

**REPORT**  
**NAR Presidential Advisory Group on**  
**Buyer Representation Liability Issues ("BRLI PAG")**

**I. CHARGE AND PAG MEMBERS**

1. The Charge to the PAG was:

To review judicial opinions and regulatory obligations addressing the duties of buyers' representatives for the purpose of identifying ways in which the REALTOR® Association could foster reasonable standards of care for buyers' representatives within state and local markets.

2. PAG Members:

Maryann Bassett (NM), Chair

Bruce Aydt (MO)

Earl Black (ME)

Steve Casper (OH)

Carolyn D'Agosta (CA)

Lee Finch (GA)

John Foltz (AZ)

Robert Foster (CA)

Curtis Hall (AZ)

Cynthia Joachim (MS)

Robert Most (CO)

James Merrion (IL)

Lou Tulga (NM)

Steve Hoover (VA), 1999 Committee Liaison, Law & Policy Group

Laurie Janik, NAR General Counsel

Diane Djordjevic, NAR Associate Counsel, Staff Executive to the PAG

David Martin, Director of REBAC

**II. BACKGROUND AND HISTORY**

In 1983, the Federal Trade Commission ("FTC") released its report, The Residential Real Estate Brokerage Industry, which indicated that in cooperative transactions, 72% of potential home buyers thought that the real estate practitioner who was working with them was working for them. This misperception was counter to the reality of the residential real estate transaction at the time, where the common business practice was that the licensee worked for the seller, either as an agent or as a subagent.

Since 1985, the NATIONAL ASSOCIATION OF REALTORS® ("NAR") has appointed five member groups to study agency issues and the brokerage relationships between licensees and consumers in real estate transactions.

1. In 1985, NAR formed its first Agency Task Force to study agency issues in-depth, in particular, the relationship between real estate practitioners and consumers. NAR's Board of Directors adopted the Agency Task Force's recommendations, and it became NAR policy to encourage state REALTOR® associations to work with their state legislatures to enact legislation providing for mandatory agency disclosure.

2. In 1991, NAR's President appointed a Presidential Advisory Group on Agency to make recommendations to assist the state REALTOR® associations during that time of transition in the industry. The Agency PAG's recommendations were adopted as NAR policy in 1992. Its recommendations included:

- a. Making subagency optional in REALTOR® MLSs;
- b. Creating corresponding standards of conduct in the REALTOR® Code of Ethics to include NAR members working with buyers;
- c. Having NAR provide education and information on a variety of agency issues to its members; and
- d. Encouraging state REALTOR® associations to work toward the promulgation of laws providing for mandatory, written, timely and meaningful agency disclosure.

3. In 1992, NAR's President appointed a Presidential Advisory Group on the Facilitator/Non-Agency Concept. This PAG was charged with assessing the advantages and disadvantages to both licensees and consumers, of a pure non-agency relationship (no fiduciary duties). The PAG recommended that NAR not further develop or promote the pure non-agency facilitator concept. Instead, it recommended nine elements for a legislative framework to clarify the law of agency as applied to real estate brokerage. These recommendations were adopted by NAR's Board of Directors and became NAR policy in 1993. The Executive Summary of the Facilitator/Non-Agency PAG Report is attached to this Report as Appendix A.

4. In 1996, NAR's Professional Standards Committee created a Non-Agency Working Group, which recommended changes to NAR's Code of Ethics to ensure that it included NAR members practicing in various non-agency relationships.

5. In December 1998, NAR's President appointed this Presidential Advisory Group on Buyer Representation Liability Issues ("BRLI PAG") in response to:

- a. Concerns over the lack of clear, specific duties and responsibilities owed to a buyer-client by his representative, and
- b. The growing number of judicial decisions imposing divergent and sometimes expansive "standards of care" on buyer's representatives.

### **III. METHODOLOGY**

To assist in its analysis of the liability issues facing buyer representatives, the PAG reviewed and discussed the following information:

- < Judicial decisions involving buyer representative liability, including the decisions in: Field v. Century 21 Klowden - Forness Realty (CA); Padgett v. Phariss (CA); Parahoo v. Mancini (OH); McFarland v. Associated Brokers (TX); Pagano v. Krohn (CA); and Gouveia v. Citicorp Person-To-Person Financial Center, Inc. (NM).
- < Each state's legislation and/or regulations that set forth duties owed to purchasers by licensees and/or that limit licensee liability. The following aspects of each state's statute or regulation also were reviewed:
  - a. Which description best characterized the statute or regulation:
    - (i) common-law type; that echoes the common law of agency;
    - (ii) non-agency default position, with duties owed a consumer;
    - (iii) presumption licensee is representing the consumer with whom he is working;
    - (iv) agency disclosure only;
    - (v) no agency legislation.
  - b. Whether agency agreements must be in writing.
  - c. How fiduciary duties flow in dual agency relationships and in designated agency relationships (whether the broker is a dual agent).
  - d. Whether there is a limitation on liability for a licensee who passes along to a party information given to the licensee by another licensee or his client/customer, which unknown to the licensee, is false.
  - e. Whether a duty of confidentiality exists in agency and non-agency relationships, and if so, how long it lasts.
- < Buyer representation contracts and/or agency disclosure forms used in a number of states including California and Colorado.
- < Market research, including What You Need to Know About Today's Home Buyers & Sellers - The NAR Home Buyers & Sellers Report produced by NAR's Economics & Research Group and the 1993 Gallup study conducted for NAR on consumer perceptions about different forms of representation.
- < A sampling of industry publications and training materials, including selected portions of REBAC course materials, addressing buyer representation and the duties and responsibilities owed when representing a buyer.
- < NAR Code of Ethics and Standards of Practice, as they create standards of care for real estate practitioners.
- < NAR legal research of judicial decisions in which the NAR Code of Ethics was used as the standard of care for real estate practitioners.

#### **IV. DEFINITIONS**

1. Buyer's representative - For the purposes of this Report, "buyer's representative" means any licensee working with a buyer, either in an agency relationship, or in a non-agency relationship with specific, statutory duties to the buyer.
2. Common law - Common law is law articulated in judicial decisions, as opposed to law created by legislatures in a statute. Since the common law comes from judicial decisions, it is difficult to ascertain in any given state, because it involves in-depth legal research. In addition, common law may change with new judicial decisions.
3. Designated agency - Once legislatively established in a given state, a brokerage practice (office policy) chosen by the managing broker to appoint, or designate, licensees associated with the managing broker as exclusive agents of consumers. This means that no other licensee in the brokerage represents that client.
4. In-house transaction - A transaction that takes place under the supervision of the same managing broker.
5. Judicial decision - A judicial decision is a court decision.
6. "Pure" non-agency - A relationship in which the licensee owes the consumer none of the traditional common law fiduciary duties. This is distinguishable from several states' versions of non-agency relationships with consumers (often called "transaction broker" or "facilitator"), in which the licensee still owes the consumer a variety of duties.

## **V. FINDINGS AND CONCLUSIONS**

1. The majority of residential real estate transactions today involve some form of buyer representation.
2. Subagency, the historical relationship between licensees and buyers, is disappearing as buyers continue to become aware that licensees acting as subagents only represent the seller.
3. The term "buyer representation" was originally used to describe an agency relationship between a licensee and a buyer. However, it is being redefined by current legislation in certain states to include a representative relationship with specific statutory duties owed a consumer, which may not include all traditional common law fiduciary duties.
4. The following factors influence and establish the standard of care for buyer representatives:
  - a. State laws and regulations
  - b. Judicial opinions/decisions
  - c. The NATIONAL ASSOCIATION OF REALTORS®:
    - < Code of Ethics and Standards of Practice;
    - < GRI, REBAC and other education programs;
    - < Policy positions taken by the Board of Directors; and
    - < Image campaign representations to the public.

#### d. Local and regional practices

5. A standard checklist of specific duties for buyer representatives cannot be created on the national level by NAR because state laws differ, as do the standards of care set by judicial opinion. Creation of a checklist can be accomplished best at the state level.
6. Because buyer representation has only been widely practiced since about 1994, few widely accepted specific standards of care or duties to a buyer have been established.
7. Judicial decisions regarding the standard of care expected of a buyer's representative are inconsistent from state to state.
8. Judicial decisions in several states have relied on NAR's Code of Ethics and Standards of Practice to define standards of care expected of a buyer's representative.
9. Since the recommendations of NAR's Agency Task Force and PAG in the mid 1980s, 49 states and the District of Columbia have enacted mandatory agency disclosure requirements through legislation or regulation.
10. Prior to 1994, when subagency was made optional, the "default" relationship of a real estate practitioner working with a buyer was as a subagent of the seller. This subagency "default" position provided clarity about the standard of care expected of a licensee when working with a buyer in that capacity.
11. Prior to entering into an agency relationship with a buyer, there may be a period of time when a licensee works with the buyer without the benefit of any defined brokerage relationship. During that time, the lack of defined licensee duties and responsibilities to the buyer can lead to problems.
12. Approximately 12 states have adopted legislation providing for a non-agency default relationship with specific duties owed a buyer by a licensee. This non-agency relationship with consumers is intended to lessen the potential legal liabilities for licensees by establishing specific, clear and measurable statutory duties owed to a consumer in a real estate transaction.
13. Since 1992, and the recommendations of the Facilitator/Non-Agency PAG, many states have incorporated in agency legislation or regulation some, or all, of NAR's recommended nine elements to clarify the law of agency as applied to real estate brokerage.
14. Since agency relationships may impose a higher standard of care on a licensee and may create vicarious liability for the consumer, they should be created with specific written agreement between the consumer and the licensee.
15. Although NAR's Code of Ethics and Standards of Practice have undergone several amendments related to agency and non-agency issues, they still reflect the influence of the common law of agency.

## **VI. RECOMMENDATIONS AND RATIONALES**

As a result of the findings and conclusions listed above, the following recommendations are ways in which the REALTOR® Association could foster reasonable standards of care for buyers' representatives within state and local markets:

## 1. Judicial Decisions

### **Recommendation - NAR should create an "early warning" system to identify lawsuits of importance to the industry involving the standard of care of buyer representatives.**

Rationale: A system needs to be created to enable NAR to identify and react proactively to lawsuits of importance to the real estate industry involving the standard of care of buyer representatives. This system should ensure that NAR learns of important cases in the early stages of litigation so that NAR can help shape the decisions, through financial support from NAR's Legal Action Committee and by filing amicus briefs.

Communication with state and local REALTOR® associations and individual members is needed to inform them that a system exists through which NAR can become involved. Additionally, the results in cases where NAR has been involved need to be communicated, as well as the standards of care buyer representatives are being held to in judicial decisions.

NAR should continue the work begun two years ago by Legal Affairs, conducting regular scans of the legal environment, including judicial decisions, statutes and regulations, and surveys of key contacts, to enable NAR to identify trends in litigation affecting the industry. NAR should continue to make the scan results available to REALTOR® associations and members, and should inform them of their availability through a variety of media.

## 2. State Statutes and/or Regulations

### **Recommendation - NAR should identify and/or develop suggested elements of legislation to:**

**a. Specify well-defined licensee duties for each type of brokerage relationship with a consumer.**(See Appendix B to this Report for a list of the brokerage relationships with consumers for which licensee duties should be specified.)**Once licensee duties are legislatively defined, the legislation should state that it abrogates (makes void/annuls and replaces) that state's common law (case law) as applied to real estate brokerage relationships to the extent the common law duties are inconsistent with the statutorily defined duties.**

Rationale: Once licensee duties are legislatively defined, it is extremely important that the legislation then abrogate (meaning annul/make void) the state common law duties, which are articulated in judicial decisions. Common law duties are difficult to ascertain even with in-depth legal research, and are difficult to determine with certainty as they are subject to change with a new judicial decision. For certainty as far as licensee duties, which will benefit both real estate practitioners and consumers, the state's common law needs to be abrogated to the extent it is inconsistent with the statutorily defined duties.

**b. Define the specific duties of a licensee.**

Rationale: Specific duties to be considered for inclusion or limitation for each of the relationships include, but are not limited to:

**Duties to be included by statute:**

1. Disclose known adverse material facts	6. Account
2. Advise consumer to obtain third party expert advice	7. Act in best interest of client
3. Act with honesty and in good faith	8. Follow lawful instructions of client
4. Use reasonable skill and care	9. Timely present all offers
5. Maintain confidentiality	10. Seek best price and terms

**And the ability to:**

- < Discharge duties by using third party experts
- < Rely upon statements of others
- < Limit duty to inspect, if any

**Duties to be limited and clarified:**

1. Investigate conditions affecting the property
2. Standard of care is that of a reasonably prudent licensee and is measured by the degree of knowledge required to obtain the relevant real estate license.

**c. Specify the licensee's disclosure duties with respect to conditions affecting the property and address licensee liability issues, including the ability of a licensee to rely on information from third parties.**

Rationale: Both consumers and licensees benefit from laws that specifically state a licensee's disclosure duties, because this clarifies for all what these duties are. An example of such statutory language is:

"Unless otherwise agreed in writing, a licensee owes no duty to conduct an independent inspection of the property or to conduct an independent investigation of either party's financial condition, and owes no duty to independently verify the accuracy or completeness of any statement made by either party or by any source reasonably believed by the licensee to be reliable."

**d. Create a presumption that the licensee/consumer relationship is one defined in the statute unless they enter into a written agreement specifically providing for a different type of relationship.**

Rationale: A non-agency default relationship should be legislatively created, with fully described duties owed to the consumer by a licensee operating in that capacity, including appropriate disclosure of the relationship to the consumer.

Specific duties to buyer to be considered for inclusion in a default non-agency relationship include, but are not limited to:

1. Disclose known adverse material facts.
2. Advise consumer to obtain third party expert advice.
3. Act with honesty and in good faith.
4. Use reasonable skill and care.
5. Account.
6. Timely present all offers.
7. Perform terms of any oral or written agreement.

A common law agency relationship imposes certain specific fiduciary responsibilities and liabilities for a licensee and vicarious liability for a consumer. Consequently, laws should be encouraged mandating that agency relationships only be established through written agency agreements outlining all of the licensee's duties and responsibilities and any vicarious liability to the consumer. A written agency agreement which clearly spells out the relationship is valuable to both the consumer and the licensee; it clarifies for both what the licensee will be able to provide.

**e. Enable a managing broker to use "designated agency" within the brokerage to: designate individual licensees within the brokerage to act as exclusive agents for buyers and sellers; designate exclusive agents without creating an agency relationship between the consumers and the broker; clarify the status of the other (non-designated) licensees affiliated with the brokerage; and limit instances of dual agency (where one individual licensee is the agent of both the buyer and the seller in the same transaction).**

Rationale: "Designated agency" is a practice through which a managing broker may meet several important objectives, and once it is legislatively established in a given state, managing brokers should be encouraged to use it.

At the time a written agency agreement is entered into, a managing broker may designate a licensee to act as the exclusive agent of the client, to the exclusion of all other licensees affiliated with that brokerage. This clarifies for the consumer that the licensee with whom he is working is the only practitioner affiliated with the brokerage who has any agency relationship with him, and that no other licensee of the brokerage represents him as his agent, nor does the managing broker. The brokerage practice of designated agency is consistent with the consumer's understanding and expectations, as opposed to the common law of agency, under which all of the licensees affiliated with the brokerage, including the managing broker, represent all of the broker's clients in an agency relationship.

Designated agency also may be utilized by a managing broker in an in-house transaction to limit dual agency to only those situations where the same individual licensee is an agent of both the seller and the buyer in the same transaction. To avoid dual agency in that situation, a broker could designate another licensee in his office to represent one of the parties.



Designated agency is not intended to limit the managing broker's obligations and duties with respect to supervision of licensees affiliated with his brokerage, nor is it intended to affect the broker's contractual rights, including the broker's right to compensation.

**f. Eliminate or modify the consumer's vicarious liability for the acts of the licensee.**

Rationale: The common law theory of vicarious liability, under which a principal may be liable for the acts of his agent, is not appropriate in a real estate brokerage relationship. Consumers do not expect that they could have vicarious liability for a licensee's actions, and it is likely that they would not select an agency relationship at all if this type of liability is present. It would benefit the consumer if it specifically is eliminated, and this would be consistent with consumer expectations.

**g. Adopt mandatory disclosure forms and rules requiring meaningful, timely written disclosure of brokerage relationships. "Timely" means before consumers offer any information that could be detrimental to their interest.**

Rationale: Disclosure forms benefit licensees as well as consumers, by ensuring that everyone understands the brokerage relationship. When the disclosure form is mandated by state law or regulation, there can be no question as to the adequacy of the language. The timeliness of the disclosure is an essential aspect.

**h. Specify how brokerage relationships end, and describe the licensee's duties upon the termination of the relationship.**

Rationale: For example, a licensee's duty with respect to treatment of confidential information following the termination of a brokerage relationship specifically should be described, as well as the types of events which would cause the information to cease to be confidential.

3. NAR Code of Ethics

**Recommendation - NAR's Professional Standards Committee should review NAR's Code of Ethics to determine whether any adjustments are needed to better reflect current real estate practices and reasonable standards of care articulated in judicial decisions.**

Rationale: A number of judicial decisions directly cite and rely on NAR's Code of Ethics to establish the standard of care for the real estate practitioner. The Professional Standards Committee needs to examine judicial decisions where NAR's Code of Ethics is cited to determine whether any adjustments to the Code are needed in light of those decisions. Additionally, the Professional Standards Committee should review/evaluate the common law of agency influences, reflected in the Code and Standards of Practice, for example, use of the phrase "absolute fidelity" in Article 1 of the Code of Ethics. (Article 1 of the Code of Ethics provides: "When representing a buyer, seller, landlord, tenant, or other client as an agent, REALTORS® pledge themselves to protect and promote the interests of their client. This obligation of absolute fidelity to the client's interests is primary, but it does not relieve REALTORS® of their obligation to treat all parties honestly...") This is not intended to lower the standards of care of REALTORS®, but rather, to more clearly articulate the duties where they are intended, without using broad terms that may not be as specific as necessary to provide guidance to REALTORS®.

#### 4. Alternate Dispute Resolution

**Recommendation - NAR should encourage the use of mediation to resolve disputes between consumers and licensees and advocate the inclusion of mandatory mediation in all broker relationship agreements with consumers. NAR should also encourage the inclusion of mandatory mediation between the consumers in all purchase and sale agreements.**

Rationale: Alternate dispute resolution creates a collaborative atmosphere in which disputes can be resolved without litigation. Settling differences with consumers out of court is advantageous for several reasons - lessened delays and costs and fewer judicial decisions. Mandatory mediation is the preferred method because of its high success rate.

NAR already has developed a Dispute Resolution System ("DRS") program for use by its state and local associations to help resolve disputes between buyers and sellers of real estate, and between consumers and licensees. NAR's program (which is not used for disputes between REALTORS®), includes mediation and arbitration components. The program does not contemplate the association or its staff serving as mediators or arbitrators. To date, over 165 state and local REALTOR® associations have endorsed NAR's DRS program

REALTOR® associations which endorse NAR's DRS program develop their own DRS rules and procedures based on NAR guidelines. Those associations have professional liability insurance coverage for administering the DRS program under NAR's insurance program for state and local associations of REALTORS®.

#### 5. Consumer Information Education Vehicles

**Recommendation - NAR should encourage state REALTOR® associations to create consumer information vehicles concerning brokerage relationships and standards of care, and NAR should serve as a clearinghouse for these materials.**

Rationale: Providing this type of information to the consumer is important for at least two reasons. One, it directs the buyer to sources for actual inspectors. Second, and equally important, it helps establish reasonable expectations of the consumer's relationship with the real estate licensee and what services the licensee will be able to provide.

The California Association of REALTORS® has created, and is in the process of revising, a Property Transaction Booklet, a copy of which is attached to this Report as Appendix C. This booklet contains brokerage relationship disclosure forms, portions of applicable statutes, and additional important information, such as what aspects of the property the buyer might want to consider inspecting, a list of possible inspection items, and the appropriate type of professional to conduct such inspections. For example, under "Condition of Systems and Components," it lists as appropriate professionals "Home Inspector, Contractor, Energy Inspector." It also provides names, addresses and telephone numbers for a number of professional associations and governmental agencies.

## **PRESIDENTIAL ADVISORY GROUP REPORT ON THE FACILITATOR/NON-AGENCY CONCEPT**

### **EXECUTIVE SUMMARY**

In response to growing interest among some of its members in exploring the possibility of a non-agency real estate brokerage relationship (frequently referred to as a "facilitator"), the NATIONAL ASSOCIATION OF REALTORS® ("NAR") Presidential Advisory Group on the Facilitator Concept (the "PAG") was formed. Essentially, the PAG's charge was to study the concept and its potential implications to consumers and to licensees, and to recommend whether it should be developed and promoted by NAR.

After careful consideration of all aspects of a non-agency brokerage relationship, which assessment included interviewing subject matter experts, analyzing new and proposed state legislation addressing brokerage relationships, evaluating market research conducted expressly for the PAG concerning the views of consumers and REALTORS® and a variety of other information, the PAG issued this Report to share its findings and recommendations.

The PAG's recommendations are as follows:

#### **Recommendation Number 1:**

NAR should not further develop or promote the pure non-agency facilitator concept. It is not the intent of NAR to characterize the facilitator concept as unprofessional.

#### **Recommendation Number 2:**

NAR shall suggest elements for a legislative framework which would clarify the law of agency as applied to real estate brokerage.

1. The legislation should include well-defined duties for each type of brokerage relationship.
2. The legislation should clarify the common law of agency as applied to real estate brokerage relationships by creating a statutory agency relationship and by creating a presumption that the relationship is one of statutory agency unless the licensee and the client enter into an agreement specifically providing for a different type of representation.
3. The legislation should contain clear guidance on disclosed dual agency.
4. The legislation should provide for the ability on the part of a broker in an in-company transaction to designate an individual licensee within the broker's company to represent the seller, and to designate another individual licensee within the company to represent the buyer, without creating a dual agency relationship.

5. The legislation should eliminate or modify the consumer's vicarious liability for the acts of the licensee.
6. The legislature (or the state's real estate commission) should promulgate mandatory agency disclosure forms and rules providing for meaningful, timely and mandatory written disclosure.
7. The legislation should specify how brokerage relationships end and describe the licensee's duties upon the termination of a client relationship.
8. The legislation should address the licensee's disclosure duties with respect to property condition and address broker liability issues.
9. The legislation specifically should state that it abrogates the common law as applied to real estate brokerage relationships.

**Recommendation Number 3:**

That the Multiple Listing Policy Committee review current policies regarding the communication of offers of compensation from the listing broker to cooperating brokers to assure that the policies accommodate the new statutory agency concept.

**Recommendation Number 4:**

That NAR provide staff resources to assist state associations which desire to modify their state laws addressing brokerage relationships.

The PAG's underlying rationale for each of these recommendations is set forth in section VI of this Report. A variety of resource materials, including copies of the new and proposed state statutes addressing brokerage relationships, are contained in the appendices to this Report.

Document Title: Buyer Representation Liability Issues PAG Report - Appendix B

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**Well-defined licensee duties should be specified for each type of brokerage relationship with a consumer:**

1. Seller's agent
2. Seller's subagent
3. Buyer's agent
4. Dual agent (one individual licensee representing two clients)
5. Designated agent (See Section IV, Definitions, of the Report for explanation of this type of relationship.)

6. Transaction broker (non-agency)

## **Exhibit C**