

Notes

Reconsidering Dual Agency Conflicts in Residential Real Estate

SAMUEL BAYER[†]

California has long permitted dual agency representation in residential real estate transactions, and consumers have long maligned the practice as presenting an unavoidable conflict of interest.¹ However, dual agency provides benefit to consumers in some situations, and those benefits are often overlooked by those who seek to prevent it altogether. Recent statutory changes in California and other states have attempted to resolve dual agency conflicts of interest while allowing the practice to continue (at least in some form). However, these attempts have largely failed to quell consumer frustrations due to a few fundamental miscommunications between consumers and legislators. By clarifying how consumers understand terms like “real estate agent” and “dual agency,” and by analyzing and compiling various statutory schemes in states across the country, California legislators may be able to rectify the situation, enacting statutory changes that finally resolve consumer frustrations without abolishing dual agency altogether.

[†] Recent graduate of the University of California, Hastings College of the Law, Class of 2020, and a licensed real estate agent in California. The Author would like to thank Professor Abraham Cable for his guidance in preparing this Note. For questions or comments regarding this Note, please contact Samuel at bayer@uchastings.edu.

1. See Michael Drouillard, *A Critique of the British Columbia Residential Real Estate Brokerage Industry's Use of Dual Agency*, 16 APPEAL: REV. CURRENT L. & L. REFORM 84, 89 (2011).

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INTRODUCTION

In a traditional residential real estate transaction (a “single agency” transaction), a buyer and seller are each represented by their respective real estate broker (“Broker”), who acts as his or her client’s personal representative or “agent.”² The California Civil Code defines “agent” in accordance with United States common law—an agent is an individual acting on behalf of, and owing certain fiduciary duties to, a third party.³ The Broker represents and advocates on behalf of the client, acting in the client’s best interest and owing the client fiduciary duties of care, honesty, integrity, and loyalty.⁴

The agency relationship is much like the relationship between coach and team. Each team’s ultimate goal is to win the game, and a knowledgeable coach can make all the difference in a close match. Each coach brings a unique perspective, practical knowledge, and independent experience to support their respective teams. In this scenario, the coach and team are clearly united with a common purpose—both succeed when the team “wins” and the opposing team “loses.” In a single agency transaction, each buyer and seller typically hires their own “coach”—a Broker. The Broker shares his or her knowledge and experience with, and is obligated by statute to act in the best interest of, his or her respective client as that client attempts to “win” the transaction.⁵ This arrangement provides the represented buyer and seller with clear benefits and broad legal protections.⁶ And, of course, the Broker is duly compensated for his or her efforts.

In today’s real estate market, transactions wherein the same Broker simultaneously represents both buyer and seller (an “in-house” or “dual agency” transaction) have become commonplace.⁷ Although prohibited in a few states,⁸

2. 45 AM. JUR. 3D *Proof of Facts* § 12 (1998).

3. CAL. CIV. CODE §§ 2295, 2079.13 (West 2019); see AM. JUR., *supra* note 2, § 3.

4. CIV. §§ 2295, 2079.13; RESTATEMENT (SECOND) OF AGENCY § 387 (AM. L. INST. 2018).

5. Arguably, a real estate transaction is not quite as simple as a game of soccer or basketball, in that a transaction is not necessarily a zero-sum game. To some extent, both buyer and seller win when both achieve their desired result. See *infra* Part I.E. But see Gerald B. Wetlaufer, *The Limits of Integrative Bargaining*, 85 GEO. L.J. 369, 377 (1996) (describing “all exchange transactions in which two parties simply exchange one thing for another” as in fact win-lose scenarios rather than win-win scenarios). Whether or not both parties accept the result of the transaction as a success, the fact remains that theoretically the buyer will always prefer a lower price while the seller will always prefer a higher one. While there can never be a true “win” in a real estate transaction, the transaction can be considered as if on a scale, where each party’s goal is to move the scale as far towards their own side as possible.

6. William D. North, *Agency, Facilitation and the Realtor* 4 (1993), https://webassets.inman.com/files/stories/Agency_Facilitation_William_North.pdf (unpublished manuscript) (“There have been few more spectacular examples of business success in reaching the needs of the consumer than that achieved by the Founders of NAR when they [adopted] the advantages of the fiduciary relationship . . .”).

7. Lu Han & Seung-Hyun Hong, *In-House Transactions in the Real Estate Brokerage Industry: Matching Outcome or Strategic Promotion?* 19 (Aug. 6, 2014), https://www.smeal.psu.edu/lema/rea_in_house_0806_2014.pdf (unpublished manuscript) (describing how approximately 20% of transactions in North America in 2009 were transacted in-house); see, e.g., Phil Querin, *Dual Agency—What Is It, and How Frequently Does It Occur in Oregon?*, QUERIN L. LLC (Apr. 4, 2015), <https://q-law.com/7036/> (describing that 19.2% of all Oregon transactions are within the same office).

8. See, e.g., COLO. REV. STAT. ANN. § 12-10-406 (West 2019); FLA. STAT. ANN. § 475.272 (West 2019); KAN. STAT. ANN. § 58-30,103(a) (West 2019).

most states, including California, permit dual agency transactions so long as the relationships between the buyer, the seller, and the Broker are disclosed and consented to in writing by all parties.⁹

This practice has long frustrated consumers,¹⁰ many of whom question whether a Broker practicing dual agency can truly provide the full range of fiduciary benefits to both parties as required by law.¹¹ Specifically, consumers point to an apparent paradox faced by any individual Broker attempting to act as a fiduciary for two adverse parties in a single transaction.¹² A Broker in this position seems forced to make a difficult, if not impossible choice, either biasing his or her actions to benefit one client over the other, or refusing altogether to act in either client's best interest and instead acting neutrally toward both. In either case, the Broker apparently fails in his or her fiduciary duties to at least one, if not both, represented parties.

Legislators are not ignorant of consumer concerns about the inherent conflicts of interest facing dual agents.¹³ Such conflicts first came to national attention in the 1980s,¹⁴ and legislators across the country have responded by developing and implementing innovative statutory schemes in an attempt to resolve these conflicts while still permitting Brokers to represent both parties in the same transaction.¹⁵ But given the widespread animosity surrounding dual agency representation,¹⁶ a more fundamental question must be asked: why do legislators continue to tolerate this practice in the first place? Why not simply eliminate dual agency altogether?

This Note explores how California in particular can modernize its statutory system in order to resolve consumer frustrations about dual agency while retaining some of its important benefits. Part I reviews the historical progression

9. CAL. CIV. CODE §§ 2079.13(d), 2079.17(a)–(b) (West 2019); *see, e.g.*, N.Y. REAL PROP. LAW § 443(4)(a) (McKinney 2019) (providing a disclosure form for buyer and seller); *see also infra* Part II.

10. This Note references the comparative terms “legislators” and “consumers.” In practice, there is likely no quintessential consumer or legislator. These concepts are useful mechanisms for interpreting the similarities and differences between the law as written in statute (California and otherwise) and the law as understood by society as a whole. One might loosely define the “legislator” as an individual who conceptualizes the world entirely through the lens of statutory language. By contrast, a “consumer” is an individual who conceptualizes the world entirely through media, blog articles, and Wikipedia.

11. *See, e.g.*, Kenneth R. Harney, *Why Your Real Estate Agent May Not Be on Your Side*, WASH. POST (Jan. 2, 2019, 3:30 AM), https://www.washingtonpost.com/realestate/why-your-real-estate-agent-may-not-be-on-your-side/2018/12/31/b28fe006-0221-11e9-b5df-5d3874f1ac36_story.html?utm_term=.1ffc543f6263; Benny L. Kass, *Can One Realty Agent Fairly Represent Both Buyer and Seller?*, CHI. TRIB. (Feb. 7, 2017, 2:00 PM), <https://www.chicagotribune.com/classified/realestate/sc-housing-0209-qa-benny-kass-consumer-20170208-column.html>; *Dual Agency—Welcome to the Dark Side of Real Estate*, KEVIN VITALI, <https://merrimackvalleymarealestate.com/dual-agency-massachusetts-real-estate/> (last visited Feb. 4, 2021); *This Watchdog Group Wants States to Ban Dual Agency*, REAL DEAL (Jan. 16, 2019, 11:00 AM), <https://therealdeal.com/2019/01/16/this-watchdog-group-wants-states-to-ban-dual-agency/>.

12. *See* sources cited *supra* note 11.

13. *See* CAL. CIV. CODE §§ 2079.13(d), 2079.17(a)–(b); N.Y. REAL PROP. LAW § 443(4)(a).

14. *See* *Horiike v. Coldwell Banker Residential Brokerage Co.*, 383 P.3d 1094, 1096 (Cal. 2016).

15. *See infra* Part II.B.

16. *See supra* note 10 and accompanying text.

of the real estate industry culminating in the emergence of the franchise brokerage system. It then details the central conflicts of interest faced by all Brokers engaging in dual agency practices. Part II reviews California's current statutory law and analyzes various legislative schemes enacted across the United States that attempt to address consumer concerns. Part III reconsiders real estate practices and dual agency through the eyes of the consumer, highlighting an important disconnect between historically consistent statutory law and the more practical (albeit misinformed) consumer conception of real estate agency law. It then reinterprets the various statutory schemes previously discussed in Part II, analyzing whether and to what extent these legislative systems actually address consumer frustrations. Finally, Part IV proposes amendments to California's statutory framework that would align statutory law with the modern practical realities of the real estate industry, thereby relieving consumer concerns about dual agency without ending the practice entirely.

I. HISTORICAL BACKGROUND

Statutory law often rides the coattails of evolving business practices. Ridesharing services like Uber and Lyft have disrupted the transportation industry and left legislators scrambling to adjust.¹⁷ Cryptocurrencies like Bitcoin have similarly disrupted the financial world.¹⁸ But whereas Uber, Lyft, and Bitcoin reflect a more sudden industry shift, disruption in the real estate market has been decidedly more gradual and unassuming.

A. THE WILD WEST OF REAL ESTATE TRANSACTIONS

The birth of the modern brokerage system began in the late nineteenth century.¹⁹ The first professional Brokers operated as “‘middlemen’ and had none of the fiduciary duties” that present-day consumers have come to expect.²⁰ Under an “open listing” model, sellers often worked with multiple brokerage firms, and “only the broker who could bring a buyer to a sale earned a commission.”²¹ While many Brokers worked together in association, sharing their inventory of prospective clients through regional Multiple Listing Services

17. Organisation for Econ. Co-operation and Dev. [OCED], *Hearing on Disruptive Innovation*, at 4, OCED Doc. DAF/COMP/WD(2015)54 (June 19, 2015), [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD\(2015\)54&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD(2015)54&docLanguage=En) (describing how these new platforms “rais[e] challenges when their business models may not fit well within existing regulatory frameworks”).

18. Helen Narvasa & Heather Morton, *The Emergence of Bitcoin*, 22 NAT'L CONF. STATE LEGISLATURES, Aug. 2014, <http://www.ncsl.org/research/financial-services-and-commerce/the-emergence-of-bitcoin.aspx>.

19. Jeffrey M. Hornstein, *A Nation of Realtors®: The Professionalization of Real Estate Brokerage and the Construction of a New American Middle Class*, 3 ENTER. & SOC'Y 613, 614 (2002).

20. Sandra Nelson, Note, *The Illinois Real Estate “Designated Agency Amendment”: A Minefield for Brokers*, 27 J. MARSHALL L. REV. 953, 956 (1994); see also BARLOW BURKE, LAW OF REAL ESTATE BROKERS § 1.01 (4th ed. 2019).

21. Matt Carter, *From Subagency to Non-Agency: A History*, INMAN (Feb. 17, 2012), <https://www.inman.com/2012/02/17/from-subagency-non-agency-a-history/>; see also *Brokerage*, BLACK'S LAW DICTIONARY (11th ed. 2019).

(“MLS”),²² others chose to keep their inventories private for fear of losing out on a commission to a competitor.²³ With almost no legal oversight, this industry attracted and “encouraged self-dealers, speculators and sharp practices that abused the consumer, gave real estate practitioners an extremely poor image, and complicated real estate transactions.”²⁴

B. THE NATIONAL ASSOCIATION OF REALTORS

In 1908, a group of Chicago Brokers formed the National Association of Real Estate Exchanges (“NAR”),²⁵ with the goal of standardizing practices within the brokerage industry.²⁶ The NAR advocated for a profession grounded in agency law,²⁷ where Brokers agreed to act in the seller’s best interest in exchange for an exclusive right to sell a particular home.²⁸ The NAR’s model has now been adopted throughout the country.²⁹

Brokers at this time still cooperated with one another through an MLS.³⁰ When an interested buyer’s Broker (“Cooperating Broker”) delivered an interested buyer to the seller’s Broker (“Listing Broker”), the Cooperating

22. MLS members agreed to compensate one another in exchange for sharing their inventory of buyers and sellers. *Multiple Listing Service (MLS): What Is It*, NAT’L ASS’N OF REALTORS, <https://www.nar.realtor/nar-doj-settlement/multiple-listing-service-mls-what-is-it> (last visited Feb. 4, 2021) (“Help me sell my inventory and I’ll help you sell yours.”); see also BURKE, *supra* note 20, § 1.04. *But see* FED. TRADE COMM’N, THE RESIDENTIAL REAL ESTATE BROKERAGE INDUSTRY 108 (1983), https://webassets.inman.com/files/stories/The_Residential_Real_Estate_Brokerage_Industry_1983_FTC.pdf (noting that these associations were not called Multiple Listing Services until 1907).

23. Carter, *supra* note 21 (“Brokers were reluctant to market properties or cooperate with each other, fearing that a competing broker might take a buyer straight to the seller.”).

24. North, *supra* note 6, at 3.

25. National Association of Real Estate Exchanges (NAREE) was later renamed National Association of Real Estate Boards (NAREB) and finally National Association of REALTORS® (NAR). *History*, NAT’L ASS’N OF REALTORS, <https://www.nar.realtor/about-nar/history> (last visited Feb. 4, 2021); see also PEARL JANET DAVIES, REAL ESTATE IN AMERICAN HISTORY 44 (1958) (listing the seventeen-year progression toward a nationalized system).

26. BURKE, *supra* note 20, § 1.03; see also FED. TRADE COMM’N, *supra* note 22, at 85; *History*, *supra* note 25.

27. See CAL CIV. CODE §§ 2079.13, 2295, 2319 (West 2019); see also RESTATEMENT (SECOND) OF AGENCY § 1 (AM. L. INST. 2018); FED. TRADE COMM’N, *supra* note 22, at 174–75; *Common-Law Agency*, BLACK’S LAW DICTIONARY (11th ed. 2019).

28. See CIV. §§ 2079.13, 2295, 2319; RESTATEMENT (SECOND) OF AGENCY § 1; FED. TRADE COMM’N, *supra* note 22, at 174–75; *Common-Law Agency*, *supra* note 27; see also *Exclusive Agency*, BLACK’S LAW DICTIONARY (11th ed. 2019).

29. FED. TRADE COMM’N, *supra* note 22, at 174 (“[T]he broker is treated in every state as an agent”); see also Carter, *supra* note 21 (“Because most MLSs were run by [NAR subsidiary associations, these] local associations grew their membership rolls as the system spread [B]rokers might find their business drying up if they didn’t join.”).

30. North, *supra* note 6, at 4 (“There have been few more spectacular examples of business success in reaching the needs of the consumer than that achieved by the Founders of NAR when they coupled the advantages of the fiduciary relationship represented by exclusive agency with marketing breadth afforded by mandatory offers of subagency to other REALTORS.”).

Broker acted as a subagent of the Listing Broker and was paid a portion of the Listing Broker's commission.³¹

Brokers also began to retain the services of one or more associate licensees,³² now known either as salespersons,³³ or broker-associates (together, "Salespersons"), depending on their license.³⁴ Salespersons acted as the Brokers' subagents or assistants,³⁵ and were closely supervised by the Broker.³⁶ Importantly, and perhaps counterintuitively, a Salesperson in California was (and still is) not considered an "agent" of the client.³⁷ Instead, the Salesperson owed duties to the client *only indirectly* through his or her association with the Broker.³⁸ For much of the twentieth century, the Listing Broker, Cooperating Broker, and Salespersons all worked on behalf the seller during a transaction—none represented the buyer.³⁹

Soon, courts began to hold that Cooperating Brokers and Salespersons who interacted with buyers had in fact created agency relationships with those buyers, thus owing fiduciary duties to both buyer and seller.⁴⁰ State legislatures responded by reforming the longstanding system so that Cooperating Brokers

31. BURKE, *supra* note 20, § 1.09; FED. TRADE COMM'N, *supra* note 22, at 182 (quoting California State Commissioner David Fox regarding cooperating agent's fiduciary duty to the seller) ("In most real estate transactions, the cooperating agent is considered to be a subagent of the seller and therefore bound to the same fiduciary obligation to the seller. The fiduciary obligation carries with it a duty to act in the best interests of the seller in all respects and that of course includes negotiating a contract for the seller on the best terms and at the best price obtainable.").

32. *Horiike v. Coldwell Banker Residential Brokerage Co.*, 383 P.3d 1094, 1096 (Cal. 2016) ("It is common practice for associate licensees, acting as agents of the listing broker . . . to assist buyers in the purchase of property."); *see* CAL. BUS. & PROF. CODE § 10016 (West 2019) (defining "Real estate salesperson" as one "retained by a real estate broker").

33. *See, e.g.*, CAL. CIV. CODE § 2079(a) (West 2019); MD. CODE ANN., BUS. OCC. & PROF. § 17-101(j) (West 2019).

34. *See* CIV. § 2079(a). Broker-Associates are licensed Brokers who work another Broker. While they are capable of working without another Broker's oversight by law, they choose to work in the same capacity as any other Salesperson. For the purposes of this Note, these positions are indistinguishable. CAL. DEP'T OF REAL EST., FREQUENTLY ASKED QUESTIONS REGARDING "BROKER-ASSOCIATE" AFFILIATION NOTIFICATION (2020), <http://www.dre.ca.gov/files/pdf/faqs/FAQ%20AB%202330%20Broker%20Associate.pdf>.

35. CIV. § 2349 ("An agent . . . can delegate to [a subagent, given specific circumstances].").

36. *North*, *supra* note 6, at 4 (describing the "close supervision and involvement of the broker with his salespersons").

37. BUS. & PROF. § 10131; *see also* CIV. §§ 2079.13(a), 2295 (2019). To clarify, under California law Salespersons act as agents of the Broker, and the Broker acts as an agent of the client.

38. *See* BUS. & PROF. § 10131; CIV. §§ 2079.13(a), 2295; *see also* *Horiike v. Coldwell Banker Residential Brokerage Co.*, 383 P.3d 1094, 1101 (Cal. 2016) ("[A]n associate licensee does not have an independent agency relationship with the clients of his or her broker, but rather an agency relationship that is derived from the agency relationship between the broker and the client.").

39. *See* FED. TRADE COMM'N, *supra* note 22, at 180; *see also* *Carter*, *supra* note 21 ("Subagency allowed cooperating brokers who worked with buyers to collect a share of the commissions paid by sellers without actually representing buyers in an agency capacity.").

40. *See Horiike*, 383 P.3d at 1096 ("California courts often held that listing agents and cooperating brokers were undisclosed dual agents, who owed fiduciary duties to buyers as well as sellers, based on their conduct in a transaction.").

could now owe fiduciary duties “solely to the buyer,”⁴¹ while still receiving a commission from the Listing Broker. California began this reform process in 1986.⁴²

C. EMERGENCE AND DOMINANCE OF FRANCHISE BROKERAGE FIRMS

The growth in popularity of the franchise real estate brokerage firm (“Franchise”) has muddled the distinction between Brokers and their Salespersons. Since the 1970s,⁴³ large Franchises have come to dominate a significant percentage of all real estate transactions across the United States.⁴⁴ Under the Franchise system, a single Broker operating a Franchise (“Responsible Broker”)⁴⁵ might manage and oversee hundreds or even thousands of individual Salespersons.⁴⁶ The Responsible Broker’s primary function is management of the Franchise as a whole.⁴⁷ The Responsible Broker typically focuses on hiring capable Salespersons and performing other managerial tasks, rather than dealing personally with buyers and sellers.⁴⁸ Due to their relationship with the Franchise and the Responsible Broker, Salespersons typically (1) receive certain practical benefits, such as free marketing, office space, and greater access to a network of agents in other cities; (2) market themselves under a Franchise brand; and (3) remain legal subagents of the Responsible Broker.⁴⁹ In practice, however, Salespersons under the Franchise banner operate as individual small businesses rather than as closely monitored assistants.⁵⁰ While many independent Brokers—any Broker not

41. FED. TRADE COMM’N & U.S. DEP’T OF JUST., COMPETITION IN THE REAL ESTATE BROKERAGE INDUSTRY 8 (2007), <https://www.ftc.gov/sites/default/files/documents/reports/competition-real-estate-brokerage-industry-report-federal-trade-commission-and-u.s.department-justice/v050015.pdf>.

42. See CIV. § 2079.16 (originally enacted as CAL. CIV. CODE § 2375) (“A Buyer’s agent can, with a Buyer’s consent, agree to act as agent for the Buyer only. In these situations, *the agent is not the Seller’s agent*, even if by agreement the agent may receive compensation . . . from the Seller.” (emphasis added)); see also *id.* § 2079.14.

43. BURKE, *supra* note 20, § 1.02. See generally REALTOR MAG., THE BRANDS OF REAL ESTATE (2017), https://magazine.realtor/sites/default/files/asset/document/2017_Franchise_Report.pdf (providing a survey of real estate franchise companies).

44. FED. TRADE COMM’N & U.S. DEP’T OF JUST., *supra* note 41, at 31 (highlighting 2004 data that, while conflicting, suggests that the top ten brokerage firms had a combined percent market share of approximately 9.1%).

45. Also known as a “broker of record.” CAL. BUS. & PROF. CODE § 10015.1 (West 2019) (defining the “responsible broker”); see CAL. DEP’T OF REAL EST., *supra* note 34.

46. See BURKE, *supra* note 20, § 20.03.

47. See North, *supra* note 6, at 2 (describing the “‘body shop’ concept of operation involving minimal broker/salesperson contact . . . eroding . . . the desirable, if not absolutely necessary, nexus between broker liability and responsibility”).

48. See *id.*

49. Agents who choose to associate with a larger (sometimes international) brokerage firm typically pay a percentage of their sales commission to that firm in exchange for these benefits. Bernice Ross, *Your Real Commission Split May Not Be What You Think It Is*, INMAN (Jan. 8, 2018) <https://www.inman.com/2018/01/08/your-real-commission-split-may-not-be-what-you-think-it-is/>.

50. North, *supra* note 6, at 10 (“The prevailing independent contractor relationship between broker and salesperson . . . encourages a degree of independence . . . which makes supervision difficult if not practically

employed at a Franchise brokerage firm—still interact personally with their clients, one can imagine that a personal relationship between a Responsible Broker and his or her clients is essentially non-existent at the largest Franchises.⁵¹

D. DUAL AGENCY AND FIDUCIARY CONFLICTS OF INTEREST

Legislators in California and across the country have long permitted Brokers to act as “dual agents.”⁵² A dual agent is an individual representative that acts as both the Listing Broker and Cooperating Broker in the same transaction.⁵³ This Broker represents both clients simultaneously, and generally receives a commission that would otherwise have been split between two independent Brokers.⁵⁴

But a dual agency Broker appears to face an untenable decision. Whether the Broker chooses to bias his or her actions toward one client over the other, or opts instead to treat both clients neutrally, providing each client with limited information and withholding the rest,⁵⁵ the Broker ultimately fails to act in the best interest of one or both clients.⁵⁶ Whereas a single agency Broker is free to provide as much support as his or her experience will allow, a dual agency Broker is forced to limit the support given to either (or both) clients, leaving at least one client without the full fiduciary benefits demanded by California’s statutory law.⁵⁷

Reconsider the earlier sports analogy, but now imagine that one person coaches two adversarial teams in the same game. This coach may still provide some benefit to both teams—his or her general knowledge and experience can help each side play the game at their respective highest level. But the coach’s ability to benefit one team is clearly limited by his or her simultaneous and identical obligations to the other. The coach might discuss general strategies with each team, but what happens when the coach has a particular intuition about

impossible and generates a ‘lack of identification’ with the client which encourages representational confusion and conflict.”); James Hussaini, *Why the Traditional Brokerage Model Is Obsolete*, INMAN (Feb. 10, 2015), <https://www.inman.com/2015/02/10/why-the-traditional-brokerage-model-is-obsolete/> (“Salespeople are the owners of their own ‘brand.’”); see, e.g., KELLER WILLIAMS, IDENTITY & STYLE GUIDE 2 (2018), https://images.kw.com/shared/mykw/docs/KellerWilliams_StyleGuide_1805.pdf (“Keller Williams believes that real estate is a local business, driven by individual agents and the market share they’ve earned.”).

51. See CAL. BUS. & PROF. CODE § 10164(a) (West 2019); see also Karl E. Geier, *Are You My Broker? The Evolving Legal Status of the Real Estate Salesperson*, 26 MILLER & STARR REAL EST. NEWSALERT, January 2016 (describing “another instance of an expanded level of authority and autonomy for salespersons”).

52. See, e.g., CAL. CIV. CODE § 2079.13(d) (West 2019); N.Y. REAL PROP. LAW § 443(1)(i) (McKinney 2019); LA. STAT. ANN. § 9:3897 (West 2019).

53. See North, *supra* note 6, at 5.

54. See Lisa Johnson Mandell, *What Is Dual Agency? Know When It’s Right, and When to Beware*, REALTOR.COM (Oct. 4, 2016), <https://www.realtor.com/advice/buy/dual-agency/>.

55. See *Horiike v. Coldwell Banker Residential Brokerage Co.*, 383 P.3d 1094, 1097 (Cal. 2016) (citing section 2079.21 of the California Civil Code).

56. See *supra* note 3 and accompanying text.

57. See *supra* note 3 and accompanying text.

one team's weakness? The coach is obligated to protect that team's interest by remaining silent but is obligated to act in the other team's best interest by sharing this valuable insight. The coach's interests, in other words, cannot simultaneously align with those of both teams. If the coach decides to help one, he or she has failed in his or her duties to the other. And if the coach decides to remain silent, to not share information with either team, then the coach has failed both teams simultaneously.

E. CONSUMER BENEFITS IN A NON-ZERO-SUM GAME

Consumers have long criticized legislative acceptance of the conflicts of interest inherent within dual agency.⁵⁸ This criticism is perhaps based on the perception that real estate transactions are essentially zero-sum—because both parties are ultimately interested only in receiving or saving the most money, no one Broker can forward both parties' goals at the same time.⁵⁹

However, dual agency representation does provide certain powerful benefits that often go unacknowledged by those who vilify the practice categorically. First, dual agency allows consumers to retain the services of their preferred Broker regardless of that Broker's concurrent relationships with any others.⁶⁰ Without dual agency, for example, a buyer interested in a home currently listed by his or her Broker would either be forced to work with another (perhaps unknown and untrusted) Broker, or he or she would be prohibited from purchasing that home. From a consumer choice perspective, dual agency provides buyers and sellers the best of both worlds—freedom to choose their representative and freedom to purchase any property on the market, regardless of which Broker lists that property.⁶¹ Second, dual agency transactions tend to take significantly less time than single agency transactions.⁶² A 2014 study of the New York real estate market indicates that dual agency transactions close up to eight percent faster than single agency transactions.⁶³ The same study found no substantial difference in final sales prices between single agency and dual agency transactions.⁶⁴ Given that real property is a notoriously non-liquid asset,⁶⁵ parties may be more interested in completing the transaction quickly than

58. See Drouillard, *supra* note 1, at 89.

59. See *supra* note 4 and accompanying text.

60. Drouillard, *supra* note 1, at 100 (“[D]ual agency may not be intrinsically harmful. The idea that an agent may act for parties with competing interests in a real estate transaction with their informed consent is reasonable in theory. It upholds the principle of party autonomy and protects the freedom that competent individuals should have to fashion a bargain as they please.”).

61. *Id.*

62. Vrinda Kadiyali, Jeffrey Prince & Daniel H. Simon, *Is Dual Agency in Real Estate a Cause for Concern?*, 48 J. REAL EST. FIN. & ECON. 164, 188, 192 (2014).

63. *Id.* at 167.

64. *Id.* (“[D]ual agency regulation distorts transaction outcomes . . . [but] our results provide little support for the prohibition of dual agency in any form (either . . . within-branch, or dual agent).”).

65. See Colton Hoisager, *Understanding Illiquidity in Real Estate Investing*, REALIZED (Sept. 16, 2020), <https://www.realized1031.com/blog/understanding-illiquidity-in-real-estate-investing>.

obtaining the absolute best price. Given these consumer benefits, it stands to reason that legislators may hesitate to abolish the practice altogether, even at the behest of a frustrated constituency.

II. A REVIEW OF STATUTORY LAW

California became the first state to address dual agency concerns in 1986,⁶⁶ when it enacted strict disclosure and consent laws requiring Brokers to better educate their clients about the nature and risks of real estate agency relationships.⁶⁷ In California, a Broker must disclose to all parties whether he or she acts exclusively for the seller, exclusively for the buyer, or simultaneously for both buyer and seller as a dual agent.⁶⁸ Brokers are also required to disclose the nature of their agency relationship “[a]s soon as practicable,” and Brokers must later “confirm[] in the contract to purchase and sell real property.”⁶⁹ Confirmation is crucial because agency relationships may change over time. For example, a Broker may agree to represent a seller exclusively, but later meet an unrepresented buyer interested in purchasing the seller’s home. Presuming all parties consent, the Broker’s relationship with the seller now shifts from single agency to dual agency. Confirmation notifies each party of this changing relationship so that all are fully informed about the nature of their representation throughout the transaction. The California Association of Realtors (“CAR”) also regularly updates its standardized disclosure contracts.⁷⁰ For example, CAR’s most recent purchase agreement now states that the parties are entering into a “dual agent” transaction when (a) both parties are represented by the same Broker, and (b) both parties are represented by the same Salesperson.⁷¹ In either case, a dual agency relationship is formed,⁷² because the Salesperson is merely an extension of the Broker.⁷³

California statutory law articulates what can best be described as the pre-Franchise interpretation of the real estate industry, wherein a Broker maintains a close relationship with clients and actively engages with them throughout the transaction.⁷⁴ Legislators understand the Broker to be an active participant in each transaction, intimately and directly connected with the represented party.⁷⁵

66. *Horiike v. Coldwell Banker Residential Brokerage Co.*, 383 P.3d 1094, 1096 (Cal. 2016).

67. See CAL. CIV. CODE § 2079.17 (West 2019).

68. See *Horiike*, 383 P.3d at 1097 (“An agent that obtains a buyer for a property . . . must disclose whether it is ‘acting in the real property transaction exclusively as the buyer’s agent, exclusively as the seller’s agent, or as a dual agent’” (quoting CIV. § 2079.17(a))).

69. CIV. § 2079.17.

70. See 2 MILLER & STARR CAL. REAL EST. § 6:20 n.9 (4th ed. 2015).

71. 2019 *Real Estate Clean Up Law Changes*, CAL. ASS’N OF REALTORS® (Nov. 20, 2018), <https://www.car.org/en/riskmanagement/qa/New-Laws/2019-Clean-Up-Law-Changes> (question 7).

72. *Id.*

73. See *id.* (question 8); see also CAL. DEP’T OF REAL EST., *supra* note 34.

74. See *supra* Part I.B.

75. *Grand v. Griesinger*, 325 P.2d 475, 481 (Cal. 1958) (“It is evident that brokers and salesmen belong in distinctly different categories and that the broker, because of his superior knowledge, experience and proven

Conversely, the Broker's Salespersons (if any) are envisioned as closely-monitored assistants, engaging with the Broker's clients only when the Broker's attention need be elsewhere.⁷⁶

Given California's emphasis on the direct relationship between Broker and client, it makes sense why California understands the Broker to be the true "agent" and imputes fiduciary duties like loyalty and honesty onto the Broker rather than his or her Salespersons.⁷⁷ Simply put, California views the Broker as the only individual in the position to act loyally or honestly toward the public.⁷⁸ While the Broker's clients presumably expect something akin to fiduciary qualities from the Broker's assistants, that expectation comes only from the fact that the Salesperson is a theoretical extension of the Broker.⁷⁹

A. THE CALIFORNIA STATUTORY ARTICULATION OF DUAL AGENCY

Because the Broker is the only true "agent" in the transaction,⁸⁰ it stands to reason that the Broker is the only potential "dual" agent. The logic is inescapable; only the individual having fiduciary responsibilities can ever find those duties divided. According to California statutory law, the Broker is the dual agent regardless of whether (a) the Broker actively represents both the buyer and seller in the same transaction, (b) one of the Broker's Salespersons represents both the buyer and seller in the same transaction, or (c) two of the Broker's Salespersons each represent separate parties in the same transaction.⁸¹

Consider the recent California Supreme Court case *Horiike v. Coldwell Banker Residential Brokerage Co.*⁸² Defendant Coldwell Banker, a Franchise brokerage firm, represented both the sellers and buyer through two Salespersons: Chris Cortazzo worked personally with the sellers, a trust, while Chizuko Namba worked personally with the buyer.⁸³ Cortazzo worked in Coldwell Banker's Malibu West office while Namba worked in Coldwell Banker's Beverly Hills office.⁸⁴ Both offices are affiliated branches under the same Franchise, which

stability is authorized to deal with the public, contract with its members and collect money from them; the salesman, on the other hand, is strictly the agent of the broker.").

76. *Id.*

77. *See, e.g.,* *Easton v. Strassburger*, 152 Cal. App. 3d 90, 96–99 (Ct. App. 1984). The court notes that the appellant, a brokerage firm, was "represented in the sale of the property by its agents Simkin and Mourning," while in the same opinion describes that "current law requires a broker to disclose to a buyer material defects known to the broker" as if the brokerage firm itself might have personal knowledge of the defects known by Simkin and Mourning. *Id.* (emphasis added). The court in this case even states that "a broker is negligent if he fails to disclose defects which he should have discovered through reasonable diligence," strongly implying that the court views the broker as the ultimately responsible party in the transaction, whether or not all of his or her actions are delegated. *Id.* at 99 (emphasis added).

78. *See supra* Part I.B.

79. *See* CAL. BUS. & PROF. CODE § 10131 (West 2019); CAL. CIV. CODE §§ 2079.13(a), 2295 (West 2019).

80. *See supra* note 77 and accompanying text.

81. *See supra* notes 71–72 and accompanying text.

82. *Horiike v. Coldwell Banker Residential Brokerage Co.*, 383 P.3d 1094 (Cal. 2016).

83. *Id.* at 1097–98.

84. *Id.*

employs over 5,000 Salespersons.⁸⁵ Plaintiff Horiike, the buyer, sued Coldwell Banker and Cortazzo for failure to disclose material information during the transaction.⁸⁶ The court considered “whether Cortazzo, as an associate licensee representing Coldwell Banker [though acting on behalf of the sellers] . . . owed a duty to [the buyer] Horiike.”⁸⁷ The court held that both Cortazzo and Namba owed fiduciary duties to the buyer because “[a]n associate licensee, by definition, is either ‘licensed under a broker’ or has contracted ‘to act as the broker’s agent.’”⁸⁸ Furthermore, citing *Grand v. Griesinger*,⁸⁹ the court in *Horiike* found that California’s “entire statutory scheme requires the broker actively to conduct his brokerage business and to supervise the activities of his salesmen.”⁹⁰ In other words, the court understood California statutory law to presume an active and involved Broker, even when that Broker oversaw thousands of Salespersons at once.⁹¹ The personal relationship that each Salesperson had with their own client was irrelevant to the court’s decision.⁹² Cortazzo and Namba, while in a practical sense representing their own clients “exclusively,” were both legally obligated to act in the interest of all of the Responsible Broker’s clients.⁹³

After the *Horiike* decision, it stands to reason that a Broker in California, whether acting directly on behalf of each client or indirectly through one or more Salespersons, faces the same difficult decision that all other dual agents face.⁹⁴

B. STATE LEGISLATIVE RESPONSES TO DUAL AGENCY CONFLICTS OF INTEREST

Certainly, the California legislature’s decision to protect buyers and sellers by informing them about the complex nature of agency relationships is laudable.⁹⁵ That said, there is no indication that California’s disclosure and consent requirements have ever addressed dual agency’s inherent conflicts of interest. In *Horiike*, the California Supreme Court referenced an Office of Senate Floor Analyses determination that the “disclosure statute [was] not intended to

85. Both are affiliated with the same Broker of Record or “Designated Officer.” *Public License Information*, CAL. DEP’T REAL EST., <http://www2.dre.ca.gov/PublicASP/ppinfo.asp?start=1> (search for License ID# 00616212) (last visited Feb. 4, 2021); see also *Coldwell Banker Awards Gentry Sales Designation*, SDNEWS.COM (May 20, 2014, 1:28 PM), http://www.sdnews.com/view/full_story/25137605/article-Coldwell-Banker-awards-Gentry-sales-designation (showing that Coldwell Banker Southwest Region employed approximately 5200 salespersons in 2014).

86. *Horiike*, 383 P.3d at 1095, 1100.

87. *Id.* at 1100.

88. *Id.* (quoting CAL. CIV. CODE § 2079.17(b)).

89. See *Grand v. Griesinger*, 325 P.2d 475, 481 (Cal. 1958).

90. *Horiike*, 383 P.3d at 1101 (quoting *Grand*, 325 P.2d at 481).

91. See *supra* notes 37, 67 and accompanying text.

92. See generally *Horiike*, 383 P.3d 1094.

93. *Id.* at 1104.

94. See *supra* Part I.D.

95. See *supra* note 67 and accompanying text.

address ‘the fundamental problem in dual agency relationships.’”⁹⁶ The court noted that “[a]lthough the legislature was certainly aware of these concerns when it enacted the disclosure statute, it opted not to address them directly.”⁹⁷

Thankfully, California is no longer the only state to have taken steps toward safeguarding consumer interests during real estate transactions. States across the country have developed progressive, innovative statutory schemes in an effort to resolve consumer concerns and relieve Brokers of the challenges stemming from dual agency conflicts of interest.

1. Designated Agency

States such as Massachusetts and Connecticut now permit Brokers to designate individual Salespersons to exclusively represent a single client (“Designated Agency”) in lieu of representing the client personally.⁹⁸ In Massachusetts, when a buyer who is represented by a Broker seeks to purchase a home from a seller represented by the same Broker, the Broker may impute his or her fiduciary obligations onto an individual subagent.⁹⁹ Each Salesperson then represents their respective clients directly and “may not share known or acquired information with any other real estate agent or person that would harm the [client’s] interest in the . . . transaction.”¹⁰⁰ The Broker becomes neutral with respect to the transaction, and has the responsibility only to maintain confidentiality and manage each client’s funds.¹⁰¹ In Connecticut, the Broker likewise designates his or her subagents to be the “primary” representatives of two competing clients.¹⁰² The Connecticut Broker may even designate the same Salesperson to represent both buyer and seller, in which case that Salesperson becomes a “dual agent.”¹⁰³ In either case, the Broker is sidelined and relieved of his or her fiduciary responsibilities, thus no longer facing a dual agency conflict of interest.

96. *Horiike*, 383 P.3d at 1104 (quoting Senate Rules Comm., Off. of Senate Floor Analyses, Analysis of Assemb. Bill No. 1034 (1985–86 Reg. Sess.)).

97. *Id.*

98. 254 MASS. CODE REGS. 3.00(13)(c) (West 2019); CONN. GEN. STAT. ANN. § 20-325i (West 2019).

99. *See* 254 MASS. CODE REGS. 3.00(13)(c) (noting that Salespersons, as the exclusive representatives of a particular client, may not share material information with the exclusive representative of another party).

100. *Id.* Compare Designated Agency with the practice of “screening” at law firms. The American Bar Association’s Rules of Professional Conduct prohibits a law firm from representing a client with whom it has a conflict of interest. *See* MODEL RULES OF PRO. CONDUCT r. 1.7, 1.9 (AM. BAR ASS’N 2018). When that conflict arises from an attorney’s prior association with the client at another firm, the attorney’s current firm can still represent the client so long as the conflicted attorney is “screened,” or separated entirely, from the client and any other attorneys representing the client. *See id.* r. 1.10. While the ABA only permits screening when an attorney is conflicted due to his work at a *prior* firm, Designated Agency can occur regardless of where and when the conflict arose, so long as each designated agent remains separate from the other. *See* 254 MASS. CODE REGS. 3.00(13)(c).

101. 254 MASS. CODE REGS. 3.00(13)(c).

102. CONN. GEN. STAT. § 20-325i.

103. *Id.* *Cf.* 254 MASS. CODE REGS. 3.00(13)(c) (providing that Massachusetts Brokers retain the title of Dual Agent after designating Salespersons; however, Brokers need not disclose separately their dual agency status so long as both clients have been informed about the Designated Agency status).

2. Transaction Brokerage

States like Colorado, Florida, and Kansas have effectively abolished the practice of dual agency altogether by creating a new optional representative class—the transaction Broker (“Transaction Broker”).¹⁰⁴ Just as Brokers forego fiduciary duties in a Designated Agency system, the Transaction Broker likewise maintains a non-agency relationship with his or her clients.¹⁰⁵ But whereas buyers and sellers in a Designated Agency state receive fiduciary protections from individual Salespersons, parties in a Transaction Brokerage state do not.¹⁰⁶ Instead, the Broker continues to work with each party in a *limited* capacity, supporting each with “the paperwork and formalities of the real estate transaction . . . but . . . not represent[ing] either [client] in a fiduciary capacity or as a single agent.”¹⁰⁷ In other words, the Transaction Broker no longer acts as an “agent” in almost any sense of the word; his or her position might better be classified more broadly as a “dual facilitator” than a dual agent.¹⁰⁸ Thus, the Transaction Broker system bypasses dual agency conflicts of interest by simply removing fiduciary duties from the equation altogether.

C. COMMONALITY BETWEEN THE VARIOUS STATUTORY SCHEMES

It bears repeating that each of these statutory schemes share one important feature—none outright prohibit a single Broker from representing (in some capacity or another) both parties in the same transaction.¹⁰⁹ While state legislatures could simply prohibit dual representation altogether, those of Massachusetts, Colorado, and California appear to agree that the practice is worth preserving, in at least some form.¹¹⁰ Support for Designated Agency might imply a legislative *attempt* to provide common-law agency protections and benefits to clients in both single agency and dual agency transactions.¹¹¹ And support for the Transaction Broker system, while an effective abandonment of common-law agency, might imply a legislative *attempt* to retain consumer freedom of choice and to give consumers the non-monetary benefits that dual agency transactions may provide.¹¹²

104. COLO. REV. STAT. ANN. § 12-10-402(8) (West 2019); FLA. STAT. ANN. § 475.278(1)(a) (West 2019); KAN. STAT. ANN. § 58-30,102(u) (West 2019).

105. COLO. REV. STAT. ANN. § 12-10-402(8); FLA. STAT. ANN. § 475.278(1)(a), (2); KAN. STAT. ANN. § 58-30,113. Each statute specifically describes that a transaction broker does not act as a legal agent.

106. *See, e.g.*, KAN. STAT. ANN. § 58-30,102(u) (“The term [transaction broker] includes the broker’s affiliated licensees.”).

107. 10 PATRICK J. ROHAN, REAL ESTATE BROKERAGE LAW AND PRACTICE § 3.22 (2018); *see, e.g.*, FLA. STAT. § 475.278(2) (including a list of limited responsibilities taken by a transaction broker); *see also* Ann Morales Olazábal, *Redefining Realtor Relationships and Responsibilities: The Failure of State Regulatory Responses*, 40 HARV. J. ON LEGIS. 65, 87 (2003) (describing Transaction Brokers as “middlemen or go-betweens . . . beholden to the transaction first and foremost, and who do not individually represent either party”).

108. *Cf.* 5 R.I. GEN. LAWS ANN. § 5-20.6-6 (West 2020).

109. *See generally supra* Part II.

110. *See generally supra* Part II.

111. *See supra* Part II.B.1.

112. *See supra* Part II.B.2.

III. THE CONSUMER CONCEPTION OF DUAL AGENCY

Much has been said about the need for statutory law to adapt over time to the practical realities of the modern era.¹¹³ But while California, Connecticut, and Colorado have made great strides in attempting to relieve conflicts of interest for dual agency Brokers,¹¹⁴ consumers have thus far not been satisfied by the results.¹¹⁵ Why have so many legislative efforts ultimately failed to quell public frustration? In truth, the strengthening of disclosure-and-consent requirements, and the creation of new legal titles like Designated Agency and Transaction Brokers, can best be described as “band-aid” solutions to a deeper wound. While Designated Agency resolves the Broker’s own agency conflicts by placing fiduciary duties onto others,¹¹⁶ and while Transaction Brokers avoid agency conflicts by removing fiduciary duties from the equation altogether,¹¹⁷ neither system resolves more fundamental consumer concerns because, simply put, consumers are not actually concerned with the Broker’s fiduciary conflicts. To see why, one must consider the consumer’s alternative conception of the real estate industry, its various players and their responsibilities.

Ignoring or disregarding statutory law, consumers instead perceive a decidedly post-Franchise world, wherein Brokers are often passively disconnected from their clients and Salespersons take a more active role in the transaction process.¹¹⁸ Without a personal connection between Broker and client, it would make little sense for a client to ask for loyalty or honesty from their Broker. Instead, the client places his or her fiduciary expectations onto a new (and decidedly non-statutory¹¹⁹) player—the “Real Estate Agent.”¹²⁰

This Note does not attempt to determine at what point, or from where, this modern notion of a Real Estate Agent originated.¹²¹ What is clear, however, is that the concept of a Real Estate Agent is now heavily ingrained within modern culture throughout the country.¹²² Consumers do not receive information from

113. Legal scholar Guido Calabresi noted a trend of “growing obsolescence” as rigid statutory law comes to dominate over flexible common law principles. GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 81 (1982).

114. *See supra* Part II.B.

115. *See supra* note 10 and accompanying text.

116. *See supra* Part II.B.1.

117. *See supra* Part II.B.2.

118. *See supra* notes 46, 49 and accompanying text; *see infra* Part III.A.

119. California’s Business and Professions Code does not include the term “real estate agent,” but instead distinguishes between a “real estate salesperson,” a “broker associate,” and a “responsible broker.” *See* CAL. BUS. & PROF. CODE §§ 10016, 10015.3, 10015.1 (West 2019). *See generally id.* div. 4, pt. 1, ch. 1 (excluding the term “real estate agent” in the “General Provisions”).

120. *See infra* Part III.A.

121. *See* North, *supra* note 6, at 1 (“The confusion, recriminations, ignorance, and self-interest which has characterized the discussions of the agency relationship of real estate brokers and salespersons . . . has reached . . . the crisis point. As a result of the agency debate, the real estate broker is rapidly becoming ‘all things to all persons’ . . .”).

122. *See 2019 Real Estate Clean Up Law Changes, supra* note 71 (acknowledging that terms like “agent” have taken on new meaning and that “non-professionals” now understand these terms differently than statutory law defines them).

one source, but presumably piece their conception of real estate practices from a variety of sources, including dictionaries, encyclopedias, websites, and everyday communications with friends and family.¹²³ That said, a number of reputable informative websites directed at and designed to educate the public can help paint a picture of this modern interpretation of Real Estate Agents and of agency relationships in general.

A. DEFINING THE CONSUMER CONCEPTION OF “REAL ESTATE AGENT” AND “BROKER”

The concept of Real Estate Agent can most simply be defined as the individual with whom the client (a) has a personal relationship with and (b) interacts directly with throughout the transaction process. Investopedia, for example, defines the Real Estate Agent as “an industry professional who serves as the facilitator of real estate transactions . . . [and is] ultimately responsible for bringing buyers and sellers together.”¹²⁴ It then notes that the Real Estate Agent “can represent both buyers and sellers involved in a real estate transaction.”¹²⁵ Redfin similarly defines a Real Estate Agent as “an individual who helps people buy and sell homes in exchange for a commission.”¹²⁶ Bankrate defines the Real Estate Agent as an active player in the transaction—describing the agent as a “licensed professional who guides buyers and sellers . . . [and] help[s] price and prepare a property When an agent works with a buyer, he works to find properties on the market.”¹²⁷ LegalMatch describes Real Estate Agents as persons who “[r]eview real estate contracts,” “[n]egotiate pricing,” or “[s]howcase properties and guide clients through walk-throughs and open houses.”¹²⁸

While the definition of Broker is less clear cut, these resources often describe the Broker as passive managers overseeing the brokerage firm as a whole. According to Investopedia, for example, the Real Estate Agent “act[s] as [the client’s] representative in negotiations,” while the Broker “typically own[s] a firm or a franchise. . . . [This requires] another higher-level license if they want

123. NAT’L ASS’N OF REALTORS® RSCH. DEP’T, REAL ESTATE IN A DIGITAL AGE 6–7 (2017), <https://www.nar.realtor/sites/default/files/reports/2017/2017-real-estate-in-a-digital-age-03-10-2017.pdf>

(explaining that 13% of all buyers looked online for information about the home buying process, and 11% of millennials talked with a friend or relative).

124. Troy Segal, *Real Estate Agents vs. Brokers vs. Realtors: What’s the Difference?*, INVESTOPEDIA, <https://www.investopedia.com/ask/answers/101314/what-are-differences-among-real-estate-agent-broker-and-realtor.asp> (Sept. 8, 2020).

125. *Id.*

126. *What’s a Real Estate Agent?*, REDFIN, <https://www.redfin.com/definition/real-estate-agent> (last visited Feb. 4, 2021). Note that Redfin is an online brokerage firm, not an informational website.

127. *Real Estate Agent*, BANKRATE, <https://www.bankrate.com/glossary/r/real-estate-agent/> (last visited Feb. 4, 2021).

128. *Buy and Sell Home*, LEGALMATCH, <https://www.legalmatch.com/law-library/article/purchase-and-sale-of-residence.html> (Feb. 19, 2020).

to hire agents.”¹²⁹ It clarifies that “[u]sually . . . agents work for brokers and split commissions with them.”¹³⁰

Most importantly, and in direct contrast to the statutory conception,¹³¹ these websites tend to place fiduciary responsibilities directly with the active Real Estate Agent rather than the Broker. Redfin states that real estate agents “must . . . join a brokerage firm,”¹³² appearing to equate the Real Estate Agent with the legal Salesperson, but then describes that “real estate agents are in a fiduciary relationship with their clients.”¹³³ LegalMatch describes that “[i]n most cases, when speaking of an ‘agent’, the person is talking about a salesperson as opposed to a broker ([who] tends to handle higher-level real estate issues),”¹³⁴ but then notes that “real estate agents” owe fiduciary duties to the client.¹³⁵ Bankrate likewise distinguishes between the Real Estate Agent and Broker,¹³⁶ but ultimately attributes fiduciary responsibilities onto the Real Estate Agent directly.¹³⁷

Thus, the critical distinction between the consumer conception and statutory law becomes apparent. To the consumer, the Real Estate Agent is defined not by his or her legal status (that is, a Broker or Salesperson) but by his or her personal relationship to the client. The Real Estate Agent is the active participant who support the client through the transaction process. And, in the mind of the consumer, the Real Estate Agent (and not necessarily the Broker) owes fiduciary duties directly to the client.

B. DEFINING THE CONSUMER CONCEPTION OF DUAL AGENCY

If the Real Estate Agent is understood to owe fiduciary duties directly to the consumer, the consumer’s interpretation of “dual agency” also takes on a new meaning from statutory law. Because consumers look to their Real Estate

129. *Real Estate Agent*, INVESTOPEDIA, <https://www.investopedia.com/terms/r/realestateagent.asp> (Jan. 19, 2021).

130. *Id.*; see also Segal, *supra* note 124 (“A real estate agent is an industry professional who serves as the facilitator of real estate transactions. . . . A broker, on the other hand, may work independently or start their own brokerage and employ other real estate agents.”). Cf. James Chen, *Real Estate Agent*, INVESTOPEDIA, <https://web.archive.org/web/20190330085506/https://www.investopedia.com/terms/r/realestateagent.asp> (Jan. 28, 2018) (“Real estate brokers typically own a firm or a franchise, and they are responsible for setting up earnest money accounts and for approving final contracts. . . . Agents work for brokers, and they split their commissions with these supervisors.”).

131. See *supra* notes 37–38 and accompanying text.

132. *What’s a Real Estate Agent?*, *supra* note 126.

133. *What Is a Fiduciary in Real Estate?*, REDFIN.COM, <https://www.redfin.com/definition/fiduciary> (last visited Feb. 4, 2021).

134. *What Is a Real Estate Agent?*, LEGALMATCH, <https://www.legalmatch.com/law-library/article/what-is-a-real-estate-agent.html> (July 5, 2018).

135. *Real Estate Agent Liability: Breach of Fiduciary Duty*, LEGALMATCH, <https://www.legalmatch.com/law-library/article/real-estate-agent-liability-breach-of-fiduciary-duty.html> (May 11, 2018).

136. *Real Estate Agent*, *supra* note 127.

137. *Fiduciary Duty*, BANKRATE, <https://www.bankrate.com/glossary/f/fiduciary-duty/#:~:text=Fiduciary%20duty%20is%20a%20requirement,on%20behal%20of%20a%20client> (last visited Feb. 4, 2021).

Agent as their “agent,”¹³⁸ the consumers also sensibly, albeit legally incorrectly,¹³⁹ imagine dual agency to mean a single Real Estate Agent representing both buyer and seller in the same transaction. This view is increasingly supported by those online resources already discussed. According to Redfin.com, dual agency “occurs when the same real estate agent represents both the seller and buyer.”¹⁴⁰ Bankrate states that “[d]ual agency . . . refers to a situation when one real estate agent represents both the home buyer and seller in a transaction.”¹⁴¹ In other words, each of these websites equates dual agency with the Real Estate Agent rather than the Broker. In fact, Bankrate declares that “dual agency does *not* apply in situations where the buyer and seller are represented by different agents working under the same broker,”¹⁴² in direct contradiction to California law.¹⁴³

Why is the distinction between statutory law and the consumer conception relevant to resolving underlying public concerns about fiduciary conflicts of interest in dual agency transactions? Recall that in many Franchise brokerage firms, one Responsible Broker can oversee thousands of individual Salespersons.¹⁴⁴ Under California law, transactions that involve any of that Broker’s Salespersons are, by legal definition, dual agency transactions.¹⁴⁵ Yet, by and large, consumers are unconcerned with the idea that a Responsible Broker, taking on a purely managerial role, carries the legal mantle of “dual agent” when he or she is only passively connected to either transacting party.¹⁴⁶ Instead, consumers are concerned primarily with the fact that their Real Estate Agent, tasked with actively guiding the transaction and intimately connected with their clients, may not fully represent their interests.

138. See *supra* note 2 and accompanying text.

139. See *supra* note 71 and accompanying text.

140. *What Is Dual Agency?*, REDFIN, <https://www.redfin.com/definition/dual-agency> (last visited Feb. 4, 2021).

141. *Dual Agency*, BANKRATE, <https://www.bankrate.com/glossary/d/dual-agency/> (last visited Feb. 4, 2021).

142. *Id.* (emphasis added). By describing full representation by subagents underneath the same broker, Bankrate necessarily describes the consumer view because this description is simply false under many statutory codes, including the California Civil Code.

143. See *supra* Part II.A.

144. See *supra* note 45 and accompanying text; see, e.g., *We’re Here to Help You Find Your Perfect*, BERKSHIRE HATHAWAY, <https://www.bhhsocalifornia.com/about> (last visited Feb. 4, 2021) (“Berkshire Hathaway HomeServices California Properties has grown to nearly 3,000 sales associates in close to 60 offices spanning the Central Coast to San Diego.”).

145. See *supra* note 71 and accompanying text.

146. See, e.g., Bill Gassett, *Dual Agency Should Be Banned in All States*, ACTIVERAIN (Apr. 18, 2017, 4:21 AM), <https://activerain.com/blogview/5044645/dual-agency-should-be-banned-in-all-states> (“Frankly, dual agency is the dumbest thing . . . [but] in some places dual agency is defined as when two agents from the same company each represent a buyer and a seller . . . I have no problem with this arrangement . . .”); see also Carol Solfanelli, *Don’t Let Your Real Estate Agent Represent the Other Side!*, SF CURB APPEAL (Feb. 21, 2017), <https://www.sfcurbappeal.com/buying/dont-let-your-agent-represent-the-other-side> (“By definition, dual agency includes not only one person representing both sides, it also includes different agents from the same brokerage firm . . . I have no problem with the latter situation.” (emphasis added)).

C. RECONSIDERING STATE LEGISLATIVE RESPONSES

Given the important role of the Real Estate Agent in the consumer conception, it becomes clear why various legislative responses have largely failed to relieve public concerns—each focuses on the Broker and do not effectively address the Real Estate Agent’s potential conflicts.¹⁴⁷ When legislators focus their efforts only on modifying or eliminating the Broker’s fiduciary responsibilities, they are quite simply addressing the wrong problem. And because the legislative focus is misdirected, the statutory schemes they create are often ineffective or incomplete.

A reassessment of Designated Agency and Transaction Broker systems through the lens of the consumer shines a dramatic light on the practical successes and failures of each approach.

1. *Designated Agency*

Designated Agency attempts to bypass the Broker’s fiduciary conflicts by shifting that burden to the Salesperson.¹⁴⁸ But in a state like Connecticut, where Brokers can designate a single Salesperson to represent both buyer and seller,¹⁴⁹ that Salesperson now faces the same conflict of interest that once troubled the Broker. And recall that most consumers presume that their Salesperson, as their active representative or Real Estate Agent, already owed fiduciary duties in the first place. In other words, a system that allows for single Salesperson representation fails because it shifts agency conflicts directly to the individuals that consumers already believed faced those conflicts in the first place.

2. *Transaction Broker*

The Transaction Broker scheme takes an uncompromising approach to resolving dual agency conflicts of interest by removing fiduciary responsibilities from all parties involved, whether Broker or Salesperson.¹⁵⁰ Fiduciary conflicts are eliminated altogether because their very premise is revoked—consumers need not be concerned about their “agent’s” conflicting loyalties because that individual no longer has any loyalty to give.

As previously discussed, however, the industry’s reliance on agency law tends to benefit consumers overall.¹⁵¹ And implicit with consumer complaints about dual agency is the view that single agency, or the ability to have a professional acting solely in the consumer’s best interest, is desirable.¹⁵² Complaints about dual agency conflicts of interest suggest that consumers want *stronger* fiduciary protections, not a lack of protections. While legislators in

147. See *supra* Part III.

148. See *Horiike v. Coldwell Banker Residential Brokerage Co.*, 383 P.3d 1094, 1104 (Cal. 2016).

149. See CONN. GEN. STAT. § 20-325i (West 2019).

150. See KAN. STAT. ANN. § 58-30,102(u) (West 2019).

151. See *supra* Part I.E.

152. Cf. *supra* note 10 and accompanying text.

Colorado, Florida, and Kansas have created an option that effectively eliminates the potential for agency conflicts,¹⁵³ that option arguably removes the most beneficial attribute of the real estate representatives: agency.¹⁵⁴ Put another way, in their attempt to remove the coach's conflicts of interest, legislators have essentially fired the coach and hired a referee.

IV. A PROPOSED SOLUTION

While statutory changes in California, Connecticut, and Kansas each independently fail to fully resolve consumer concerns about dual agency conflicts of interest, a solution might be created through a combination of all three statutory schemes.

A. THE PROPOSAL

California statutory law must adapt and conform to the lay conception of the real estate industry. The law has become obsolete,¹⁵⁵ and the California legislature is ultimately responsible for remaking antiquated law so that it comports with present-day realities—adoption of the consumer conception is the most direct method of achieving this outcome. The proposal outlined in this Note achieves the following: (a) it promotes the consumer conception of the active Real Estate Agent having direct fiduciary responsibilities to their clients; (b) it gives consumers the ultimate freedom to select their preferred Real Estate Agent, regardless of his or her ties to a Broker; and (c) in cases where imparting fiduciary duties onto a single Real Estate Agent creates a conflict of interest (that is, when both parties select the same Real Estate Agent), it allows the Real Estate Agent to act as a facilitator to both, without owing fiduciary duties to either.

First, Brokers should be understood and defined legally not as active participants but as passive overseers (“Managing Brokers”) who remain neutral with respect to individual transactions and owe no fiduciary duties toward either client. Conversely, Real Estate Agents, defined as the individuals who work actively with buyers and sellers regardless of licensing status, should owe fiduciary duties directly to their respective clients.¹⁵⁶ Just as with today's distinction between Brokers and Salespersons, Managing Brokers should still be required to hold additional licenses over their Real Estate Agent counterparts.¹⁵⁷

153. See COLO. REV. STAT. ANN. § 12-10-407 (West 2019); FLA. STAT. ANN. § 475.278(1)(a) (West 2019); KAN. STAT. ANN. § 58-30,102(u).

154. See KAN. STAT. ANN. § 58-30,102(u).

155. See *supra* Part I; see also SOFIA RANCHORDÁS, CONSTITUTIONAL SUNSETS AND EXPERIMENTAL LEGISLATION 19 (2014) (quoting Francis Lieber “who argued that ‘all that is in a code which is not conformable to the spirit of society must fall to the ground’” and noting that “[o]bsolescence of legislation could be the price to pay for holding on to rules that last longer than the phenomena they originally aimed to regulate”).

156. This would include (using the former statutory terminology as a comparison) both Salespersons and Brokers.

157. See *Requirements to Apply for a Real Estate Broker License*, CAL. DEP'T OF REAL EST., <http://www.dre.ca.gov/examinees/RequirementsBroker.html> (last visited Feb. 4, 2021).

The primary distinction between today's Broker and tomorrow's Managing Broker, or between today's Salesperson and tomorrow's Real Estate Agent, is that while Brokers and Salespersons were defined by their relationship to one other, Managing Brokers and Real Estate Agents will be defined by their relationships to the clients. The result: the law will better conform to common sensibilities about the role of real estate representation.

Second, California should adopt a Designated Agency system, wherein the Managing Broker must necessarily designate the role of Real Estate Agent to a licensed individual in his or her brokerage firm, thus imputing fiduciary duties onto that individual. This does not mean that an individual acting as Managing Broker cannot elect to represent his or her own client directly. Managing Brokers who would choose to actively engage with their clients could still do so—they would simply *self-designate* as a Real Estate Agent for the purposes of the transaction, thereby imputing fiduciary duties onto themselves and foregoing their neutral status in such cases.¹⁵⁸

In other words, statutory law should clearly divide legal obligations of Managing Brokers from Real Estate Agents, so that a Managing Broker is always the *designator* and the Real Estate Agent is always the *designatee*. It should clarify that only Real Estate Agents owe fiduciary duties, while Managing Brokers remain neutral. The result: current dual agency conflicts of interest at the Broker level—conflicts faced by a Broker who employs two Salespersons each representing their respective party in the same transaction—are resolved because Managing Brokers no longer hold fiduciary duties.

Third, California should adopt a Transaction Broker system for those cases where both buyer and seller prefer to be represented by the same Real Estate Agent.¹⁵⁹ Here, the Managing Broker relieves the Real Estate Agent of all fiduciary responsibilities and directs the Real Estate Agent to act merely as a neutral coordinator. Clients would thus retain the option to each select the same representative, but that representative would no longer face fiduciary conflicts of interest. Presumably, this option would apply only in rare cases, where both parties have a stronger interest in having a single representative acting as a facilitator than in receiving the protections of agency law generally. The result: consumers would ultimately retain absolute freedom of choice as to who facilitates their transaction.¹⁶⁰

Finally, California should retain its strong disclosure and consent requirements within this proposed statutory structure. All of the above proposals presume, if not necessitate, that consumers fully contemplate whom they are

158. See *supra* note 50 and accompanying text. While Franchise brokerage firms are now commonplace, many “independent” Brokers still choose to hang their own “shingle.” The process of self-designation allows for the legal separation of Managing Broker and Real Estate Agent, while still allowing persons acting as Managing Brokers to represent their own clients if they so choose.

159. See COLO. REV. STAT. ANN. §§ 12-10-402(8), 12-10-407 (West 2019); FLA. STAT. ANN. § 475.278(1)(a) (West 2019); KAN. STAT. ANN. § 58-30,102(u) (West 2019). Akin to a Transaction Broker.

160. See RESTATEMENT (SECOND) OF AGENCY § 387 (AM. L. INST. 2018).

choosing to represent them and the legal ramifications of that choice. Real Estate Agents and their Managing Brokers should be obligated to inform clients about the nature of these complex legal relationships, and should alert clients when this relationship status changes.¹⁶¹ While this proposal is an incomplete resolution to consumer concerns regarding dual agency, California's strict disclosure requirements still serve an important function by educating and protecting buyers and sellers throughout a complicated transaction process.

B. BENEFITS OF PROPOSAL

This proposal resolves the following consumer concerns about dual agency. First, it clarifies statutory language and resolves the conceptual divide between consumers and statutory law. One of its desirable aspects is to create a legislative framework that is both sensible and understandable to consumers at large, while still functioning effectively as statutory law. Without this clarity, California risks further confusing and frustrating laypersons and their interests. Second, the proposal focuses statutory law in the direction the public truly cares about—toward the individual actively engaged in the transaction. Finally, the proposal successfully synthesizes two major consumer interests: full agency law protections and freedom of choice. That is, the proposal provides for agency protections in almost all cases, while still allowing buyers and sellers to forego those protections if desired. While the law should not continue to endorse the notion that fiduciary duties are somehow compatible with dual agency, clients ultimately deserve to make their own determinations about who represents them in a real estate transaction.

C. ISSUES NOT ADDRESSED BY THIS PROPOSAL

Although the proposal outlined in this Note addresses many prominent consumer concerns, its scope is limited. First, it does not resolve all potential conflicts of interest within the real estate practice. Just as agency law itself is fallible, this proposal too is fallible if professionals abuse the system and their perceived roles within it. Agency law carries a strong presumption, but only a presumption, that an agent will actually endeavor to represent the client above his or her own interests.¹⁶²

Second, this proposal presumes, for simplicity's sake, that the Managing Broker always knowingly designates a Real Estate Agent to represent a particular client. In practice, as a "small business,"¹⁶³ each Real Estate Agent is likely to form relationships with buyers and sellers without the Managing Broker's immediate awareness.¹⁶⁴ In those cases, the Real Estate Agent will be required, in some sense, to designate himself or herself as Real Estate Agent on

161. *See supra* Part II.

162. *See* FED. TRADE COMM'N, *supra* note 22, at 73 (describing the practice of "self-dealing").

163. *See supra* note 49 and accompanying text.

164. *Cf. supra* notes 45, 142 and accompanying text.

the Managing Broker's behalf, and presumably receive later approval from the Managing Broker. While this Note does not address the relationship between Managing Broker and Real Estate Agent, California should closely consider how the two positions interact both in theory and in practice.

Third, this Note does not consider liability ramifications of removing fiduciary responsibilities from the Managing Broker and placing them entirely on the Real Estate Agent. Certainly, a grant of fiduciary responsibility to the Real Estate Agent is not intended to waive all of the Managing Broker's obligations to clients represented by that Managing Broker's selected Real Estate Agent. This Note advocates more consumer protections, not less, and the Managing Broker should not be relieved from all liability if the Real Estate Agent acts inappropriately or the Managing Broker biases his or her actions toward one client over another. Perhaps the Managing Broker can be given lesser duties to ensure that his or her Real Estate Agents comply with high ethical standards, thus indirectly providing assurances to each client in the transaction.

These factors and their potential ramifications should be considered in subsequent literature or by legislators when drafting this proposal into law. This proposal attempts to provide clarity to a confusing industry by sensibly redefining agency relationships, streamlining communication between lawmakers and law-seekers, and resolving fiduciary conflicts without eliminating dual agency altogether. Adoption of this proposal should continue to emphasize and promote those goals.

CONCLUSION

In the age of Franchise brokerage firms and "small business" Salespersons, California statutory law has become outmoded, inefficient, and out of step with modern practices and the consumer's understanding of the residential real estate industry. Fortunately, the groundwork has already been laid for much-needed reform. California legislators now have an opportunity to assume a pioneering role and reshape real estate practices for the better.