

CHAPTER IV: ANALYSIS OF INDUSTRY STRUCTURES AND PRACTICES

A. TRADE ASSOCIATIONS

The National Association of Realtors (NAR) and its affiliated state Associations and local Boards of Realtors together comprise the principal trade organization in the real estate brokerage industry. In this section we first present introductory descriptions of the NAR and its affiliates, followed by brief introductions to the other smaller groups. Next we trace the history of the Realtor organizations and recurring themes in that history. Last we describe and analyze the Realtor structures and practices which have been the subject of particular attention in our investigation.

1. Introductory Description of the Trade Associations 126/

The Realtor system is a tripartite trade organization consisting of the National Association, 50 state Associations, and more than 1,800 local Boards of Realtors.

a. National Association of Realtors (NAR) 127/

The National Association of Realtors is the parent organization and nation component of the Realtors system. Founded in 1908 in its headquarters location Chicago, Illinois, the organization was known until 1972 as the National Association of Real Estate Boards (NAREB). Today, with more than 730,000 members, the NAR is the largest trade and professional association in the nation.^{128/} Of NAR's current members, 85 percent are primarily engaged in residential brokerage, as opposed to commercial brokerage or other forms of practice.^{129/} We have located no precise statistics on the Realtors' share of the real estate brokerage services market. However, data from the FTC Consumer and MLS Surveys suggests that an overwhelming percentage of all broker-assisted residential housing transactions in the U.S. involve a Realtor.^{130/}

^{126/} This overview is drawn largely from Appendix C, "Trade Associations," which provides a detailed description of the principal trade associations in real estate brokerage. Appendix C should be reviewed for further detail and source references.

^{127/} See Appendix C, Section 1.

^{128/} NAR, Operations Manual (1978), at 1; NAR Monthly Report, Vital Statistics (May 1980), at 1.

^{129/} NAR, 1978 Annual Report, at 2.

The NAR charters the state and local units, maintains its Code of Ethics, licenses the collective service mark "Realtor," helps establish Realtor policies, and performs a wide range of services for its members.

Brokers or salespersons who wish to participate in any Realtor organization must join all three branches: a local Board of Realtors, the state Association, and the NAR. Only after payment of annual dues to all three branches and a pledge to abide by the Code of Ethics and other regulations can a broker call him/herself a "Realtor." Salesperson members are known as "Realtor-Associates." If a broker belongs to the NAR, all the salespersons affiliated with the broker must join, or the member broker must pay dues for the salespersons in lieu of their joining.

The 1978 budget for the NAR — distinct from the state Associations and local Boards, which keep separate budgets — was \$13.8 million. Of this income, 87 percent was generated by member dues. The largest expenditures were for headquarters administration (42%), public relations (20%), and "Washington activities" (12%).^{131/}

The NAR is governed by a Board of Directors, consisting of NAR officers and directors at large, elected by the local Boards and state Associations on a per capita formula. A professional staff of 358 persons,^{132/} distributed among 14 departments, conducts the day-to-day business of the NAR, aided by 36 standing committees of members and staff. The NAR has established nine specialized sub-groups, such as the Society of Industrial Realtors (SIR) for commercial brokers, the American Institute of Real Estate Appraisers, and the Realtors National Marketing Institute (RNMI), the educational arm of the NAR.

Over the years the NAR has played an increasingly complex and important role in the brokerage industry. During its 70-year history, discussed next in this section, the NAR has significantly influenced such major developments as the use of fee schedules, the development and regulation of the MLSS, and the evolution of standards of brokerage practice.

Today the NAR performs a wide range of important functions for brokers and the real estate industry. The NAR coordinates the Realtors' highly-organized national political activities. The NAR spearheads Realtor campaign fund-raising, which is organized through the Political Action Committees (PACs) at all levels

^{130/} Ninety-two percent of sellers utilizing a broker in our Consumer Survey reported that their homes were listed on an MLS. (FTC Consumer Survey Exhibit, Screener Question 13.) Seventy percent of MLSSs do not allow non-Realtors to participate. (MLS Survey, 16.) Of the 30% of MLSSs that do allow non-Realtors to be members, the mean number of non-Realtor participating brokers is 13. (MLS Survey, 17.) The mean number of participating brokers for all MLSSs surveyed is 122. (MLS Survey, 13.) Assuming the MLSSs allowing non-Realtors are approximately the same size as those not allowing non-Realtors, the percentage of non-Realtor participants in all MLSSs is approximately 3.2%. Assuming the 8% of broker sales not involving an MLS are all non-Realtor, and assuming the non-Realtor MLS offices are on average no larger than the Realtor MLS offices, the minimum market share of Realtors would be approximately 88% of all broker-assisted residential transactions in the U.S.

^{131/} NAR, Supplemental Operations Manual (1980), at 74.

^{132/} NAR, Monthly Report (May 1980), at 1.

of the Realtors system. The Realtors' 1978 PAC fund-raising total, \$893,636, ranked first among all business PACs and third among all groups in the nation that year.^{133/} The NAR also coordinates the Realtors' legislative activity in Washington, D.C., spending over \$1.65 million each year in these efforts.

The NAR considers itself the nation's "spokesman for real estate."^{134/} It performs the central public relations functions for the Realtors, including producing a large range of publications and media efforts.

The NAR plays a role in ensuring compliance with the Realtor Code of Ethics and other standards. Failure to comply can result in the revocation of a Board or Association charter, revocation of use of the "Realtor" mark, and termination of important services such as insurance.

The National Association also provides member services of all kinds. Educational and information services, including an unequalled real estate library, training courses and materials, and advanced designations for specialists are among the most widely-used NAR offerings.

b. State Associations of Realtors ^{135/}

The state Associations are the middle link in the tripartite structure. In most ways the development of the state Associations has followed and paralleled that of the NAR.

Each state Association is incorporated separately in its state and is composed of all the Boards, Realtors, and Realtor-Associates located in the state. Members elect a state Board of Directors and other officials to preside over each state Association. Each state Association maintains a professional staff. The California Association of Realtors (CAR), by far the largest state Association, has nearly 140,000 members, 182 member Boards, a budget of \$6 million and a full-time staff of 118. Most state Associations are much smaller. On average, Associations have about 13,500 members, 34 Boards, a \$514,000 budget, and nine staff members.^{136/}

Each state Association generally has a governing framework and a system of committees that parallels that of the NAR.

The state Association functions are also in many ways parallel to those of the NAR. Most state Associations are active in political affairs and generally coordinate with the NAR for fund-raising and legislative activities in national matters. The larger Associations perform public relations functions. Most maintain a Legal Action Fund and coordinate legal efforts with the NAR, when appropriate. The state groups are particularly active in the education and training of members and in the development and publication of standardized forms including listing and offer forms. State Associations also provide support service for the Boards, such as aid with bylaws and procedures and inter-Board arbitration, and member services, such as insurance and pension programs.

^{133/} Fortune (March 27, 1978), at 56.

^{134/} NAR, Operating Manual (1978 ed.), at 3.

^{135/} See Appendix C, Section 2.

^{136/} All state Association statistics from NAR, Barometer of Accomplishments (November, 1979).

c. Local Boards of Realtors ^{137/}

In many ways and for most Realtors, the local Board is the most important branch of the Realtors system.

Local realty boards, first organized in the late 19th century, were the earliest form of real estate brokerage trade group.^{138/} From their beginnings in social functions and informal exchanges of listings, the Boards slowly coalesced into important business structures, especially with the advent of the MLSs, which the Boards generally control. Today there are more than 1,800 local Boards and more than 900 Board-affiliated MLSs.^{139/}

The Boards, as the local branch of the tripartite structure, are assigned geographical areas by the NAR. Boards vary greatly in size and complexity, but an average Board will have membership in the hundreds, with Associates outnumbering Realtors roughly two-to-one.

Since 1974, Board membership requirements have been limited to those specified in the NAR's eight-point set of criteria. These criteria were developed by the NAR in an effort to establish "reasonable and non-discriminatory written requirements for membership."^{140/}

Most Boards have formal budgets. Member dues and specific charges for services provide the revenue. Like the NAR and the state Associations, Boards are governed by elected directors and officers and served, size permitting, by paid staff.

The most recent NAR Board survey, conducted in 1973, revealed that 71 percent of all Boards, and nearly all large Boards, have an MLS available for members. The MLS is usually organized as a committee or division of the Board. The MLS is arguably the most valuable service offered to members and is thus a prime attraction for membership.

Another principal function of the Boards is the enforcement of the NAR Code of Ethics through grievance procedures and the resolution of business disputes among members in arbitration proceedings. Panels of members hear these matters and recommend to the Boards appropriate sanctions for violators of Realtor rules.

Larger Boards engage in public relations and political activities, with impact varying with the magnitude of the efforts. Nearly all Boards offer other member services, including educational services, publication of newsletters and directories, and social functions.

Control of the MLS and the enforcement process gives a local Board great influence over the practices of its members and over the local brokerage industry as a whole.

^{137/} See Appendix C, Section 3.

^{138/} See Section 2, "History of the Realtors Organizations and System of Brokerage," below.

^{139/} In many cases an MLS will serve a territory including several local Boards.

^{140/} NAR, Membership Policy and Procedures Manual (1973), at 44.

d. Non-Realtor Trade Associations ^{141/}

The National Association of Real Estate Brokers (NAREB), whose 5,000 members are known as "Realtists," is composed predominant of Black real estate brokers. Although the largest minority trade group in the housing industry, it is modest in size and influence by comparison with the Realtors. However, the organization is a significant factor in the struggle for equal opportunity in housing, especially in urban centers where Realtist Boards are most active.

The National Association of Real Estate Service Agencies (NARESA) is a loosely organized association of alternative or "discount" brokers. Headquartered in Florida, NARESA claims a mailing list of 200 brokers, although a much smaller number are active in the organization.

2. History of the Realtor Organizations and System of Brokerage

a. Introduction

Today's brokerage structures and practices are often viewed as the only possible system of brokerage. However, they have evolved over many years in response to the specific problems and needs of the industry. These structures and practices were not implemented arbitrarily, nor were they imposed by an outside force. They were, for the most part, developed and instituted by the industry members themselves.

The primary factor in the evolution of the brokerage industry and the Realtor organizations has been the continual increase in the size and complexity of local housing markets. Generally, search costs increase as these markets increase in size. Search costs decrease as the concentration of the market-making systems, such as MLSs, increases.^{142/} The history of the Realtor organizations is, in large part, the story of the development of structures to solve the problem of increased search costs.

We used a variety of information sources to research the history of the Realtors and their system. While the practice of real estate is generally local, the structures and practices of brokerage developed in parallel fashion throughout the country. The most complete record of the Realtors is contained in the journals of the California Association of Realtors (California Real Estate). The California Association of Realtors (CAR) is the one state Association which pre-dates the national organization. Not only has the California Association literature traced the national developments in brokerage throughout the century, but the California Association has also been a leader in most of those developments. California structures and practices have often been models for others throughout the United States. In addition, California brokers have long been a major portion of the industry. Today California contains approximately one-fifth of the nation's licensees and Realtors. As early as 1925, the CAR accounted for approximately one-sixth of the total national membership.^{143/}

^{141/} See Appendix C, Section 4.

^{142/} See Chapter II above regarding the nature of making a market in heterogeneous products.

b. Chronology

Until the mid-19th century, the principal intermediaries in the real estate sales transaction were lawyers and other business persons not specialized in real estate. The creation of the real estate associations and the advent of brokerage as a separate occupation coincided. As the size and complexity of the market, and therefore the complexity of the function of brokerage, increased, specialization in brokerage became increasingly common.^{144/}

Brokers have probably always held informal meetings. The first formal association of brokers is generally believed to be one formed in New York in 1847. That group's primary function was to serve as a forum for the exchange of information on properties for sale. It also established standards of practice for those participating in the exchange.^{145/} The first group to call itself a "realty board" was established in San Diego in 1887.^{146/}

As population moved westward, local boards or exchanges were established and patterned after the New York exchange. The common objectives of these local associations were to exchange listing information more efficiently and to establish standards of practice.

The first state Association in continuous operation was the California Association, formed in 1905.

In 1908 the National Association of Real Estate Exchanges was formed in Chicago. Present at the initial meeting were 19 local Boards and the California Association. These brokers and officials were just beginning to see the "possibility of self-government" for the real estate industry. The challenge was to organize the industry.^{147/}

The National Association of Real Estate Exchanges later changed its name to the National Association of Real Estate Boards, or NAREB. This name was used until 1972. In 1972, the National Association adopted the name National Association of Realtors. This was done, in part, to stress the term "Realtor," which some Realtor officials felt was in danger of becoming a generic substitute for the word "broker."^{148/}

In 1913 the first Code of Ethics was drafted by the National Association. The Code, although amended many times, has retained much of its original content.^{149/}

^{143/} California Real Estate (June 1925), at 6.

^{144/} See, e.g., California Real Estate (October 1923), at 42; California Real Estate (April 1925), at 19; and California Real Estate (December 1961), at 32. See Case, supra, note 57, at 1. Attempts by the Associations to eliminate part-time brokers and others, directly and through licensing laws, may have also contributed to this trend.

^{145/} Case Report, supra, note 57, Part 3, at 1.

^{146/} California Department of Real Estate, Reference Book 1979-80, at 53.

^{147/} California Real Estate (June 1937), at 18.

^{148/} California Real Estate (January 1975), at 9; California Real Estate (June 1972), at 8.

In the early years of the Associations, the most pressing task was to hold the organizations together. Association officials at the time looked forward to the day when licensing laws would help this effort.^{150/} In 1917 the California Association succeeded in its campaign to persuade the California legislature to pass the first state licensing law. This original law was overturned by the California courts on constitutional grounds. In 1919 the modified statute became the first real estate license law to take effect in the United States. The then-secretary of the Association later noted: "With the enactment of the license law, the value of the state organization was more readily apparent. The way opened up for the beginning of a long range, constructive program which was continued without interruption to the present day."^{151/}

This early license law incorporated into a regulatory statute the essence of the Realtor's ethics. Many practicing brokers at that time who were not Realtors were apparently not in favor of this legislation:

The officers and directors of the associations at that time had been largely responsible for the passage of the license law. . . . Only a small portion of those who were engaged in the real estate business at that time were members of the state association, a large group were bitterly opposed to its adoption. . . .^{152/}

In 1923 the first Association of State Real Estate Commissioners was formed. This Association, working closely with the National Association of Real Estate Boards, helped coordinate the various state activities.^{153/} By 1949, 36 states, two United States territories, and three Canadian provinces had adopted license laws. Most of these laws were based upon the California law.^{154/}

During the 1920's, the structures and principles which now dominate the industry evolved rapidly. The state licensing laws and the Realtor Associations facilitated the development of a single, organized industry. The advantages of cooperation in marketing also bound together the otherwise fragmented industry. This is reflected most strikingly in the development of the multiple listing services. In 1921 there were only ten Boards in the country with multiple listing services. By 1923 there were more than 120.^{155/} By 1926, a National

^{149/} Compare, for example, the Code Provisions contained in California Real Estate (August 1924), at 17, with the modern code.

^{150/} California Real Estate (August 1947), at 8.

^{151/} F. Reed, President, 1920-21, Secretary 1916-19, California Real Estate Association, California Real Estate (August 1947), at 8.

^{152/} R. Riley, Controller, State of California, California Real Estate (October 1923), at 42.

^{153/} California Real Estate (December 1924), at 22; CRE (October 1923), at 35.

^{154/} California Real Estate (December 1949), at 22.

Association survey indicated that a majority of Boards throughout the country operated multiple listing services. The average length of time of operating such service was three years. The maximum time was eight years. For those Boards that operated MLSs, an average of 70 percent of Board members belonged.^{156/}

By the end of the 1920's, most of today's brokerage structures had been developed and were in fairly wide use. The most dramatic change since that time has been the increasing dominance of the Realtor's system of brokerage. This has been reflected most clearly in the increased use of the multiple listing services.

c. The Role of Cooperation

(1) Early Emphasis

The primary purpose for real estate brokerage associations was to facilitate the exchange of information relating to buyers and sellers. In order to facilitate this exchange of information, it was necessary to make the many competitive brokers cooperate. Cooperation, therefore, became a major theme of the Realtor organizations. This theme is striking in the very earliest of Realtor journals, where the word "COOPERATE" is capitalized each time it appears.^{157/}

Consistently, since they drafted the Code of Ethics in 1913, Realtors have stated that the Code is based upon the "Golden Rule": "Whatsoever ye would that men should do unto you, do ye also unto them."^{158/}

A fundamental function of the local Boards has been to bring about:

[T]hat essential of the Code of Ethics which is summed up in the term 'cooperation'. . . . [B]ut some will ask how you can make a team out of competitors. Some Boards have answered this query with 'multiple listings. . . .'^{159/}

The Realtors' goal of cooperation has been closely associated through the years with the MLS. However, industry literature also indicates that the

^{155/} California Real Estate (January 1923), at 31.

^{156/} NAREB, Annals of Real Estate Practice, Volume II (1926), at 341, 342. The MLSs are discussed in depth in Ch. IV, Part C, below.

^{157/} See, e.g., California Real Estate (July 1913), at 267.

^{158/} Matt. 7:12. See also Realtor Code of Ethics; California Real Estate (August 1924), at 17; Interpretations of Code of Ethics (1976), at viii.

^{159/} A. Donough, Jr., Secretary, Berkeley Realty Board, California Real Estate (July 1939), at 19. The author noted also that other forms of interchange can be helpful to the Board.

Associations claimed a degree of success in promoting cooperation and joint marketing even before the development of the MLS. For example, in its early years the California Association claimed to have "dignified the disorganized, independent and competitive real estate offices of California into a stable, cooperative and honorable profession."^{160/}

(2) Standardization

One of the major programs of the early Associations was to standardize the practice of real estate. This involved not only the standards of practice contained in the Code of Ethics, but also the forms used, the commissions charged, and the methods of doing business. For example, in 1921 two of the first committees established by the California Association were the Standard Forms Committee and the Uniform Commission Committee.^{161/} Often Boards and MLSs also had appraisal committees in an attempt to obtain uniform appraisals.^{162/}

The Associations believed they could facilitate cooperation among competitors by eliminating differences relating to listing contracts, appraisal methods, and fees. The marketing of real estate was viewed as a cooperative joint venture.^{163/}

d. Professionalism

(1) The Meaning of Professionalism

Realtors have been striving for, and the industry has been on the verge of "finally becoming," a "profession" for more than 60 years. The goal of professionalism, and the broad use of the term, have been recurring themes in the Realtors' efforts to cope with the problems of the brokerage industry. Realtors have used "professionalism" to justify rules which have been either necessary or helpful in establishing and maintaining the Realtor system. "Professionalism," therefore, has been an issue in many contexts, but two deserve special discussion: entry into the industry, and the proper relationships among brokers and consumers in a real estate transaction.^{164/}

^{160/} California Real Estate (November 1913), at 3.

^{161/} See, e.g., California Real Estate (October 1924), at 23; NAREB, Annals of Real Estate Practice, *supra* note 31, at 343. California Real Estate (August 1955), at 14; see also, California Real Estate (January 1960), at 9.

^{162/} California Real Estate (November 1913), at 3.

^{163/} NAREB, Annals of Real Estate Practice (1925), at 90. See also California Real Estate (December 1923), at 42.

^{164/} The latter theme is discussed in detail in Part F, "Broker/Consumer Relationship," below.

(2) Entry: The Example
of California

Excessive entry into the industry has been identified as a problem by the industry for a number of years. The industry literature often mentions this subject and explains what the Associations have done in response. There are few reliable statistics on the number of persons actually engaged in the business of real estate brokerage, for, while state departments of real estate keep records of numbers of licensees, the number of licensees does not necessarily reflect the number of people active in the brokerage business. There are many inactive licensees, as well as many part-time or occasional participants. The flow of workers into and out of the brokerage industry during a normal three-to-five year housing cycle cannot be measured with existing data. However, California statistics do provide some general insight into the number of licensees per capita for large market areas during the longer cycle represented by the 1920's, the Great Depression, and the post-Depression expansion.

The 1920's was characterized by a very active and rapidly expanding housing market, known in brokerage as a "hot" market. In this respect, the market of the 1920's was similar to the market in the late 1970's. In 1928, at the peak of this hot market, a survey in California showed that one person in every 80 held a real estate license.^{165/}

The Depression put an end to the hot market of the 1920's. The brokerage industry was decimated. However, by 1936 business had rebounded substantially. Lots were selling for 20 percent more than the year earlier. With commissions fixed, the average price of homes and lots increasing, and the number of transactions increasing, increasing entry had become a problem. The Chairman of the California Association's Brokers' Division observed that there was a "Flood of New Licensed Agents--The increase in licensed brokers is all out of proportion to the increase in business up to the present time."^{166/} The Chairman called for better "protection" for brokers. He felt that more difficult examinations and a large transfer fee to stop salesmen from jumping from one office to another would help the situation.^{167/} By January 1939, one in every 200 California residents held a real estate license. The California Association membership was at its highest since 1929.^{168/}

During the 1940's the pressure from new entry continued. In 1949 the California license law was amended, in accord with the recommendations of the Association, to require two years' experience as a salesman or its equivalent as a condition for obtaining a broker's license.^{169/}

The effect of this requirement was sharply to reduce the number of new applications for broker licenses. This requirement at least temporarily slowed entry and shifted the preponderance of new applications from brokers' licenses to

^{165/} California Real Estate (April 1928), at 21.

^{166/} L. Ackley, Chairman, Broker's Division, C.R.E.A., California Real Estate (April 1936), at 32. See Ch. IV, Parts C and G for history of rate schedules.

^{167/} Id.

^{168/} California Real Estate (January 1939), at 6.

^{169/} California Real Estate (August 1949), at 16.

salespersons' licenses.^{170/}

Pressure from entry, however, continued. By 1955 the pressure was sufficient for the California Association to lobby for, and succeed in obtaining from the state legislature, license law amendments which tended to discourage part-time and inactive brokers. Included in this package of changes was an increase in the licensees' annual fees.^{171/}

In 1958, the newly created Real Estate Research Program at UCLA undertook a study for the Association regarding the Association's proposed increase in the recommended minimum commission rate from 5 percent to 6 percent. The resulting report noted that during the period between 1950 and 1956, the number of transactions involving brokers increased approximately 31 percent. However, during the same period the number of real estate licensees increased 47 percent. Consequently, 47 percent more licensees were competing for only 31 percent more business. The report concluded that actual real income of Realtors may have decreased during this period. Furthermore, the study concluded, the most likely effect of increasing the commission rate would be an increase in the number of people entering the real estate industry. This increase in the number of agents could, in turn, prevent the increase in commission rates from having its desired effect of increasing the income of individual brokers and salespersons. "However," the report concluded, "the problem of controlling entry into the business is a question of licensing and education and probably should be solved independently of the question of raising commission rates."^{172/}

The industry did raise the commission rate, and the flood of new licensees continued.

The issues of "excessive" entry and part-time brokerage practices persist. The commonplace industry view is that part-time participants are unprofessional and hurt the image of full-time brokers. According to this view, consumers do not discriminate between part-time and full-time brokers. Thus, the mere presence of the part-time brokers hurts the full-time brokers. As one contributor to the CAR magazine noted: "Part-timers skim the cream, listing and selling to neighbors, friends, relatives, anything that is easy to come by. Of course, these people would otherwise list and buy through a full-time professional."^{173/}

The real estate industry has responded to this continuing "problem." In answer to the above comment, the editors of the California Association journal stated:

The 'Plan for the Professional Development of the Real Estate Business in California' (March, 1978, California Real Estate) addresses this problem in its requirement that 45 clock hours of continuing education credits be earned for license renewal. It is contemplated that only those licensees truly serious about the business will meet the requirements. Over the past decade, C.A.R. has been a prime mover behind the

^{170/} California Real Estate (December 1949), at 22.

^{171/} California Real Estate (July 1955), at 8.

^{172/} "The Real Estate Commission Rate," California Real Estate (June 1959), at 28.

^{173/} California Real Estate (November, 1978), at 13.

drafting and adoption of this plan.^{174/}

Large-scale entry, however, continues. Recent statistics indicate that approximately one person in every 50 in California now holds a real estate license.^{175/}

We believe the historical pattern of entry in California to be reasonably representative of the entry pattern nationwide. Other California developments, such as the trade associations and licensing laws, have proven accurate indicators of national developments. To the extent national statistics exist, it appears that the increase in the number of licensees relative to the total population and relative to the number of transactions is a long-term national phenomenon. The resulting historical trend of decreasing industry productivity was recently noted in an NAR-commissioned A.D. Little Report.^{176/}

(3) Defining Appropriate Relationships Among the Parties

In addition to the perceived problems of excessive entry, "professionalism" has been associated with a number of issues relating to the proper relationships among the parties. These include the relationships among the brokers in the transaction and the relationship among brokers and consumers. These issues are discussed in detail in Part F, "Broker/Consumer Relationships," below.

The concerns of professionalism were reflected very early in the format of the older versions of the Code of Ethics. The 1924 version of the Code, for example, was divided into three sections:^{177/}

Part I of the 1924 Code was entitled "Professional Relations." It includes those Code articles which were considered useful in facilitating cooperation among brokers.

Part II, "Relations to Clients," outlined the basic principal-agent relationship with the client, usually the seller.

Part III, "Relations to Customers and the Public," included those articles which outlined appropriate ethical behavior toward parties other than the principal. This included honesty and general fairness.^{178/}

In addition to establishing and maintaining these ethical standards, the Realtors have also provided important educational services and worked for higher educational standards. While both the ethical and educational standards appear to have served broker self-interest as well, a significant part of their purpose clearly was to raise the quality of service provided to consumers.

^{174/} Editor's note, California Real Estate (November 1978), at 13.

^{175/} Los Angeles Times (April 20, 1980), Part IX, at 1.

^{176/} D. Little, Inc., supra, note 80, at 71. See also Section III.A.

^{177/} See, e.g., Code of Ethics, California Real Estate (August 1924), at 17.

^{178/} Id.

3. Analysis of the Realtors' Current Structure and Practices

a. Introduction

As we have noted, there is only one trade organization of decisive industry-wide importance in real estate brokerage — the National Association of Realtors and its affiliates. In many ways, the Realtors^{179/} are the system that has become the industry.

The Realtors' groups helped establish and help maintain the interdependent system of brokerage. The MLS and the broker/ consumer relationship that accompanies it are the key aspects of the cooperative system. The Realtors' groups are the framework that holds the system together.^{180/}

To view the Realtors' role in a fair perspective, we must recognize the distinctions between the different levels of Realtor organizations, between past and present practices, and between intentional acts and mere results. For example, many practices which would today be unlawful were in previous times widely accepted as legitimate. The generalizations offered in this section should be tempered with these distinctions in mind.

b. Control of the MLS and Other Important Services

(1) MLS

The Realtor groups were primarily responsible for the establishment and popularization of the MLS.^{181/} The MLS has become, in most areas, the primary residential real estate sales system.^{182/} Today the local Boards control 90-95 percent of all the MLSs in the country.^{183/} Control over the MLSs gives the

^{179/} We use the term "Realtors" to refer to all Realtor organizations -- national, state and local -- taken together.

^{180/} An automotive metaphor has been suggested: the MLS is the vehicle of broker interdependence, and the Realtors are the engineers and mechanics who helped build and help maintain that vehicle.

^{181/} See Ch. IV., Part C, "MLSs," below, for a discussion of the Realtor's role in the MLS movement.

^{182/} See generally Ch. IV, Part C, "MLSs," below, on the importance of the MLS in residential brokerage today.

^{183/} Extensive efforts by the staff (see Staff Memorandum, "FTC MLS Survey Methodology,") working from information provided by the NAR and other sources, identified only 55 non-Realtor MLSs nationwide, as against 931 Realtor MLSs. Even assuming staff located only one-half of all unaffiliated MLSs, yielding a total of about 100, the Realtor-controlled MLSs

Realtor groups the single most powerful tool available for shaping brokerage practice. All three levels of the Realtors' organization share in the exercise of the influence conferred by MLS control.

The National Association affects MLS practices primarily through the enforcement of its "Multiple Listing Policy" of November 15, 1971, known as the "Fourteen Points."^{184/} A Board's failure to adhere to this policy can result in charter revocation. A recent example of the exercise of this influence was the NAR MLS policy notice circulated in April 1980. This notice advised Realtor MLSs to cease publishing the complete commission rate and the "split" being offered to cooperating brokers with their listings, and advised instead that MLSs publish only the percentage of the total selling price being offered as the cooperating broker's commission (e.g., instead of listing a 6% commission to be divided 50/50, to list the 3% commission available to a successful cooperating broker).^{185/}

The state Associations do not play a dominant role in MLS policy, but often help local Boards establish and operate MLSs and conform them to NAR policy guidelines.

The local Boards are directly responsible for most of the rules governing MLS use. The most important of these rules include requirements for access to the MLS, rules on types of listings accepted and disseminated, requirements of mandatory or voluntary listing, rules on time periods within which listings must be submitted, and required forms for submitting housing data. Violations of these rules can result in denial of MLS access or use.

(2) Other Services

In most cases, the MLS is the most important service offered by the Realtor groups. However, the Boards control other important services as well. One, an offshoot of the MLS, is the publication of recent sales information, known as "comparable" or "comp" data. The Board-controlled MLS is often the best or the only source of this data in the community. Further, the Boards often control the "lock box" system, through which keys are made available to brokers who wish to show homes. These two facilities provide additional incentives for a broker to conform to the Realtors' system and standards of practice.

c. Establishment and Enforcement of Standards of Practice

(1) Fees

The Realtors' historical policy of rate increases and stabilization is documented in Ch. IV, Part G, "Fee Stabilization," below. Historically, the Realtors viewed rate uniformity as important to the smooth functioning of the

would still be 90 percent of the total.

^{184/} See NAR, Handbook on Multiple Listing Policy, 3d ed. (1975), at 11-12 (hereinafter cited as "NAR Handbook").

^{185/} See NAR, The Executive Officer, Vol. 17, No. 2 (April 1980), at 4.

cooperative system of brokerage. Mandatory and then "recommended" fee schedules were used throughout the nation by all levels of the Realtors' structure. The last of the schedules were officially abandoned approximately 10 years ago. Thus a great many brokers active today were trained during the period when "price-cutters" were formally viewed as unethical or destructive of the norms of the interdependent system, and the prevailing commission rates of today are often those specified in the last schedule that was in use in a local community.

A substantial stigma still attaches to rate competition among members of Realtor groups in many communities, despite the NAR's current counseling against antitrust violations.^{186/} The widespread consumer myth that rates are fixed by law or the Boards of Realtors may have persisted in part because, until rather recently, schedules were still in effect in many communities.^{187/} Thus, the standards of brokerage practice today show a residual effect of the Realtors' historical policy on rates.^{188/}

(2) Broker/Consumer Relationship

The Realtor organizations have influenced the development of the broker/consumer relationship as part of their larger effort to foster the interdependent brokerage system.^{189/}

The NAR Code of Ethics, Multiple Listing Policy, and other basic policy statements make clear that the cooperative system is favored. One example is Article 6 of the NAR Code, which states, "the REALTOR should urge the exclusive listing of property unless contrary to the best interests of the client." Brokers who have failed to urge exclusives on clients have been found in violation of the Code.^{190/} Other provisions of the Code of Ethics, discussed in the next section on "Ethics and Dispute Resolution," similarly encourage adherence to the interdependent system.

The "Fourteen Points" help promote the exclusive listing as the standard of practice by providing in Point 13 that MLSs may not reject "any exclusive listing" submitted by a member.^{191/} This promotion of one form of business

^{186/} See Ch. VI, Part E, "Alternative Brokers," and Appendix D. For a discussion of the NAR's current position, see Handbook on Multiple Listing Policy (1975), at 11.

^{187/} See Ch. III, Part B, for documentation of the extent of consumer misunderstanding about rate negotiability.

^{188/} See Ch. IV, Part G and Appendix C for a discussion of the Realtors' policies of rate stabilization. See especially California Real Estate (September 1965), at 32, and California Real Estate (January 1966), at 32, for relatively recent discussions on the harm to the cooperative system associated with commission-cutting and advertising of rates.

^{189/} See Ch. IV, Part F, "Broker/Consumer Relationship," for a detailed analysis.

^{190/} See, e.g., NAR, Interpretations, Case #6-4 (1976), supra, note 51, at 35-36.

relationship tends to limit competition and the variety of services routinely offered to consumers.

The legal interpretations provided by NAR counsel, while not necessarily binding on members, set out standards of practice which greatly influence how brokers serve consumers. For example, advice from NAR counsel on agency law has helped establish the subagency relationship as the norm for client services. Relating to this issue, in a lead article in the NAR national journal, NAR counsel advised that no true fiduciary obligation exists between broker and buyer.^{192/} The same article concluded "it is clear . . . that a broker can't have 'out-and-out' agreements to represent both parties."^{193/}

Local Board policies, especially the requirement of exclusives as a condition for MLS access, shape the broker/client relationship. A seller seeking to use the Board-run MLS or to deal with a Realtor is likely to have no effective choice among brokers regarding key terms. These terms include the type of listing, when it will be turned over to the MLS, the nature of any cooperation with other brokers, the data form to be used, and in many cases, the listing contract form itself. Many of these requirements may not harm consumers. However, potential or actual harm can result when group pressure for uniformity cuts off a potential avenue for competition.

(3) Ethics and Dispute Resolution

The NAR Code of Ethics has a direct influence on standards of practice nationwide. In general, the Code serves the interdependent system by promoting broker cooperation over competition in selling listed properties. Many of the Articles of the Code are intact from the days of fee schedules and formal opposition to price competition. Several of the Articles may continue to inhibit competitive conduct by favoring practices more consistent with interdependence than with arm's length rivalry.

Articles 23 and 4^{194/} contain admonitions on avoiding "disparage[ment] of the business practices" of others and on "avoid[ing] controversies," which have in the relatively recent part been interpreted to discourage comparative advertising and to challenge price-cutting as unethical.^{195/} Article 21 and the accompanying Standard of Practice 21-3^{196/} forbid solicitation of clients of

^{191/} Point 13, NAR Multiple Listing Policy, supra, note 59 (emphasis added).

^{192/} W. North, "Identity Crisis Realtor-Style," Real Estate Today (Nov./Dec. 1973).

^{193/} Id. at 52.

^{194/} Article 23 declares: "The REALTOR shall not publicly disparage the business practices of a competitor. . . ." Article 4 declares: "The REALTOR shall seek no unfair advantage over other REALTORS and should conduct his business so as to avoid controversies." NAR, Interpretations, supra, note 51, at IX-XII.

^{195/} See e.g., Henry Pena matter in documents and trial exhibits in People v. San Diego Bd. of Realtors, et al., Civ. No. 375827 (1976) (San Diego District Attorney's Office).

other brokers. And Article 6 promotes the use of exclusive listings over other alternatives.

Several of these provisions may have legitimate and even pro-competitive purposes or potential. Examples of provisions with this mixed character are Article 21 (solicitation of clients should be limited in some ways to limit unwanted, harassing calls to sellers) and Article 23 (disparagement rules apply equally, in theory, to prohibit harassment of alternative brokers). However, these provisions have aspects which help foster the atmosphere where classical price competition is downplayed in a system already characterized by mutual interdependence. Further, these provisions are sufficiently broad and ambiguous that some Boards may be tempted to apply them in a discriminatory and anticompetitive fashion.

The local Boards are responsible for the application of the Code through the enforcement mechanisms of Board Grievance Committees, Professional Standards Committees, and Arbitration Panels.

Boards use two processes: the grievance process and the arbitration process. The grievance process is used for complaints, from members or consumers, of violations of the NAR Code of Ethics. The process begins with a written complaint, referred to the Board Grievance Committee, which advises the Professional Standards Committee as to whether the complaint merits a hearing. If it does, a Hearing Panel is appointed, composed exclusively of member Realtors. The hearing is then held, with procedural rights including notice, counsel, duty of members to testify, use of witnesses, cross-examination, and a written record (the latter only at the party's expense). The panel renders a decision, appealable to the Board of Directors. The Board of Directors may use a declaratory relief process in the courts if it believes the decision may give rise to Board civil liability. Sanctions available to the Boards include public or private reprimands, suspension, fines, or expulsion.

The arbitration process is used for "business disputes," generally fee disputes. The Board bylaws mandated by the NAR require members to submit to arbitration, where such requirement is not inconsistent with state law.^{197/} In this process, an Arbitration Panel, composed entirely of member Realtors, is appointed by the Professional Standards Committee. This panel gathers documents and testimony and renders a decision. The Board of Directors may seek judicial enforcement of the decision if necessary.

Possibly of great impact on brokers who wish to compete by non-traditional means is the requirement in Article 14 and Board regulations^{198/} that arbitration of all disputes be before a panel of competitor Realtors. Professional Standards Committees, to which grievance committees refer ethics complaints, are similarly

^{196/} Article 21 declares: "The REALTOR shall not engage in any practice or take any action inconsistent with the agency of another REALTOR. Standard 21-3 declares: "The REALTOR shall not solicit a listing which is currently listed exclusively with another broker." NAR, Interpretations, supra note 65, at 157.

^{197/} See NAR Code of Ethics, Art. 14.

^{198/} Article 14 declares: "In the event of a controversy between REALTORS. . . . The REALTORS shall submit the dispute to arbitration in accordance with the regulations to their Board. . . ." NAR, Interpretations, supra note 65, at XI.

composed.

Many alternative brokers believe this mandatory arbitration system results in discriminatory applications of the broad Ethics provisions. Of all alternative brokers answering our survey question, 43 percent (48 brokers) claimed to have experienced what they characterized as "unfair grievance proceedings or legal action" during their first year of operations.^{199/} Over 50 percent of MLS alternative brokers complained of this problem.^{200/} Our investigative files contain numerous complaints from alternative brokers throughout the country alleging what might possibly be construed as anticompetitive abuses of Board grievance or arbitration processes.^{201/} Even if the number of actual discriminatory Board actions is low, the perception that a Realtor's fate in the ethics and arbitration processes is in the hands of his or her competitor Realtors may provide a strong incentive to conform to "traditional" norms of commercial behavior.

d. Political and Legal Action

The Realtors' political and legal activities are closely related. They both consist of advocacy on issues which are central to the system of broker interdependence.

The Realtors' close relationship with state departments of real estate is one reason for their political effectiveness. This close relationship began with the Realtors' important roles in devising the original licensing laws, and it allows the Realtors a unique impact on real estate regulation and the state standards of practice.^{202/} For example, seven states incorporate into their real

^{199/} Question V-4, FTC Alternative Brokers Survey, 1979-80. See Table 8 in Appendix D.

^{200/} See Appendix D.

^{201/} See, e.g., Materials submitted by Terry Abraham of AB-RO Realty, Farmington, Michigan (cites Board harassment and grievance actions as the principal cause of the failure of his alternative firm); Henry Pena of Twin Palms Realty, San Diego, California (advertising discount commission rate held to be "disparagement" and "taking unfair advantage" of fellow Realtors); Bob Park of Bob Park Realty, El Paso, Texas (complains of spending "50% of my time" during one period responding to frivolous grievance proceedings); Dan Lindley of The Great 5% Real Estate Co., Los Angeles, California (complaint brought by members of the Board Grievance Committee alleging disparagement and unfair advantage based upon an advertisement that offered "quality services" at a 5% commission rate); William J. Motluck of Host Realty, Chicago Heights, Illinois (received letter from local Board accusing him of price fixing because of advertising of reduced commission rate); Carlin Stuart, franchisor of Home Sellers Center alternative brokerage franchise, Memphis, Tennessee (complains of numerous cases of local Board failure to act upon his grievances that allege harassment by traditional brokers).

estate regulations by reference, or publish in state manuals but do not formally adopt, the entire NAR Code of Ethics.^{203/} Other states have adopted individual Code provisions verbatim.^{204/} Further, the majority of the membership of most state commissions consists of Realtor-licensees, and five states require their governors to choose or "consider" Realtor nominees.^{205/}

The substantial political activity of the Realtors groups at all levels of government has been discussed in the "Introductory Description" above. The Realtors appear to be most effective at the state level. State officials have offered the opinion that virtually no proposed legislation relating to real estate has a chance of passage unless it is approved by the state association of Realtors.^{206/}

This influence is used in ways which further the cause of cooperative brokerage. For example, the California trade groups were active in obtaining legislation to impose restrictions upon advance fee brokerage compensation,^{207/} where brokers charge a portion of their fees before service is rendered. This is a method often used by "flat-fee" alternative brokers. Concerns about potential consumer abuse may have been part of the motivation for this legislation, but the result, intended or not, was to frustrate certain forms of alternative brokerage.

Similarly, the Texas Association of Realtors has recently played a major role in the Texas Real Estate Commission's promulgation of a regulation restricting certain forms of advertising by alternative brokers.^{208/} Again, concerns over consumer abuse may have been present, but the effort had the effect of entrenching the status quo form of brokerage practice.

The legal defense and counseling role of the Realtor groups is increasingly important. The NAR is the leader in the defense of the MLS and the cooperative brokerage system in court challenges throughout the nation. In recent years, many public and private plaintiffs have sued Boards, charging anticompetitive restrictions on MLS use or attempts to raise or stabilize prices. The Realtors have fought hard and often successfully to defend their system.

^{202/} See generally Ch. IV, Part A.2, on the Realtors' role in the movement for state licensing of brokers.

^{203/} See Appendix B, Part B.3 and Table F for a review of the ethics code approaches of the various states.

^{204/} See Appendix B, Table F.

^{205/} See Appendix B, Table G.

^{206/} See, e.g., Report of Interview with California Commissioner David Fox (February 27, 1979).

^{207/} See California Real Estate (July 1955), at 8, for the CAR role in the advance fee legislation.

^{208/} Rules of the Texas Real Estate Commission, Rule 402.03.05.021, §15(4)(P).

e. Education and Training

The Realtor organizations go to great lengths to educate the new broker or agent regarding the values of the Realtor system, including the cooperative marketing approach. This effort ranges from what is called the initial "indoctrination" of new members^{209/} to advice from NAR counsel, and from continuing training courses to articles in Realtor publications.

Many of today's brokers were trained at a time when fee schedules were in use and the cooperation ethic was at its strongest. Thus an important segment of the industry, and of the teachers of new members, may have been influenced deeply by values antithetical to open competition. The influence of the training activities over broker values extends to the entire range of practice issues, including MLS use, cooperative brokerage, and agency relationships with clients.

4. Conclusions

a. Historical Role of the Realtors

The Realtor organizations have played a central role in evolving a system of brokerage based upon broker interdependence. This evolution has occurred in response to industry problems. First among these was the challenge of making a workable market, given the high search costs which result from heterogeneous housing supply and consumer demand.

Local Boards, as well as the National Association and state Associations, were key factors in the transition from the early competition-oriented brokerage system, typified by the open listing and the maxim "competition is the life of the trade,"^{210/} to the interdependent system of MLSs and cooperation. Licensing laws were instituted; the Realtor Code of Ethics was developed; the MLS and the exclusive listing were popularized; fee schedules were adopted. These and other efforts were intended to unify and "professionalize" the industry. In the process, the competition ethic was replaced, in key respects, by the cooperative approach.^{211/}

b. Current Role of the Realtors

Cooperation remains a primary theme of the Realtor's activities. Aspects have been changed to reflect modern standards, but the basic orientation toward the mutual interdependence of competitor-brokers has remained.

^{209/} See NAR, Membership Policy and Procedure Manual (1974), at 45.

^{210/} California Real Estate (March 1923), at 37.

^{211/} In certain respects competition among brokers has never been discouraged. For example, certain forms of competition for listings have always been acceptable. But these have not, historically, included the key aspect of competition in price.

The modern Realtor system operates as a complex support mechanism for cooperative brokerage and for the interests of member brokers. Policy in the Realtor system flows in two directions: from the local Boards upward, and from the NAR down. However, the basic needs of local brokers are the paramount element in Realtor policy. The MLS and cooperation are essential for most local Realtors and are the primary concerns of their Boards.

The National Association, and to a lesser extent, the state Associations, are, however, playing increasing leadership roles in the development of Realtor policy. This is apparent in Realtor policy on MLS operations, agency law, the independent contractor status of real estate salespersons, legal defense, and political activity. Today, more than ever before, it is accurate to speak of a unified brokerage industry.^{212/}

The Realtors face a dilemma in attempting to increase industry efficiency without limiting competitive freedom and innovation. They have developed a mechanism, the MLS, and an ethic, the norm of cooperation, in an attempt to make brokerage more efficient and more profitable. These innovations have helped to improve the efficiency of housing markets, but they have also fostered uniformity of brokerage practice at the expense of competition. This uniformity has occasionally led to such overt abuses as secret fee schedules and price-fixing conspiracies, and also to the subtle discouragement of innovation and alternative forms of practice.

This uniformity may in some instances have limited the competitive freedom of brokers without justification. Certain restrictions on MLS access and use, Board membership and rules, and on other aspects of the Realtor system can hamper alternative forms of practice and yet may not be conditions necessary for Board survival.

^{212/} Practices in different eras and at the different Realtor levels should, however, be distinguished. Certain of the Realtors' historical conduct -- particularly the use of fee schedules -- are clearly unlawful under current interdependence of antitrust laws, and we have found no current evidence of such schedules on the parts of the NAR or the several state Associations we have studied. However, recent antitrust prosecutions and lawsuits at the levels of the local Boards suggest that price-fixing activities continue to some extent on a local basis. See, e.g., U.S. v. Jack Foley Realty, Inc., et al., 598 F.2d 1323 (4th Cir. 1979), cert. denied, 100 S. Ct. 727 (1980), U.S. v. Greater Syracuse Bd. of Realtors, 1978-1 Trade Cases 62,008 (N.D.N.Y. 1978); see also comments, from six of seven attorneys general and district attorneys who addressed the trade association issue in response to our request for comment on the industry, that state or local Realtor organizations were involved in some form of anticompetitive practice, Appendix B, Section 3.

B. STATE LAW AND AGENCIES

1. Introduction

The Los Angeles Regional Office conducted a review of state laws and the agencies which regulate the practice of brokering and selling real estate in each of the states in preparing this report. These efforts included a comprehensive review of the licensing laws of all 50 states, a mail survey of more than 300 state and local officials, and the inclusion of certain questions on the FTC Alternative Broker Survey instrument.

Appendix B describes in detail the state laws, regulations, and agencies governing real estate licensees. In this section we summarize preliminary findings and enumerate issues for possible further study.

2. State Real Estate Laws

All 50 states and the District of Columbia require real estate brokers and salespersons to be licensed. The licensure statutes form the framework for state control of those professions, delineating the licensure prerequisites, the prohibited practices for which licenses may be suspended or revoked, and the structure and powers of the regulatory agency.

Each state has a dual licensing system, one for brokers and another for salespersons. The state laws establish the prerequisites to licensure, which typically include minimum age, education, and experience requirements. Applicants for brokers' licenses usually are required to have proportionately more education and experience than those for salespersons' licenses. In each state both types of licensure applicants also are required to pass an examination administered by the state.

All of the state licensure laws contain various requirements and proscriptions concerning the business practices of real estate licensees.^{213/} The states universally prohibit false, misleading, and deceptive representations by real estate licensees. Several states also require brokers to make certain affirmative disclosures, such as identification of the licensee's name in advertisements. Brokers also are required in many states to disclose their representation of more than one party in a transaction or their own involvement as a principal in a transaction. The laws and regulations of several states prohibit such practices as the use of net listing agreements;^{214/} rebating of brokerage fees to nonlicensees (including consumers); use of sales contests, lotteries, and gifts; and the use of trademarks such as "Realtor" unless the licensee is a member of the trade-named organization.

The regulations of eight states include provisions specifically designated as a "code of ethics," and two other states incorporate by reference the Code of the National Association of Realtors. Instead of enacting specific codes of

^{213/} See Appendix B, Section 1 for a more detailed discussion of the requirements and proscriptions contained in the licensing laws.

^{214/} In a "net listing" agreement the broker receives as his/her commission all proceeds in excess of a specified listing price.

ethics, most of the states have included in the grounds for license suspension a blanket proscription against any conduct which demonstrates bad faith, incompetency, dishonesty, or like characteristics.

Sanctions for violation of the statutes and regulations include suspension or revocation of one's license, and in some states, criminal penalties of fines or imprisonment. A few states also provide for private rights of action, with damage awards of up to three times the amount of commissions or profits earned as a result of each violation.

3. State Real Estate Agencies

The licensure laws of every state establish a regulatory agency, usually designated as a real estate commission or board, to administer the licensing process and to enforce the statutory provisions. As of 1977, industry members comprised the majorities on every state's commission except that of Rhode Island where public members predominated. The statutes of more than half of the states require that at least one commission member be a nonlicensed representative of the public. Most of the state statutes provide for the appointment of commission members by the governor. A few state statutes require that the nominees be supplied by the state Realtor Association.

With few exceptions, the state agencies are granted broad and exclusive rulemaking and enforcement powers by the licensing statutes. In a few states rulemaking and enforcement authority is vested in an agency with jurisdiction over more than just real estate; the real estate commissions in such states usually serve in a subsidiary role to these larger regulatory entities.

4. State Regulation Issues

In this section we highlight issues for further study and offer a few preliminary findings.

a. State Law Provisions

(1) Entry/Licensing Restrictions

All states employ licensing statutes which establish standards of age, education, and experience for brokers and salespersons, as described in detail in Appendix B, Section 1.a.

Entry barriers were an early concern in this project, since the uniform price and service patterns suggested that some form of barrier might be present to make group enforcement activities profitable. However, the nearly universal opinion is that there are no significant barriers to entry, if entry is construed as gaining a license in order to practice. The educational and experience requirements in most states are generally modest; licensing fees are nominal, and the required examinations are generally passed following a short period of concentrated study.^{215/} The proportionately more difficult broker requirements

^{215/} See Appendix B, Tables A and E.

are generally met by any salesperson willing to wait the statutorily required period after obtaining the salesperson's license.^{216/}

The only entry requirement generating a significant number of complaints is the residency requirement imposed by some states.^{217/} Residency requirements, especially those much longer than the norm, may warrant further study. However, the possible correlation between length of residency and knowledge of market or ability to do business in the state should be examined in such a study.

(2) Advertising Restrictions

As noted in Appendix B, Section 1.b.(1), the states universally enforce general prohibitions against false, misleading, and deceptive representations by real estate licensees. Other than these proscriptions, which generally are viewed as consumer protection measures, the staff's survey of state laws revealed no blanket prohibitions on advertising by brokers or salespersons. For example, there are no overt restrictions on price advertising such as those which were the focus of the Federal Trade Commission's Ophthalmic Goods and Services Rulemaking.^{218/}

An example of a type of advertising restriction which may have a disproportionate impact on alternative brokers is California's prohibition on advertising services which require "front-end" payments unless such advertisements are cleared by the Real Estate Commissioner.^{219/} This requirement tends to chill certain forms of "aid-to-sellers" alternative approaches, which call for flat-fee payments before services are rendered.^{220/} However, analysis of this type of restriction should consider carefully the consumer protection function which arguably is served by state regulation of future service contracts.^{221/}

^{216/} See Appendix B, Table A.

^{217/} See Appendix B, Table D.

^{218/} See Bureau of Consumer Protection, FTC, Staff Report on Advertising of Ophthalmic Goods and Services and Proposed Trade Regulation Rule (May 1977).

^{219/} California Business and Professions Code, Division 4, §10085.

^{220/} See Ch. IV.E.

^{221/} See, e.g., Bureau of Consumer Protection, FTC, Proprietary Vocational and Home Study Schools: Final Report to the Federal Trade Commission and Proposed Trade Regulation Rule (December 1976), Roger J. Fitzpatrick, Presiding Officer, Report of the Presiding Officer on Trade Regulation Rule: Health Spas (April 1979).

(3) Disclosure Requirements

Section 1.b.(2) of Appendix 3 lists three types of disclosures often required by the states. These generally amount to different forms of the requirement that the broker disclose to all involved any "dual agency" situations (i.e., situations where the broker is paid or owes formal duties to both parties), or any situations where the broker is acting as a principal in the transaction.

Four states^{222/} add an additional requirement that amounts to a mandatory disclosure of broker loyalty. These statutes or regulations require that the broker "make clear for which party he is acting." As we discuss in Chapter III and Chapter IV.F., considerable confusion may currently exist among consumers as to whom the broker represents in a real estate transaction. Thus, such disclosure requirements appear to be appropriate measures to help improve consumer knowledge.

(4) Codes of Ethics or Equivalents

As was noted in Section 2. above, eight states include in their real estate regulations provisions which are specifically designated as a "code of ethics," and two others incorporate by reference the Code of the National Association of Realtors. A handful of other states reprint or refer to the NAR Code in the publications for licensees, thereby implying state approval of the Code. In addition, several states incorporate in their statutes or rules certain of the more controversial NAR Code provisions discussed in Chapter IV.A.3.c.(3), above.

(5) Forms

A small number of states mandate the use of state-prepared forms for real estate transactions. In some others (e.g., California) the state Association of Realtors and the State Bar together produce "model forms" which appear to have taken on a quasi-official status in the minds of many of those who are professionally involved with the keeping, selling and financing of real estate.

We have received very few complaints regarding state-mandated or state-drafted forms. Obviously, in the event complaints are received or other evidences surfaces, further investigation on a state-by-state basis might be necessary to confirm any conclusion that this is not a problem area.

(6) Net Listing Provisions

Prohibitions on net listings, in force in 17 states, prevent brokers from entering into contracts with sellers whereby the broker retains as his/her commission when the property is sold any sums above a listing previously price agreed upon between the seller and the broker.

Net listing contracts constitute an alternative to the traditional

^{222/} See Appendix B, Section 1.b.(2).

commission rate format employed by most brokers. However, net listing agreements may also be used by unscrupulous brokers to exploit uninformed sellers, by setting the contract price of a house at below its market value in order to reap the "net" profits when the house is sold for a more realistic price. Net listings thus involve a potential for abuse. The Commission has received very few complaints regarding any restrictive effects of statutes prohibiting these listings.

(7) Anti-Rebating and Anti-Incentive Provisions

Most states prohibit the splitting of brokerage fees with non-licensees. They also prohibit the use of lotteries and contests, as well as the offer of gifts or free lots, as an inducement to consumers to list with or buy realty from licensees. Concern about the burden such laws place upon vigorous price competition may arise when some states (e.g., Massachusetts and, recently, Illinois) interpret such laws to prohibit brokers from giving commission rebates to consumers, even when the availability of such rebates is publicly disclosed.^{223/} Rebating is a form of price competition that is used by a number of alternative brokers.^{224/} Allowing cooperating brokers to attract prospective buyers by offering rebates to them may be the only practicable method by which price competition can reach the buyer's end of the transaction. Prohibitions on rebating may restrain competition unnecessarily with few, if any discernible public benefits.

The application of anti-incentive laws to deny brokerage firms the opportunity to use price competition against one another in competing for buyers' business, in the absence of any clear risk of injury to the public, is being challenged at present in at least one injunctive action filed by a brokerage firm. Coldwell Banker, which is owned by Sears, Roebuck, & Company, has begun a program in several states of offering discounts on certain Sears merchandise to buyers who purchase their homes through Coldwell Banker. Coldwell Banker has recently filed in the Illinois courts to prevent the enforcement of that state's anti-incentive statute against the company's proposed plan.^{225/}

(8) Fiduciary Responsibilities

All states impose fiduciary responsibilities on the broker to ensure that all monies deposited with him or her are safeguarded and properly accounted for. Such provisions are designed to protect the parties to a real estate transaction and are appropriate consumer protection measures.

^{223/} See, e.g., Boston City Summary.

^{224/} See Ch. IV.F. for a description of rebating practices.

^{225/} Coldwell Banker Residential Real Estate Services of Illinois v. Clayton (Circuit Court of Cook County, Illinois, No. 83L51898, filed August 1, 1983).

b. State Agencies

(1) Composition

Licenses outnumber non-licenses on the state commissions or boards in every state except Rhode Island, and the mix generally favors practitioners.^{226/} Several states in the last few years have amended their licensing statutes to provide for public members on the regulatory boards controlling professions,^{227/} including some boards with regulatory authority over real estate brokers.^{227/}

(2) Practices

The composition of the agencies contributes directly to the practices of the agencies. The staff of the Los Angeles Regional Office frequently heard the complaint that the state licensing agencies enjoy a "sweetheart" relationship with the industry they regulate.^{228/}

The principal remedy for any defective practices, to the extent they are either serious or prevalent, may be the adoption of changes in the composition of state agencies. Individual provisions of the licensing laws might also deserve scrutiny. While most state licensing requirements do not appear to be unduly restrictive, and the frequency of anticompetitive applications or interpretations of licensing statutes may be quite low, there is a clear potential for serious anti-competitive effects should these state consumer protection statutes be misused.

^{226/} See Section 2.a., supra.

^{227/} See Appendix B, Table G.

^{228/} See, e.g., comments of John Little, President, NARESA, Transcript of Interview (June 29, 1979).