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Attn: Terry McDermott, CEO
National Association of Realtors
430 North Michigan Avenue
Chicago, Ill 60611

Attn: Joel Singer, Executive Vice President
California Association of Realtors
525 South Virgil Avenue
Los Angeles, CA 90020

Attn: John R. Liberator, Chief Deputy Commissioner
California Department of Real Estate
P. O. Box 187000
Sacramento, CA 95818-7000

Attn: Bob Golden, CEO
Colorado Association of Realtors
309 Inverness Way South
Englewood, CO 80112

Attn: Richard F. O'Donnell, Executive Director
Colorado Real Estate Commission
1560 Broadway, Suite 1550
Denver, CO 80202

Re: Open letter of opinion and suggestions on real estate today.

The real estate industry has undergone substantial change and reformation over the past years. With the advent of sophisticated computers, cell phones, fax machines and the Internet, we are certainly equipped to offer accurate, fast, updated and detailed information unthinkable in the past. Being a real estate broker for over 31 years, I have experienced all these changes firsthand. I have had the benefit of incorporating and utilizing these tools to provide improved and faster service to my clients, while keeping updated with the market and all the dynamic changes within the field of real estate.

In my opinion, there remains room for significant change that could help our industry immerge as a true profession. I would like to offer some thoughts and reflections regarding our industry with the sincere hope that they might be shared, analyzed, criticized and hopefully considered as constructive input for change. If other people share these same thoughts and feeling, it may be possible to include changes to the industry that will help us to become true “professionals”.

In my opinion we can never be considered true professionals until we accept a basic fact of life, as the bible says, “**No servant can serve two masters.**” I have been a true single agent broker for over 25 years. I am very proud of this fact, because it has given me greater freedom to truly serve the best interests of my clients. Sure, there were times when a buyer came to me demanding that my client sell the property to them, but it was always made abundantly clear that this party must seek competent legal, tax and real estate advice as desired or required. This is always fully disclosed in the initial meeting with the prospective buyer, clearly spelled out in the initial offer and again referenced in the final closing documents at escrow.

Agency laws differ in many states and I believe this is one of the big problems within our entire industry. Past NAR Boards have expressed and shown concern for approving a broad array of association initiatives for enhancing the Code of Ethics on a more international presence, but I don't feel this has been fully implemented or accomplished. I have completed real estate transactions in 20 different states over the years, and I currently hold real estate licenses in California and Colorado. Doing business in these two different states is like night and day! Wouldn't it be far more powerful and important to consider the best interest of the public and truly nationalize a strict code of ethics and practices for every single agent in our wonderful country?

I am proud to be a member of CAR (California Association of Realtors). They have led the nation in stricter practices; procedures, and laws to best protect the public. There is a plethora of disclosure documentation required to sell real property in the state of California and there is no question of the benefits provided to BOTH buyer and seller. Nearly all these disclosure documents are mandatory, which is good practice for the protection of ALL parties involved in a real estate transaction, including the real estate agent (s).

California encourages all real estate offices to utilize the services of licensed and regulated escrow/title companies to handle the closing of real estate transactions. There are so many violations each year with commingling of funds and improper accounting or disbursement of funds. Why shouldn't the NAR step in here and have a strict policy of any and all funds going directly to a "neutral intermediary" upon acceptance of an offer by the parties? It is very unfortunate that attorneys still want to control closings in some states to enhance their earnings. As far as I know, all escrow/title firms have competent legal counsel on staff to help in this regard. If the use of escrow/title companies is prevalent in so many states, why shouldn't it become a standard for the whole country? With the help of our legislators, I believe this is possible (as long as the legislators are not attorneys!!). There should also be strict laws regarding the prompt disbursement of funds in the event of a failed transaction. In Colorado, there appears to be no strict ruling on how deposits are handled in situations where a transaction is terminated. As I understand things, a broker can basically keep funds in his trust account, until some type of court ruling is obtained or in the event there is no mutual agreement by the parties to release these funds.

California has a terrific real estate commission and legal hotline that is very responsive and helpful to its members. This should be the common practice in every state. I have sent letters and faxes to the Colorado Real Estate Commission, and one of the commissioners, and I never received any type of reply! This had to do with very strange practices in the smaller community of Montrose, Colorado where they use a sale pending status of "**Hold Don't Show**".

When I first moved back here to Montrose, I observed that many firms were using this designation on their listing with the MLS. What I found was that the majority of these sales were "**in house sales**", where the listing office basically took the listing off the market, unknown to the seller, as far as I can tell. I started "tracking" all the listings that have used this status of "**Hold Don't Show**" and one large company has done this with over 225 listings! Big question here: Is this

properly complying with the Code of Ethics under Article 1 (Standard of Practice 1-7 and 1-8)? There are a few other offices that chose to use this status, but only two other companies that use it with numerous listings. When I spoke with a CAR Attorney (California), he thought this might even be a violation of the Fair Trade Laws.

It would be very interesting to examine these files to insure that each and every file had a **written letter** on file with instructions from the seller not to continue to show the property or accept backup offers! Any good, single agent broker knows that you continue to offer the property for sale and to encourage a possible back-up offer as an “insurance policy”. This is also beneficial in putting added pressure on the existing offer to perform. I ran into a situation with one large firm not presenting my buyer’s offer timely because they had an “in-house offer” in progress. I later noted that the property sold for less than my offer, but we chose not to take any action because I found a better property for my client.

When I placed an article in the local newspaper concerning this practice, I was quickly served with the one and only grievance complaint I have ever encountered in all my years of practice. I had great counsel from my California Legal Hotline and the issue was promptly dropped after my lengthy reply to the complaint. I have run the ad since then with no problem.

Our MLS service provider, Risco, sent me a letter of confirmation that only 15% of their members use this status of “Hold Don’t Show”. I did receive a call from the local MLS Board informing me that my idea was most interesting and that many brokers were going to have to reconsider the use of the practice and insure that a **written letter** from the seller was placed in the file instructing the agent not to accept any further offers (this is directly addressed in Standard of Practice 1-7). I never did receive any type of written reply from the local board, other realtors, the Colorado Real Estate Commission, or the various personnel to whom I faxed and wrote letters. I did note that the one Commissioner’s firm did stop using this designation after receiving my letter.

In my opinion, no board should be allowed to use such a status as “Hold Don’t Show”. When an agent is a true “single agent broker” looking out for the best interests of the seller, it is common sense that you would like to entertain as many offers as possible. Having a “back-up offer” or offers is usually a great “insurance policy” because it puts added pressure on the primary offer for specific performance. I have had some primary offers fall through in my years of practice, and in nearly all these instances I had the secondary offer that kicked in and closed.

Having a standard of practice requiring “single agency brokerage” only would certainly simplify and aid our industry in becoming a true profession, in my opinion.

With regards to this issue, there is the related Standard of Practice 1-6. How many agents out there have experienced long delays and no type of communication from the listing broker regarding an offer that was presented? How many boards stipulate a strict practice of allowing the selling broker to be present for the initial presentation? I have talked with numerous agents over the years regarding this issue. In this area, most brokerage firms discourage the presence of the selling agent and are very slow to present offers or provide timely and documented proof of attempts to present the offer. The majority of all sales in this area are “in-house sales”.

A national rule about these two items would be very beneficial to buyers and sellers in my opinion. This matter could be handled simply and easily with additions to the existing code, as follows: 1) As a continuation of Standard of Practice 1-6, “listing agents shall be required to keep an accurate log indicating the date and time any offer is initiated and delivered to the listing agent’s office. The listing agent shall also be required to provide a written verification of the status of this offer within 24 hours or sooner to the selling agent; this should be done via facsimile transmission for proper documentation or a “paper trail” to support the listing agent’s efforts to fulfill this obligation of a timely presentation of the offer to the seller. This also helps the selling agent working as a buyer’s broker because they would have proof and confirmation of the efforts made to present the offer (presuming that the listing agent is not allowed to be present for the initial presentation). I have found this to be most helpful in my practice of representing sellers. I also fax the listing broker to verify the date and time my offer was dropped off to the listing office when I am representing buyers, since I only represent buyers under a “Buyer’s Broker Agreement”. Even with the fax confirmation, I have experienced delays as much as 3 days before hearing from the listing agent!

In this area I have had listing offices refuse to present my offers because I did not specify that the buyer’s deposit was to be placed directly in the listing broker’s trust account, but to be held until acceptance by the seller and then deposited directly into escrow; or that I left the original check at the office and only included a copy of the check with my offer. You can confirm with the Legal Hotline here in Colorado all the many questions I have posed to them on these various issues and the written replies I have retained on file! Unfortunately, this usually has to do

with the inexperience of the agent involved and the lack of proper supervision of their agent! I am thankful that CAR (Colorado) has a very excellent “Legal Hotline” like CAR (California). Ken Kaplan and John Goodman have been really helpful, kind, and great about follow-up with all the various problems I have encountered these past years. The Colorado Legal Hotline always provides a written response to the question and answer, which is a great idea that should be incorporated nationwide.

Colorado has enacted a provision that allows all real estate people to be called “**Brokers**” which is very scary. I have always respected the laws of California where they have held firm on the true distinction between “Broker” and “Salesperson”. In Colorado, the distinction is “Broker” and “Broker Associate”, which is misleading, in my opinion. Anyone with a broker or broker associate designation should be held to the highest possible standards of practice, which includes more strict educational requirements and experience. If one wishes to be designated as a broker in California, one has to take a broker’s exam and be held to a higher standard than a salesperson.

Colorado has also enacted the designations of “Transaction Broker” and “Designated Brokerage”. Per Colorado Law, under transaction-broker it states “a broker engaged as a transaction-broker is not an agent for either party.” From all I can gather, this was a way for Colorado to cut down on the number of lawsuits filed against real estate people. In my opinion, this designation reduces an agent to the status of a “used car salesperson”. You are saying to the public that I will represent you, but I have no fiduciary duty to you and I am not truly responsible for my actions in representing you. When I took my last seminar, the speaker said that the state is still trying to figure out how to sue a transaction broker! How sad that people have chosen to hide behind this designation in the hope that they can’t be held fully accountable for their actions and advice given to a person they usually call a “client”! I call this the “No Broker” representation. Have you ever heard of a “transaction attorney” or “transaction doctor” who could only give you advice but not be held accountable for his representation and advice? A national standard of single-agency brokerage would be highly beneficial in our efforts to be recognized as true professionals and impose higher standards of practice on behalf of any real estate person claiming to be an agent for a client.

Designated brokerage is really an interesting concept that further degrades our profession in my opinion. Can you imagine a world where you have a “Designated Attorney” who’s firm can legally represent both parties in a legal dispute and maintain two separate, locked offices to keep everything confidential and properly

segregated? Again I think this was a great copout on behalf of the State of Colorado and others who have gone down this path. If the designated broker is a salesperson in a large firm who, for some reason, is not available then who is in charge?? This is the wackiest thing I have ever heard for anyone who wants to be a true professional. In a heartfelt attempt to comply with this agency situation, a brokerage firm with more than one agent should have two separate offices with files that are locked and under constant security to best protect the interests of the buyer and the seller! In California, an “in-house agency” is a dual agency, even though sellers and buyers are represented by different persons. This should be true in any state. As long as we allow “in-house sales” or “dual agency”, I don’t think we can ever consider ourselves a true profession.

It is my belief that the only way the real estate industry can immerge as a true profession is to insist on true single-agency representation. Our industry and our society seem to be driven by power and greed. Large organizations and corporations are constantly seeking control of a larger segment of the marketplace to obtain more wealth, power and control. All these attempts by states to adopt complex agency laws to try and explain our behavior and representation to the public is a joke. All the big firms will always fight this simple principle, but the fact is that “single-agency brokerage” would be good for our clients and for our industry. It would raise us to a new level of standards as true professionals with only representation of one client per office, a simple agency law that says you can be represented in a true fiduciary capacity or you can choose to represent yourself. What could be simpler? This would spread the wealth and more importantly make all agents fully accountable for their actions.

Standard of Practice 1-2 should be rewritten to state: The duty of the Code of Ethics is the nationwide, minimum standard for all licensed real estate personnel. If you are a real estate broker, you are held to a higher standard than acting as a “real estate sales person”. There should be a clear designation that there are two types of real estate agents: brokers and salespeople. If you aspire to be designated as a real estate broker, you should be required to conform to the higher standards and obtain the additional education and experience to be so designated.

I don’t know if complete unification and standardization is possible. But it seems to me that the real estate industry is one of the largest and most powerful trade organizations in the country. Why not make a national push for true professionalism and recognition as an industry consolidated and intent on serving the public in the best possible way? We have the power to put pressure on our representatives to “do the right thing” in the best interests of consumerism.

All the “little local MLS Boards” need to unify and expand to large MLS Boards that represent all the surrounding areas. With the age of the computer and all the other “high tech” tools we have to work with, there is no reason for all small boards to hoard information and force membership in their board in order to share information. These little boards end up adopting their own set of standards and practices that don’t always conform and comply with the national or state standards of practice as pointed out above. Is this in the best interest of our clients to hoard listings and withhold information from surrounding area brokers? We need to “cut the fat” and insure more unification and cooperation among our boards, both interstate and intrastate. Some boards are still receiving weekly booklets for those licensees who have not updated themselves to the computer age! It is hard to believe that some agents are still living in the “stone age” in this area. This is really sad and incomprehensible. How can one serve the best interests of their client (s) if they don’t have access to a computer in this day and age?

I believe the time has come to “take the proverbial bull by the horns” and initiate prompt and positive action to elevate the real estate industry to a true profession. This won’t come easy or without tremendous pressure and criticism from all the large real estate firms in the country, but it is something that is long overdue and in the best interests of the public.

A national push for change can be a very positive thing to our industry and set an example of how positive change can be completed in the best interests of the public and the agents in the industry. Instead of being driven by power and greed, we can become an industry influenced by positive action and change to further simplify, unify, and make our industry easier to understand and to identify with. It is not an easy task by any means, but one that has far more positive benefits for the whole country.

A simple, universal agency law with uniform standards for all states would certainly do a lot to elevate our industry. These new changes would bring more trust and confidence to our industry. It would set a true national standard of practice to be observed by all states and all real estate boards. It would make everyone more accountable for his or her actions and set a higher standard for representation. Since the purchase of real estate is one of the most expensive endeavors we undertake in our lifetimes, we should have the right to demand true professional representation with an agent held fully accountable for their actions.

Attorneys are considered professionals and they are supposed to be held fully

accountable for their actions. We know this is not fully true, but you certainly don't see attorneys practicing "divided agency" or acting as "transaction attorneys"! Colorado has a mandatory law regarding errors and omissions insurance. I don't really like this idea, but this action has apparently been taken by the state of Colorado to better protect the public. Why not go one step further and require all real estate personnel to be true single agents for the party they represent.

I am involved with a situation in which a local attorney is being sued for breach of a fiduciary duty. It is very apparent that this person was involved with real estate law and failed to properly disclose and protect a lot of people. Since errors and omissions insurance is apparently not mandatory in Colorado, this person chose not to have the coverage. Instead, he has quietly placed all of his assets into his wife's name and apparently made a fraudulent transfer of a real estate asset to his wife that was in his name initially. In the "carryback financing", he had his wife named as the beneficiary! How sad and lowly can a person go? Good reason why all attorneys in the country should be required to carry E & O Insurance as well as real estate brokers and sales people.

The true test of a professional is the best possible representation of a buyer to obtain the lowest possible price and best terms and conditions that favor the buyer. When representing the seller to overall goal is to obtain the highest possible price with the best terms and conditions that favor the seller. I don't believe it is possible for one agent or one company to comply with these overall goals and objectives when representing both buyer and seller. I think most attorneys would agree with the importance of "single-agency brokerage" as the preferred method of representation.

While it is true that real estate brokerage is practiced differently in different states, I still believe it is possible to have a unified and more comprehensive Code of Ethics that applies to all states. The simplification of agency law in all states specifying "single-agency" would be the right approach if we truly want our industry to be recognized as a true profession. This would also provide the public with the greatest protection and help in eliminating those who are not well trained and educated to be competent and responsible agents.

It is also obvious to me that we need to improve and change the existing Code to include the full confirmation, receipt and tracking of all offers. A simple logbook could be created and required as part of any transaction to insure the best interests of buyers and sellers. This would also help in enforcing the "Golden Rule" quoted

in the Preamble to the Code: “Whatsoever ye would that others should do to you, do ye even so to them.” This logbook would also serve as an important aid to all agents in the endeavor to best serve and protect the best interests of all parties to a real estate transaction. This section should also address the important issue of multiple offers. It is my belief and opinion that all agents should have a right to be present when there are multiple offers. We had a lot of this in California in the really active years, and I have always made it a practice to create a “level playing field” where each agent has the right to hear the initial presentation of the offers to insure that their clients have been treated fairly. I then excuse the agents to discuss the terms and conditions of each offer with my client.

These changes seem necessary with the “Buyer Agency” concept, which is becoming more common today. I wouldn’t think of representing a buyer unless they are willing to execute a “Buyer’s Agency Agreement” and agreeing to obtain a “Pre-Approval Letter” (to be clearly distinguished from a “Pre-Qualification Letter”- funny how many agents still don’t understand the difference!) from a good and reputable lender. A “direct-source lender” is always preferred here since they do their own underwriting of the loan “in-house”. This assures the buyer’s agent of a level playing field, as the buyer’s agent has a true fiduciary duty to best represent his client. The large firms in this area discourage the practice of selling brokers being present when offers are presented to the seller. The Code of Ethics should clearly spell out the right (s) of the selling broker to be present for the presentation of an offer when the agent is acting as a true “Buyer’s Agent”. I would like the Legal Hotline’s response on this matter regarding how the selling agent can best represent his buyer in offer presentations to the seller, when the agent is acting as a true Buyer’s Agent?

Taking the “right path” is never an easy thing to do. It is my opinion that we need to take action to insure the practice of “single-agency brokerage” nationwide. This will help our industry in becoming a true profession. As professionals we will then be representing clients in a true fiduciary capacity. This will discourage those who are not willing to obtain the required education and experience to truly represent a client. Changing the Code of Ethics as I have suggested above will then tie in closely with this practice by setting true guidelines to be followed so everyone’s client is treated fairly and professionally. Having a “transaction log” which records the date, time and communication between agents representing all parties to a transaction will help to support the actions and efforts taken in the best interests of all the parties. This “log” will also become a very important document for any real estate transaction, which supports and verifies the efforts of the parties acting in the best interests of their respective clients.

I want to thank you for your time and consideration in reading my letter. I hope to hear from everyone regarding your ideas and opinions on these issues. I plan to use much of this information in a book I am working on, so it is important to get your opinions and ideas on these various issues. I look forward to hearing from everyone.

Sincerely,

Fred R. Schneider, RECI, GRI

FRS/cll

Cc: Governor Arnold Schwarzenegger

Governor Bill Owens

Ken Kaplan, Esq. (CAR-California)

John Goodman, Esq. (CAR-Colorado)

Debbie Campagnola, Director DORA Colorado
file