marketing: 9.9%
- Other: 25.8%

Data Source: NAR, Membership Profile 1986
Notice the variety of real-world preparation and the small percentages of each area. The pre-broker education reflects a wide variety of life experiences. No area exceeds 11%, with the highest representing that amorphous grouping called management. Note that real-world training in areas of major potential liability: real estate, disciplines which would give insight into the condition of the improvement or land, finance, and the law, are represented by less than 11% of brokers and slightly less than 9% of salespersons.

State legislatures have attempted to deal with this complex problem of training by enacting licensing requirements for both real estate brokers and salespersons. Competency is generally established by an examination prepared and administered by the state agency charged with supervision of these personnel. The following table reflects the real estate education and experience requirements of all fifty (50) states.30

<table>
<thead>
<tr>
<th>State</th>
<th>Education Requirement</th>
<th>Continuing Education</th>
<th>Education Requirement</th>
<th>Experience Requirement</th>
<th>Continuing Education</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>45 hours</td>
<td>No</td>
<td>45 hours</td>
<td>2 years</td>
<td>No</td>
</tr>
<tr>
<td>Alaska</td>
<td>None</td>
<td>No</td>
<td>None</td>
<td>2 years</td>
<td>No</td>
</tr>
<tr>
<td>Arizona</td>
<td>45 hours</td>
<td>Yes</td>
<td>90 hours</td>
<td>3 years</td>
<td>Yes</td>
</tr>
<tr>
<td>Arkansas</td>
<td>30 hours</td>
<td>No</td>
<td>90 hours or</td>
<td>2 years</td>
<td>No</td>
</tr>
<tr>
<td>Calif.</td>
<td>None</td>
<td>Yes</td>
<td>270 hours</td>
<td>2 years</td>
<td>Yes</td>
</tr>
<tr>
<td>Colorado</td>
<td>48 hours</td>
<td>No</td>
<td>96 hours</td>
<td>2 years</td>
<td>No</td>
</tr>
<tr>
<td>Conn.</td>
<td>30 hours</td>
<td>No</td>
<td>90 hours</td>
<td>2 years</td>
<td>No</td>
</tr>
<tr>
<td>Delaware</td>
<td>75 hours</td>
<td>No</td>
<td>30 hours</td>
<td>5 years</td>
<td>No</td>
</tr>
<tr>
<td>D.C.</td>
<td>None</td>
<td>None</td>
<td>None</td>
<td>None</td>
<td>No</td>
</tr>
<tr>
<td>Florida</td>
<td>51 hours</td>
<td>Yes</td>
<td>48 hours</td>
<td>1 year</td>
<td>Yes</td>
</tr>
<tr>
<td>Georgia</td>
<td>24 hours</td>
<td>Yes</td>
<td>60 hours</td>
<td>3 years</td>
<td>Yes</td>
</tr>
<tr>
<td>Hawaii</td>
<td>40 hours</td>
<td>No</td>
<td>46 hours</td>
<td>2 years</td>
<td>No</td>
</tr>
<tr>
<td>Idaho</td>
<td>45 hours</td>
<td>No</td>
<td>90 hours</td>
<td>2 years</td>
<td>No</td>
</tr>
<tr>
<td>Illinois</td>
<td>30 hours</td>
<td>No</td>
<td>90 hours</td>
<td>1 year</td>
<td>No</td>
</tr>
<tr>
<td>Indiana</td>
<td>40 hours</td>
<td>No</td>
<td>64 hours</td>
<td>1 year</td>
<td>No</td>
</tr>
<tr>
<td>Iowa</td>
<td>30 hours</td>
<td>Yes</td>
<td>No addit'l</td>
<td>1 year</td>
<td>Yes</td>
</tr>
<tr>
<td>Kansas</td>
<td>30 hours</td>
<td>Yes</td>
<td>No addit'l</td>
<td>2 years</td>
<td>Yes</td>
</tr>
<tr>
<td>Kentucky</td>
<td>96 hours</td>
<td>No</td>
<td>336 hours</td>
<td>2 years</td>
<td>No</td>
</tr>
<tr>
<td>Louisiana</td>
<td>90 hours</td>
<td>Yes</td>
<td>150 hours</td>
<td>2 years</td>
<td>Yes</td>
</tr>
<tr>
<td>Maine</td>
<td>High School</td>
<td>Yes</td>
<td>90 hours or</td>
<td>1 year</td>
<td>Yes</td>
</tr>
<tr>
<td>Maryland</td>
<td>60 hours</td>
<td>Yes</td>
<td>135 hours</td>
<td>3 years</td>
<td>Yes</td>
</tr>
<tr>
<td>Mass.</td>
<td>24 hours</td>
<td>No</td>
<td>30 hours</td>
<td>1 year</td>
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</tr>
<tr>
<td>Michigan</td>
<td>30 hours if exam failed</td>
<td>No</td>
<td>90 hours</td>
<td>3 years</td>
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<tr>
<td>Minn.</td>
<td>90 hours</td>
<td>Yes</td>
<td>90 hours</td>
<td>2 years</td>
<td>Yes</td>
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<table>
<thead>
<tr>
<th>State</th>
<th>Salesperson License</th>
<th>Broker License</th>
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<tr>
<td></td>
<td>Education Requirement</td>
<td>Continuing Education</td>
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<tr>
<td>Miss.</td>
<td>60 hours</td>
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<td>Missouri</td>
<td>54 hours</td>
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<td>10th grade</td>
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<td>Nebraska</td>
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<td>Nevada</td>
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<td>New Hamp.</td>
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<tr>
<td>N.J.</td>
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<td>No</td>
</tr>
<tr>
<td>N.M.</td>
<td>60 hours</td>
<td>No</td>
</tr>
<tr>
<td>N.Y.</td>
<td>45 hours</td>
<td>Yes</td>
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<tr>
<td>N.C.</td>
<td>30 hours</td>
<td>No</td>
</tr>
<tr>
<td>N.D.</td>
<td>30 hours</td>
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<td>Okla.</td>
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<td>Oregon</td>
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<td>Pa.</td>
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<td>R.I.</td>
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<td>S.C.</td>
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<tr>
<td>S.D.</td>
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<td>Tenn.</td>
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<td>Wyoming</td>
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In order to evaluate the statistical information provided above, the stated educational requirements should be compared to those of other professionals. For example, a lawyer prior to entering practice is currently required to have graduated from an accredited four year college and then a three year law school. If one assumes that the undergraduate degree was comprised of approximately one hundred twenty (120) semester credit hours and the law degree took approximately ninety (90) semester credit hours, then it can be extrapolated that if the average semester was fourteen (14) weeks long and each course met three (3) hours a week, a lawyer has spent eight thousand eight hundred and twenty (8,820) hours in classrooms preparing to practice his profession. Engineers and architects, depending upon the state licensing requirements, may spend from approximately forty eight hundred (4,800) to over six
thousand (6,000) hours in a formal education experience. Granted, a portion of those hours are spent in general education, but at least one-half will be devoted to their specialty or allied fields. Even the requirements of the thirteen states which strongly regulate their real estate brokers and demand that brokers have formal educational training ranging from one hundred twenty (120) to seven hundred twenty (720) hours, appear insignificant by comparison.

Given the apparent expectations of the parties to the real estate transaction, what should be the job description of a real estate broker? Despite state regulation, broker’s are not required to have in-depth specific training in law, engineering, building/construction, finance, or other challenged areas, further than introductory materials found in licensing examinations and limited continuing education courses. Yet, this paper has outlined the specific legal and apparent professional expectations of brokers and salespersons not only toward his employer but to others in the transaction. Further, the present real estate broker appears prepared to answer to this liability under an assumed confidence and through training no one can practically possess.

Simply stated, real estate sales personnel with limited knowledge and training are required to know too much and are held liable for attempting to meet society’s expectations. It seems clear that the movement toward equilibrium must be either the legal enactment of a particularized broker liability immunity, increased liability insurance requirements for practicing real estate brokers, or the institution of a fundamental change in the manner real estate brokers are trained and licensed. In the latter instance, the educator’s solution would be to create a bachelor’s and/or graduate degree in real estate brokerage which addresses these multiple interdisciplinary issues and require that all brokers be graduates of such a program. There appears to be a movement in that direction in several of the state legislatures. It can be argued, however, that although theoretically desirable, this solution may be practically unattainable because of the burgeoning number of disciplines and depth of information required in each leading to potential liability in the recent case law.

CONCLUSION AND RECOMMENDATIONS

In the past, real estate brokers have performed a myriad of services for their customers that have been or are on the threshold of becoming institutionalized into legal obligations. Further, current real estate transfers in the United States are very complex and test not only the real estate broker’s technical competence but his ethics as well. This increased threshold of performance and standard of care reveals real estate brokers in startling no-win situations caused, it is offered, by two faulty assumptions: (1) that real estate

brokers should have competence in the fields of finance, credit, marketing, law, engineering, surveying, building construction and others; and, (2) that the real estate broker owes identical duties to competing parties.

It is offered that real estate brokers serve the public interest when they perform the role of transaction facilitator ably and honestly. Accordingly, it is for the reader to evaluate whether any person in that role should be required to possess the technical competence many courts appear to impute as a duty to real estate brokers. Second, whether the duty to speak, the candor requirement which can be described as the keystone of the fiduciary doctrine, can operate in the modern real estate broker environment.

It seems reasonable to expect less of the real estate broker than the present trend in the broker liability case law reveals. Real estate brokers perform best when they are dispatched to do the hard jobs: finding a willing and able purchaser; and, accommodating and comforting the parties as they give birth to the doable deal. They do not serve well or ably when they influence the transaction by professing expertise in unknown areas or when they are unduly burdened by the fiduciary doctrine.