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Micheal Fleming

William Mitchell College of Law, micheal.fleming@wmitchell.edu

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Mike Fleming

**EMPOWERING THE CONSUMER: A DISCUSSION ON MINNESOTA'S DUAL
AGENCY STATUTE AND A PROPOSED SOLUTION THAT PUTS THE CONSUMER
FIRST**

Micheal.Fleming@wmitchell.edu

MFleminglaw@gmail.com

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FIRST**

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**EMPOWERING THE CONSUMER: A DISCUSSION ON MINNESOTA’S DUAL
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FIRST

I. INTRODUCTION

Many Americans across this county strive to achieve the dream of home ownership. The obstacles¹ that stand in the way of achieving that dream can be staggering and unique to the persons pursuing home ownership. To a certain extent, it is expected that there be some proverbial hoops of fire to jump through before finally turning that key to a new home. What the consumer does not expect is to find a statutory scheme that creates unnecessary obstacles, such as a broker with a divided loyalty and information barriers, at the expense of the public.² This statutory scheme is enshrined in Minnesota Statutes, section 82. The statute provides for standardized disclosure and notices regarding the agency relationship between the broker/salesperson and the consumer—in all there are three required notices.³ Nor does the consumer expect the state to favor a brokerage’s bottom line over a consumer’s right to fully

¹ The obstacles can include such barriers as: 1) securing adequate financing; 2) finding the right location and type of structure to meet a buyer’s needs; 3) zoning regulations that might prevent intended uses or the building itself might not be up to code; 4) the surrounding area might be susceptible to circumstances that reduce property values; or 5) title marketability concerns and insurance coverage.

² As will be discussed, the main obstacle is that the limited disclosures foster an environment that encourages a less informed consumer. *See infra* Part IV & V.

³ The first agency disclosure is required at “the first substantive contact.” The second disclosure comes “when the consumer engages either a seller’s agent or buyer’s agent” through either a listing or buyer’s agreement. The third comes in the purchase agreement itself. Mary Szto, *Dual Real Estate Agents and the Double Duty of Loyalty*, 41 REAL EST. L.J. 22, 70 (2012).

understand all the relevant aspects of the transaction. Yet in Minnesota, that is precisely what happens.

All too often, a typical residential real estate transaction involves a broker with a divided loyalty—to buyer, to seller, and to self.⁴ The average consumer likely understands that an agent, or a party acting on behalf of a seller or buyer, owes a significant duty of loyalty to the represented consumer.⁵ Thus, when a broker represents both the buyer and the seller in a realty transaction, the consumer will likely sense that something is amiss. The interests of a seller and a buyer are fundamentally at odds. The seller will want to sell the property at the highest price possible, disclaim every warranty and representation permitted by law, adhere only to the minimum disclosure requirements, keep confidential information confidential, and have an aggressive representative to negotiate with the other side. The buyer on the other hand will want the price lowered as much as possible, obtain as many warranties and representations as possible above the statutory disclosure requirements, maintain confidential information secret, and secure aggressive representation to advance the buyer's other interests in negotiations.⁶ The consumer may be surprised, however, to find that a real estate agent is permitted to represent both sides to the transaction.⁷ What is not surprising is that such representation is the source of many

⁴ See *infra* Part III.B.

⁵ An “agent” is defined as “one who is authorized to act for or in place of another.” BLACK’S LAW DICTIONARY 72 (9th ed. 2009).

⁶ GEORGE LEFCOE, REAL ESTATE TRANSACTIONS, FINANCE, AND DEVELOPMENT 22–23 (6th ed. 2009) (describing the negotiation process and diverging interests of a buyer and seller in realty).

⁷ MINN. STAT. § 82.55, subdiv. 6 (2012).

disputes.⁸ Despite the fact that this dual relationship is rife with troubles, the consumer will often find him or herself subject to it.⁹ This form of agency is called dual agency.¹⁰

Minnesota courts recognize the conflict of interest as an inherent one,¹¹ yet they consider it an acceptable conflict so long as the parties can agree to it.¹² Even though the required disclosure has been increasingly limited.¹³ But the question remains, to what extent the parties actually understand the implications of this conflict? It seems absurd that an informed consumer would consent to this kind of conflict in what is likely to be the largest and most significant type of transaction in which he or she will engage in.

This article proposes a new approach to how Minnesota should view the agency relationship between a real estate broker/salesperson with consumers. This article focuses exclusively on the residential real estate-dual representation form of agency. In Part II, the article provides useful definitions of agency concepts and outlines current Minnesota law.¹⁴ In Part III, the origins of agency law is discussed and Minnesota's common law history of agency is evaluated, along with the pattern of limiting consumer disclosures.¹⁵ Part IV discusses the legislative purpose of section 82 and how that purpose is evaded through the statutory text itself.¹⁶ Part V evaluates how other jurisdictions view the topic of dual and designated agency and how some of those jurisdictions strive to serve their legislative purposes, similar to those in

⁸ See Stzo, *supra* note 3, at 22 (noting that “the top three issues that cause the most disputes in a real estate transaction are dual agency, disclosure, and breach of fiduciary duty.”).

⁹ See *infra* Part III.C.

¹⁰ See *infra* Parts II, III & IV (discussing and defining dual agency); *infra* note 26.

¹¹ See *infra* note 42 (and accompanying text).

¹² See MINN. STAT. § 82.67, subdiv. 3(IV) (2012) (requiring “informed consent of all parties”).

¹³ See *infra* Part III.C (discussing the trend limiting disclosures to the consumer).

¹⁴ *Infra* Part II.

¹⁵ *Infra* Part III.

¹⁶ *Infra* Part IV.

Minnesota.¹⁷ Next, in Part VI, the article discusses how Minnesota and other states view the concept of the attorney-broker acting in a dual agency capacity.¹⁸ Finally, in Part VII, the article proposes various statutory amendments that will help align the text of the law with the purpose of the law,¹⁹ followed by a brief summation in Part VIII.²⁰

II. USEFUL DEFINITIONS ON THE LAW OF AGENCY

A. *Agency, Dual Agency, and Designated Agency*

In 1981, Minnesota courts settled on a general definition of the word “agency.” Minnesota defines it as “the fiduciary relation[ship] which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.”²¹ This definition is the launching point to understand the relationship between a seller or purchaser of residential realty with an agent. The basic elements of an agency relationship, as outlined in the Second Restatement of Agency, are: 1) a mutual manifestation of consent; 2) a principal and an agent; and 3) the principal’s continuous control over that agent.²² Minnesota courts have consistently used this restatement definition of agency in the real estate context.²³ There is an additional requirement that any agency relationship

¹⁷ *Infra* Part V.

¹⁸ *Infra* Part VI.

¹⁹ *Infra* Part VII.

²⁰ *Infra* Part VIII.

²¹ RESTATEMENT (SECOND) OF AGENCY § 1 (1) *as adopted in* A. Gay Jenson Farms Co. v. Cargill, Inc., 309 N.W.2d 285, 290 (Minn. 1981).

²² *Id.*

²³ *See Cargill*, 309 N.W.2d at 290 (the most authoritative case); *New Millennium Consulting, Inc. v. United HealthCare Servs.*, 695 F.3d 854 (8th Cir. 2012) (applying Minnesota law); *Medlock v. Meahyen*, No. A11-320, 2012 WL 118240, *15 (Minn. Ct. App. Jan. 17, 2012); *Tonna Mech., Inc. v. Double AI, LLC*, No. A10-1174, 2011 WL 2437387, *2 (Minn. Ct. App. June 20, 2011).

related to real property be in writing.²⁴ This is an exception from the common law rule that, while a contract can govern an agency relationship, no contract is necessary to enter into an agency relationship.²⁵

A dual agency is a standard agency relationship, except that one agent acts on behalf of *both* principals in the same transaction.²⁶ A designated agent is typically defined by a state legislature and can vary from state to state. Generally, it is a standard agency relationship in which a brokerage firm, as the agent, will designate at least one salesperson to exclusively represent the buyer and at least one salesperson to exclusively represent the seller.²⁷ It is the dual agency relationship, and to a lesser extent designated agency, that creates controversy.²⁸ Minnesota regulates the controversial dual agent relationship through statute.²⁹

B. Current Minnesota Dual Agency Definition

In Minnesota, dual agency is defined by statute for purposes of a real estate agent's relationship with a purchaser and seller. Minnesota expands the dual agency definition providing that dual agency also arises when the agent-broker delegates its duties to salespersons representing one or the other consumers.³⁰ The statute states that a dual agency “means a

²⁴ All real estate transactions should be in writing to overcome the statute of frauds defense. *See* LEFCOE, *supra* note 6, at 63–64 & 66–69. In Minnesota, the Legislature mandates that the agency relationship that brings about the sale must be in writing. MINN. STAT. § 82.66, subdiv. 1(a) (2012). This is consistent with the “equal dignities” rule in the common law of agency. RESTATEMENT (THIRD) OF AGENCY § 3.02 cmt. b (2006).

²⁵ *PMH Props. v. Nichols*, 263 N.W.2d 799, 803 (Minn. 1978).

²⁶ RESTATEMENT (SECOND) OF AGENCY § 392 (1958); *see also* BLACK'S LAW DICTIONARY 73 (9th ed. 2009) (defining dual agent as one who represents both parties in the same transaction).

²⁷ *See infra* notes 181–82 (those states which have a designated agency).

²⁸ *See Szto, supra* note 3, at 22 (noting that dual agency (and related topics) creates disputes).

²⁹ *See generally* MINN. STAT. § 82 (2012) (regulating the real estate broker/salesperson relationship with consumers).

³⁰ *See id.* § 82.55, subdiv. 6.; *see also supra* Part II.A.

situation in which a licensee owes a duty to more than one party to the transaction.”³¹ The statute goes on to list two circumstances in which a dual agency arises including: “1) when one licensee represents both the buyer and the seller in a real estate transaction; or 2) when two or more licensees, licensed to the same broker, each represent a party to the transaction.”³² Minnesota is not alone in defining dual agency by statute. Many state statutes provide for the relationship and its parameters.³³ Interestingly, the concept has deep historical roots.

III. THE INCEPTION OF AGENCY LAW AND MINNESOTA’S HISTORICAL TAKE ON DUAL AGENCY

A. *The Law of “Use”*

The roots of dual agency may stretch back to the beginnings of agency law—or “use” law—in old English law.³⁴ Sir Frederick Pollock,³⁵ when speaking of the term “agency” in 1899, observed that “the phrase will appear in our own day as expressing rights and duties which the common law can sanction without the help of any ‘equity’”³⁶ In the context of a land conveyance during Twelfth-century England, Sir Pollock noted that “we sometimes see the lord intervening between the vendor and the purchaser of land.”³⁷ In explaining this transfer of land Sir Pollock reported that: “[T]he vendor surrenders the land to the lord ‘to the use’ of the

³¹ § 82.55, subdiv. 6.

³² *Id.* § 82.55, subdiv. 6(1)–(2).

³³ *See infra* notes 180 & 182 (identifying states that provide for dual agency).

³⁴ FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW: BEFORE THE TIME OF EDWARD I* 228–29 (2d ed. Boston, Little, Brown & Co. 1899).

³⁵ Sir Frederick Pollock was an English legal scholar and baronet. He was a professor at the University of Oxford (1883–1903) and was made a king’s counsel in 1920. *Sir Frederick Pollock, 3rd Baronet*, *ENCYCLOPÆDIA BRITANNICA*, <http://www.britannica.com/EBchecked/topic/468047/Sir-Frederick-Pollock-3rd-Baronet> (last visited Oct. 8, 2013).

³⁶ POLLOCK & MAITLAND, *supra* note 34, at 230.

³⁷ *Id.*

purchaser by a rod, and the lord by the same rod delivers the land to the purchaser.”³⁸ In our modern day understanding of agency law in Minnesota, this hardly constitutes the elements of an agency relationship.³⁹ However, one can see its inception as the lord having a duty to take possession of the property on behalf of the vendor along with a subsequent duty to the purchaser to transfer the property to him upon payment to the vendor. In any event, it at least resembles a dual agency in that both the buyer and the seller are using the same person to further their interests—the conveyance of realty.⁴⁰ From a more modern standpoint the transaction seems absurd, yet understandable in the context of a Middle Age society in Europe.⁴¹

B. Minnesota’s Dual Agency: A Common Law Approach

As early as 1887, the Minnesota Supreme Court observed the inherent problems with a dual agency relationship in a real estate transaction. The court in *Webb v. Paxton* noted that:

[I]f an agent, under [dual agency], may enter the service of a proposed purchaser, and charge him a commission for his services, it immediately becomes [the agent’s] interest to sell only to those who will pay [the agent] double commission, to the exclusion of all others. The interests of his principal are manifestly in danger of prejudice from the counter-interest in the agent.⁴²

³⁸ *Id.*

³⁹ *See supra* Part II.A.

⁴⁰ Leaving aside the idea that either party to the transaction ever had any real control over his lord. It may be that the vendor and the lord have the agency relationship and the vendee is merely the beneficiary.

⁴¹ Distinction in old England: the “use” law provided for a conveyance to the lord so the lord owned the land for a moment before conveying it to the purchaser. *See* POLLOCK & MAITLAND, *supra* note 34, at 230–31. That is more like a straw man in today’s jargon. BLACK’S LAW DICTIONARY 1557 (9th ed. 2009) (“A third party used in some transactions as a temporary transferee to allow the principal parties to accomplish something that is otherwise impermissible.”).

⁴² *Webb v. Paxton*, 36 Minn. 532, 534, 32 N.W. 749, 750 (1887) (finding that a dual agency did not exist because the agent exclusively represented the seller in the transaction). The *Webb*

Interestingly enough, the *Webb* court does not find that such an agency is inherently unlawful. It observes—as do later courts—that an agent engaging in a double agency, while “repugnant to the fundamental principle on which the law of agency rests,” may be permissible so long as the agent does not do so in secret.⁴³ The court also affirmed that a broker is more than a mere go-between, even when not entrusted with knowledge of terms or price of the sale.⁴⁴

Almost four decades later, the Minnesota Supreme Court adopted the rule that when an agent acts as a dual agent and one of the principals is ignorant of the dual agency, the ignorant principal has an absolute right to rescind the transaction whether the principal has suffered an injury or not.⁴⁵ In *Olson v. Pettibone*, the court observed that nothing will defeat the ignorant principal’s remedy “except his own confirmation after full knowledge of all the facts.”⁴⁶ After the *Olson* decision, it became clearer that a real estate agent could not hide the dual agency from the principal and expect to retain a commission. Under current agency law, this amounts to a breach of a fiduciary duty of loyalty to the principal.⁴⁷

court’s observation regarding the inherent conflict of interest may be mere dicta in this case, yet considering following case law, it will prove to be good dicta.

⁴³ *Id.* at 533 (noting that where such an agency exists the broker may not recover a commission, “at least against a party kept in ignorance of the [dual agency]”).

⁴⁴ *Id.* at 533–34 (noting that by the broker’s acceptance of employment as seller’s agent, he acquired a duty to sell the property as quickly as possible and at the best price).

⁴⁵ *Olson v. Pettibone*, 168 Minn. 414, 417, 210 N.W. 149, 149 (1926) (in the fraudulent real estate transaction context).

⁴⁶ *Id.* at 418 (citing *Ferguson v. Gooch*, 26 S.E. 397 (Va. 1896)).

⁴⁷ A fiduciary duty is “[a] duty of utmost good faith, trust, confidence, and candor owed by a fiduciary . . . to the beneficiary . . . ; a duty to act with the highest degree of honesty and loyalty toward another person and in the best interests of the other person” BLACK’S LAW DICTIONARY 581 (9th ed. 2009). The Minnesota Supreme Court held that where a fiduciary failed to disclose the dual representation, the fiduciary had breached the duty of loyalty. *Anderson v. Anderson*, 293 Minn. 209, 208, 197 N.W.2d 720, 725–26 (1972).

In *White v. Boucher*, fifty-six years later, the court evaluated what it takes for a real estate broker to enter an agency relationship with a principal and the fiduciary duties that arise from that relationship.⁴⁸ The *White* court observed that a broker enters an agency relationship “upon the execution of a listing agreement” with the principal.⁴⁹ As an agent, the broker assumes the “duty to communicate to the [principal] ‘all facts of which he has knowledge which might affect the principal’s rights or interests.’”⁵⁰ In discussing the agent’s failure to disclose the purchaser’s financial troubles to the seller, the *White* court noted that “[w]hat might be ‘the best thing’ for the seller must ultimately be the seller’s decision, not the agent’s.”⁵¹ The notion that the principal must decide what is best for his or herself is well enshrined in the common law concept of the *right* and the *power* of control the principal has over the agent. A principal may have his *right* to control the agent limited only by contract, yet the principal’s

⁴⁸ *White v. Boucher*, 322 N.W.2d 560 (Minn. 1982).

⁴⁹ *Id.* at 564 (citing *Klawitter v. Billick*, 308 Minn. 325, 242 N.W.2d 588 (1976)); *cf.* MINN. STAT. § 82.66 (2012) (requiring a signed listing agreement or buyer’s agreement before the agency begins, no matter the agency’s form).

⁵⁰ *White*, 322 N.W.2d at 564 (citing *Magee v. Odden*, 220 Minn. 498, 503, 20 N.W.2d 87, 90 (1945)). In fact, a broker has a duty to make a “full disclosure of the financial status of a prospective purchaser.” *Id.* at 564–65 (citing *Fulsom v. Egner*, 248 Minn. 156, 79 N.W.2d 25 (1956)). The Minnesota Supreme Court even went so far as to prevent a broker from receiving his commission when he failed to disclose to his principal that the prospective buyer was ill and might not be able to perform, even after the principal released the prospective buyer from the contract due to the illness. *See Hare v. Bauer*, 223 Minn. 285, 26 N.W.2d 359 (1947).

⁵¹ 322 N.W.2d 560 at 555–56.

power to do so is not lost.⁵² The court also considered who pays the agent in making agency determinations.⁵³

Normally the agent will be the agent of the principal who pays him,⁵⁴ except when a buyer first approaches the broker to act on the buyer's behalf with the understanding that the broker eventually will be paid by the seller.⁵⁵ In the *White* case, the court's decision as to whether or not the agent acted as a dual agent of both the seller and the buyer turned on whether or not the buyer exercised any control over the agent⁵⁶—control being one of the basic elements of the agency relationship.⁵⁷ The court answered the agency formation question by evaluating the subsequent control the purchaser may have exercised over the agent. Having found that the buyer did not exercise any subsequent control, the court concluded, retroactively, that there was no agency relationship between the real estate agent and the buyer.⁵⁸

C. *Minnesota's Dual Agency: A Statutory Approach*

⁵² See RESTATEMENT (SECOND) OF AGENCY § 118 cmt. b (1958), *as adopted in* *Klawitter v. Billick*, 308 Minn. 325, 329–30 242 N.W.2d 588, 592 (1976). The exercise of that power, where there is no contractual right, will generally lead to principal liability to the agent. *Id.* § 18 cmt. c, *as adopted in Klawitter*, 308 Minn. at 330, 242 N.W.2d at 592. In any case, the court views the authority as clearly distinguishing the difference between a principal's *right* and *power* to impact the agency. *Klawitter*, 308 Minn. at 329, 242 N.W.2d at 592 (citing to RESTATEMENT (SECOND) OF AGENCY §§ 450, 455 & 118 (1958)).

⁵³ *White*, 322 N.W.2d 560 at 566.

⁵⁴ *Id.*

⁵⁵ *Id.* (citing *Duffy v. Setchell*, 347 N.E.2d 218 (Ill. App. Ct. 1976)).

⁵⁶ See *id.* at 567 (stating that “[t]here is no evidence to suggest that [the brokerage] agents acted at the [purchaser’s] direction or were subject to their control.”).

⁵⁷ See *supra* note 21 (the elements of common law agency).

⁵⁸ See *White*, 322 N.W.2d 560 at 567.

In 1993, the Minnesota Legislature drafted statutes to govern the dual agency relationship found in real estate transactions.⁵⁹ Lawmakers, at that time, included an agency disclosure requirement that obligated a broker or salesperson to “include a clear and complete explanation of how the broker will represent the interests of the seller or buyer.” In the case of a dual agency, the agent was also required to inform the principal “how that representation would be altered in a dual agency situation”⁶⁰ This is in stark contrast to today’s current law.⁶¹

The 1993 Legislature made clear that it did not intend to replace the common law disclosure requirement for agency. Instead, it sought only “to establish a minimum standard for regulatory purposes, [which was] not intended to abrogate common law.”⁶² Just as the “clear and complete explanation” requirement has been removed from today’s current statute, so too has the original intention of the Legislature to not abrogate the common law regarding disclosures.⁶³ In fact, the Legislature currently takes the opposite view and deems “disclosures made in accordance with [the statutory requirement] . . . sufficient to satisfy common law disclosure requirements.”⁶⁴ At first glance this 180 degree turn may seem rather inconsequential, but it has

⁵⁹ Act of May 20, 1993, ch. 309, § 2, subdiv. 11, 1993 Minn. Laws 1794, 1796 (codified as amended at MINN. STAT. § 82.55, subdiv. 6 (2012)).

⁶⁰ *Id.* § 9, subdiv. 1 at 1800 (codified as amended at MINN. STAT. § 82.67, subdiv. 1 (2012)). The 1993 disclosure also required a broker to make agency disclosures in a “time and manner sufficient to protect the customer’s bargaining position.” *Id.*

⁶¹ The current law in Minnesota no longer requires a real estate agent to provide a “clear and complete explanation” of how the interests of the principal will be served by the broker. *See generally* MINN. STAT. § 82.67, subdivs. 1 & 3. (2012) (requiring only a disclosure of the types of agency available and at most the role of the agent or broker in the various types of agency).

⁶² Act of May 20, 1993, ch. 309, § 9, subdiv. 3, 1993 Minn. Laws 1794, 1801 (codified as amended at MINN. STAT. § 82.67, subdiv. 2 (2012)).

⁶³ *See generally* MINN. STAT. § 82 (2012) (abandoning the former requirement and stance on the abrogation of the common law regarding disclosure).

⁶⁴ *Id.* § 82.67, subdiv. 2.

a substantial impact on the sufficiency of the statutory disclosures. Especially when considering what was once required to be disclosed, and what is now left unsaid.⁶⁵ It also impacts, to a great extent, the purpose of the statute, in that the language itself proves repugnant to the consumer's well-being.⁶⁶

The common law disclosure requirement goes to one element of the agency relationship's formation—namely, consent. But not just mere consent, the consent must be mutual, and particularly relevant to this discussion, informed.⁶⁷ In one fell swoop, the Legislature replaced the common law consent requirement with a statutory requirement, but neglected to indicate anything in regards to the common law requirement of control. In fact, the particular statute, section 82.67, which disclaims the common law consent rule, says absolutely nothing in regards to control.⁶⁸ Thus, it is logical to conclude that the Legislature intended to permit the common law rule regarding control to persist unaltered.⁶⁹

⁶⁵ See generally *supra* Part III.C. The current statute confirms the limited disclosure by disclaiming any longstanding disclosure requirement at common law, namely that the principal-to-be obtain a “full knowledge of all the facts” before consent. Compare MINN. STAT. § 82.67, subdiv. 2 (2012) (abrogating the common law disclosure requirement), with *Olson v. Pettibone*, 168 Minn. 414, 418, 210 N.W.2d 149, 149 (1926) (providing that principals need to have full knowledge of all the facts).

⁶⁶ See *infra* Part IV.

⁶⁷ § 82.67, subdiv. 3(IV) (2012) (requiring “informed consent” for dual agency). See *supra* note 21; see also RESTATEMENT (SECOND) OF AGENCY § 381 (1958) (regarding the agent's duty to inform the principal).

⁶⁸ § 82.67, subdiv. 2 (2012).

⁶⁹ See MINN. STAT. § 645.17(2) (2012) (establishing the presumption that the entire statute is to be effective and certain); *id.* § 645.19. The Minnesota Supreme Court has adopted the general rule that the “[e]xpressio unius est exclusio alterius [doctrine] generally reflects an inference that any omissions in a statute are intentional.” *State v. Caldwell*, 803 N.W.2d 373, 383 (Minn. 2011). Simply put, the legislature presumably does not make mistakes in word choice. See also *Weston v. McWilliams & Assocs.*, 716 N.W.2d 634, 639 (Minn. 2006) (noting that where the

It appears strange that the Legislature flip-flopped so quickly regarding the broad common law disclosure requirement in favor of its current limited form,⁷⁰ especially since residential real estate transactions are singled out as protected transactions.⁷¹ It therefore seems counter intuitive to say on the one hand, the state provides additional and heightened protections and disclosures for residential realty on a public policy basis, and on the other hand encourages minimal disclosures regarding the agency relationships that bring about those transactions. However, there is more to the trend of restricting disclosures in Minnesota.

Prior to the 2001 session, the disclosure statute required that “[d]ual agents must disclose to [b]uyers any material facts of which the broker is aware that could adversely and significantly affect the [b]uyer’s use or enjoyment of the property.”⁷² During the 2001 session, the Legislature again narrowed the scope of what must be disclosed by removing the word “any” from “any material facts.”⁷³ It also defined the term “material facts,” arguably narrowing what

legislature includes language in one provision and excludes it in another, such exclusion is indicative of legislative intent).

⁷⁰ See Act of Apr. 18, 1994, ch. 461, § 1, subdiv. 3 1994 Minn. Laws 309, 309 (codified as amended at MINN. STAT. § 82.67, subdiv. 2 (2012)) (favoring a statutory disclosure requirement instead of a minimum standard for regulatory purposes). The amendment is likely a response to a Minnesota District Court case finding a statutory disclosure requirement insufficient in 1993. See *infra* note 82.

⁷¹ See *Kratzer v. Welsh Cos., LLC*, 771 N.W.2d 14, 20 (2009) (noting that “[t]he legislature has thus provided for specific, heightened duties of disclosure in the residential real estate context,” as opposed to the commercial realty context); MINN. STAT. § 513.55, subdiv. 1 (2012) (requiring certain disclosures in the residential realty context).

⁷² Act effective Oct. 1, 1996, ch. 439, art 3, § 8, subdiv. 4 1996 Minn. Laws 1108, 1141 (codified as amended at MINN. STAT. § 82.67, subdiv. 3 (2012)).

⁷³ Act of May 29, 2001, ch. 208, § 12, subdiv. 4 2001 Minn. Laws 856, 863 (codified as amended at MINN. STAT. §82.67, subdiv. 3 (2012)).

that term means, to facts that the broker *actually knows* that “could adversely and significantly affect an ordinary purchaser’s use and enjoyment . . . or any intended use”⁷⁴

Certainly a valid argument can be made that a broker needs to know exactly what a material fact is so that he or she can disclose those facts. However, if that were the case, the statute could have provided some guidance as to the meaning of “significantly affects . . . use or enjoyment of the property,” what an “ordinary purchaser” is, and it could have nailed down what an “intended use” means.⁷⁵ Instead, the statute qualifies vague terms on the actual knowledge of the broker and states what is *not* a material fact.⁷⁶ In fact, the clearest rule as to what a material fact is, pursuant to the 2001’s version, is found in sub-section (e), which states that a contradiction of “any information in a written report” needs to be disclosed as a material fact. Furthermore, the current statute again limits common law disclosure requirements particular to the material facts disclosures.⁷⁷ The limitation on a seller’s disclosure of material facts occurred in 2004,⁷⁸ along with some other disclosure limitations. One removed disclosure required a broker representing a buyer to “make known to the seller . . . the fact of the agency relationship

⁷⁴ *Id.* § 13, subdiv. 6(a) at 865 (codified as amended at MINN. STAT. § 82.68, subdiv. 3 (2012)). (limiting the material facts disclosure to “facts of which the licensee is aware”).

⁷⁵ *See id.* § 13, subdiv. 6(a) at 865 (mentioning terms, yet leaving them undefined). *See also* MINN. STAT. § 82.68, subdiv. 3 (2012) (using the same undefined and vague language).

⁷⁶ *Id.* § 13, subdiv. 6(b)–(d) at 865 (noting what is *not* a material fact). *See also* MINN. STAT. § 82.68, subdiv. 3(b)–(e) (2012) (adding to the list of facts that are not material facts for disclosure purposes; including, airport zoning, information on a written report from a qualified third party, presence of adult family homes, community-based residential facility, and nursing home).

⁷⁷ MINN. STAT. § 82.68, subdiv. 3(g) (limiting disclosures in the case of registered offenders, certain information about prior owners, accidental deaths on the property, paranormal activity, and other information listed in subsections (b) and (c)).

⁷⁸ Act effective Aug. 1, 2004, ch. 203, art. 1, § 6, subdiv. 4 2004 Minn. Laws 476, 480 (codified as amended at MINN. STAT. § 513.56, subdiv. 4 (2012)).

before any showing or negotiations are initiated.”⁷⁹ Finally, the latest disclosure restriction makes airport zoning immaterial, as long as the broker gives written notice of where to find the information.⁸⁰ Given the successive line of limitations on disclosures, it is not surprising that a number of courts prior to 1993 found that when a dual agency existed, the disclosures were inadequate and post 1993 more courts have upheld the validity of a transaction involving dual agency.⁸¹

In 1993, just before the Legislature passed the first wave of disclosure limitations, the U.S. District Court in Minnesota found that Edina Realty’s agency disclosure was insufficient, even though it satisfied the statutory drafting requirement.⁸² As a result of Edina Realty’s failure to disclose fully the implications of the dual agency, the *Dismuke* court held that

⁷⁹ Act of May 5, 2004, ch. 203, art. 2, § 15, subdiv. 5(b) 2004 Minn. Laws 476, 491 (struck out portion) (codified as amended at MINN. STAT. § 82.81, subdiv. 6(b) (2012)). Perhaps the Legislature found it unnecessary to require this disclosure since it passed Minnesota Statute, section 82.19, subdivision 12 in 2002 regarding fraudulent practices, which has subsequently been renumbered as Minnesota Statute, section 82.81, subdivision 12. However, the fraudulent practices section does not require any disclosure as to the agency to the other party in the transaction, such a disclosure could help to guard against fraud since a party would certainly not deal with an agent who could not show that he represents the other party. The only justification, therefore, would be to provide for instances of an undisclosed principal. Currently, the broker or salesperson is required not to advertise the property to the “general public” until a listing agreement is signed—but does not prohibit approaching a particular buyer before an agreement is signed, nor does it require a showing to the other party that the agent is duly authorized to so act, as the law once did. *See* MINN. STAT. § 82.66, subdiv. 1(a) (2012); *but see id.* § 82.66, subdiv. 2(a) (stating that a licensee may not perform “any” action on behalf of a buyer until an agreement is signed).

⁸⁰ Act of May 10, 2007, ch. 64, § 1, subdiv. 8 2007 Minn. Laws 507, 507 (codified as amended at MINN. STAT. § 82.68, subdiv. 3(d) (2012)).

⁸¹ *See generally supra* Part III.

⁸² *Dismuke v. Edina Realty, Inc.*, No. 92-8716, 1993 WL 327771, at *3 (D. Minn. June 17, 1993) (applying Minnesota law as it stood at the time finding that the disclosure could not “be characterized as either a full or adequate disclosure of all the facts under common law.”), *superseded by statute*, MINN. STAT. § 82.67, subdiv. 2 (2012).

the brokerage had breached its fiduciary duty to the plaintiffs—an entire class.⁸³ A later state court observed the effect of the limited disclosure statutes as they currently stand today when discussing the *Dismuke* case.⁸⁴ In *Grady v. Burnet Realty, Inc.*, the court declined to rely on the analysis in *Dismuke* and a related case, because they “did not consider whether a party must disclose more than what the legislature required.”⁸⁵ *Grady* concluded that “disclosure obligations have been addressed by the legislature” and the legislature had “preempted the common [law] . . .”⁸⁶ In fact, the *Grady* court could not find any justification for the disclosure of “elaborate details regarding conflict of interest.”⁸⁷ In making this statement, the *Grady* court was referring to an instance where the agent referred the principal to a title company.⁸⁸ What is clear is that, in the court’s opinion, a court is not barred from reviewing the disclosure requirement’s sufficiency—only that it hasn’t happened yet in a real estate-dual agency context after Minnesota’s trend of limiting disclosures.⁸⁹

In 2006, one year before the *Grady* case, the Minnesota Court of Appeals found an example of when an agent properly—in the court’s opinion—established and disclosed the dual agency relationship between a buyer and seller of real estate.⁹⁰ In *Alt v. Mainstreet Lofts, LLC*, the court observed that “[i]n a real estate transaction, dual representation of the buyer and seller is permitted if the broker makes a full disclosure to all parties to the transaction and obtains

⁸³ *Id.*

⁸⁴ *Grady v. Burnet Realty, Inc.*, No. 27-CV-07-3336, 2007 WL 6737282, n.7–8 (Minn. 4th Jud. Dist. Ct. Dec. 14, 2007).

⁸⁵ *Id.* at n.7.

⁸⁶ *Id.*

⁸⁷ *Id.* at n.8.

⁸⁸ *Id.*

⁸⁹ *See id.* at n.7.

⁹⁰ *Alt v. Mainstreet Lofts, LLC*, No. A05-1476, 2006 WL 1806191, at *11–13 (Minn. Ct. App. July 3, 2006).

their consent.”⁹¹ The court found that the broker satisfied the statutory disclosure requirements on two forms, both of which were signed by the buyer.⁹² In siding with the brokerage, the *Alt* court observed that “[o]ne of the problems with dual agency . . . is that the [agent’s] prospect of getting ‘both sides of the commission’ can blind the agent of her fiduciary duties.”⁹³ While the court correctly observed that this statement merely “describes the nature of the conflict of interest inherent in a dual-agency agreement,” the court ignores the prospect that such an omission creates an insufficient disclosure; instead, jumping to the question of breach.⁹⁴ Perhaps the court was justified in avoiding the more interesting and complicated question of disclosure sufficiency, because the appellants failed to contest the issue.⁹⁵ It is unclear what the court would have found if the appellants had argued that the statutory disclosure was insufficient because it did not describe the inherent conflict of interest as to the broker’s motivations for a double commission.

After the trend of limiting disclosure requirements and courts deferring to the Legislature, it has become clear that informed consent is what the Legislature says it is. While simultaneously ignoring the reality that a legislative imposition of knowledge through a standard form is not the same as actual knowledge. However, this serves a practical purpose. It is difficult to gauge the subjective understanding of what a dual agency means to any variety of individuals who may walk into a broker’s door. Individuals who have different priorities may not give any thought to the dual agency so long as they get their house by an appointed date. The fact of the

⁹¹ *Id.* at *11 (citing MINN. STAT. § 82.22, subdiv. 5 (2004); *cf.* MINN. STAT. § 82.67, subdiv. 1 (2012) (regarding the current requirement for disclosures of the agency relationship).

⁹² *Alt*, 2006 WL 1806191, at *12–13.

⁹³ *Id.*

⁹⁴ *Id.* at *13.

⁹⁵ *Id.*

matter is that dual agency is firmly imbedded in Minnesota. It isn't likely to be abandoned, nor does this article argue for its abandonment. But just because it is difficult to make an adequate and full disclosure to the average consumer, that doesn't mean that lawmakers should shirk the task in favor of organized brokerages and real estate associations. In reality, the Legislature has created a rather ambiguous and absurd result. The fact that a case has not arisen to discuss the sufficiency, ambiguity, absurdity, and misleading disclosure requirement may be more a function of consumer ignorance stemming from the limited disclosure requirements themselves. The consumer does not know what the consumer does not know.

IV. LEGISLATIVE PURPOSE BEHIND MINNESOTA STATUTES, SECTION 82 (2012)

A. *The Overarching Legislative Intent*

Section 82 of the Minnesota Statutes does not expressly identify its purposes; however, the Legislature has given direction in how to ascertain its purpose.⁹⁶ The guidance the Legislature provides to courts is currently found in Minnesota Statutes, section 645.⁹⁷ The Minnesota Legislature provides some useful presumptions in ascertaining legislative intent that include:

[T]he legislature does not intend a result that is absurd, impossible of execution, or unreasonable; the legislature intends the entire statute to be effective and certain; the legislature does not intend to violate the Constitution of the United States or of this state; when a court of last resort has construed the language of a law, the legislature in subsequent laws on the same subject matter intends the same construction to be placed upon such language; and the legislature intends to favor the public interest as against any private interest.⁹⁸

⁹⁶ See MINN. STAT. § 645 (2012).

⁹⁷ *Id.* § 645.17 (providing presumptions for courts to ascertain legislative intent).

⁹⁸ *Id.*

The Legislature also has provided that while “[e]very law shall be construed, if possible, to give effect to all of its provisions. [Absent ambiguity], the letter of the law shall not be disregarded under the pretext of pursuing the spirit.”⁹⁹ The Legislature gives further guidance when the language is found to be ambiguous stating that:

[T]he intention of the legislature can be discovered by considering, among other matters: 1) the occasion and necessity for the law; 2) the circumstances under which it was enacted; 3) the mischief to be remedied; 4) the object to be attained; 5) the former law, if any, including other laws upon the same or similar subjects; 6) the consequences of a particular interpretation; 7) the contemporaneous legislative history; and 8) legislative and administrative interpretations of the statute.¹⁰⁰

Minnesota Statutes, section 645 governs statutory interpretation,¹⁰¹ and as such, it governs the method of ascertaining legislative purpose, particularly since section 82 does not expressly indicate the legislative purpose. When the Legislature enacted the law, it was in light of many years of an established custom of doing business in the real estate industry—the dual agency relationship.¹⁰² Typically, a court only looks to the intent of the legislature when there is an ambiguity present.¹⁰³ While there are ambiguities present in the statute,¹⁰⁴ a court doesn’t necessarily *have* to find an ambiguity in order to ascertain the legislative intent.¹⁰⁵ Nor at this point would it be useful. However, it is useful to go through the considerations listed in sections

⁹⁹ *Id.* § 645.16.

¹⁰⁰ *Id.*

¹⁰¹ *See id.* § 645.001 (providing that the provisions of chapter 645 apply to “all rules becoming effective after June 30, 1981.”).

¹⁰² *See supra* Part III.

¹⁰³ *See* MINN. STAT. § 645.16 (stating that “[w]hen the words of a law are not explicit, the intention . . . may be ascertained . . .”).

¹⁰⁴ *See supra* Part III.C (discussing the ambiguity in § 82.68, subdiv. 2).

¹⁰⁵ *See infra* Part IV.B.

645.16 and 645.17 to discover the legislative purpose. Under Minnesota Statutes, section 645.16(1)–(8) the purpose is ascertainable as follows:

- The “occasion and the necessity for the law” goes mainly to protecting the consumer from fraudulent agency relationships and incompetent realty brokers.¹⁰⁶
- The “circumstances under which it was enacted” and “the mischief to be remedied” appear to be related with the occasion and necessity for the law stated above. There is an interest in avoiding fraud and apprising the consumer as to the form of agency, else why would the Legislature regulate the industry and provide disclosures at all?¹⁰⁷
- The “object to be attained” is probably best ascertained by looking at the language in the statute. The statute includes licensing requirements, education requirements, sanction provisions, disclosure provisions, contract provisions, commissioner authority is discussed, fees and other money matters are clarified, and advertising amongst other things.¹⁰⁸ All of these provisions, taken together, suggest a purpose of protecting the consumer from fraud, from incompetent agents, and making clear to the consumer that the Legislature is looking out for them in this protected transaction.
- The “former law” demonstrates a trend of limiting disclosure requirements in an apparent attempt to alleviate agents from liabilities concerning those disclosures and thus alleviating the court docket.¹⁰⁹

¹⁰⁶ See generally MINN. STAT. § 82 (2012) (providing for real estate broker regulations and disclosures as to the agency relationship). It may also be fair to say that the Legislature might have been concerned about alleviating court cases concerning the agency relationship when it abrogates the common law disclosure requirement. See *id.* § 82.67, subdiv. 2.

¹⁰⁷ However, there is at least a countervailing argument that the limited disclosure trend suggests an interest in expediting the transaction at the cost of keeping the consumer in the dark.

¹⁰⁸ See generally § 82.67, subdiv. 2.

¹⁰⁹ See *supra* note 106 (and accompanying text).

- The “consequences of a particular interpretation,” the “contemporaneous legislative history” and particularly the “legislative and administrative interpretations” also support the purpose of protecting the consumer in this type of transaction.¹¹⁰

Given the considerations discussed above, it is logical to conclude that the primary overarching purpose of section 82 is to protect the consumer in a residential real estate transaction.

B. Legislative Presumption in Favor of Consumer Protection

However, the list of considerations is not exhaustive,¹¹¹ nor is it in isolation of the various presumptions offered in section 645.17. The presumptions have already been cited.¹¹²

Under section 645.17(1)–(5) the presumptions are listed as follows:

- The Legislature does not intend an “absurd” result, yet it appears absurd that Minnesota law protects the residential real estate transaction but favors a limited disclosure as to the agency relationship that brings about that transaction. It appears absurd that in an effort to make sure that adequate disclosures are given, the law neglects to inform the consumer

¹¹⁰ See generally MINN. R. 2810.3100, subpt. 12(B) (2007) (discussing an agent’s failure to disclose as “unfair”). Indeed, the Minnesota Department of Commerce takes violations of Minnesota Statutes, section 82’s disclosure and technical requirements very seriously. Thomas A. Bridge, 18122/TK OAH No. 2-1005-22200-2 2011 WL 7945991 (Minn. Dep’t Comm. Aug. 19, 2011) (commencing formal action against a licensee for *inter alia* the failure to disclose the agency relationship pursuant to MINN. STAT. § 82.67, subdiv. 3); accord Tara J. Welch, 15228/JEK 2011 WL 7945988 (Minn. Dep’t Comm. Dec. 23, 2011) (commencing formal action against a licensee for failure to obtain a signed listing agreement in violation of MINN. STAT. § 82.66); CLD Enters., LLC, 16869/JEK/GM 2010 WL 3245349 (Minn. Dep’t Comm. July 6, 2010) (commencing formal action against a licensee for fraudulent, deceptive, or dishonest practices giving rise the licensee’s incompetence, untrustworthiness, or financial irresponsibility).

¹¹¹ MINN. STAT. § 645.16 (2012) (noting that the list is not exhaustive given the preceding phrase “among other matters”).

¹¹² See *supra* notes 96–97.

that he or she has both a power and a right to control the agent, including as to the form of the agency *throughout the relationship*.¹¹³

- While the Legislature may intend for “the entire statute to be effective and certain,” that simply is not the case. There is ambiguous language found in section 82.68 subdivision 3,¹¹⁴ which leads to uncertainty. Furthermore, the defined term “licensee” is used to refer to different parties within the definition of dual agency itself.¹¹⁵ In section 82.55 subdivision 6 (1) a “licensee” refers to either a broker or a salesperson, while in (2) the word “licensee” only refers to a salesperson.
- Perhaps most significant, the presumption that “the legislature intends to favor the public interest as against any private interest” is compromised. A fair reading of Minnesota Statutes, section 82 does not favor the public interest *vis-à-vis* any private interest. The limited disclosure form requires only that the form “substantially” follow the statutory scheme gives brokerages room to leave out or include alternate language.¹¹⁶ The definition of a dual agency makes it easier for a brokerage to claim its double commission due to its dual agency-designated agency combination. Under the designated agency situation there is nothing to prevent the buyer’s salesperson and the seller’s salesperson from sharing all information with each other *outside the view of the consumers*.¹¹⁷ The preprinted forms ignore the common law of agency that still applies in

¹¹³ See MINN. STAT. §§ 82.66–.68 (2012) (omitting entirely from the disclosure requirement the concept of principal control over the agent).

¹¹⁴ See *supra* note 75.

¹¹⁵ *Id.* §§ 82.55, subdvs. 6 & 10.

¹¹⁶ See *id.* § 82.67, subdiv. 1.

¹¹⁷ The contractual notice requirement states that information about price, terms and motivation will not be shared, but “[a]ll other information will be shared.” See *id.* § 82.66, subdiv. 9. The

regards to control of the agent. The contractual notice itself is designed to induce a consumer to consent to the dual agency.¹¹⁸ All of these factors demonstrate that the language of the law heavily favors the private brokerages *vis-à-vis* the consumer. Such a condition flies in the face of the overall purposes of the law and is the essence of absurdity.¹¹⁹

Taken together, the presumptions found in Minnesota Statutes, section 645.17(1)–(5) are frustrated by the language found in section 82 as described above. After considering both the presumptions and intent of the Legislature, the primary purpose of section 82 is still to protect the consumer. Yet the statutory language fails the consumer in Minnesota.

C. Minnesota Statutes, Section 82 Purpose Evaded: Discussing Minnesota Law

Even before Minnesota Statutes, section 645 was enacted, the Minnesota Supreme Court has attempted to ascertain the overall purpose behind a piece of legislation—absent ambiguity—to see if the legislative purpose is evaded.¹²⁰ After the enactment of section 645, Minnesota courts have looked to it for guidance on how to interpret legislative purpose, with much to the same effect. The Minnesota Court of Appeals noted that “[w]hen a statute is free

statute does not restrict information from being shared between salespersons outside the view of the consumers. *Id.*

¹¹⁸ *See id.* § 82.66, subdvs. 1(9) & 2(7). The listing agreement language states: “However, if the seller(s) should decide not to agree to a possible dual agency, and the seller(s) want broker to represent the seller(s), the seller(s) may give up the opportunity to sell the property to buyers represented by broker.” Concluding the notice in this fashion induces a seller to agree because no reasonable seller would want to limit his pool of buyers. *Id.*

¹¹⁹ *See infra* Part IV.B.

¹²⁰ *See* Judd v. Landin, 211 Minn. 465, 469–71, 1 N.W. 861, 863–864 (1942). *Judd* instructs that “[i]t is an old and unshaken rule in the construction of statutes * * * that the intention of a remedial statute will always prevail over the literal sense of its terms” *Id.* at 470, 864.

from ambiguity, we look only at its plain language,”¹²¹ and that it is the “[p]lain and unambiguous statutory language [that] manifests legislative intent.”¹²² Conversely, when a statute is ambiguous, the “[court] must determine and give effect to the intent of the legislature.”¹²³ Whether there is ambiguity or not, the court is to construe—if it must at all—the language in the context of the whole chapter.¹²⁴ In an instance where the statute is not ambiguous but deals with a “failure of expression,” the Minnesota Supreme Court has noted “‘courts are not free to substitute amendment for construction and thereby supply the omissions of the legislature.’”¹²⁵—at least in this criminal law context. Yet even in criminal law, the common law is known to aid a court in interpreting and applying criminal statutes.¹²⁶

For instance, in *Genin v. 1996 Mercury Marquis*, the court noted that the relevant statute was “silent as to who bears responsibility for any accrued storage fees.”¹²⁷ The court also noted that in comparing two related statutes, “[w]here one section of a statute contains a particular provision, omission of the same provision from a similar section is significant to show different legislative intent for the two sections.”¹²⁸ Similarly, to suppose that the use of the word

¹²¹ *In re Estate of Nordlund*, 609 N.W.2d 910, 913 (Minn. App. Ct. 1999) (citing MINN. STAT. § 645.16 (1998)).

¹²² *Id.* (citing *Klein Bancorporation, Inc. v. Commissioner of Revenue*, 581 N.W.2d 863, 866 (Minn. App. Ct. 1998)).

¹²³ *Id.* (citing MINN. STAT. § 645.16).

¹²⁴ *Id.* (citing *Minneapolis Police Officers Fed’n v. City of Minneapolis*, 481 N.W.2d 372, 374 (Minn. App. Ct. 1992) (observing that statutes relating to the same issue or having a common purpose should be construed together), *review denied* (Minn. Apr. 6, 1992)).

¹²⁵ *Genin v. 1996 Mercury Marquis*, 622 N.W.2d 114, 117 (Minn. 2001) (citing *State v. Moseng*, 254 Minn. 263, 269, 95 N.W.2d 6, 11–12 (1959)).

¹²⁶ 21 AM. JUR. 2D *Criminal Law* § 10 (2013) (on construction of statutes).

¹²⁷ *Genin*, 622 N.W.2d 114, 117.

¹²⁸ *Id.* at 118 (citing 2A Norman J Singer, *Sutherland Statutory Construction: Statutes and Statutory Construction* § 46.07 (6th ed. 2000)).

“broker,” a defined term in its own right, also means “salesperson,” also a defined term, in the contractual notice required under section 82.66 is not tenable.¹²⁹

However, the Minnesota Supreme Court instructs that it may, under certain circumstances, disregard the unambiguous language of a statute in favor of pursuing the purpose when “the plain meaning utterly confounds a clear legislative purpose.”¹³⁰ It is a rare instance where the court will disregard unambiguous language in favor of serving the purpose of the statute, in fact, the court observed that it only happened once so far,¹³¹ but that was in 1993, before the trend of limiting disclosures to the consumer. The only time such an instance has occurred, was in *Wegner v. Commissioner of Revenue*, where the court held that it was “equally obliged to reject a construction that leads to absurd results or unreasonable results which utterly depart from the purpose of the statute.”¹³² Even though there is a high standard to reach for the court to disregard plain language, that standard can and should be attainable when looking at the language in section 82.

To show an instance where unambiguous language can be disregarded, an evaluation of *Auto Owners Ins. Co. v. Perry* is helpful.¹³³ *Perry* involves a dispute about the definition of the word “dependent” under the Minnesota No-Fault Insurance Act.¹³⁴ *Perry*, the unwed survivor of her partner, sued the insurance company after it denied her claim because she was not a “dependent.” The insurance company argued *Perry* was not entitled to payment under

¹²⁹ See *infra* notes 142–46.

¹³⁰ *Weston v. McWilliams & Assocs.*, 716 N.W.2d 634, 639 (Minn. 2006) (quoting *Mut. Serv. Cas. Ins. Co. v. League of Minn. Cities*, 659 N.W.2d 755, 760 (Minn. 2003)).

¹³¹ See *Schatz v. Interfaith Care Ctr.*, 811 N.W.2d 643, 651–52 (Minn. 2012).

¹³² 505 N.W.2d 612, 617 (Minn. 1993).

¹³³ 749 N.W.2d 324 (Minn. 2008).

¹³⁴ *Id.* at 325.

the policy because she was not a surviving spouse or child—a requirement to qualify as a “surviving dependent.”¹³⁵ Perry contended that a phrase in the policy that stated “[q]uestions of the existence and the extent of dependency shall be questions of fact” meant that there is a “class of provable dependents . . . other than surviving spouses”¹³⁶ Ultimately, the court found the language of the statute unambiguous,¹³⁷ and found for the insurance company.¹³⁸ In reaching that conclusion, the court noted that the purpose behind the act was, “*inter alia*, ‘to relieve the severe economic distress of uncompensated victims to automobile accidents within this state, to speed administration of justice, and to ease the burden of litigation on the courts.’”¹³⁹ In *Perry*, the court had the luxury of a purpose statement in the Act itself.¹⁴⁰

Perry is instructive because it illustrates reasoning for the opposite result when discussing the dual agency notice found in a listing or buyer’s agreement with a broker. Both situations involve a contract. Both instances involve words that are not, by themselves, ambiguous.¹⁴¹ However, the language in the notice of a dual agency for the contract with a real estate broker does utterly conflict with the purpose of section 82, giving rise to an absurd result the Legislature could not have intended—namely, misleading the consumer.

¹³⁵ *Id.*

¹³⁶ *Id.* at 326.

¹³⁷ *Id.* at 327.

¹³⁸ *Id.* at 329. (finding that the language was unambiguous, and that Perry was not entitled to her partner’s survivor’s economic loss benefit under the Minnesota No-Fault Insurance Act).

¹³⁹ *Id.* at 328–29. (citing to MINN. STAT. § 65B.42 (2006), which is the purpose statement for the Act).

¹⁴⁰ MINN. STAT. § 65B. 42 (2006).

¹⁴¹ At least the majority of section 82 is not ambiguous on its face.

The dual agency notice—as written—for a listing agreement or buyer’s agreement only pertains to a dual agency in which the broker is the agent.¹⁴² This matters because the agency relationship, as defined in section 82.55 subdivision 6, is *not* as to the brokerage firm, *but is only* as to the particular licensee.¹⁴³ A “licensee” is clearly defined as a “person,” not a firm.¹⁴⁴ Furthermore, the word “broker” is defined also as a “person,” not a firm.¹⁴⁵ As mentioned before, the word “licensee” does *not* have the same meaning throughout the definition of a dual agency.¹⁴⁶ If the Legislature intended to mean that a dual agency arises where a person with a broker’s license represents both the buyer and the seller in the same transaction *and* where two or more salespersons licensed to the same broker (one representing the seller and the other representing the buyer) then the notice required in the listing and buyer’s agreements are absurd on their face. They are absurd on their face because they exclude the second circumstance in which a dual agency arises by omitting salespersons altogether. This absurdity results in a misleading notice that is used to secure the consumers informed consent to the dual agency. Furthermore, it is well settled law that an agent cannot delegate to its subagents more authority than what the agent has.¹⁴⁷ Yet, under the second prong of the dual agency definition, a

¹⁴² See MINN. STAT. § 82.66, subdivs. 1 (9), 2 (7) (2012) (using the word “broker,” while omitting the word “salesperson.”).

¹⁴³ See *id.* § 82.55, subdiv. 6. Although a brokerage may make a business decision to create the agency relationship as to the brokerage firm in its written agreement—that is not how the statute reads.

¹⁴⁴ See *id.* § 82.55, subdiv. 10.

¹⁴⁵ See *id.* § 82.55, subdiv. 19. Similarly, the word “salesperson” is defined and refers to a natural person only. See *id.* § 82.55, subdiv. 20.

¹⁴⁶ See MINN. STAT. § 82.55, subdiv. 6 (2012). Compare *id.* § 82.55, subdiv. 6(1) (using the word “licensee” to mean a person with a broker’s license and/or a salesperson), with *id.* § 82.55, subdiv. 6(2) (using the word “licensee” to refer exclusively to a salesperson).

¹⁴⁷ See *Morrison v. Swenson*, 142 N.W.2d 640, 641 (Minn. 1966) (noting that subagents may bind the principal to the *same* extent as the agent), *superseded on other grounds* *Graff v. Robert*

salesperson is purported to have the added authority to negotiate on behalf of a consumer, while the broker-dual agent never had that authority to begin with.

Just as the *Perry* court observed, “[i]t would be anomalous for the legislature to create a broad class of provable dependents and then fail to delineate a standard by which payments to members of that class terminate.”¹⁴⁸ So too would it be anomalous for the legislature to create a broad definition of a dual agency in the definition section and then limit the scope of the dual agency to persons with a broker’s license in the contractual notice required to be included and used to evidence informed consent to the dual agency. Yet that is precisely what the language does, unfortunately, the omissions and absurdities do not stop there.

The Minnesota Legislature requires that every listing agreement or buyers agreement with a broker contain a dual agency notice,¹⁴⁹ in addition to the agency disclosure form at the first substantive contact with the consumer.¹⁵⁰ Both notices for the listing agreement and the buyer’s agreement are substantially the same—the listing agreement notice reads as follows:

If a buyer represented by broker wishes to buy the seller’s property, a dual agency will be created. This means that broker will represent both the seller(s) and the buyer(s), and owe the same duties to the buyer(s) that broker owes to the seller(s). This conflict of interest will prohibit broker from advocating exclusively on the seller’s behalf. Dual agency will limit the level of representation broker can provide. If a dual agency should arise, the seller(s) will need to agree that confidential information about price, terms, and motivation will still be kept confidential unless the seller(s) instruct broker in writing to disclose specific

M. Swendra Agency, Inc., 800 N.W.2d 112 (Minn. 2011). In fact, generally when a fiduciary agent delegates authority that he does not have to a subagent and the subagent acts beyond the scope of the agent’s authority, the subagent could be susceptible to liability. RESTATEMENT (SECOND) OF AGENCY § 18 cmt. d (1958).

¹⁴⁸ Auto Owners Ins. Co. v. Perry, 749 N.W.2d 324, 327 (Minn. 2008).

¹⁴⁹ MINN. STAT. § 82.66, subdiv. 1 (b) (9), subdiv. 2 (b) (7) (2012).

¹⁵⁰ *Id.* § 82.67, subdiv. 3.

information about the seller(s). All other information will be shared. Broker cannot act as a dual agent unless both the seller(s) and the buyer(s) agree to it. By agreeing to a possible dual agency, the seller(s) will be giving up the right to exclusive representation in an in-house transaction. However, if the seller(s) should decide not to agree to a possible dual agency, and the seller(s) want broker to represent the seller(s), the seller(s) may give up the opportunity to sell the property to buyers [sic] represented by broker.

Seller's Instructions to Broker

Having read and understood this information about dual agency, seller(s) now instructs broker as follows:

Seller(s) will agree

Seller(s) will not agree

[signature block omitted]¹⁵¹

The mandatory notice in the listing agreement is hypothetical and indefinite. It does not guarantee that a dual agency will arise, it only provides that it may arise. In fact, the way it is worded it apparently automatically arises and without indicating any need for further notice or approval.¹⁵² Furthermore, when such a notice is imbedded in the middle of an entire contract it gives the appearance of absolute enforceability. This results in a situation where that the average consumer will likely think that if a dual agency actually arises, the consumer can do nothing about it without breaching the entire agreement.

As mentioned above, one of the hallmarks of the agency relationship is the principal's control over the agent.¹⁵³ Control is needed to form the agency relationship in the first instance,¹⁵⁴ yet control does not end there.¹⁵⁵ There is also a right of continued control

¹⁵¹ *Id.* § 82.66, subdiv. 1(b)(9).

¹⁵² Although the purchase agreement will also contain an agency notice.

¹⁵³ *See supra* Part II.A.

¹⁵⁴ *Id.*

¹⁵⁵ *See supra* Part IV.B. (discussing continued control in terms of power and right).

throughout the agency relationship.¹⁵⁶ However, since real estate transactions require that the agency agreement be put in writing,¹⁵⁷ there is a contractual overlay imposed on the agency relationship that governs the agency. While this contract will govern the *rights* that are applicable to the principal-agent relationship, the contract does not restrict the *powers* of control the principal has over the agent.¹⁵⁸ In the typical dispute the issue will be whether or not the principal has the right to discontinue the agency relationship. In the context of a real estate broker acting as a dual agent, the dispute should not rest on whether the agency should be discontinued, but modified from a dual agency to a single agency at the option of the principal—even after executing a listing agreement or buyer’s agreement with the broker.

In the introductory note to the Second Restatement of Agency, the drafters contemplated the principal’s power to modify the agency relationship. In discussing actual and apparent authority and distinguishing agency from contract law, “there may be an implicit modification if the changes are such that the agent should know the principal would not wish him to act, or [act] with some modifications.”¹⁵⁹ Furthermore, upon the principal’s notice to the agent, that “he should infer that the principal does not wish him to act as originally specified, the agent’s authority is . . . modified accordingly.”¹⁶⁰ In a modification as to the form of agency, an agent is not entitled to damages arising from such modification because the principal is not terminating the agreement, only modifying the manner in which the agent achieves the purpose

¹⁵⁶ RESTATEMENT (SECOND) OF AGENCY § 14, cmt. a (1958).

¹⁵⁷ See MINN. STAT. § 82.66 (2012).

¹⁵⁸ *Infra* note 170.

¹⁵⁹ RESTATEMENT (SECOND) OF AGENCY Intro. Note (1958).

¹⁶⁰ *Id.* § 14, cmt. a.

of the agency.¹⁶¹ In fact, an agent “cannot recover damages for losses which, in the exercise of due diligence, he could have avoided.”¹⁶² An agent is entitled to no compensation whatsoever for “conduct which is disobedient . . . if such conduct constitutes a willful and deliberate breach of his contract of service”¹⁶³ As stated before, the statutory disclosure requirements go to the informed consent and the actual formation of the agency relationship,¹⁶⁴ nothing more. The statute does not purport to abrogate the common law rule of continued control of the principal over his agent.¹⁶⁵ If there is a dual agency and the principal initially consents to that form of agency, then the principal’s control over the agent is limited by contract; however, that does not mean that the principal is not free to change the form of the agency from a dual agency to a single agency at the discretion of the principal during the course of the agency relationship, without breaching the contract, before closing.

Not surprisingly, there are few cases in Minnesota that deal with a principal’s modification as to the form of the agency after the execution of a contract forming the

¹⁶¹ In an instance where changing the form of agency results in a breach of the contract, the consumer should be shielded from liability by statute pre-closing. This makes sense because the broker can continue to represent the consumer(s) on both sides of the transaction even after the change in the form of agency and even though one consumer’s election to alter the agency impacts the other party under a dual agency. The fact that a broker may have his commission reduced should not impede the consumer’s right to control his broker. In any event, under the current law in Minnesota, a brokerage firm that has salespersons would not lose out on the double commission because the firm, if it elects to create the agency as to the firm, may then designate a salesperson to represent the seller and another salesperson to represent the buyer. *See generally* MINN. STAT. § 82.55, subdiv. 6 (2012).

¹⁶² RESTATEMENT (SECOND) OF AGENCY § 455 cmt. d (1958) (discussing avoidable damages); *see also* RESTATEMENT (FIRST) OF CONTRACTS § 336 (1932) (citing the same standard).

¹⁶³ RESTATEMENT (SECOND) OF AGENCY § 469 (1958).

¹⁶⁴ *See supra* Part III.C; MINN. STAT. § 82.67, subdiv. 2 (2012) (abrogating only the common law disclosure requirement).

¹⁶⁵ § 82.67, subdiv. 2.

relationship. However, one Minnesota Supreme Court case is illustrative of the general rule regarding a unilateral modification of a listing agreement. In *Klawitter v. Billick*, the principal unilaterally modified an exclusive listing agreement changing the price of the land and the agent's authority to sell the land, under the modified agreement, which was extended by thirty days.¹⁶⁶ In determining whether or not the principal has the *right* to modify the listing agreement, the Minnesota Supreme Court observed that first, "a broker's expenditures of time or money to find a purchaser is sufficient consideration for the promise to pay a commission and makes the agreement bilateral and binding,"¹⁶⁷ and secondly, "[s]ince the listing agreement was an enforceable bilateral contract, it follows that the [principal] did not have a unilateral right to modify *its terms*."¹⁶⁸ However, where there is only an "executory agreement" the principal may unilaterally modify the agreement without fear of any liability.¹⁶⁹ The court takes special care to distinguish between a principal's *right* to alter an agreement with his broker with the *power* to do so.¹⁷⁰ The power is absolute as a matter of agency law. The right to do so is a function of the agreement's terms or other applicable law.¹⁷¹ In *Klawitter*, the principal did not have the *right* to alter the listing agreement and was therefore held liable to the agent for any entitled damages,¹⁷² although the principal did have the *power* to alter the listing agreement and therefore the agent

¹⁶⁶ 308 Minn. 325, 331, 242 N.W.2d 588, 593 (1976).

¹⁶⁷ *Id.* at 330, 592.

¹⁶⁸ *Id.* (emphasis added).

¹⁶⁹ *Id.* An executory contract is defined as one that will be performed in the future. BLACK'S LAW DICTIONARY 369 (9th ed. 2009); *but see* 12 AM. JUR. 2D *Brokers* § 62 (2013) (noting that where there is sufficient reciprocity of consideration the principal cannot unilaterally alter the agreement without added consideration moving to the adversely affected party).

¹⁷⁰ *Klawitter v. Billick*, 308 Minn. 325, 331, 242 N.W.2d 588, 593 (1976).

¹⁷¹ *Id.*

¹⁷² *Id.*

was bound to act only as provided by the modified agreement.¹⁷³ But that is not the end of the story, as the Minnesota Supreme Court noted:

In some circumstances a principal may escape liability for his unilateral modification or renunciation of a listing agreement [beyond the executory contract exception] if his action was not ‘arbitrary’ or in ‘bad faith’—e.g., for the purpose of depriving the broker of his commission—but, rather, is based on a ‘reasonable cause.’¹⁷⁴

While a principal changing his mind as to whether or not to sell a property is not reasonable cause,¹⁷⁵ a principal changing his mind as to the *form* of agency relationship with his real estate agent, before closing, should be as a matter of law. The principal that initially consents to a dual agency, for whatever reason, may soon find that negotiations with the other side have stalled. If the principal is bound to the dual agency, he has no one to advocate for him.¹⁷⁶ Given the nature of the transaction, a principal should not be shackled to a form of agency that encourages direct negotiation with the other side against the principal’s better judgment.¹⁷⁷ Furthermore, a principal should be apprised of that reality in the statutorily required disclosure form and notice. This makes sense because the statutory requirements governing the real estate broker’s relationship with clients is “subject to the general rules governing the

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 331–32, 593.

¹⁷⁵ *Id.* at 332, 593.

¹⁷⁶ *See* MINN. STAT. § 82.67, subdiv. 4 (2012).

¹⁷⁷ A residential real estate transaction can be filled with high emotions and expectations that can turn a once blissful experience into a nightmare. Consumers understand what is at stake and the importance of a competent advocate. Such a change in attitudes between seller and buyer and a desire to be represented exclusively coupled with a broker’s inability to do so should be considered a material change in circumstances. This material change in circumstances warrants rescission of the principal’s consent to the dual agency form. Such a rescission is in keeping with Ohio’s statute that permits rescission to a dual agency form when there is a material change in information. *See infra* Part V.

principal agent relationship” upon the execution of a listing agreement.¹⁷⁸ This conclusion is also supportable in that “[w]here a broker claims the seller has prevented his performance, [the broker] must show that the seller has deprived [the broker] of the opportunity to procure a purchaser”¹⁷⁹ The result that this article proposes, does not prevent a broker from procuring a purchaser and earning his commission, only the manner in which the broker serves his client to that end.

Excluding a statement from the agency notice and disclosure that addresses the consumer’s right and power to alter the form of agency during the representation flies in the face of the statutory purpose to protect the consumer. Part of protecting a consumer is the appraisal of vital rights and privileges surrounding the transaction. The omission is not excusable, nor should it be left to the average consumer to discover which agency principles persist and which have been abrogated.

V. PULSE OF THE NATION: HOW OTHER STATES VIEW THE RISKY DUAL AND DESIGNATED AGENCY RELATIONSHIP IN RESIDENTIAL REALTY TRANSACTIONS

Looking at the statutes of all fifty states that govern the agency relationship in a realty transaction, there is a sense of how risky the various jurisdictions view dual and designated agencies. Omitting other forms of agency the various states provide, such as single or facilitator relationships, eleven states currently provide for a “dual agency” only,¹⁸⁰ four states provide only

¹⁷⁸ White v. Boucher, 322 N.W.2d 560, 564 (1982).

¹⁷⁹ Century 21-Birdsell Realty, Inc. v. Hiebel, 379 N.W.2d 201, 203 (Minn. Ct. App. 1985).

¹⁸⁰ States that provide only for a dual agency include:

Alabama. ALA. CODE § 34-27-82(a) (current through the end of the 2013 Reg. Sess.).

Arizona. Manley v. Ticor Title Ins. Co., 816 P.2d 225, 229–30 (Ariz. 1991) (Permitting dual agency and observing that it is not by itself equivalent of acting adversely).

Arkansas. ARK. CODE ANN. § 17-42-316(b)(2)(G) (West, current through the end of the 2013 Reg. Sess.).

California. CAL. CIV. CODE § 2079.13(d) (West, current through the 2013 Reg. Sess.) (defining “dual agent”); CAL. CIV. CODE § 2079.16 (West, current through the 2013 Reg. Sess.) (providing for dual agency disclosure requirement).

Hawaii. HAW. CODE R. § 16-99-3.1(g) (current through the Haw. Admin. R. Listing of Filings Sept. 2013) (requiring consent and written disclosure regarding the dual agency).

Minnesota. MINN. STAT. § 82.55, subdiv. 6 (2012) (defining “dual agency”).

Mississippi. MISS. CODE ANN. § 89-1-519 (West, current through the end of the 2013 Reg. Sess.) (permitting dual representation when it is done by agreement). *See also* Palmer v. Pittman, 90 So. 3d 84, 87 (Miss. Ct. App. 2011) (observing same standard).

New Jersey. N.J. STAT. ANN. § 45:15-17(b) (West, current with laws effective through 2013). *See also* Coldwell Banker Commercial Real Estate Servs. v. Wilson, 700 F.Supp. 1340, 1346 (D. N.J. 1988) (observing that dual representation need be cured with consent).

Ohio. OHIO REV. CODE ANN. §§ 4735.70 & 4735.71(A) (West, current through 2013).

Utah. UTAH ADMIN. CODE r. 162-2f-401a(3) & (4) (2013) (providing for a substantive dual agency under the title “limited agent”).

West Virginia. W. VA. CODE ANN. § 30-40-26(d) (West, current with the laws of the 2013 First Extraordinary Sess.).

for a “designated agency,”¹⁸¹ thirty-one states provide for both,¹⁸² while four states do not permit either.¹⁸³ At first glance, it appears that very few, only four, really are adverse to the dual agency

¹⁸¹ The states that provide only for a designated agency include:

Alaska. Alaska provides for a “neutral licensee” to get around the problems of the dual agency relationship. ALASKA STAT. ANN. § 08.88.600(b)–(c) (West, current through the 2013 1st Reg. Sess.). However, the state also provides expressly for a designated agency. *Id.* § 08.88.600(d).

Colorado. COLO. REV. STAT. ANN. § 12-61-803(6)(c) (West, current through the First Reg. Sess. (2013)), *but see id.* § 12-61-803(6)(d) (permitting one broker to be designated to “work for both” parties to the transaction as a “transaction-broker”).

Kansas. Defines designated agency. KAN. STAT. ANN. § 58-30,102(k) (West, current through 2013). Kansas also expressly permits designated agency. *Id.* § 58-30,109(b)(1).

Wyoming. Provides a definition for a “designated licensee” (but not a dual agent). WYO. STAT. ANN. § 33-28-102(vx) (West, current through the 2013 Gen. Sess.). The state also provides expressly for a designated agency. *Id.* § 33-28-302(h).

¹⁸² The states that provide for both a dual agency and a designated agency include:

Connecticut. CONN. GEN. STAT. ANN. § 20-325g (West, current with Pub. Acts of the 2013 Jan. Reg. Sess.) (providing for dual agency); *id.* § 20-325i (providing for designated agency).

Delaware. DEL. CODE ANN. tit. 24, § 2936(a) & (e)(9) (West, current through 79 Laws 2013) (providing for designated and dual agency respectively).

Georgia. GA. CODE ANN. § 10-6A-12 (West, current through the end of the 2013 Reg. Sess.) (providing for dual agency); *id.* 10-6A-13(a) (providing for designated agency).

Idaho. IDAHO CODE ANN. § 54-2084(2)(c)–(d) (West, current through 2013).

Illinois. 225 ILL. COMP. STAT. ANN. 454/15-50 (West, current through P.A. 98-450 of the 2013 Reg. Sess.) (providing for designated agency); *id.* 454/15-45 (providing for dual agency).

Indiana. IND. CODE ANN. § 25-34.1-10-12 (West current through 2013) (providing for a dual agency under the term “limited agent”); *id.* § 25-34.1-10.6.5 (providing for a designated agency under the term “in house agency relationship”).

Iowa. IOWA CODE ANN. § 543B.59(1)–(2) (West, current with legislation from the 2013 Reg. Sess.).

Kentucky. KY. REV. STAT. ANN. § 324.121 (West, current through the end of the 2013 reg. sess.) (providing for both dual and designated agency).

Louisiana. LA. REV. STAT. ANN. § 9:3897 (West, current through 2013) (providing for dual agency); *id.* § 9:3892 (providing for designated agency).

Maine. ME. REV. STAT. ANN. tit. 32, §§ 13275(1) & 13278(1) (current through the 2013 First Reg. Sess.). (providing for dual and designated agency respectively).

Maryland. MD. CODE ANN., BUS. OCC. & PROF. § 17-530(a)(4)–(5) & (c)–(d) (West, current through the 2013 Reg. Sess.) (providing for dual and designated agency); *id.* § 17-546(a) (identifying designated agents as “intracompany agents”).

Massachusetts. MASS. GEN. LAWS ANN. ch. 112, § 87AAA3/4(b) & (c) (West, current through 2013 of the 1st Annual Sess.) (providing for dual and designated agency respectively).

Michigan. Provides for dual agency and affiliated licensees. MICH. COMP. LAWS ANN. § 339.2517 (West, current through P.A.2013 of the 2013 Reg. Sess.) (disclosure requirement).

Missouri. MO. ANN. STAT. § 339.750(1) (West, current through the end of 2013 First Reg. Sess.) (providing for dual agency); *id.* § 339.780 (providing for designated agency).

Montana. MONT. CODE ANN. § 37-51-102(10), (12) & (13) (West, current through July 1, 2013) (defining dual agency and designated agency relationships with buyer and seller).

Nebraska. NEB. REV. STAT. ANN. § 76-2419 (West, current through the Second Reg. Sess. (2012)) (permitting dual agency); *id.* § 76-2420 (permitting designated agents).

Nevada. Requires that the agent get the consent of all parties to the transaction for a dual agency. NEV. REV. STAT. ANN. § 645.252(1)(d) (West, current through the 2011 Reg. Sess.). Nevada also permits a designated agency—but without a consent requirement. *Id.* § 645.253.

New Hampshire. N.H. REV. STAT. ANN. §§ 331-A:25-d(I) & 331-A:25-e(I) (current through the 2013 Reg. Sess.) (providing for dual and designated agency respectively).

New Mexico. Permits a variety of agency relationships, including but not limited to designated and dual agency. N.M. CODE R. § 16.61.19.9 (2013). The state also outlines the dual agency relationship in the same statute. *Id.* § 16.61.19.10.

New York. N.Y. REAL PROP. LAW § 443(1)(i) & (j) (McKinney, current through L.2013) (providing definitions and disclosure form).

North Carolina. 21 N.C. ADMIN. CODE 58A.0104(d) & (j) (2013) (providing for dual and designated agency respectively).

North Dakota. N.D. CENT. CODE ANN. § 43-23-12.3(1)–(3) (West, current through the 2013 Reg. Sess.) (providing for both dual and designated agency).

Oregon. Provides for both dual and designated agency as dual representation. OR. REV. STAT. ANN. § 696.815 (West, current through the 2013 Reg. Sess.).

Pennsylvania. 63 PA. CONS. STAT. § 455.606 (current through the 2013 Reg. Sess.).

Rhode Island. R.I. GEN. LAWS ANN. §§ 5-20.5-6 & 5-20.5-14(7) (West, current through the 2013 Reg. Sess.). *See also* RHODE ISLAND MANDATORY REAL ESTATE RELATIONSHIP DISCLOSURE FORM (providing for designated agency and a “Dual Neutral Facilitator”), *available at* http://www.dbr.state.ri.us/documents/divisions/commlicensing/realestate/RE-Disclosure_Form.pdf.

South Carolina. S.C. CODE ANN. § 40-57-137(A)(3) & (P)(1) (West, current through the end of 2012 Reg. Sess.) (providing for dual and designated agency respectively).

South Dakota. S.D. CODIFIED LAWS § 36-21A-141.1 (2013) (describing both dual and designated agency in terms of a limited agent and appointed licensee respectively).

Tennessee. TENN. CODE ANN. § 62-13-402 (West, current through the end of the 2013 First reg. Sess.) (providing for a dual agency termed as “limited agency”); *id.* § 62-13-406 (permitting designated agency).

Virginia. VA. CODE ANN. § 54.1-2139(A) (West, current through the end of the 2013 Reg. Sess. and end of the 2013 Sp. Sess. I) (providing for dual agency); *id.* § 54.1-2139.1(A) (providing for designated agency).

Washington. WASH. REV. CODE ANN. § 18.86.020(1)(c) & (2) (West, current through 2013) (providing for both dual and designated agency).

Wisconsin. WIS. STAT. ANN. § 452.134(2)–(3) (West, current through 2013).

¹⁸³ The states that do not permit either dual agency or designated agency include:

Florida. Florida provides only for a single agency or a transaction broker relationship. FLA. STAT. ANN. § 475.278(1) & (2) (West, current through the end of the 2013 1st Reg. Sess.) Note that a dual or designated agent actually has some limited fiduciary duties to the principal, while in Florida, the transactional broker does not represent a principal as a fiduciary.

Oklahoma. Oklahoma provides for either a single agency or a transactional brokerage relationship. OKLA. STAT. ANN. tit. 59, § 858-352 (West, current through the First Reg. Sess. 2013). While a cursory look at Oklahoma law might initially look like a brokerage can represent both parties to the transaction—that is not true. The brokerage has duties to both parties to the transaction and may provide “brokerage services” to both parties to the transaction. Act effective Nov. 1, 2013 ch. 240, §§ 3 & 4 2013 Okla. Sess. Serv. 1245 (West) (codified as amended at OKLA. STAT. ANN. tit. 59, §§ 858-353 & 858-355.1 (2013)). “Brokerage services” are defined by the statute and do not include the establishment of the agency relationship. *Id.* § 2, 2013 Okla. Sess. Law Serv. 1245 (codified as amended at OKLA. STAT. ANN. tit. 59, § 858-351 (2013)). A transaction broker essentially acts only to facilitate the mechanics of the transaction and ensure the statutory disclosure requirements are complied with. *Id.* §§ 2 & 3, 2013 Okla. Sess. Law Serv. 1245 (codified as amended at OKLA. STAT. ANN. tit. 59, §§ 858-351 & 858-353 (2013)). *Cf.* OKLA. STAT. ANN. tit. 59, § 858-359 (West, current through the First Reg. Sess. of 2013) (noting that not even a promise to pay the broker is indicative of an agency formation).

Texas. TEX. OCC. CODE ANN. § 1101.558 (West, current through the end of the 2013 Third Called Sess.) (providing for a single agency, sub agency, and intermediary only) *see also id.* § 1101.652(b)(16) (providing that the commissioner may discipline a broker or salesperson for acting in a dual capacity and undisclosed principal).

Vermont. Vermont is rather unique. It prohibits outright dual agency, yet it will permit the dual agency—renamed as a “limited agency”—only in circumstances where the firm already represents both parties in *separate* transactions and then the principals decide to be involved in the *same* transaction. 20-4 VT. CODE R. § 1800(4.4) (current through Sept. 2013) (cited on Westlaw as VT. ADMIN. CODE § 20-4-1800:4).

or designated agency concepts. The difference between the Minnesota dual agency statute and those of many other states, is that the statutes found elsewhere tend to be better written. Looking across the nation, there are statutes that do abrogate all of the common law of agency, there are more robust disclosure requirements, and some protective measures are put in place where information is not shared between salespersons.¹⁸⁴ Minnesota is lagging behind. If Minnesota is to permit dual agency at all, the time has come for Minnesota to do it well—insomuch as that is even possible.

Texas, for example, finds that the purpose behind its Real Estate License Act “is to eliminate or reduce fraud that might be occasioned on the public by unlicensed, unscrupulous, or unqualified persons.”¹⁸⁵ In addition to protecting the public from fraud, Texas views the purpose of its Act is “to guarantee fidelity and honesty of the real estate salesman in his dealings with the public and to insure and indemnify any member of the public against damages or injuries caused by a violation of this Act.”¹⁸⁶ In short, the purpose is to protect the consumer and public—just like Minnesota’s law.¹⁸⁷ One interesting tool that Texas uses is a committee of brokers and lawyers that “drafts and revise[s] contract forms” in order to “expedite real estate transactions and minimize controversy.”¹⁸⁸ Additionally, the committee is instructed that any “[c]ontract forms must contain safeguards adequate to protect the principals in the

¹⁸⁴ See generally *supra* notes 180 & 183.

¹⁸⁵ *Henry S. Miller Co. v. Treo Enters.*, 585 S.W.2d 674, 675–76 (Tex. 1979) (referring to the then Real Estate Licensing Act). The current Act is under TEX. OCC. CODE ANN. § 1101.001 (West, current through the end of the 2013 Third Called Sess.).

¹⁸⁶ *State v. Pace*, 640 S.W.2d 432, 433 (Tex. App. 1982).

¹⁸⁷ See *supra* Part IV.A. (discussing the purpose of MINN. STAT. § 82 (2012)).

¹⁸⁸ TEX. OCC. CODE ANN. § 1101.254(a) (West, current through the end of the 2013 Third Called Sess.).

transaction.”¹⁸⁹ Granted, Texas does not permit either a dual or designated agency like most other states, yet if there was such a committee in Minnesota that could create and edit standard forms that protected the consumer, the legislative purpose of Minnesota Statutes, section 82 might be better served.

Ohio is a state that permits dual agency, just like Minnesota. Under Ohio law, there is a more robust definition of a dual agent.¹⁹⁰ Furthermore, Ohio recognizes the inherent riskiness of the conflict and deals with it by requiring for not only an amplified disclosure, but providing for the common law principal of continued control as to the form of the agency. Ohio law requires the consumer to have “full knowledge of the dual representation” followed by “consent in writing.”¹⁹¹ However, before that consent can be given the statute requires the agent must disclose “all relevant information necessary to enable each party to make an informed decision” about whether or not to enter the dual agency relationship.¹⁹² The law also requires, after consent to the dual agency is given, if a “material change in the information” occurs, it must be disclosed and the consumer is given a chance to “revoke consent.”¹⁹³ Furthermore, in the case of dual agency, where a licensee discovers confidential information about another client of the brokerage, the licensee is prohibited from disclosing it or using that information to aid the licensee’s own client.¹⁹⁴ That is in stark contrast to Minnesota’s rule which prohibits confidential information from being disclosed, but says nothing about whether or not the licensee can use it

¹⁸⁹ *Id.* § 1101.254(b).

¹⁹⁰ Compare OHIO REV. CODE ANN. § 4735.70 (West, current through 2013), with MINN. STAT. § 82.55, subdiv. 6 (2012).

¹⁹¹ OHIO REV. CODE ANN. § 4735.71(A) (West, current through 2013).

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.* § 4735.72(E)(3).

once discovered.¹⁹⁵ When looking at the disclosure requirements of Ohio and Minnesota, there is little comparison. Ohio provides much greater protections than Minnesota even though they both provide for dual agency.

A final example comes from Delaware, where the law provides that the statutory agency relationship is only a default rule. If the parties agree, the common law can govern the agency relationship.¹⁹⁶ Delaware law appropriately recognizes that a consumer might understand the risks and opt out of the statutory default in favor of greater protections. Minnesota law, in contrast, shackles the consumer to its statutory scheme in a “state-knows-best manner.”¹⁹⁷

Another useful Delaware provision is a disclaimer of the common law principle of imputed knowledge in an agency relationship.¹⁹⁸ Minnesota’s statute does not disclaim imputed knowledge.¹⁹⁹ At best, Minnesota law remains unsettled as to this type of imputation.²⁰⁰

¹⁹⁵ See MINN. STAT. §§ 82.66–67 (2012) (providing that the licensee cannot disclose confidential information regarding price, motivation, and terms but the statute says nothing about using that information *without* disclosing). Arguing that such a requirement is implied is unpersuasive. The legislature is presumed to not make mistakes in drafting and that which is omitted is done so on purpose. See *supra* note 69 (doctrine of *expressio unius est exclusio alterius*).

¹⁹⁶ The law in Delaware states that “[u]nless specifically hired as a common law agent by a written brokerage agreement, a licensee is a statutory agent” DEL. CODE ANN. tit. 24, § 2936(a) (West, current through 2013).

¹⁹⁷ Minnesota Statutes, section 82 is not a default rule, it is compulsory. See *generally* MINN. STAT. § 82 (2012).

¹⁹⁸ Imputed knowledge is knowledge “attributed” to a person, particularly due to that person’s legal responsibilities for another’s conduct, such as an agent. See BLACK’S LAW DICTIONARY 951 (9th ed. 2009). Delaware disclaims imputed knowledge. DEL. CODE ANN. tit. 24, § 2936(f) (West, current through 2013).

¹⁹⁹ *But see* White v. Boucher, 322 N.W.2d 560,563 (Minn. 1982) (noting that the agent did not disclose information to the principal and treated the non-disclosure as not being imputed to the principal, yet the court did not reach the issue of imputation). However, in the context of seller disclosure requirements, there is still imputation of knowledge. MINN. STAT. § 513.55, subdiv. 2 (2012).

²⁰⁰ See *supra* note 198 (and accompanying text).

VI. THE ATTORNEY-BROKER: DUAL AGENCY JUST GOT COMPLICATED

A. *Minnesota and the Attorney-Broker*

Normally, the consumer thinks of a real estate broker as one who is *licensed* as a real estate broker. However, that is not always the case. Most states, including Minnesota, provide for a licensing exception for attorneys. “The right of an attorney to participate in real estate transactions is predominately governed by state real state licensing statutes.”²⁰¹ In the case of Minnesota, that is Minnesota Statutes, section 82.56 (a).²⁰² Minnesota permits the attorney to act as a broker with the requirement that the funds be segregated in a trust account separate from the law practice’s funds.²⁰³ No law absolutely prevents an attorney from engaging in a dual agency in a real estate transaction in Minnesota. However, engaging in duplicative representation implicates the Minnesota Rules of Professional Conduct (“MRPC”).

The problem with an attorney acting in a dual agency capacity is that, for example, “[a]s a seller’s broker . . . the attorney would owe [a] duty to the buyer to disclose known defects in a home sale, a disclosure quite inconsistent with [an] attorney’s duty to preserve client confidences.”²⁰⁴ The MRPC recognizes that there are instances where conflicts arise in the course of representation, but the rules cannot provide for every eventuality. When more unusual conflicts come about, these “issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the

²⁰¹ J.P. Sawyer, *When does an Attorney need a Real Estate License?*, 17 J. LEGAL PROF. 329, 331 (1992).

²⁰² MINN. STAT. § 82.56 (a) (2012) (providing an exception to the licensing requirement for licensed attorneys who comply with the trust account provisions of under MINN. STAT. § 82.75).

²⁰³ *See id.* §§ 82.56(a) & 82.75.

²⁰⁴ George Lefcoe, REAL ESTATE TRANSACTIONS, FINANCE, AND DEVELOPMENT, 38 (6th ed. 2009).

rules.²⁰⁵ When an attorney acts as a real estate broker, particularly when the attorney engages in dual agency, a number of MRPC rules are potentially implicated.²⁰⁶ The lawyer may even be subject to a claim of malpractice if the conflict is not cured and an injury was caused by the conflict.²⁰⁷

The Lawyers Professional Responsibility Board issued an opinion regarding malpractice and a concurrent conflict of interest.²⁰⁸ When a lawyer also acts as a broker it is clear that the attorney broker assumes an interest in the transaction similar to that of a contingency fee. In a contingency fee situation, the attorney acquires an interest in the outcome of a client's case and receives a percentage of any sum recovered.²⁰⁹ Similarly, when an attorney acts as a broker, the attorney gains a commission in the form of a percentage. This correlation alone demonstrates that the lawyer-broker should, at a minimum, follow the same procedures for establishing a contingency fee as establishing a commission.²¹⁰ The contingency fee provisions in the MRPC

²⁰⁵ MINN. RULES OF PROF'L CONDUCT PMBL. ¶ 9 (2005) (with amendments through July 1, 2011).

²⁰⁶ The MRPC rules that may be implicated likely include: rule 1.5 regarding fees; rule 1.6 regarding confidentiality of information; rule 1.7 and 1.8 regarding conflicts of interest; 1.9 regarding duties to former clients; and others that may arise under a particular set of facts.

²⁰⁷ See *Gustafson v. Chestnut*, 515 N.W.2d 114, 116 (Minn. Ct. App. 1994) (finding that, in a realty transaction, the malpractice claim failed because the conflict of interest did not cause the client's harm).

²⁰⁸ Minn. Lawyers Prof'l Responsibility Bd., Formal Op. 21 (2009) (discussing a lawyer's duty to inform a client about the lawyer's own malpractice), *available at* <http://lprb.mncourts.gov/rules/LPRBOpinions/Opinion%2021.pdf>.

²⁰⁹ MINN. RULES OF PROF'L CONDUCT R. 1.5(C) (2005).

²¹⁰ See *id.* A contingent fee must be: 1) in writing; 2) signed by the client; 3) describing the method the fee is determined; 4) clear about any expenses the client will have to pay. The attorney also has to send an invoice to the client after the transaction describing the outcome of the transaction, and describing any remittance to the client and the method of its determination. Of course, the fee must be reasonable. *Id.*

are geared towards civil actions and arguably don't apply to a real estate transaction.²¹¹ However, the MRPC contemplated instances where MRPC does not appear explicit, yet the underlining principles of the code should still govern.²¹² Even though the acts of a broker are not technically the practice of law, when a lawyer performs those acts, at a minimum, the spirit of rule 1.5(c) regarding contingency fees should compel the attorney take heed.

A question arises as to how the attorney-broker gets around the prohibition of representing a client who is “directly adverse to another client,” as a buyer and seller are under the dual agency context.²¹³ As stated, there is no law in Minnesota that prohibits this kind of representation, but there is the MRPC to consider. The MRPC contemplates litigation in an adversarial context, not a transaction where there may actually be no adversarial nature to the deal.²¹⁴ Furthermore, if the lawyer is acting in a dual agency, the lawyer should create an “ethical wall”²¹⁵ between the lawyer’s law practice and the non-legal services provided as broker. This is

²¹¹ An argument can be made that the rules of professional responsibility do not apply or are at a minimum insufficient in regulating a transactional lawyer’s conduct. The Model Rules of Professional Conduct, for example, “are premised on an adversarial system; they presume adverse parties, zealous advocates, and a neutral tribunal. They were never designed to guide a lawyer’s transactional work . . . which is often non-adversarial and cooperative.” Gregory M. Duhl, *The Ethics of Contract Drafting*, 14 LEWIS & CLARK L. REV. 989, 995 (2010) (discussing, *inter alia*, the ethics behind attorney contract drafting).

²¹² MINN. RULES OF PROF’L CONDUCT PMBL. ¶9 (2005).

²¹³ *Id.* R. 1.7(a)(1).

²¹⁴ *See supra* note 211.

²¹⁵ The term “Chinese wall,” while common place, is potentially offensive and is substituted with other terms, such as “ethical wall.” Christopher J. Dunnigan, *The Art Formerly Known as the Chinese Wall: Screening in Law Firms: Why, When, Where, and How*, 11 GEO. J. LEGAL ETHICS 291, 291 n.1 (1998). An “ethical wall” is a set of procedures used to ensure that confidential information does not pass between persons associated with the same firm. *Id.* at 291–92. However, such walls are not perfect. “The most obvious problem with the implementation of a screening system is that if two lawyers [or agents] within a firm are determined to share a

done through MRPC's rule 1.7(b). If the requirements of 1.7(b) are met, the attorney can act as a dual agent in a real estate transaction. Patrick Burns, as First Assistant Director of the Minnesota Office of Lawyers Professional Responsibility, while not a formal opinion, contemplated a similar conflict arising from the sale of title insurance.²¹⁶

Patrick Burns identifies the multi-layered conflict that arises when an attorney sells title insurance to a client for a commission.²¹⁷ He compares the lawyer's financial interest with the attorney acting as an agent for the title insurance company and the client.²¹⁸ Patrick Burns concludes that this multi-layered conflict, where an attorney's financial interest intersects a dual representative capacity, is consentable under rule 1.7(b).²¹⁹ There are four requirements under rule 1.7(b), yet only three apply because a real estate transaction is not done in front of a tribunal nor does it involve a legal claim.²²⁰ In the context of a dual agency in which an attorney acts as broker for a client, the attorney must "reasonably believe" that the lawyer can give "competent and diligent representation to each affected client."²²¹ The lawyer needs to be sure the representation is not prohibited by law, and finally, "each affected client gives informed

confidence that they should not, a screen will not stop them." *Id.* at 298. In fact, when the firm and the agents stand to gain from a higher commission and income, the risk will be ever present.

²¹⁶ PATRICK R. BURNS, FIRST ASSISTANT DIR., AVOIDING CONFLICTS IN THE SALE OF TITLE INSURANCE TO CLIENTS (2008), available at <http://lprb.mncourts.gov/articles/Articles/Avoiding%20Conflicts%20in%20the%20Sale%20of%20Title%20Insurance%20to%20Clients.pdf>.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ See MINN. RULES OF PROF'L CONDUCT R. 1.7(b)(3) (2005) (regarding client claims against another client or proceedings before a tribunal).

²²¹ *Id.* R. 1.7(b)(1).

consent, confirmed in writing.”²²² As long as the attorney can pass these three tests, the conflict is consentable and the attorney can proceed with the dual representation.

Permitting an attorney to also act as a real estate broker presents an “ethical gap” when trying to find where the attorney’s legal ethics do not extend to his real estate transactions.²²³ Some states try to address the question by limiting the licensing exception to attorneys who are acting within the scope of client representation.²²⁴ Minnesota deals with the “ethical gap” through case law.²²⁵ In *In re Scallen*, the Minnesota Supreme Court noted that there is a “heavy burden placed on attorney-business people” and the “Code of Professional Responsibility” applies to them.²²⁶ It is no excuse to say that since the work of a broker is not the practice of law, the code does not apply to the attorney acting as broker.²²⁷

B. *Pulse of the Nation: The Attorney-Broker*

Whether or not an attorney can act as a broker is determined by state law. The particular law that a state adopts is indicative of how risky the state sees an attorney acting as a broker. Some states find it very risky and prohibit it outright,²²⁸ unless the lawyer also has a

²²² *Id.* R. 1.7(b)(2) & (4). Informed consent should be acquired via independent counsel from another attorney and the consent put in writing signed by each client. *Id.* R. 1.7(b)(4), cmt. 10, 18, 20. Even if the client initially give informed consent to the conflict, the client may revoke that consent. *Id.* cmt. 21. Such a revocation is consistent with the common law principal of continued control of the agent and should be extended to the basic broker-client relationship. *See also id.* R. 1.0(f) (regarding informed consent requiring “adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.”).

²²³ Sawyer, *supra* note 201, at 334.

²²⁴ *Id.*

²²⁵ *In re Scallen*, 269 N.W.2d 834 (Minn. 1978).

²²⁶ *Id.* at 841–42.

²²⁷ *See id.*

²²⁸ States that prohibit a lawyer from acting as a real estate broker without being separately licensed include:

broker's license. Other states permit a lawyer to act as a broker without a license,²²⁹ apparently finding the risk to be lower or at least tolerable. Those states that permit a lawyer to also act as a

Hawaii. Prohibiting a licensed attorney from acting also as a real estate broker without being separately licensed. *See* HAW. REV. STAT. §§ 467-2, 467-7 (2013) (requiring everyone to be licensed except for a few exceptions—attorneys at law not listed as one of the exceptions). *See also* *Katayama v. Heller-White Hotels Co. Inc.*, 692 F.Supp. 1239, 1243 (D. Haw. 1988) (applying Hawaii law and reversing summary judgment because there was an issue of fact as to whether or not the attorney acted as a broker—while unlicensed as such, which would preclude him from recovering a broker's commission).

Texas. Prohibits an attorney at law from acting as a broker without a separate real estate broker's license. TEX. OCC. CODE ANN. § 1101.351 (West, current through the end of the 2013 Third Called Sess.); *see also* *Sherman v. Burton*, 497 S.W.2d 316, 321 (Tex. Civ. App. 1973) (finding that an attorney is not authorized to engage generally in the business of a broker by virtue of his license).

²²⁹ States that provide for a total exemption of the licensing requirement whether or not the attorney is providing brokerage services ancillary to the legal services include:

Delaware. Providing for an exemption to the licensing requirement for attorneys at law. DEL. CODE ANN. Tit. 24, § 2901(e)(3) (West, current through 2013).

Maryland. Exempting attorneys who: 1) do not regularly engage in real estate transactions; and 2) do not hold themselves out as being engaged in a broker's business. MD. CODE ANN., BUS. OCC. & PROF. § 17-301(b) (West, current through the 2013 Reg. Sess.); *see also* *Atlantic Richfield Co. v. Sybert*, 456 A.2d 20, 28 (Md. 1983) (interpreting, then statute MD. CODE ANN., BUS. OCC. & PROF. art. 56 § 212(f) (6) (1957), effectively placing Maryland into the total exemption camp since the attorney does not have to provide the brokerage service as ancillary to the practice of law).

Minnesota. An attorney may act as a broker without a separate broker's license so long as the attorney complies with the statute's trust account requirements. MINN. STAT. § 82.56(a) (2012).

Missouri. Providing for an exemption from chapter 339's licensing requirement for attorneys at law. MO. ANN. STAT. § 339.010(7)(2) (West, current through the end of the 2013 First Reg. Sess.). The Missouri Supreme Court justified this exemption stating: "The exemption of attorneys is rational because each attorney has been licensed professionally and is regulated by this [c]ourt and, therefore, does not need to be governed by chapter 339." *Kan. City Premier Apartments, Inc. v. Missouri Real Estate Comm'n*, 344 S.W.3d 160, 171 (Mo. 2011) *cert. denied*, 132 S. Ct. 1075, 181 L. Ed. 2d 739 (U.S. 2012).

New York. Providing an exception to the licensing requirement for attorneys at law. N.Y. REAL PROP. LAW § 442-f (McKinney 2013). This exception has been a long standing one recognized also by the courts in New York. *See* *Weinblatt v. Parkway-St. Johns Corp.*, 241

broker without a separate broker's license can be divided into a total exemption camp or the exemption with the caveat that the lawyer can act as broker only as an incidental service of the practice of law. Most states fall into the exemption with the caveat that the lawyer can only act as a broker when the brokerage services are incidental to the legal services provided to a client.²³⁰

N.Y.S. 721, 721 *aff'd without op.*, 243 N.Y.S. 810 (N.Y. App. Div. 1930) (concluding that passing the bar is a good enough licensing requirement to act as a broker). *See also* Matter of Cianelli v. Dept. of State of N.Y., 16 A.D.2d 352, 353–54 (1962) (finding that where an attorney received and then lost his broker's license, he could still act as a broker due to his admittance to the bar).

Rhode Island. Enumerating an exception to the licensing requirement for attorneys at law. R.I. GEN. LAWS ANN. § 5-20.5-2(b)(1) (West, current through the 2013 Reg. Sess.).

South Dakota. South Dakota exempts a licensed attorney, unless that licensed attorney holds himself out and advertises himself as one who provides brokerage services. S.D. CODIFIED LAWS § 36-21A-29(a)(7) (2013).

²³⁰ States that allow the attorney to act as a broker without a separate license when practicing law or similar caveat include:

Alabama. Exempting attorneys at law when performing the attorney's duties as such. ALA. CODE § 34-27-2(b)(2) (2013).

Alaska. Exempting attorneys from the licensing requirement when performing duties as an attorney. ALASKA STAT. ANN. § 08.88.900(a)(3) (West, current through 2013 1st Reg. Sess.).

Arizona. Exempting attorneys from the licensing requirement in performing the duties of a lawyer and expressly denying attorneys the ability to act as a broker in other capacities outside the practice of law without a separate license. ARIZ. REV. STAT. ANN. § 32-2121(A)(3) (2013) (current through the First Regular and First Special Sessions of the Fifty-first Legislature).

Arkansas. Exempts attorneys in the practice of law. ARK. CODE ANN. § 17-42-104(a)(3) (West, current through the end of the 2013 Reg. Sess.).

California. Exempting attorneys from a licensing requirement when rendering legal services to a client and such services include real estate broker services. CAL. BUS. & PROF. CODE § 10133(a)(3) (West, current through the 2013 Reg. Sess.).

Colorado. Stating that the term "real estate broker" does not apply to an attorney at law who is practicing law on behalf of a client. COLO. REV. STAT. ANN. § 12-61-101(2)(b)(V) (West, current through the First Reg. Sess. (2013)) (exempting, presumably, attorneys who are practicing law on behalf of a client from the licensing requirement that a real estate broker would be subject to).

Connecticut. Exempting attorneys at law in the “performance” of the attorney’s duties as such. CONN. GEN. STAT. ANN. § 20-329(a)(2) (West, current with Pub. Acts of the 2013 Jan. Reg. Sess.).

Florida. Providing an exception for attorneys at law when acting within the scope of an attorney’s duties. FLA. STAT. ANN. § 475.011(1) (West, current through the 2013 1st Reg. Sess.).

Georgia. Exempting attorneys when “acting solely as an incident to the practice of law . . .” GA. CODE ANN. § 43-40-29(a)(3) (West, current through the end of the 2013 Reg. Sess.).

Idaho. Exempts attorneys from the licensure requirement insomuch as the attorney is furthering the representation of the particular client and does not regularly engage in realty transactions. IDAHO CODE ANN. § 54-2003(1)(e) (West, current through 2013).

Illinois. Exempting attorneys at law in performing duties as such. 225 ILL. COMP. STAT. ANN. 454/5-20(2) (West, current through the 2013 Reg. Sess.).

Indiana. Exempting attorneys in the practice of law. IND. CODE ANN. § 25-34.1-3-2(b)(1) (West, current through 2013).

Iowa. Exempts attorneys when “acting solely as an incident to the practice of law.” IOWA CODE § 543B.7(3) (2013).

Kansas. Exempts attorneys when performing “professional duties as an attorney.” KAN. STAT. ANN. § 58-3037(c) (West, current through 2013).

Kentucky. Exempts attorneys in “performing his duties as attorney-at-law.” KY. REV. STAT. ANN. § 324.030(3) (West, current through the end of the 2013 Reg. Sess.).

Louisiana. Exempts attorneys at law who, in the regular course of client representation, engage in the work of a real estate broker. LA. REV. STAT. ANN. § 1438(A)(2) (2012).

Maine. Provides an exception for attorneys at law from the definition of a real estate brokerage when the attorney performs duties related to practice of law and does not regularly engage in real estate brokerages. ME. REV. STAT. ANN. tit. 32, § 13002(2) (2013).

Massachusetts. Exempts attorneys who are rendering a service to a client and the transaction is in furtherance of that representation. MASS. GEN. LAWS ch. 112, § 87QQ (2013).

Michigan. Exempts attorneys at law acting as such. MICH. COMP. LAWS ANN. § 339.2503(2) (West, current through 2013). In Michigan, an attorney cannot collect a commission, even acting solely as a finder without a license—unless the attorney was acting on behalf of a client. *Kraus v. Boraks*, 67 N.W.2d 202, 204–05 (Mich. 1954).

Mississippi. Exempts licensed attorneys who are performing “primary or incidental” acts related to the practice of law. MISS. CODE ANN. § 73-35-3(8)(a) (West, current through the end of the 2013 Reg. Sess.).

Montana. Providing an exception for attorneys at law while “performing” the attorney’s “duties.” MONT. CODE ANN. § 37-51-103(1)(c) (2013).

Nebraska. Exempts attorneys at law when performing their duties as such. NEB. REV. STAT. ANN. § 81-885.04(2) (West, current through the Second Reg. Sess. (2012)).

Nevada. Exempts attorneys at law performing their duties as such. NEV. REV. STAT. ANN. § 645.240(2)(C) (West, current through the 2011 Reg. Sess.).

New Hampshire. Exempts attorneys at law in performing their duties as such. N.H. REV. STAT. ANN. § 331-A:4(a)(III) (2013).

New Jersey. While the New Jersey statute gives a total exemption for attorneys at law, courts have limited the exemption to attorneys who act as a broker ancillary to the practice of law for the particular client. *Compare* N.J. STAT. ANN. § 45:15-4 (2013) (observing that the exemption is limited to attorneys acting within their scope as attorneys for the client), *with* *Spirito v. N.J. Real Estate Comm'n*, 434 A.2d 623 (N.J. Super. Ct. App. Div. 1981), *and* *Matter of Roth*, 577 A.2d 490 (1990) (reaching the same conclusion).

New Mexico. Exempts attorneys at law in performing their duties as such. N.M. STAT. ANN. § 61-29-2(C)(5) (West, current through the First Reg. Sess. (2013)).

North Carolina. Exempts “active” state bar members when their actions constitute the “practice of law.” N.C. GEN. STAT. ANN. § 93A-2(c)(3) (West, current through the 2013 Reg. Sess.).

North Dakota. Exempts attorneys at law from licensure requirements when the attorney handles the transaction in the “usual course of the practice of law.” N.D. CENT. CODE ANN. § 43-23-07(a)(2) (West, current through the 2013 Reg. Sess.).

Ohio. Provides an exception for licensed attorneys in the performance of the lawyer’s duties. OHIO REV. CODE ANN. § 4735.01(I)(1)(d) (West, current through 2013).

Oklahoma. Exempts attorneys at law in performing their duties as such. OKLA. STAT. ANN. tit. 59, § 858-301(a)(3) (West, current through the First Reg. Sess. (2013)).

Oregon. Exempts attorneys at law in performing their duties as such. OR. REV. STAT. ANN. § 696.030(4) (West, current through the 2013 Reg. Sess.).

Pennsylvania. 63 PA. STAT. ANN. § 455.304(4) (West, current through the 2013 Reg. Sess.), *as interpreted in* *Kribbs v. Jackson*, 129 A.2d 490, 495 (Pa. 1957) (interpreting the law to mean that an attorney is exempt from the licensing requirement “as an incident of his legal profession.”).

South Carolina. Exempts attorneys acting within the scope of representation of a client. S.C. CODE ANN. § 40-57-240(a)(2) (2012).

Tennessee. Exempts attorneys in the performance of their duties as such. TENN. CODE ANN. § 62-13-104(a)(1)(C) (West, current through the end of the 2013 First Reg. Sess.).

Utah. Exempts attorneys in the performance of their duties as such. UTAH CODE ANN. § 61-2f-202(2)(b) (West, current through the 2013 First Special Sess.).

Vermont. Exempts attorneys at law from licensure requirements when the attorney handles the transaction in the “usual course of the practice of law.” VT. STAT. ANN. tit. 26, § 2211(b)(2) (West, current through the First Sess. (2013–14)).

Virginia. Exempts attorneys at law in the performance of their duties as such. VA. CODE ANN. § 54.1-2103(A)(3) (West, current through the end of the 2013 Reg. Sess.).

The American Bar Association (“ABA”) has weighed in cautioning practitioners to avoid altogether the attorney-broker conflict.²³¹ The ABA favors the “ancillary business rule,” which has been adopted in one form or another by most states.²³² Minnesota has not adopted the suggestion, instead falling into the total exemption camp.²³³ Evidently, Minnesota has thus far relied on MRPC rule 1.7 and other applicable rules to govern lawyers when their personal interests are in conflict with their clients or when they represent conflict-prone clients.²³⁴

Under a designated agency situation where an attorney acts as broker designating employee-lawyers to represent a buyer or seller exclusively, the attorney should follow the spirit of the “screening off” rule. The Model Rules of Professional Conduct affirms that if a lawyer is disqualified from representing a client that disqualification is imputed to the firm where the lawyer works, unless an exception applies.²³⁵ This is to prevent harmful or other confidential

Washington. Exempts attorneys when practicing law. WASH. REV. CODE ANN. § 18.85.151(a)(3) (West, current through 2013).

West Virginia. Exempts lawyers who are providing “an ancillary service in conjunction with a real estate transaction.” W.VA. CODE ANN. § 30-40-5(b) (West, current through the 2013 First Extraordinary Sess.).

Wisconsin. Exempts attorneys at law from the definition of a real estate broker while acting within “the scope of their attorney’s license.” WIS. STAT. ANN. § 452.01(3)(h) (West, current through 2013).

Wyoming. Exempts attorneys at law in the performance of their duties as such. WYO. STAT. ANN. § 33-28-103(a)(ii) (West, current through the 2013 Gen. Sess.).

²³¹ PATRICK A. RANDOLPH, THINKING OF BEING A LAWYER/BROKER? THINK AGAIN. (Oct. 12, 2013, 1:25 PM), <http://dirt.umkc.edu/files/art2.htm>.

²³² *Id.*; see *supra* note 230 (and accompanying text).

²³³ See *supra* note 228.

²³⁴ See MINN. RULES OF PROF’L CONDUCT R. 1.7 cmt. 10 (2005) (cautioning that a “lawyer’s own interests should not be permitted to have an adverse effect on representation of a client.”).

²³⁵ MODEL RULES OF PROF’L CONDUCT R. 1.18(c) & (d) (2003).

information from being used against the client.²³⁶ When a law firm acts as a brokerage and engages in a designated agency type²³⁷ of realty transaction, similar safeguards used to screen off conflicted-out attorneys in litigation should be used to screen employee attorneys that exclusively represent a buyer or seller to prevent confidential information from being shared in-house. Minnesota Statutes, section 82 currently does not provide for that safeguard. The result being, as long as the parties consent and MRPC rule 1.7(b) is followed, information could be shared that isn't about price, terms, or motivation for the transaction.

VII. PROPOSED STATUTORY AMENDMENTS TO MINNESOTA STATUTES SECTION 82: ALIGNING
TEXT AND PURPOSE

A. *Amendment to Minnesota Statutes, Section 82.55, Subdivision 6: Definition Bifurcation and Material Fact*

In Part VII, various provisions of section 82 are redrafted with example amendments. The examples throughout Part VII follow the basic statutory amendment form in that underlined language is added language and ~~stricken language is deleted language~~ and normal text is unaltered. Minnesota Statutes, section 82.55 subdivision 6 should be bifurcated into a dual agency and designated agency definition as follows:

- **Dual Agency.** “Dual Agency” means a situation in which a licensee or person exempted from the licensure requirement represents both the buyer and the seller in the same real estate transaction.

²³⁶ *Id.* cmt. 6 (stating that lawyers cannot use information from a prospective client that “could be significantly harmful if used in the matter”).

²³⁷ Regardless of the term used to describe the transaction. In Minnesota, designated agency is impermissible. *See* MINN. STAT. § 82.55, subdiv. 6 (2012). However, the client hires the law firm in this case, and the firm may designate employee-attorneys in the firm to perform required tasks. This is basic agency law.

- **Designated Agency.** “Designated Agency” means a situation in which at least two salespersons, licensed to the same broker, each represent a party to the transaction to the exclusion of all other parties.
- **Ordinary Purchaser.** “Ordinary Purchaser” means the person or entity who presents themselves as a prospective purchaser of residential realty and similarly situated parties, which include: 1) natural persons; 2) entities; 3) trustees; and 4) agents thereof.

Adopting a bifurcated definition would make clear that a broker, salesperson, or professional exempted from the licensure requirement can act as a dual agent. This is not a change to current law but makes it clearer. It also means that only salespersons licensed to a licensed broker can engage in a designated agency, to the exclusion of all others. Doing so, fixes the current statute’s misuse of the word “licensee.”²³⁸ Finally, it would be helpful if the word “agent” was included under section 82.55, subdivision 4 in addition to “closing agent” and “real estate closing agent” since normally the generic word “agent” usually suffices.

Defining an ordinary purchaser is also useful because the statute, as written, does not limit itself to the present purchaser.²³⁹ The ordinary purchaser at large is an ambiguous term. It does not present boundaries of time and space. It could mean any ordinary purchaser anywhere at any time. This is just too expansive an interpretation and is likely not what the Legislature intended. Limiting the term to those persons and entities which are present and considering the property fits with reality. As written, the agent may have a duty to disclose material facts that some far-flung hypothetical ordinary purchaser may want to know at some point in the future, particularly as modified by the preceding word “could.”²⁴⁰ It just doesn’t make sense and the prospective purchaser doesn’t typically need or want that kind of disclosure. The definition

²³⁸ See *id.* § 82.55, subdiv. 6(1)–(2).

²³⁹ See *id.* § 82.68, subdiv. 3(a).

²⁴⁰ See *id.*

includes consideration of the actual purchaser and similarly situated parties so that; for example, a natural person, as the prospective purchaser, is considered among natural persons in the area and the general interests that natural persons share in purchasing realty. On the other hand, when an entity, such as a business in the business of flipping houses is the prospective purchaser, the agent considers that entity among other entities that also flip houses and that industry's general interests, which may be significantly different from a natural person who wants to establish a homestead. When thinking about an ordinary purchaser, it makes most sense to compare apples with apples and oranges with oranges.

B. Amendment to Minnesota Statutes, Section 82.66: A Clear Contract

Minnesota Statutes, section 82.66, subdivisions 1(9) and 2(7) should also be amended. The example below uses the listing agreement language, which is similar to a buyer's agreement:

- If a buyer represented by broker, salesperson, or professional exempted from licensure (collectively termed "agent") wishes to buy the seller's property, a dual agency will be created. This means that ~~broker~~ the agent(s) will represent both the seller(s) and the buyer(s), and owe the same duties to the buyer(s) that ~~broker~~ the agent(s) owes to the seller(s). This conflict of interest will prohibit ~~broker~~ the agent(s) from advocating exclusively on the seller's behalf. Dual agency will limit the level of representation ~~broker~~ the agent(s) can provide. If a dual agency should arise, the seller(s) will need to agree that confidential information about price, terms, and motivation will still be kept confidential unless the seller(s) instruct ~~broker~~ the agent(s) in writing to disclose specific information about the seller(s). All other information will be shared with the other party. ~~Broker~~ The agent(s) cannot act as a dual agent(s) unless both the seller(s) and the buyer(s) agree to it. By agreeing to a possible dual agency, the seller(s) will be giving up the right to exclusive representation in an in-house transaction. ~~However, if the seller(s) should decide not to agree to a possible dual agency, and the seller(s) want broker to represent the seller(s), the seller(s) may give up the opportunity to sell the property to buyers represented by broker. At any time before closing, buyer(s) or seller(s) may revoke consent to a dual agency relationship with the agent(s) in writing. This means that the buyer(s) or seller(s) may elect either a designated agency relationship or a single agency relationship with the agent(s). Neither buyer(s) nor seller(s) shall be liable to agent(s) for any commission lost resulting from the change in the form of agency.~~

Adopting these or similar changes will better inform the consumer about the dual agency relationship and the consumer's common law right and power to alter the form of the agency relationship. It is also consistent with the common law stance as to losses when modifying the form of the agency.²⁴¹ Additionally, if a designated agency definition is to be adopted, it stands to reason that a separate disclosure should be included in the contract, such as:

- If a licensed broker designates one or more salespersons to represent the buyer(s) and one or more salespersons to represent the seller(s), a designated agency will be created. This means that buyer(s)' salesperson(s) shall represent the buyer(s) exclusively and advance buyer(s) interests and that seller(s)' salesperson(s) shall represent the seller(s) exclusively and advance the seller(s) interests. Since the salesperson(s) on both sides of the transaction are affiliated with the same licensed broker, a financial conflict of interest exists. In light of this conflict, all confidential information shall be kept confidential. No information shall be shared between the salesperson(s) except information necessary to facilitate the mechanics of the sale or confidential information the seller(s) permits the salesperson(s) to disclose in writing. No other information will be shared, and the licensed broker shall create safeguards and procedures to reasonably ensure that seller(s) confidential information remains segregated from buyer(s) salesperson. If confidential information is obtained about the other party to the transaction, the salesperson representing the adversely affected party may not use that information whatsoever, unless permitted by the adversely affected party in writing.

By agreeing to a possible designated agency, the seller(s) will not be giving up the right to exclusive representation in an in-house transaction, but understands the broker stands to gain the double commission if the sale occurs. Salesperson(s) cannot act as designated agents unless both the seller(s) and buyer(s) agree to it. At any time before closing, buyer(s) or seller(s) may revoke consent to a designated agency relationship with the salesperson(s) in writing. The buyer(s) or seller(s) may elect to enter into a single agency with licensed broker or salesperson. This means that the seller(s) may give up the opportunity to sell the property to buyer(s) represented by the licensed broker. Instead, the broker will engage other brokerages to find buyer(s). Seller(s) shall not be liable to agent(s) for any commission lost resulting from the change in the form of agency.

²⁴¹ See *supra* Part IV.B.

Adopting this type of disclosure will inform the consumer in the same manner as the amended dual agency disclosure. It also makes clear that if the seller does not wish to continue a designated agency, before closing, the seller might give up the opportunity to find buyers represented by the brokerage. Only in a designated agency should this result. The current statute provides a vague qualifier “may” when it says the seller “may give up the opportunity to sell the property to buyers represented by broker.”²⁴² Separating the disclosures makes clearer what the agency relationship is, and what the consumer’s rights and powers are in controlling that relationship.

C. Amendment to Minnesota Statutes, Section 82.67: Certainty as to Form

The changes to Minnesota Statutes, section 82. 67 are at least three fold: 1) there needs to be certainty in the form, not substantial compliance; 2) the dual agency disclosure needs to be bifurcated; and 3) subdivision 4 needs to include language regarding the consumer’s right and power to control the form of agency. Subdivision 4 is in regards to the agency disclosure required in the purchase agreement and a particular amendment there is omitted, yet should be included in a manner consistent with the proposed amendments for the listing agreement and subdivision 3 below.

- **Subdivision 1. Agency disclosure.** A real estate broker, ~~or salesperson,~~ or professional exempt from licensure shall provide to a consumer in the sale and purchase of a residential real property transaction at the first substantive contact with the consumer an agency disclosure form in ~~substantially~~ the form set forth in subdivision 3. The agency disclosure form shall be intended to provide a description of available options for agency and facilitator relationships, ~~and~~ a description of the role of a licensee the agent(s) under each option, and any right or power the consumer has to modify the form of the agency relationship. The agency disclosure form shall provide a signature line for acknowledgment of receipt by the consumer. The disclosures required by this subdivision apply only to residential real property transactions.

²⁴² § 82.66, subdiv. 1(9).

Adopting this language or something similar will require the agent to actually use the language in the statutory disclosure form.²⁴³ Granted, most will do that anyway because it is easier to copy and paste, but if the purpose of the section 82 is to protect the consumer,²⁴⁴ and it is, then the language should be certain and fixed. Removing the word “substantially” does just that.

- **Subdivision 3. Agency disclosure form.** The agency disclosure form shall be in ~~substantially~~ the form set forth below:

Dual Agency-Broker Agent Representing both Seller and Buyer: Dual agency occurs when one ~~broker or salesperson~~ agent represents both parties to a transaction, ~~or when two salespersons licensed to the same broker each represent a party to the transaction.~~ Dual agency requires the informed consent of all parties, and means that the ~~broker and salesperson~~ agent owe the same duties to the Sseller(s) and the Bbuyer(s). This role limits the level of representation the ~~broker and salespersons~~ agent can provide, and prohibits ~~them~~ the agent from acting exclusively for either party. In a dual agency, confidential information about price, terms, and motivation for pursuing a transaction will be kept confidential unless one party instructs the ~~broker or salesperson~~ the agent in writing to disclose specific information about him or her. Other information will be shared with the other party. Dual agents may not advocate for one party to the detriment of the other. Within the limitations described above, dual agents owe to both Sseller(s) and Bbuyer(s) the fiduciary duties described below. Dual agents must disclose to Bbuyer(s) material facts as defined in Minnesota Statutes, section 82.68, subdivision 3, of which the ~~broker~~ agent is aware that could adversely ~~and significantly~~ affect the Bbuyer’(s) use or enjoyment of the property. At any time before closing, buyer(s) or seller(s) may revoke consent to a dual agency relationship with the agent in writing. This means that the buyer(s) or seller(s) may elect either a designated agency relationship or a single agency relationship with the agent. Neither buyer(s) nor seller(s) shall be liable to the agent for any commission lost resulting from the change in the form of agency.

Designated Agency-Salesperson Designated to Represent Either Seller(s) or Buyer(s) In-House. Designated agency occurs when a licensed broker designates one or more salespersons to represent the buyer(s) and one or more salespersons to represent the seller(s). Designated agency requires informed consent of all parties, and means that the assigned salesperson shall represent the consumer exclusively and advance that consumer’s interests. No information shall be shared between the salesperson(s) except information necessary to facilitate the mechanics of the sale or confidential information the parties permit the salesperson(s) to disclose in writing. No other information will be

²⁴³ See *id.* § 82.67, subdiv. 3. (currently only requiring the “form be in substantially the form set” in subdivision 3).

²⁴⁴ See *supra* Part IV.A.

shared, and the licensed broker shall create safeguards and procedures to reasonably ensure that a party's confidential information remains segregated from the other party's salesperson. If confidential information is obtained about the other party to the transaction, the salesperson representing the adversely affected party may not use that information whatsoever, unless permitted by the adversely affected party in writing.

By agreeing to a possible designated agency, the seller(s) will not be giving up the right to exclusive representation in an in-house transaction, but understands the broker stands to gain the double commission if the sale occurs. At any time before closing, buyer(s) or seller(s) may revoke consent to a designated agency relationship with the salesperson(s) in writing. The buyer(s) or seller(s) may elect to enter into a single agency with licensed broker or salesperson. This means that the revoking seller(s) may give up the opportunity to sell the property to buyer(s) represented by the licensed broker and the revoking buyer(s) may give up the opportunity to purchase from sellers represented by the licensed broker. Instead, the broker will engage other brokerages to find buyer(s) or seller(s). Neither buyer(s) nor seller(s) shall be liable to agent(s) for any commission lost resulting from the change in the form of agency.

Adopting these changes, or similar changes, increases consistency across the three required agency disclosures in a residential real estate transaction. It also informs the consumer as to their rights and powers in controlling the agency relationship. The disclosure also makes clearer the conflict of interest and the brokerage's financial interest in receiving a double commission, whether under dual or designated agency.

D. Amendment to Minnesota Statutes, Section 82.68: The Principal Is Always Right

Minnesota Statutes, section 82.68, subdivision 3 regarding material facts should be amended as follows:

- **Material facts.** (a) ~~A licensee~~ An agent shall disclose to a prospective purchaser all material facts of which the ~~licensee~~ agent is aware, which could adversely ~~and significantly~~ affect an ordinary purchaser's use or enjoyment of the property, or any intended use of the property of which the ~~licensee~~ agent is aware.
(b) It is not a material fact relating to real property offered for sale the fact or suspicion that the property:
 - (1) is or was occupied by an owner or occupant who is or was suspected to be infected with human immunodeficiency virus or diagnosed with acquired immunodeficiency syndrome;
 - (2) was the site of a suicide, accidental death, natural death, or perceived paranormal activity; or

(3) is located in a neighborhood containing any adult family home, community-based residential facility, or nursing home.

(4) Notwithstanding the provisions contained in subsection (b)(1)–(3), an agent shall disclose as a material fact information contained in subsection (b)(1)–(3), of which the agent is aware, that may adversely affect the value of the property to the ordinary purchaser or information requested by the purchaser regarding the subjects covered in (b)(1)–(3).

~~(c) A licensee or employee of the licensee~~ An agent has no duty to disclose information regarding an offender who is required to register under section 243.166, or about whom notification is made under that section, if the ~~broker or salesperson~~ agent, in a timely manner, provides a written notice that information about the predatory offender registry and persons registered with the registry may be obtained by contacting local law enforcement where the property is located or the Department of Corrections, or unless the purchaser requests the agent to provide the information in writing.

~~(d) A licensee or employee of the licensee~~ An agent has no duty to disclose information regarding airport zoning regulations if the ~~broker or salesperson~~ agent, in a timely manner, provides a written notice that a copy of the airport zoning regulations as adopted can be reviewed or obtained at the office of the county recorder where the zoned area is located, or unless the purchaser requests the agent to provide the information in writing.

~~(e) A licensee~~ An agent is not required to disclose, except as otherwise provided in paragraph (f), information relating to the physical condition of the property or any other information relating to the real estate transaction, if a written report that discloses the information has been prepared by a qualified third party and provided to the ~~person~~ purchaser. For the purposes of this paragraph, "qualified third party" means a federal, state, or local governmental agency, or any person whom the broker, salesperson, or a party to the real estate transaction reasonably believes has the expertise necessary to meet the industry standards of practice for the type of inspection or investigation that has been conducted by the third party in order to prepare the written report and who is acceptable to the person to whom the disclosure is being made.

~~(f) A licensee~~ An agent shall disclose to the parties to a real estate transaction any facts known by the ~~broker or salesperson~~ agent that contradict any information included in a written report described in paragraph (e), if a copy of the report is provided to the ~~licensee~~ agent.

~~(g) The limitation on disclosures in paragraphs (b) and (c) shall modify any common law duties with respect to disclosure of material facts,~~ unless the purchaser requests the information from the agent in writing.

This amendment is appropriate because it lets the principal determine what is best for the principal. The amendment also changes, where needed, the word “licensee” or “broker and/or salesperson” to “agent” so as to include the concept of an attorney broker who is not licensed—

the attorney broker being omitted from the definition of a “licensee.”²⁴⁵ However, this amendment would be most effective if the terms “ordinary purchaser,” and “agent” were defined as proposed above.²⁴⁶

E. The Attorney-Broker Exception Bridled

Minnesota Statutes, section 82.56(a) should be amended as follows:

- (a) a licensed practicing attorney if the attorney complies in all respects with the trust account provisions of this chapter and provides broker services ancillary to the practice of law for a particular client.

Amending the statute in this or a similar manner will ensure that an attorney can only provide broker services only in the furtherance of a particular client’s overall representation. This is desirable because, as the ABA noted, the ethical responsibilities of a broker and a lawyer are different and treating attorneys the same as a broker doesn’t make much sense.²⁴⁷ When Minnesota totally exempts an attorney from the licensure requirement, Minnesota treats an attorney’s license as equal to or even greater than a broker’s license for realty transactional purposes. All without ensuring that the attorney knows anything about realty transactions, which is against the purpose of section 82 in protecting the consumer from incompetent licensees.²⁴⁸

F. Amendments Uniquely Tailored to Protect the Consumer

²⁴⁵ See MINN. STAT. § 82.55, subdiv. 10 (2012). (defining a “licensee” as one who is licensed under the chapter, yet attorneys are exempt from the licensure requirement under section 82.56(a)).

²⁴⁶ See *supra* Part VII.A.

²⁴⁷ See *supra* note 231.

²⁴⁸ While this might be justifiable due to the competence requirement in MRPC rule 1.1, it is not desirable when the purpose of section 82 is to protect the consumer. See *supra* Part IV.A.

As mentioned above, statutes in Delaware and Texas help give the consumer the choice to opt out of the statutory agency relationship and also have designated a committee to draft disclosure forms with a special purpose to protect the consumer.²⁴⁹ Such an approach could be useful in Minnesota as a means to further the overall purpose of section 82 in protecting the consumer. Minnesota could adopt this approach as follows:

- In Minnesota Statutes, section 82.66, the section that requires the statutory agency agreement to be in writing, Language could be included in the beginning of subdivisions 1 and 2 that states: Unless the consumer enters into an agency relationship contract under the common law principles of agency, [remainder of the subdivision omitted].

Amending the statute in this manner will give the consumer the choice to require an agent to provide a more robust form of disclosure in compliance with the common law as discussed in Parts II and III of this article. The Minnesota Legislature should also include an amendment, similar to Texas, to form a committee of brokers and attorneys with the task of creating better disclosure forms that properly inform the consumer. The Texas statute is well written and should be incorporated into Minnesota Statutes, section 82 as currently written:

- (a) “[T]he committee shall draft and revise contract forms that are capable of being standardized to expedite real estate transactions and minimize controversy. (b) The contract forms must contain safeguards adequate to protect the principals in the transaction.”²⁵⁰

VIII. SUMMATION

²⁴⁹ See *supra* Part V.

²⁵⁰ TEX. OCC. CODE ANN. § 1101.254(a)–(b) (West, current through the end of the 2013 Third Called Sess.). See also James N. Johnson, *Texas Real Estate Broker-Lawyer Committee*, in 1 TEX. PRACTICE GUIDE: REAL ESTATE TRANSACTIONS § 4:3 (2012) (discussing the committee generally).

As examined throughout this article, Minnesota Statutes, section 82 is problematic. It fails to adequately uphold its purpose of protecting the consumer in a residential realty transaction by materially limiting the disclosures required to form the agency relationship that brings the protected transaction about.²⁵¹ An amendment to the statute is necessary to ensure the purpose is better served and rectify some of the ambiguity in the text itself. As the statute currently stands, the brokerage's double commission is safeguarded at the expense of the informed consumer. Purchasing a homestead truly is one of the most significant purchases the consumer will ever engage in, and as the Minnesota Supreme Court put it: "[w]hat might be 'the best thing' for the [principal] must ultimately be the [principal's] decision, not the agent's."²⁵² Providing a more robust disclosure requirement, and the amendments above, aids in the overall purpose of section 82 so that the consumer can truly decide what is best.

²⁵¹ *See supra* Parts III & IV.

²⁵² *White v. Boucher*, 322 N.W.2d 560, 555–56 (Minn. 1982).