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THE IOWA LAW OF REAL ESTATE BROKERAGE*

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I. BROKER LICENSING AND REGULATION

A. *Original Licensing*

1. *Requirements of License*

The privilege of engaging in the profession or occupation of real estate brokerage requires compliance with chapter 117 of the Iowa Code.[1] A person

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1. Chapter 117 was originally enacted as 1929 Iowa Acts ch. 215 for the purpose of defining, regulating and licensing real estate brokers and salesmen, to create the Iowa Real Estate Commission and to provide penalties for violations of the Act.

may not act as a real estate broker, real estate salesperson or real estate apprentice salesperson without previously obtaining a license. The requirements of this chapter not only apply to an individual person but also to a partnership, association or corporation engaging in the regulated activities.[2]

A partnership, association or corporation may not be granted a firm license unless every member or officer thereof, who actively engages in its brokerage business, holds a license as a real estate broker, salesperson or apprentice salesperson. At least one member or officer must be licensed as a real estate broker.[3] Furthermore, the license may not be granted to the firm unless every employee who acts as a salesperson on its behalf holds a license as a real estate broker, salesperson or apprentice salesperson.[4] This requirement does not mean that every member or officer of the firm must be licensed. For example, a passive shareholder not engaging in the firm's business need not be licensed. Nor must an employee, such as a secretary, who is not engaging in real estate sales be licensed.

2. *Definition of Terms*

BROKER

The term "real estate broker" means a person,[5] other than a salesperson or apprentice salesperson,[6] who engages either full time or part time in:

> 1. The business of selling, exchanging, purchasing, or renting of real estate for another for a fee, commission, or other consideration.
> 2. Listing real estate of another for sale, exchange, or rental for a fee, commission, or other consideration or advertises or holds himself out as a real estate broker.[7]

This definition includes a person who actively engages in negotiating the sale, exchange, purchase or rental of real estate. It is also broad enough to include a person who passively acts as a mere liason between someone who desires to sell, exchange or rent real estate and another.

SALESPERSON

A "real estate salesperson" is a person who is "employed by or other-

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2. Iowa Code § 117.1 (1979). As to the effect of a failure to procure a license, see Part IIB(6)-(7) *infra*.

3. Prior to 1974 Iowa Acts ch. 1086, § 33, this section required every active member or officer of the firm to hold a license as a real estate broker.

4. Iowa Code § 117.2 (1979).

5. The term "person" includes a partnership, association or corporation. Iowa Code § 117.1 (1979). *See* Part IA(1) *supra*.

6. The word actually used is "salesman." *Id.* § 117.3. This is apparently an oversight. Elsewhere in chapter 117 the term "salesman" was converted to "salesperson" and "apprentice salesperson" by 1976 Iowa Acts ch. 1101.

7. Iowa Code § 117.3 (1979).

wise associated with a real estate broker, as a selling, renting, or listing agent or representative of the broker."[8] Prior to being issued a license as a salesperson that person must have successfully completed a short course in real estate education.[9]

APPRENTICE SALESPERSON

A "real estate apprentice salesperson" is a person who meets the definition of a real estate salesperson but who has not yet completed the educational requirements and examination necessary for a license.[10]

REAL ESTATE

The term "real estate" includes "real property wherever situated" as well as "any and all estates therein."[11] This is a broad definition. It would appear to include not only legal estates in real property but also equitable estates; not only present estates but also future estates.[12]

3. *Covered Brokerage Activities*

The delineation of activities which constitute a person as a real estate broker, salesperson or apprentice salesperson relate back to the definition of a real estate broker. The activities specified therein are "[t]he business of selling, exchanging, purchasing or renting of real estate or the listing of real estate"[13] for sale, exchange or rental; also included are advertising or holding oneself out as a broker. If a person performs any single act or transaction there specified that person is performing acts covered by the statute.[14] To be a covered activity it must be performed on behalf of another person. It must also be performed in consideration of, or with the intention, expectation or promise of receiving, compensation by fee, commission, salary or otherwise. The activity is covered regardless of whether performed by an individual, partnership, association or corporation.[15]

A person may perform one of the brokerage activities when that person

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8. *Id.* § 117.5(1). A salesperson may not engage in the real estate brokerage business except as an employee of a real estate broker. *Id.* § 117.33. *See* Part IB(2) *infra.*

9. *Id.* § 117.15. See Part IA(7) *infra*, as to further requirements which must be met to obtain a salesperson's license.

10. *Id.* § 117.5(2). See Part IA(6) *infra*, as to further requirements which must be met to obtain an apprentice salesperson's license.

11. *Id.* § 117.4.

12. A person who buys and sells real estate contracts for another, *i.e.*, equitable estates in real property, deals in real estate and must be licensed. [1948] Rep. Att'y Gen. Iowa 259.

13. Iowa Code § 117.3 (1979). *See* Part IA(2) *supra.*

14. A person who supplies a sales kit and other advertising material to a landowner for a price certain so as to enable the landowner to sell his own real estate does not perform one of the specified activities and a license is not required. [1968] Rep. Att'y Gen. Iowa 973.

15. Iowa Code § 117.6 (1979).

either "does" or "engages in" one of the specified acts. However, under Iowa Code section 117.6, the definition is not limited to completed acts. The act is performed if the person either (1) does or offers, attempts or agrees to do, or (2) engages in or offers, attempts or agrees to engage in, that act. The individual's act is covered by the statute regardless of whether that person does or engages in the activity directly or indirectly, or whether the act is "an incidental part of the transaction or the entire transaction."[16]

4. *Excluded Acts*

Certain persons are excluded from the provisions of the act when they engage in the sale, exchange, purchase, rental or advertising of real estate.[17] However, these persons are exempted only for specified activities. No license is required by the following:

1. Owners, lessors and their regular employees with regard to the realty so owned or leased. However, their acts must be "performed in the regular course of or incident to the management of the property owned."[18]

2. A person acting as an attorney in fact under a power of attorney from the owner to consummate and execute a real estate transaction.[19]

3. "[A]n attorney admitted to practice in Iowa."[20]

4. A person "while acting as a receiver, trustee in bankruptcy, administrator, executor, guardian, or under court order or while acting under authority of a deed of trust, trust agreement, or will."[21]

5. An auctioneer as to acts related to the conduct of a public sale or

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16. *Id.* § 117.6. It has become increasingly more common today for businesses such as farming to incorporate. A conveyance of the beneficial interest in the real estate may then be made by a transfer of the corporation's stock. Must a person who brokers that sale be licensed under this chapter? It would appear that where the transfer of all the corporation's stock is an alternative to the direct conveyance of the real estate a license may be required. The sale may be considered to be engaging "indirectly" in an act which is "an incidental part of a transaction" specified in Code section 117.3. In fact, under statutes similar to that discussed here two courts have required a license in order to recover a commission. Kenney v. Paterson Milk & Cream Co., 110 N.J.L. 141, 164 A. 274 (1933); De Metre v. Savas, 93 Ohio App. 367, 113 N.E.2d 902 (1953). Where there is a transfer of only a portion of the corporation's stock and the direct conveyance of the real estate is not a viable alternative, the above result would not appear justified.

17. IOWA CODE § 117.7 (1979).

18. *Id.* § 117.7(1).

19. *Id.* § 117.7(2).

20. *Id.* § 117.7(3). This exemption while applying to "attorneys admitted to practice" is not restricted to practicing attorneys. [1930] REP. ATT'Y GEN. IOWA 332, 332. *But see* [1934] REP. ATT'Y GEN. IOWA 455. However, the purpose of the exemption is to facilitate an attorney in transacting real estate business for his client. If the attorney desires to engage in the brokerage business or to hire salesmen, a broker's license must be obtained. *Id.* at 476.

21. IOWA CODE § 117.7(4) (1979). A referee in partition is a person acting under court order and does not need to be licensed under this Act. Blakeley v. Miller, 232 Iowa 980, 7 N.W.2d 11 (1942).

auction.[22]

6. An owner's representative who performs "an isolated real estate rental transaction."[23]

5. *Iowa Real Estate Commission*

The Iowa Real Estate Commission is a five member board.[24] It is vested with the power to issue[25] and reissue[26] licenses to real estate brokers, salespersons and apprentice salespersons. To ascertain the competency of persons applying for licensure, it is authorized to require examinations.[27] It is empowered to require continuing education of its licensees as a precondition to license renewal.[28] The commission may also revoke or suspend a license or otherwise discipline a licensee where appropriate.[29] It has also been given the power to regulate the sales of subdivided lands outside of the state of Iowa.[30]

6. *Licensing Procedure—Apprentice Salesperson*

An applicant for a license as an apprentice salesperson must make a written application on the form prepared and furnished by the Iowa Real Estate Commission. The Commission may not require a photograph of the applicant.[31] It does require, however, detailed personal, financial and business information.[32] The application must be accompanied by a written state-

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22. IOWA CODE § 117.7(5) (1979). However, "an auctioneer whose authority extends to closing a sale of real estate" which he has auctioned must obtain a license. [1944] REP. ATT'Y GEN. IOWA 145, 145.

23. IOWA CODE § 117.7(6) (1979). Whether a person who performs an isolated act of *selling* land for another must be licensed is not clear under the wording of the present Act. In *Noll v. Mastrup*, 233 Iowa 1176, 11 N.W.2d 367 (1943) the court decided that the Act was designed to cover a profession and not isolated incidents. Therefore, a person who commits an isolated act of brokerage need not have a license. Subsequent to that case Iowa Code section 117.6 was amended so that it now applies to "any single act or transaction" of brokerage. *See* Part IA(3) *supra*. *See also* Hudson, *Contracts in Iowa Revisited—Illegality*, 8 DRAKE L. REV. 3, 5-6 (1958).

24. IOWA CODE § 117.8 (1979). Three members of the Commission must be persons licensed under chapter 117 and must have been actively engaged in the real estate business for five years prior to their appointment. At least one of the licensed members must be a real estate salesperson at the time of his appointment. Two members of the Commission are not to be licensed under chapter 117 and are to represent the general public. *See also id.* § 117.51.

25. *Id.* §§ 117.15, .16, .18, .19 & .21.

26. *Id.* § 117.28.

27. *Id.* § 117.20. *See also* IOWA AD. CODE §§ 700-1.1(117), .10(117).

28. IOWA CODE §§ 258A.1(d), .2 (1979).

29. *Id.* §§ 117.29, .34, 258A.3(2).

30. *Id.* § 117A.2.

31. *Id.* § 117.16.

32. IOWA AD. CODE § 700-2.2(117). The applicant must also submit a credit bureau report to the Commission at his own expense and pay an examination fee. *Id.* §§ 700-1.3(4)(117), -2.2(2)(117).

ment from the broker by whom the applicant will be employed recommending that the license be granted to the applicant.[33]

According to the regulation of the Real Estate Commission, prior to applying for an apprentice salesperson's license the applicant must sit for a written examination.[34] The examination is graded anonymously.[35] If the examination is passed the applicant will then apply for an be issued a real estate apprentice salesperson's license.[36] If the applicant fails the written examination it may be retaken at the next scheduled time, and thereafter at the Commission's discretion.[37] The unsuccesful applicant may also request information as to his performance on the examination.[38]

7. *Licensing Procedure—Salesperson*

The real estate apprentice salesperson's license is valid until "the last day of the twelfth calendar month following the month in which the license is issued."[39] During that time the apprentice salesperson must successfully complete a thirty hour course in real estate education approved by the Commission.[40] If the course is successfully completed within that period the apprentice salesperson is entitled to be issued a real estate salesperson's license. The salesperson's license will be issued upon application therefor and upon return of the unexpired apprentice salesperson's license.[41] No further examination is required.

An applicant may successfully complete the thirty hour short course prior to taking the examination for a real estate apprentice salesperson's license.[42] If the applicant thereafter should pass the apprentice salesperson's examination within twelve months of the successful completion of the course, the applicant is then entitled to be issued a real estate salesperson's license.[43] A person who has successfully completed the thirty hour course within the period of the apprentice salesperson's license may apply for a salesperson's license during the thirty days following the expiration of the

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33. IOWA CODE § 117.16 (1979).

34. IOWA AD. CODE § 700-2.2(117). However, this regulation is under current objection by the Administrative Rules Review Committee on the grounds that the procedure is the reverse of that prescribed in section 117.15. See objection 2.2 located following Iowa Ad. Code section 700-2.4(117).

35. IOWA CODE § 117.20 (1979).

36. *Id.* § 117.15; IOWA AD. CODE § 700-1.3(5)(117).

37. IOWA CODE § 117.20; IOWA AD. CODE §§ 700-1.3(5)(117), -1.4(117).

38. IOWA CODE § 117.20 (1979).

39. *Id.* § 117.15.

40. *Id.*

41. *Id.* §§ 117.15, .16. The application must be accompanied by a written statement from the broker by whom the applicant will be employed "recommending that the license be granted to the applicant." *Id.* § 117.16.

42. *See* Part IA(6) *supra.*

43. IOWA CODE § 117.15 (1979).

apprentice salesperson's license.[44] An apprentice salesperson who does not successfully complete the thirty hour course within the prescribed period may not reapply for an apprentice salesperson's license until the expiration of an additional six months.[45]

8. *Licensing Procedure—Broker*

After a person has been a licensed real estate salesperson for a period of twelve months that person may apply for a license as a real estate broker.[46] Such application must be in writing and made on forms supplied by the Iowa Real Estate Commission. The form may not require a photograph of the applicant,[47] but does require detailed personal, financial and business information.[48]

An applicant must sit for a written examination. The examination is graded anonymously.[49] If successful thereon a qualified applicant is entitled to apply for and be issued a real estate broker's license.[50] Should the applicant fail the examination, the applicant may retake it at the next scheduled time, and thereafter at the Commision's discretion.[51] The unsuccessful applicant may also request information concerning his performance on the examination.[52]

9. *Applicant Qualifications*

An applicant desiring to obtain a license as a real estate broker, salesperson or apprentice salesperson must be at least eighteen years of age. The applicant must be of good character and the Commission may consider past felony convictions, but only if they relate directly to the practice of selling real estate.[53] A person seeking any of the above licenses must not have had

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44. *Id.*

45. *Id.* The Commission may waive this waiting period if "just cause" is shown as to why the course was not completed.

46. *Id.*

47. *Id.* § 117.16.

48. IOWA AD. CODE § 700-2.2 (117). The applicant must furnish his or her business and residence address and a list of places where the applicant has been in business for at least 60 days during the prior five years. IOWA CODE § 117.16 (1979). Also, the applicant must supply, at the applicant's own expense, a credit bureau report and must pay the examination fee. IOWA AD. CODE 700-1.3(4)(117), -2.2(2)(117).

49. IOWA CODE § 117.20 (1979). The real estate broker's examination is different from the real estate apprentice salesperson's examination. It is "of a more exacting nature . . . and require[s] higher standards of knowledge of real estate." *Id.*

50. The applicant may instead by issued a license as a broker-salesperson. *See* IOWA AD. CODE § 700-2.2(117). *See also* note 34 *supra* & Part IA(10) *infra.*

51. IOWA CODE § 117.20 (1979); IOWA AD. CODE §§ 700-1.3(5)(11), -1.4(117).

52. IOWA CODE § 117.20 (1979).

53. *Id.* § 117.15. *Cf.* Blakeley v. Miller, 232 Iowa 980, 7 N.W.2d 11 (1942) (court held that a broker's license could not be revoked due to his misconduct outside the scope of his brokerage

an application for a license denied in Iowa or any other state during the six month period prior to application. In addition, the applicant must not have had a real estate license revoked in Iowa or any other state during the two year period prior to application.[54] A person is not ineligible for any real estate license "because of citizenship, sex, race, religion, marital status or national origin."[55]

In order to be qualified for a license as a real estate broker the applicant, in addition to the above qualifications, must have been a licensed real estate salesperson for a twelve month period preceding the application. However, two exemptions are provided. The applicant will be considered to be qualified if he has had experience substantially equivalent to that which a salesperson would acquire during a period of twelve months, "whether as a former broker or salesperson, a manager of real estate, or otherwise."[56] Also, an applicant will be considered to be qualified if the Commission finds that the applicant could not acquire employment as a salesperson "because of conditions existing in the area where he resides."[57]

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business).

54. IOWA CODE § 117.15(1979). The license denial referred to above would appear to be a denial based upon the merits of the application and not based upon failure of the examination. A person who fails the examination is entitled to retake the examination at the next regularly scheduled time regardless of whether it is given within the six month period. *Id.* § 117.20. In fact, the Commission does not even require that a new application be filed when the failing applicant retakes the examination at the next regularly scheduled time. IOWA AD. CODE § 700-1.4(117). *See* Part IA(6), (8) *supra.*

55. IOWA CODE § 117.15 (1979). However, the application form may require information as to the applicant's citizenship.

56. *Id.* The exception would allow a person to be licensed as a real estate broker although not having been a salesperson for an entire period of twelve months if that person had experience substantially equivalent to that of an ordinary person who had been a salesperson for twelve months. However, it does not appear to allow an applicant to tack experience as an apprentice salesperson onto that as a salesperson to make up the twelve month period. The gist of the exception is not to allow the automatic treatment of all periods of real estate experience so as to equal, in quantity, twelve months. Rather, it is intended to allow a person to be licensed as a broker if he can show that he has had experience which is, in quality, equal to that which a salesperson would ordinarily acquire in a period of twelve months. It does not appear that experience as an apprentice salesperson was intended to be considered as equal in quality. First of all, the legislature did not include within the exception experience as an apprentice salesperson after it listed experience as a broker or salesperson. Furthermore, while a person is an apprentice salesperson he probably has not completed his thirty hour real estate education course. One of the purposes of such education is to enable the person to apply the education course to his experiences in order to better understand what he has been observing. *Cf. id.* § 258A.2(2) (g) (statutory provision regarding purposes of continuing education requirement). Since experience as an apprentice salesperson for a given period of time is not of the same quality as that of a salesperson, it should not be computed as part of the twelve month period of experience equivalent to that of a salesperson.

57. *Id.* § 117.15. This exception would appear to be aimed at a situation such as where a locality may have no licensed broker by whom a salesperson might be employed. *See id.* § 117.24.

In addition, in order to be qualified, an applicant for any real estate license must file the proper application, pass the applicable examination and complete any education requirements as specified in the three immediately preceding sections.

If the Commission should deny any real estate license, the applicant may, within thirty days after the denial, request a hearing.[58]

10. *Other Broker Licenses*

A license is required not only of individuals who engage in the real estae estate brokerage business but also of each partnership, association or corporation. Therefore, the Iowa Real Estate Commission issues firm licenses to such entities.[59] In order to qualify for a firm license every member and officer of the partnership, association or corporation who is active in its real estate business must have a license as a broker, salesperson or apprentice salesperson. In addition, every employee who acts as a salesperson for the firm must be licensed as a broker, salesperson or apprentice salesperson. At least one member or officer of the firm must have a broker's license.[60] Since it would be impossible for the firm, as opposed to its members or officers, to take a broker's examination, such is not necessary for issuance of a firm license. When its members, officers and salespersons have their required licenses, as described above, the firm is entitled to its own broker's license.[61]

The Commission also issues a license to an individual as a broker-salesperson.[62] This license will be issued to a person who is otherwise qualified as a real estate broker but "who operates as a salesman for another duly licensed broker."[63] With certain exceptions,[64] a broker-salesperson has the

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58. *Id.* § 117.19.

It would appear that this hearing was intended to be available only when the license is denied because of a lack of personal qualification as shown in the application and not when the license is denied due to failure of the relevant examination. This is revealed by the legislative history of chapter 117. The predecessor to Iowa Code section 117.19 was originally enacted in 1929. The written examination provisions of Code section 117.20 were not enacted until 1945 as 1945 Iowa Acts ch. 96, § 20. Thus, the original intent was that the section 117.19 hearing should be available only where there was a denial based on lack of personal qualification. Furthermore, in 1974 specific provisions were added (1974 Iowa Acts ch. 1086, § 40) to section 117.20 granting the failing applicant the right to obtain information as to the applicant's performance on the examination. In such a case it would appear that the specific would control the general and the right to a hearing, as provided in section 117.19, would not be available.

59. *See* IOWA AD. CODE § 700-1.13(117).

60. IOWA CODE § 117.2 (1979). *See* Part IA(1) *supra*. *See also* [1936] REP. ATT'Y GEN. IOWA 457, 458; [1934] REP. ATT'Y GEN. IOWA 743.

61. *See* [1946] REP. ATT'Y GEN. IOWA 87.

62. *See* IOWA AD. CODE § 700-1.13(117). *See also id.* §§ 700-1.8(117), -3.6(5)(117).

63. *Id.* § 700-1.21(117). *See also* IOWA CODE § 117.46(1) (1979).

64. For example, a broker-salesperson may not advertise under his own name, IOWA AD. CODE § 700-1.8(117), nor sponsor a salesperson, *id.* § 700-1.21(117). However, a broker-salesperson need not maintain a separate trust account for the deposit of funds held for others.

same privileges and duties as a broker.

11. *Nonresident Licenses*

A person who is a nonresident of the state of Iowa and who has a real estate license in another state may obtain a nonresident license if certain requirements are fulfilled.[65] The nonresident applicant must comply with all the provisions of law relating to resident real estate brokers, salespersons and apprentice salespersons except as otherwise provided. If the state in which the nonresident is licensed has similar requirements and grants reciprocal nonresident licensing to Iowa real estate licensees, the requirement of taking the written examination may be waived by the Iowa Real Estate Commission.[66]

In order to obtain a nonresident license the applicant must file a certification from the state of original licensure stating that the applicant is currently licensed there, that no charges are pending against the applicant, and that the applicant's record in that state justifies the issuance of an Iowa license. The certification must be signed by a duly qualified and authorized official of the state or original licensure.[67] Furthermore, prior to the issuance of the nonresident license the applicant must file with the Commission an irrevocable consent to suit in the district courts of Iowa by service of process upon the chairman of the Commission.[68] The consent must be authenticated by the corporate seal if the applicant is a corporation; otherwise it must be acknowleged by an officer or member of the firm. All applications, except by individuals, must be accompanied by a certified copy of the firm's resolution authorizing the proper officer's execution thereof.[69]

If the license is a nonresident broker's license, the licensee must "maintain an active place of business within the state of his domicile."[70] The non-

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IOWA CODE § 117.46(1) (1979); IOWA AD. CODE § 700-2.4(117). *See* Part IIIA(9) *infra*.

65. IOWA CODE §§ 117.21, .22 (1979).

66. *Id.* § 117.21. The Iowa Real Estate Commission has found that the states of Minnesota, Missouri, Nebraska, North Dakota and South Dakota have real estate licensing requirements similar to those of Iowa. The Commission, therefore, grants nonresident licenses to licensees from those states on the same basis that Iowa licensees are granted reciprocity in those states. IOWA AD. CODE § 700-2.3(117).

67. IOWA CODE § 117.21. The Iowa Real Estate Commission specifically requires "certification of the type of license held by the applicant, the business and residence address of the applicant, the original date of issuance of this resident license, the current renewal date and a statement regarding applicant's record as a licensee." IOWA AD. CODE § 700-2.3(2)(117).

68. IOWA CODE § 117.23 (1979). A law suit may be commenced against the nonresident licensee by filing one copy of the pleadings in the office of the Commission and immediately mailing, by certified mail, a duplicate copy thereof to the main office of the applicant. *Id.*

69. *Id.*; IOWA AD. CODE § 700-2.3(3)(117).

70. IOWA CODE § 117.22 (1979). This Code section also provides that the nonresident broker need not maintain a place of business in Iowa. The rules of the Iowa Real Estate Commission provide that "the reciprocity license holder shall not maintain an office in the State of Iowa unless it is managed by a resident Iowa licensed broker." IOWA AD. CODE § 700-2.3(4)(117).

resident license becomes void upon the licensee becoming a resident of Iowa or moving his domicile to a state not having reciprocity with Iowa.[71]

B. *Relicensing and Regulation*

1. *Continuing Education Requirements*

The Iowa Real Estate Commission is mandated by law[72] to require continuing education as a precondition to renewal of a real estate license. The purpose of the requirement is to assure the "continued maintenance of skills and knowledge by a . . . licensee directly related and commensurate with the current level of competency of the [real] estate profession."[73]

Each real estate salesperson, broker-salesperson and broker must complete at least twelve contact hours of accredited continuing education prior to each December 31st.[74] Thus, an apprentice salesperson need not take continuing education courses during his twelve month period of licensure. During that period the apprentice salesperson must complete a thirty hour course in real estate education.[75] A salesperson is exempt from the continuing education requirement during the first twelve months after issuance of his salesperson's license.[76] Nor must a nonresident real estate licensee comply with this requirement if the licensee meets the requirements of the state of his domicile.[77] Finally, a licensee is deemed to have complied with the continuing education requirement during periods of active duty in the military service.[78]

Continuing education courses must relate to the subject matter of real estate. To be accredited, the course must not involve "solely self-study, including T.V. viewing, video or sound recording programs, correspondence courses, office skills, speed reading, or personal motivation."[79]

2. *Certain Operational Requirements*

Each resident real estate broker, whether an individual or a firm, must

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Cf. [1940] Rep. Att'y Gen. Iowa 18.

71. Iowa Ad. Code § 700-2.3(4)(117). This provision strongly suggests that a nonresident licensee must be a resident or a domiciliary of the reciprocity state. It further suggests that the nonresident licensee may not have a resident license from a third state not having reciprocity with Iowa.

72. Iowa Code §§ 258A.1(d), .2(1) (1979).

73. *Id.* § 258.2(2)(g). The continuing education requirements may not be implemented for the purpose of limiting the size of the profession. *Id.* § 258A.2(2)(e). *See also* Iowa Ad. Code § 700-2.7(5)(117).

74. Iowa Ad. Code § 700-3.6(5)(117). No grace periods are allowed.

75. Iowa Code § 117.15 (1979). *See* Part IA(7) *supra.*

76. Iowa Ad. Code § 700-3.6(5)(b)(117).

77. Iowa Code § 258A.2(3).

78. *Id.*

79. Iowa Ad. Code § 700-3.7(5)(117).

maintain a place of business within the state of Iowa. If the broker maintains more than one place of business, a duplicate license will be issued to the broker for each branch office.[80] The broker's current license must be conspicuously displayed at that place of business together with licenses issued to all employees.[81] If a broker should change a place of business, he must notify the Iowa Real Estate Commisson whereupon, after the payment of a fee, a new license will be issued.[82]

Each real estate licensee will be issued a pocket card. This card certifies that the person named thereon is a licensed real estate broker, salesperson or apprentice salesperson, and identifies the name and address of a salesperson's or apprentice salesperson's employer.[83]

A real estate salesperson may not function in the real estate business other than as an employee of a licensed real estate broker. The license issued for each salesperson or apprentice salesperson is delivered to the real estate broker by whom the licensee is employed. That license must be kept in the custody and control of the broker.[84] Whenever a broker terminates the employment of a salesperson or apprentice salesperson he must immediately redeliver the salesperson's or apprentice salesperson's license to the Commission.[85] From the date the Commission receives the returned license it is unlawful for the salesperson or apprentice salesperson to perform any of the actions regulated by chapter 117 of the Iowa Code. Upon proof of employment by another broker, return of his former pocket card and payment of a fee, a salesperson or apprentice salesperson will be issued another license and pocket card.[86]

All real estate advertising must be done by the employing real estate broker and may not be done by a salesperson, broker-salesperson or apprentice salesperson.[87] In addition, a salesperson or apprentice salesperson may not handle the closing of a real estate transaction without the direct supervision or consent of the employing broker.[88]

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80. IOWA CODE § 117.21 (1979); IOWA AD. CODE § 700-1.25(117). Two or more brokers may maintain an office at the same address provided each broker maintains separate records and trust accounts. The business name must clearly distinguish one broker from the others. *Id.* § 700-1.25(1)(117).

81. IOWA CODE § 117.25 (1979).

82. *Id.* § 117.32.

83. *Id.* § 117.26.

84. *Id.* § 117.24. Part time brokers and broker-salespersons may not sponsor salespersons for their apprenticeship period. IOWA AD. CODE § 700-1.21(117). *See also* [1934] REP. ATT'Y GEN. IOWA 476; *Id.* at 455.

85. IOWA CODE § 117.33 (1979). The broker must set out the date and cause of termination on the reverse side of the license. The broker must also send a notice thereof to the salesperson's or apprentice salesperson's last known residence.

86. *Id.*

87. IOWA AD. CODE § 700-1.8(117). However, this regulation does not apply if the licensee is the owner of the real estate being advertised. *Id.*

88. *Id.* § 700-1.29(117).

3. *Expiration and Renewal of Licenses*

Every real estate license, except that of an apprentice salesperson,[89] expires on December 31 of the year in which it became effective.[90] Upon written application by the licensee the Iowa Real Estate Commisson may issue a new license for the next ensuing year. The Commission must reissue the license unless there is a reason or condition which would warrant the revocation of the license. In such an event the Commission may deny the renewal but only after a prior hearing.[91]

Normally the application for renewal must be made prior to the expiration date of the license. However, a thirty day grace period is provided in which to make application, but a penalty will be assessed in such event. If the licensee does not file a renewal application by the expiration of the thirty day grace period, the licensee must file an original application and retake the examination relative to the license for which renewal is sought.[92] If the licensee does not apply for renewal within two years from the expiration of the license, the licensee "will not be permitted to apply for a license based on past experience, but must qualify for a license as if it were an initial application."[93]

In addition, since a licensee must attend twelve contact hours of continuing education courses in real estate as a precondition to license renewal,[94] proof thereof must be submitted with the application for license renewal.[95]

4. *Revocation or Suspension*

Two separate sources of authority give the Iowa Real Estate Commission the power to revoke or suspend a license, or otherwise discipline a person coming within the provisions of chapter 117 of the Code.

Under Code section 117.34,[96] the Commission has the power, after in-

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89. Within a 12 month period after issuance of the apprentice salesperson's license, the holder thereof must meet the requirements for a salesperson's license. Application for the salesperson's license must be made within 30 days after the expiration of the 12 month period. IOWA CODE § 117.15 (1979). *See* Part IA(7) *supra*.

90. *Id.* § 117.28; IOWA AD. CODE § 700-1.7(117).

91. IOWA CODE § 117.28 (1979). *See id.* § 17A.18. The hearing provisions are contained in Code sections 117.34 and 117.35 and are the same as for revocation and suspension of a real estate license. *See* Part IB(4) *infra*.

92. *Id.* § 117.28; IOWA AD. CODE § 700-1.7(117).

93. IOWA AD. CODE § 700-1.7(1)(117). This would appear to mean that a licensee must retrace his steps through the levels of apprentice salesperson, salesperson and broker as would be required for an initial applicant.

94. IOWA CODE § 258A.2 (1979); IOWA AD. CODE § 700-3.6(5)(117). *See* Part IB(1) *supra*.

95. IOWA AD. CODE § 700-3.6(5)(117). The proof is accomplished by attaching the certificate of attendance issued by the accredited real estate school to the application for renewal. *Id.* § 700-3.6(6)(c)(117).

96. IOWA CODE § 117.34 (1979). This section is chronologically the earlier of the two sources of authority.

vestigation, to revoke or suspend a license if the licensee has obtained his license by false or fraudulent statements or is guilty of any of eleven other enumerated violations.[97] Pursuant to the provisions of Code section 258A.2(2) the Commission may revoke or suspend a license on certain grounds specified in Code section 117.29[98] or may impose other disciplinary procedures.[99] These two sources are, to some extent, duplicative of each

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97. These acts are as follows:
1. Making any substantial misrepresentation.
2. Making any false promise of a character likely to influence, persuade or induce.
3. Pursuing a continued and flagrant course of misrepresentation, or making of false promises through agents or salesmen or advertising or otherwise.
4. Acting for more than one party in a transaction without the knowledge of all parties for whom he acts.
5. Accepting a commission or valuable consideration as a real estate salesperson or a real estate apprentice salesperson for the performance of any of the acts specified in this chapter, from any person, except his employer, who must be a licensed real estate broker.
6. Representing or attempting to represent a real estate broker other than his employer, without the express knowledge and consent of the employer.
7. Failing, within a reasonable time, to account for or to remit any moneys coming into his possession which belongs to others.
8. Being unworthy or incompetent to act as a real estate broker, salesperson or apprentice salesperson in such manner as to safeguard the interest of the public.
9. Paying a commission or any part thereof for performing any of the acts specified in this chapter to any person who is not a licensed broker, a salesperson or apprentice salesperson under the provisions of this chapter or who is not engaged in the real estate business in another state.
10. Failing, within a reasonable time, to provide information requested by the Commission as the result of a formal or informal complaint to the Commission which would indicate a violation of this chapter.
11. Any other conduct, whether of the same or different character from that hereinabove specified, or demonstrates such bad faith, improper, fraudulent, or dishonest dealings as would have disqualified him from securing a license under this chapter.

Id. § 117.34.

98. These grounds are as follows:
1. Fraud in procuring a license.
2. Professional incompetency.
3. Knowingly making misleading, deceptive, untrue or fraudulent representations in the practice of his or her profession or engaging in unethical conduct or practice harmful or detrimental to the public. Proof of actual injury need not be established.
4. Habitual intoxication or addiction to the use of drugs.
5. Conviction of a felony related to the profession or occupation of the licensee or the conviction of any felony that would affect his or her ability to practice the profession of real estate broker and salesman. A copy of the record of conviction or plea of guilty shall be conclusive evidence.
7. Use of untruthful or improbable statements in advertisements.
8. Willful or repeated violations of the provision of this Act.

Id. § 117.29. *See also id.* § 258A.10.

99. Revocation or suspension may also be imposed for failure to comply with an order of the Commission as well as "lack of education or experience, or because of negligence, or careless acts or omissions, or because of one or more intentional acts or omissions, the licensee demon-

other. The latter provision was enacted as a part of a uniform licensing and continuing education enactment[100] and, since it deals with other professions, is of a more general nature. The former is more specific and is aimed solely toward the regulation of real estate licensees.[101] The two provisions are not inconsistent with each other and should be construed as complementary to each other.[102]

Prior to the revocation or suspension of a license or the imposition of other disciplinary measures, the real estate licensee is entitled to notice of charges and a hearing thereon.[103] The revocation of a broker's license automatically suspends the license of every salesperson and apprentice salesperson in the employ of the broker pending a change of employer and issuance of a new license.[104] The violation of any of the provisions of chapter 117 of the Code by a salesperson, apprentice salesperson, employee, partner or associate of a broker will not cause the revocation of the broker's license unless the "employer, partner or associate had guilty knowledge thereof."[105]

It has also been held that, in order for a broker's license to be revoked or suspended, the act of the broker for which discipline is being imposed must be performed in the conduct of his brokerage business.[106] However, subsequent to that holding Code section 117.29 was enacted. In part it provides for suspension or revocation of a broker's or salesperson's license upon

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strated a lack of qualifications which are necessary to assure the residents of this state a high standard of professional and occupational care." *Id.* §§ 258A.2(2)(a), (b). The Commission may impose a period of probation, require additional professional education or training, or re-examination as a precondition to reinstatement of a license or termination of suspension, impose civil penalties and issue a citation and warning. *Id.* §§ 258A.2(2)(c), (d), (e), (f).

100. 1977 Iowa Acts ch. 95.

101. In *Miller v. Iowa Real Estate Comm'n*, 274 N.W.2d 288 (Iowa 1978), it was alleged that Iowa Code sections 117.34(8) and 117.34(11) were so ambiguous as to deny a broker due process. The broker had not maintained a proper trust account as required by Code section 117.46. The court held that the requirements of section 117.46 were sufficient to put the broker on adequate notice of what activity would violate section 117.34. 274 N.W.2d at 292.

102. While it might be suggested that the latter enactment should control the former, such would not appear to be proper in this case. First of all, the provisions of Code section 117.34 are not inconsistent with those of Code section 258A.2 and 117.29. In addition the former (Code section 117.34) is the provision which contains the regulations most specifically dealing with real estate licenses. *See also* IOWA CODE § 258A.3(3) (1979) (provides that powers conferred under Iowa Code section 258A.2 are in addition to powers specified elsewhere in the Code).

103. *Id.* § 117.35; *see id.* §§ 17A.18(3), 258A.5(2)(a). *See also* IOWA AD. CODE § 700-1.6(117).

104. IOWA CODE § 117.29 (1979).

105. *Id.* § 117.34.

106. In *Blakeley v. Miller*, 232 Iowa 980, 7 N.W.2d 11 (1942), a broker was guilty of misconduct in the performance of duties as a court-appointed referee in partition. The court cited the provisions of current Iowa Code section 117.34, and stated that a license may be revoked only where the misconduct occurs "in performing or attempting to perform any acts mentioned herein." *Id.* at 982, 7 N.W.2d at 13. Since the broker did not commit the misconduct as part of his brokerage business his license could not be revoked.

"the conviction of any felony that would affect his or her ability to practice the profession of real estate broker and salesman."[107] While this would not allow the revocation or suspension of a license due to any general misconduct outside of the brokerage business, it does specifically allow such discipline if the misconduct is a felony which would affect the broker's or salesperson's ability to practice the profession.

II. Brokerage Agreements

A. *Types*

1. *Types of Brokerage Agreements*

Brokerage agreements or listings may be classified by reference to several different criteria. The first and most common method of classification is by consideration of whether or not the listing requires the broker to have produced a buyer in order to be entitled to compensation, *i.e., by productive activity*.[108] If the only method by which a broker can earn compensation is by producing the specified type of buyer, then the listing is a general listing. However, if compensation may also be due even if the broker does not produce a buyer, then the listing is a form of exclusive listing.

A second method of classifying brokerage agreements is by consideration of the result which the listing requires from the broker's productive activity,[109] *i.e., by result.*[110] Most often the result which the broker must produce is a ready, willing and able buyer. However, the listing may demand a different result. For example, the listing may require that the buyer complete the purchase before a commission is earned.

Finally, brokerage agreements may be classified by reference to the purpose for employing the broker, *i.e., by purpose.*[111] Commonly, the pupose of the employment is to find a buyer of the real estate. However, other purposes, such as finding a tenant, may be involved.

2. *Productive Activity—General Listing*

Under a general or open listing the owner of a piece of real estate promises the broker that if the broker finds the required kind of buyer, the broker will be paid a commission for his services. The broker must be the procuring cause for the ultimate buyer. Thus, compensation will not be earned if there is a sale to a buyer procured by another broker.[112] Nor will

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107. Iowa Code § 117.29(5)(1979).

108. *See* Parts IIA(2)-(5) *infra.*

109. This classification assumes that the broker earns the compensation by performing productive activity.

110. *See* Parts IIA(6), (7) *infra.*

111. *See* Part IIA(8) *infra.*

112. Armstrong v. Smith, 227 Iowa 450, 457, 288 N.W. 621, 624 (1939); Wallace, *Promis-*

compensation be earned if there is a sale to a buyer which resulted from the owner's, and not the broker's, efforts.[113] Furthermore, the listing is normally freely revocable and automatically revoked by a prior sale.[114]

A general listing is not itself a contract immediately upon the making thereof. Rather it is an offer by the owner which, if accepted by the broker, will then become a unilateral contract.[115] It may only be accepted by the broker supplying the kind of buyer specified in the listing. It may not be accepted by the mere promise to find a buyer.[116] The seller's consideration in this unilateral contract is the promise to pay a commission. When the broker supplies the specified buyer his consideration has been rendered. It is at this point that there is a unilateral contract.[117] It also appears that although such offers are freely revocable until accepted, in order to protect a broker's investment in time and efforts expended, the seller may not revoke in bad faith.[118]

3. *Productive Activity—Exclusive Listings*

EXCLUSIVE AGENCY. Under this form of listing a seller promises to pay compensation if the premises are sold through the efforts of another agent or broker, as well as if the listing broker supplies the specified kind of buyer. However, if a buyer is found through the efforts of the owner, no compensation is earned by the broker.[119] In addition, if the listing so provides, it may be irrevocable for a period of time, unless there is a sale to a buyer produced by the owner's efforts.[120]

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sory Liability under Real Estate Brokerage Contracts, 37 IOWA L. REV. 350, 350-51 (1952); *see* Stromberg v. Crowl, 257 Iowa 348, 351, 132 N.W.2d 462, 464 (1965); McCulloch Investment Co. v. Spencer, 246 Iowa 433, 439, 67 N.W.2d 924, 927 (1955).

113. White & Hoskins v. Benton, 121 Iowa 354, 357, 96 N.W. 876, 877 (1903); *see* Ross v. Miller, 254 Iowa 1364, 1368, 121 N.W.2d 124, 127 (1963).

114. McFarland v. Howell, 162 Iowa 110, 112, 143 N.W. 860, 861 (1913); Johnson Bros. v. Wright, 124 Iowa 61, 64, 99 N.W. 103, 104 (1904).

115. Thus it is somewhat inappropriate to speak of a "brokerage agreement" when the broker has not yet found a buyer.

116. Since the owner is looking for performance it would also not be adequate for the broker to promise to use his best efforts. Nor would mere commencement of a search be sufficient in the normal case. *But see* note 118 *infra*.

117. Armstrong v. Smith, 227 Iowa 450, 457, 288 N.W. 621, 624 (1939); RESTATEMENT (SECOND) OF AGENCY §§ 445-450 (1957); Wallace, *supra* note 112, at 350.

118. Morton v. Drichel, 237 Iowa 1209, 1214, 24 N.W.2d 812, 815 (1946); *see* RESTATEMENT (SECOND) OF AGENCY § 445 (1957).

119. Gilbert v. McCullough, 146 Iowa 333, 335, 125 N.W. 173, 174 (1910); RESTATEMENT (SECOND) OF AGENCY § 449, Comment c, at 362 (1957). "A contract to give an 'exclusive agency' to deal with specified property is ordinarily interpreted as not precluding competition by the principal personally but only as precluding him from appointing another agent to accomplish the result." *Id. See generally* Wallace, *supra* note 112, at 351-53.

120. Merle O. Milligan Co. v. Caliborne, 213 Iowa 1088, 240 N.W. 694 (1932); *see* Knudson & Richardson v. Laurent, 159 Iowa 189, 140 N.W. 392 (1913). *See generally* Wallace, *supra* note 112, at 351-53.

EXCLUSIVE RIGHT TO SELL. In this type of listing a seller promises to pay compensation to the listing broker even if a sale is made to a buyer produced through the seller's own efforts, as well as if a sale is made through another agent or broker, or the listing broker supplies the specified kind of a buyer.[121] In addition, the listing may provide that the premises may not be withdrawn from sale and if so withdrawn compensation will be earned.[122]

4. *Productive Activity—Exclusive Listings, Theory*

From even a cursory observation it is obvious that an exclusive agency and an exclusive right to sell listing cannot be analyzed and explained on the same basis as a general listing. The theory of a general listing is that the owner makes an offer for entry into a unilateral contract which can only be accepted by the broker supplying a buyer.[123] However, these exclusive listings purport to entitle the broker to compensation not only when the broker supplies a buyer, but also when other events occur such as sale through another broker. If the broker has not produced a buyer he can not be said to have accepted the offer. Nor can it be true that the listing broker and the owner have entered into a bilateral contract. The owner can not be said to have agreed to pay a commission merely because the broker promises to find a buyer.[124]

Various theories have been suggested by the courts of Iowa and elsewhere. At least one court in a foreign jurisdiction has said that the broker has an agency coupled with an interest which cannot be revoked.[125] While the Iowa court has raised the concept on occasion,[126] it has properly recognized that this cannot be the correct analysis. The interest to which the agency is coupled must be more than the commission to be earned.[127] It has also been said that the listing may be revoked by the seller, but such revocation may subject him to a cause of action for breach of contract. That is, a distinction is drawn between the power to revoke and the right to revoke a contract.[128] While such may be a valid observation if an enforceable contract

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121. Boyd & Williams v. J. J. Watson & Co., 101 Iowa 214, 70 N.W. 120 (1897); RESTATEMENT (SECOND) OF AGENCY § 449, Comment c, at 362 (1957). "A contract to give the 'exclusive sale' of a specified property ordinarily indicates that the agent is to have the exclusive power." *Id. See generally* Wallace, *supra* note 112, at 353-54.

122. Ferguson v. Bovee, 239 Iowa 775, 779-80, 32 N.W.2d 924, 926 (1948). *See generally* Wallace, *supra* note 112, at 353-54.

123. *See* Part IIA(2) *supra*.

124. It is extremely doubtful that any broker would, in fact, make a promise to find a buyer. At best a broker might make a promise to use his best efforts to find a buyer.

125. Chamberlain v. Grisham, 229 S.W.2d 14, 16-17 (Mo. Ct. App. 1949), *aff'd*, 230 S.W.2d 721 (1950).

126. Milligan v. Owen, 123 Iowa 285, 287-88, 98 N.W. 792, 793-94 (1904).

127. Ferguson v. Bovee, 239 Iowa 775, 779, 32 N.W.2d 924, 926 (1948).

128. Hilgendorf v. Hague, 293 N.W.2d 272, 276 (Iowa 1980); Knudson & Richardson v. Laurent, 159 Iowa 189, 192, 140 N.W. 392, 393 (1913). *See generally* RESTATEMENT (SECOND) OF

exists, it does not explain when or how an enforceable contract came into being.

There are three primary theories, all closely related to each other, which might give a correct analysis.[129] The first theory proceeds from the prior statement that the seller's listing is merely an offer to enter into a unilateral contract. Such an offer may still only be accepted by the broker producing a buyer as specified in the listing. However, the seller's offer is made irrevocable because of a subsidiary bilateral contract. In this subsidiary bilateral contract the seller is viewed as promising not to revoke the offer to pay a commission. This promise becomes binding when the broker promises to use his best efforts to locate the specified kind of buyer.[130] This subsidiary contract is an enforceable agreement, the breach of which entitles the other party to damages. Under this analysis the broker does not accept the primary offer until he supplies the specified buyer. When he does supply the buyer, the seller is obligated by the now-created unilateral contract to pay a commission. However, if the seller should, for example, sell through another broker, there has been a failure to hold the offer open. This is a breach of the subsidiary contract for which the broker is entitled to damages.[131] One problem with this analysis is that there is serious doubt that the seller merely sought the broker's promise to use best efforts when he made the offer not to revoke. What the seller really desired is that the broker in fact use his best efforts![132]

The second analysis picks up on this last observation. The listing is again viewed as merely an offer to enter into a unilateral contract which can only be accepted by the broker producing the requisite buyer. The seller's offer is also made irrevocable by a subsidiary contract, but in this theory it is a unilateral subsidiary contract. In this subsidiary contract the seller promises not to revoke the offer to pay a commission. However, this subsidi-

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AGENCY §§ 118, 450 (1957).

129. The Iowa court has seldom given much discussion regarding the theory to which it adheres. However, it is believed that the court would agree with one of the three following theories, probably the second.

130. There are thus two levels of contracting: The primary level where the seller has offered to pay a commission if a buyer is produced (an offer for a unilateral contract); the subsidiary level where the seller has promised not to revoke in consideration for a promise to use best efforts (a bilateral contract).

131. As to the amount of these damages see Part IIE(3) *infra*.

132. *See generally* RESTATEMENT (SECOND) OF AGENCY § 449, Comment a, at 361 (1957); Wallace, *supra* note 112, at 358-59. A slightly different analysis is that the subsidiary contract contemplates alternative performances. These alternatives are for the seller to hold the offer open for acceptance by the broker or to withdraw the offer and pay a sum certain. Blank v. Borden, 11 Cal. 3d 963, 524 P.2d 127, 115 Cal. Rptr. 31 (1974) (en banc). This avoids an analysis based on damages and, thus, any liquidated damages issue. However, it is submitted that this skirts the issue because under such an analysis a party under any contract may refuse to perform the primary promise by paying an alternative specified sum. That sum is precisely what is known as liquidated damages.

ary promise is viewed as being intended to be accepted only by the broker commencing to use his best efforts to find a buyer. Once the broker begins to expend efforts the subsidiary unilateral contract is formed and becomes enforceable. If the broker now supplies the required buyer he accepts the primary offer and earns a commission. If the seller should sell through another broker, compensation is due because of a breach of the subsidiary contract.[133]

A final theory is suggested by Restatement (Second) of Contracts section 45. The analysis under this theory is that upon part performance by the broker there is an acceptance of the seller's offer to pay a commission. At that point there is an existing unilateral contract. However, the seller's obligation to pay the commission is conditioned upon the broker ultimately supplying the specified buyer.[134] If the seller interferes with the broker's completion of his performance by, for example, selling through another broker, the seller is subject to damages for breach of the unilateral contract.

5. *Productive Activity—Exclusive Listings, Construction*

In construing various exclusive listings the Iowa courts have been very cautious so as not to deny unnecessarily the owner's right to find his own buyer. Unless there is clear and unequivocal language to the contrary, the listing will be interpreted as an exclusive agency and not an exclusive right to sell.[135] The owner in such case may be denied the right to sell through another broker, but he may continue to seek his own buyer. The listing is construed most strongly against the drafter thereof; such is usually the broker.[136] In one listing the following language was employed: "I hereby grant you the exclusive right for 90 days from date hereof, to sell. . . . If said property is sold before the termination of this agreement, I agree to pay you a commission."[137] The court held that these words did not sufficiently and clearly limit the owner's continued right to sell the realty himself without

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133. Attix, Noyes & Co. v. Pelan & Anderson, 5 Iowa 336 (1857). *See also* Metcalf v. Kent, 104 Iowa 487, 73 N.W. 1037 (1898); *see generally* Wallace, *supra* note 112, at 359-66. As to the amount of damages see Part IIE(3) *infra*.

134. RESTATEMENT (SECOND) OF CONTRACTS § 45 (Tent. Draft No. 1 1973).

> (1) Where an offer invites an offeree to accept by rendering a performance and does not invite a promissory acceptance, an option contract is created when the offeree tenders or begins the invited performance or tenders a beginning of it.
>
> (2) The offeror's duty of performance under any option contract so created is conditional on completion or tender of the invited performance in accordance with the terms of the offer.

Id. See generally Wallace, *supra* note 112, at 360-66.

135. Estes v. Leibsohn, 248 Iowa 1173, 85 N.W.2d 15 (1957). "[A] listing contract will not be construed to defeat the right of one to sell his own property, without liability for commission, if it will fairly bear a contrary construction." *Id.* at 1178-79, 85 N.W.2d at 18.

136. *Id.* at 1178-79, 85 N.W.2d at 18.

137. Stromberg v. Crowl, 257 Iowa 348, 349, 132 N.W.2d 462, 463 (1965).

the broker earning a commission. Furthermore, the fact that the listing was to be in existence for a specific period of time did not preclude the owner's personal right to find a buyer.[138]

No special magic is attached to the use of the words "exclusive right to sell." Where the listing was entitled "exclusive right to sell" and provided for a commission to be earned if the broker should procure a purchaser or if the owner "should in any way obstruct or prevent a sale,"[139] the seller impliedly maintained his personal right to sell.[140] Under a listing which was also labeled an "exclusive right to sell" for a stated term, and which provided for payment of a commission if sold by the broker "or anyone else during period herein named,"[141] the seller did not relinquish his right to sell without a commission being due.[142] Thus, it would appear that the only way to draft a listing which is certain to be construed as an exclusive right to sell is to state that "a commission is earned if the owner sells the property through his own efforts" or similar language.[143]

The courts have also been prone to construe contracts most strongly against the broker when called upon to decide what constitutes a sale through another agent. Thus, a sale by an auctioneer under the direct supervision of the seller, or a sale by the owner's spouse, is not a sale through another agent.[144] In such a case no compensation would be due to a listing broker under an exclusive agency.

6. *By Result—Ready, Willing and Able Buyer*

Under the usual type of brokerage listing the broker has produced a sufficient result by producing a ready, willing and able buyer. When a buyer who meets this standard[145] is produced, the broker has accepted the owner's offer for entry into a unilateral contract.[146] It does not matter, under this standard, whether the buyer and seller ever enter into a contract of sale or

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138. *Id.*; *accord* Ingold v. Symonds, 125 Iowa 82, 99 N.W. 713 (1904).

139. McPike v. Siver, 168 Iowa 149, 150, 150 N.W. 52, 52 (1914).

140. *Id.* "So salutary is the rule of the implied reservation of right of the principal to sell his own land that no contract should be construed to its defeat if it will fairly bear a construction consistent therewith." *Id.* at 152, 150 N.W. at 53.

141. Hedges Co. v. Shanahan, 195 Iowa 1302, 1303, 190 N.W. 957, 958 (1922).

142. *Id.*

143. However, in at least one case the court held that it was proper to admit parol evidence to demonstrate what the parties intended the listing to be, and the court treated it as an exclusive right to sell. Kuehnle v. Schromen, 258 Iowa 989, 140 N.W.2d 188 (1966).

144. Ingold v. Symonds, 134 Iowa 206, 111 N.W. 802 (1907).

145. For a further discussion of this standard see Parts IIC(1)-(7) *infra*.

146. RESTATEMENT (SECOND) OF AGENCY § 445, Comment c, at 346-47 (1957).

> [T]he principal in effect makes an offer which, in the absence of a manifestation of a contrary intent, is interpreted as a promise to pay the broker a commission in consideration of the production by the broker of a customer ready and willing to contract on the principal's terms and able to perform such a contract.

Id.

whether the sale is ever consummated.[147] If the listing contains substantially all of the terms of sale, a broker achieves the required result by supplying a buyer who is ready, willing and able to purchase on the listing terms.[148] If the terms of sale are not substantially set out in the listing or if the owner indicates that terms other than those in the listing are satisfactory, the broker achieves the required result by producing a buyer who is ready, willing and able to purchase on terms which are satisfactory to the owner.[149]

7. *By Result—Due on Sale or Closing*

The result required in order to accept the seller's offer may be modified by the listing. One of the more common types of modification is that which requires the broker not merely to produce a ready, willing and able buyer but one who in fact consummates the sale.[150]

Also, the modification of the required result may cause a commission to be earned even if the broker does not produce a ready, willing and able buyer. Where the listing merely required that the broker "urge" a particular person to buy, the broker need not do more than "urge" in order to earn a commission.[151]

8. *By Purpose*

While the owner's purpose in a brokerage listing is usually the sale of real estate, other objectives are also common. Sometimes the broker is hired to find, for the principal, a person who desires to trade properties.[152] Current desires for real estate trades may be instigated by advantageous tax results.[153] Another purpose which the owner may have in listing the premises may be for the broker to find a tenant for the premises.[154]

It is also not uncommon for the principal to hire a broker for the purpose of finding land for the principal to purchase.[155] However, the mere fact that a person approaches a broker requesting to be shown prospective real estate to purchase does not make the broker an agent for the purchaser. An agency relationship must be found to exist between the broker and the pur-

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147. Murphy v. Brown, 252 Iowa 764, 108 N.W.2d 353 (1961), *overruled on other grounds*, Miller v. Berkoski, 297 N.W.2d 334 (Iowa 1980).

148. Gatton v. Stephen, 239 N.W.2d 159, 161 (Iowa 1976); *see* RESTATEMENT (SECOND) OF AGENCY § 445, Comment d (1957).

149. McHugh v. Johnson, 268 N.W.2d 225, 227 (Iowa 1978); *see* RESTATEMENT (SECOND) OF AGENCY § 445, Comment d (1957).

150. *See* RESTATEMENT (SECOND) OF AGENCY § 445, Comment e, at 349-50 (1957); Part IIC(8) *infra*.

151. Tuffree v. Saint, 147 Iowa 361, 126 N.W. 373 (1910).

152. *See, e.g.*, Mealey v. Kanealy, 226 Iowa 1266, 286 N.W. 500 (1939).

153. *See* I.R.C. § 1031.

154. *See* Donahoe v. Casson's Market, Inc., 248 Iowa 1106, 84 N.W.2d 29 (1957).

155. *See* Shannon v. Gaar, 233 Iowa 38, 6 N.W.2d 304 (1942).

chaser, rather than between the broker and the seller.[156]

9. *Combination of Listings*

A listing may call for various combinations of productive activity, result and purpose. Thus, for example, an exclusive right to sell may be combined with a due on closing provision. The result would be that in order to earn a commission the broker would have to produce a buyer who actually closes. However, if the seller withdraws the real estate from sale or sells through another broker, compensation will also be earned.

10. *Commission—Elements of Recovery*

In order for a real estate broker to be able to recover a commission from his principal, the broker must be able to show the following:[157]

1. that a brokerage agreement has been properly executed (formal requirements);[158]

2. that the result specified in the listing has occurred (required result);[159] and

3. that the broker has procured that result (procuring cause).[160]

The burden of proof on each of the issues is upon the broker.[161] To carry that burden the broker must prove the facts by a preponderance of the evidence.[162] These are fact questions to be determined by the jury.[163]

B. *Formal Requirements*

1. *Writing—In General*

The normal brokerage agreement for the sale of real estate does not fall within the Iowa statute of frauds.[164] Thus, the agreement does not need to be in writing to be enforceable. In particular, it is not a contract "for the creation or transfer of any interest in lands."[165] No "in rem" interests are created in, or transferred to, the broker in the normal case.[166] Nor is it a

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156. Havner v. Miller, 191 Iowa 865, 183 N.W. 509 (1921).

157. McCulloch Investment Co. v. Spencer, 246 Iowa 433, 437, 67 N.W.2d 924, 926 (1955); Wareham v. Atkinson, 215 Iowa 1096, 1100, 247 N.W. 534, 536 (1933).

158. *See* Parts IIB(1)-(8) *infra.*

159. *See* Parts IIC(1)-(8) *infra.*

160. *See* Parts IID(1)-(9) *infra.*

161. McCulloch Investment Co. v. Spencer, 246 Iowa 433, 437, 67 N.W.2d 924, 926 (1955); Wareham v. Atkinson, 215 Iowa 1096, 1100, 247 N.W. 534, 536 (1933); *see* Monson v. Carlstrom, 141 Iowa 183, 185, 119 N.W. 606, 607 (1909).

162. Murphy v. Hiltibridle, 132 Iowa 114, 118, 109 N.W. 471, 473 (1906).

163. *See* Parker v. Tuttle, 260 N.W.2d 843 (Iowa 1977).

164. The same is true with regard to brokerage agreements providing for the purchase, trade or leasing of real estate. *See* IOWA CODE § 622.32 (1979).

165. *Id.* § 622.32(3).

166. *See* Bannon v. Bean, 9 Iowa 395 (1859). *See also* McHugh v. Johnson, 268 N.W.2d

contract "not to be performed within one year."[167] Even if the term of a listing agreement does exceed one year, since a buyer might be found within the one year period, the contract does not fall within the provisions of section 622.32(4) of the statute.[168] Further, it is not "a contract for the sale of goods."[169] In fact, the Iowa courts have decided numerous cases in which it volunteered the information that the listing was oral. Nevertheless, the listing was not unenforceable on account thereof.[170]

2. *Writing—Conflict of Laws*

Under traditional Iowa conflict of laws rules the validity of a brokerage agreement is determined under the law of the state where it is made. Thus, if the brokerage listing is made and entered into in another state and, if under the law of that state, the listing must be signed and in writing, no oral enforceable agreement exists.[171] It has also been held that the fact that the listing was to be performed (at least partially) in Iowa does not make Iowa law applicable.[172] Furthermore, the law of the state in which the land is located does not necessarily control. The listing is not a contract for the sale of real estate but rather an agreement for the employment of a broker to perform services.[173] Nevertheless, if the parties agree that the brokerage listing is to be performed in Iowa, the Iowa rules as to the statute of frauds would apply.[174]

However, these decisions predate the current tendancy to apply the so-called "most significant relationship" test in the resolution of conflict of laws as applied to contract matters.[175] It is not presently clear that Iowa would apply this test to a brokerage agreement, but the cases would seem to suggest that result.[176] Under such a test the law of the state where a major

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225 (Iowa 1978).

167. IOWA CODE § 622.32(4) (1979).

168. *See* Shearon v. Boise Cascade Corp., 478 F.2d 1111, 1114 (8th Cir. 1973); Johnson v. Ward, 265 N.W.2d 746, 747 (Iowa 1978). It is conceivable that a brokerage agreement might require the listing not to commence until more than one year after the date of the agreement. In that case, the statute of frauds should apply and a writing would be necessary.

169. IOWA CODE § 554.2201(1) (1979). The term "goods" is defined as moveables (including certain fixtures and emblements). *Id.* § 554.2105(1).

170. *See, e.g.*, Christensen v. Miller, 160 N.W.2d 509 (Iowa 1968); Pound v. Brown, 258 Iowa 994, 140 N.W.2d 183 (1966); Morton v. Drichel, 237 Iowa 1209, 24 N.W.2d 812 (1946).

171. Brown & Brammer v. Wm. Pearson Co., 169 Iowa 50, 55-58, 150 N.W. 1057, 1059-60 (1915); Osborne v. Dannatt, 167 Iowa 615, 621, 149 N.W. 913, 915 (1914). *See generally* Ehrenzweig, *The Real Estate Broker and the Conflict of Laws*, 59 COLUM. L. REV. 303 (1959).

172. Osborne v. Dannatt, 167 Iowa 615, 621, 149 N.W. 913, 915 (1914).

173. Brown & Brammer v. Wm. Pearson Co., 169 Iowa 50, 57, 150 N.W. 1057, 1060 (1915); Bannon v. Bean, 9 Iowa 395, 396 (1859).

174. Brown & Brammer v. Wm. Pearson Co., 169 Iowa 50, 55-56, 150 N.W. 1057, 1059-60 (1915).

175. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 187-188 (1971).

176. *See In re* Allen, 239 N.W.2d 163 (Iowa 1976); Hall v. Allied Mut. Ins. Co., 261 Iowa

part of the services are to be rendered would apply, unless another state had a more significant relationship to the transaction.[177] As a result, the law of the state where the listing was entered would not necessarily control. Rather, the place of performance, the location of the real estate, the state of licensing and other factors would have to be considered.[178]

3. *Writing—Rules and Regulations*

The Rules and Regulations of the Iowa Real Estate Commission provide, in pertinent part that "[a]ll listing agreements shall be in writing, properly identifying the property and containing all the terms and conditions under which the property is to be sold, including the price, the commission to be paid, the signatures of all parties concerned and a definite expiration date."[179] This would mean that, at a minimum, the Iowa Real Estate Commission would have the power to suspend or revoke the license of a broker who obtains an oral brokerage agreement or the power to impose other disciplinary measures.[180] However, no such case has yet been decided.

An argument might be made, however, that the regulation may also be raised by a private individual as a defense to a suit for a commission. The objective of the rules and regulations is to further the purposes of chapter 117.[181] One of those purposes is "to safeguard the interests of the public."[182] If that is the case, a member of the public affected by the failure to comply with the regulation might be able to use it as a defense. More specifically, the affected person might be able to argue that the above quoted rule was adopted by the Iowa Real Estate Commission in order to protect members of the public from questionable commission claims by brokers. To not allow the regulation to be raised as a defense against a person regulated by it would be to negate the efficacy of the statute and regulations.[183] However, there is no specific authority to that effect in chapter 117,[184] the Iowa Administrative Procedure Act[185] or the decisions of the Iowa Supreme Court.

1258, 158 N.W.2d 107 (1968). In *Intercontinental Planning, Ltd. v. Daystrom, Inc.*, 24 N.Y.2d 372, 248 N.E.2d 576, 300 N.Y.S.2d 817 (1969), the New York Court of Appeals applied a similar standard and found that the New York statute of frauds applied to a finders contract.

177. Restatement (Second) of Conflicts of Laws § 196 (1971).

178. *Id.* at Comment d, Illustration 2. For example, it might be decided that the location of the land in Iowa, together with visits to the land to show it to prospective buyers, might qualitatively be sufficiently significant to apply Iowa law, even if the broker and seller reside elsewhere.

179. Iowa Ad. Code § 700-1.23(117).

180. Iowa Code §§ 117.18, .29, .34, 258A.5 (1979).

181. Iowa Code § 117.9 (1979) "The commission is empowered to promulgate rules to carry out and administer the provisions of this chapter consistent therewith." *Id.*

182. Iowa Code § 117.34(8) (1979).

183. *See* Amato v. Latter & Blum, Inc., 227 La. 537, 79 So. 2d 873 (1955).

184. Iowa Code ch. 117 (1979).

185. Iowa Code ch. 17A (1979).

4. *Listing Agreement*

In order for the broker to be able to recover a commission it must be demonstrated that (1) there is a listing agreement under which the broker is employed, and (2) there is a promise therein by the party charged to pay the commission.[186] However, if the broker should be able to prove the employment but is unable to prove the existence of a promise to pay a commission, the broker may still be able to recover expenses and the value of the benefit conferred.[187]

The burden of proof is upon the broker to show both the listing agreement and the promise to pay.[188] These matters may be proved from an express written or oral agreement or from facts demonstrating an implied agreement.[189] While parol evidence may not be used to change or vary a written agreement, it is admissible to clear up ambiguities.[190] Inasmuch as the statute of frauds does not apply,[191] parol evidence may also be used to supply missing terms in the writing or to prove a completely oral listing agreement.[192] The full listing agreement may be collected from several documents revealing the total intention of the parties.[193] However, if a written listing agreement is a culmination of the negotiations of the parties, previous documents expressing the negotiations are integrated into the final agreement. Evidence of the prior document is not admissible to contradict the final agreement.[194] The essential terms of the listing agreement must be established with certainty.[195]

5. *Listing Agreement—Ratification*

While a landowner may not have originally submitted a listing agreement or promised to pay a commission, a listing which was executed by another person may be ratified by the landowner.[196] Furthermore, a listing drafted by the broker may be ratified as the seller's listing agreement by the seller's subsequent acts and circumstances.[197] However, a seller will not be considered to have offered a listing agreement by the *mere* fact that the

186. Moore v. Griffith, 234 Iowa 1024, 1027, 14 N.W.2d 644, 645 (1944); Wareham v. Atkinson, 215 Iowa 1096, 1100, 247 N.W. 534, 536 (1933).

187. Staufer v. Bell, 99 Iowa 545, 68 N.W. 817 (1896). *See also* Part IIE(2) *infra*.

188. *See* Stover v. Hindman, 159 N.W.2d 422 (Iowa 1968).

189. McCulloch Investment Co. v. Spencer, 246 Iowa 433, 67 N.W.2d 924 (1955).

190. Kvamme v. Barthell, 144 Iowa 418, 423-24, 118 N.W. 766, 768-69 (1908).

191. *See* Part IIB(1) *supra*.

192. Larson v. Thoma, 143 Iowa 338, 121 N.W. 1059 (1909).

193. Tracy Land Co. v. Polk County Land & Loan Co., 131 Iowa 40, 107 N.W. 1029 (1906).

194. Goss v. Smith, 178 Iowa 348, 159 N.W. 984 (1916).

195. Stover v. Hindman, 159 N.W.2d 422, 425 (Iowa 1968).

196. Wolfgang v. Naumann, 199 Iowa 585, 202 N.W. 216 (1925).

197. Ducummon v. Johnson, 252 Iowa 1192, 1196, 110 N.W. 2d 271, 273 (1961).

seller knew that the broker was going to show the land.[198]

6. *Necessity of Broker's License*

Iowa Code section 117.1 mandates licensure of persons acting in the real estate brokerage business. The provision states in pertinent part that "[n]o person shall act as a real estate broker, real estate salesperson or real estate apprentice salesperson without first obtaining a license."[199] A person found guilty of violating the above provisions may be punished, on a first offense, by a fine not to exceed $100 or by imprisonment not to exceed thirty days.[200] In addition it is further provided:

> No person, copartnership, association or corporation engaged in the business or acting in the capacity of a real estate broker, a real estate salesperson or real estate apprentice salesperson within this state shall bring or maintain any action in the courts of this state for the collection of compensation for any services performed . . . without alleging and proving that such person, copartnership, association, or corporation was a duly licensed real estate broker, real estate salesperson or real estate apprentice salesperson *at the time the alleged cause of action arose.*[201]

The two sections do require some interpretation. Iowa Code section 117.1 prohibits a person from acting as a broker, salesperson or apprentice salesperson without first being licensed. However, the penalty is not necessarily the loss of the commission. According to the court in *Pound v. Brown*,[202] the commission may not be collected if "at the time the alleged cause of action arose"[203] the broker, salesperson or apprentice salesperson was not duly licensed. The fact that the person was not licensed at the time of the listing or the showing of the property is not relevant. The crucial issue is when does the cause of action arise. While the cause of action usually arises when the broker produces a ready, willing and able buyer,[204] in the *Pound v. Brown* case the court found that, under the facts, it did not arise until the sale was consummated.[205] Thus, the broker, salesperson or apprentice salesperson would have until such later date to become licensed.

If no objection is raised in Court at the time of introduction, the broker's own assertion of being a licensed broker is sufficient proof of being licensed.[206]

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198. Welch & Griffin v. Collenbaugh, 150 Iowa 692, 695-96, 130 N.W. 792, 793 (1911).
199. Iowa Code § 117.1 (1979). *See also* Part IA(1) *supra*.
200. *Id.* § 117.43.
201. *Id.* § 117.30 (emphasis added).
202. 258 Iowa 994, 140 N.W.2d 183 (1966).
203. *Id.* at 1000, 140 N.W.2d at 187.
204. *See* Part IIA(6) *supra* and Part IIE(1) *infra*.
205. Pound v. Brown, 258 Iowa 994, 140 N.W.2d 183 (1966).
206. Ducummon v. Johnson, 242 Iowa 488, 494-95, 47 N.W.2d 231, 235 (1951).

7. *Necessity of Related Licensing*

A problem related to that discussed in the previous section concerns whether all members of the brokerage firm and its employees must be licensed in order for the firm to recover a commission. Iowa Code section 117.2 provides:

> No copartnership, association, or corporation shall be granted a license, unless every member or officer of the copartnership, association, or corporation, who actively participates in the brokerage business of the copartnership, association, or corporation, shall hold a license as a real estate broker, salesperson or apprentice salesperson, and unless every employee who acts as a salesperson for the copartnership, association, or corporation shall hold a license as a real estate broker, salesperson or apprentice salesperson.[207]

A question will naturally arise as to whether a brokerage firm may recover a commission if a salesperson or active member is not licensed at the time the cause of action arose. It is not clear that Code section 117.30[208] would preclude the recovery of the commission. It might be argued that if the firm possesses a current license at the time the cause of action arose, it is properly licensed to collect a commission although it is in violation of section 117.2. The fact that subsequent to the issuance of the firm license a member of the firm, who was not licensed, became active (or that a person who was not licensed was employed) in selling real estate merely causes the firm to be in violation of the act. Certainly the counterargument could be raised that if a firm is in violation of section 117.2 it is not entitled to the license which it currently has. As a result it should not be entitled to a commission. It may also be possible[209] for a salesperson to sue for the commission if the listing is so drafted, even if the firm for which he works does not have a license.

In *Pound v. Brown*[210] the court observed that where the suing broker was not a brokerage firm, it was not necessary that all salespersons employed by the broker be licensed in order for the broker to collect the commission.[211] However, by negative implication, the court may be suggesting that if a brokerage firm was involved, no commission could be collected when a salesperson is not licensed.

8. *Local Licensing*

Prior to the enactment[212] of chapter 117 of the Iowa Code some locali-

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207. Iowa Code § 117.2 (1979). *See* text accompanying notes 3-4 *supra*.
208. *Id.* at 117.30. *See* Part IIB(6) *supra*.
209. If the problem is an unlicensed active firm member.
210. 258 Iowa 994, 140 N.W.2d 183 (1966).
211. *Id.* at 1001-2, 140 N.W.2d at 187-88.
212. 1929 Iowa Acts ch. 215.

ties had enacted broker licensing ordinances. A failure to be licensed under such an ordinance could result in the inability to collect a commission.[213] However, an ordinance which now prohibits an act permitted by chapter 117 is in conflict with state law and is null and void. The state statute preempts the issue.[214]

C. *Required Result*

1. *Required Result—Introduction*

In the following sections consideration will be given to those issues which concern whether or not the person whom the broker presents as a buyer meets the requirements set forth in the listing agreement. Whether or not the broker is responsible for the production of the buyer will be considered thereafter.

2. *Ready, Willing and Able on Listing Terms*

The listing agreement usually sets the terms on which the owner is willing to sell. Such a listing is viewed as establishing an offer to the broker. If the broker can produce a buyer who is ready, willing and able to purchase on those terms, without change, the broker has accepted the offer. Thus, the courts have consistently held that a commission is earned when the broker produces a ready, willing and able buyer on the terms specified in the listing.[215] If the owner and buyer actually enter a contract of sale the commission would be earned.[216] However, the broker's right to the commission is not affected by the fact that the seller does not take advantage of the opportunity to enter into a contract of sale with the proposed buyer.[217]

Generally, the broker must obtain an offer which complies precisely with the the terms of the listing in order to earn a commission under this principle. However, when a deviation is trifling or is no less beneficial to the seller than the terms of the listing, there is an exception.[218] Thus, where the owner's listing required the buyer to pay any capital gains tax resulting from a prepayment of the purchase price, and the proposed buyer's offer did not even contain a right to prepay, a ready, willing and able buyer was produced on the listing terms.[219] Where the owner stated a March 1 settlement date,

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213. Richardson v. Brix, 94 Iowa 626, 63 N.W. 325 (1895).

214. Pape v. Westerdale, 254 Iowa 1356, 121 N.W.2d 159 (1963) (Davenport city ordinance requiring local broker licensing held invalid).

215. Gatton v. Stephen, 239 N.W.2d 159, 161 (Iowa 1976); Nagl v. Small, 159 Iowa 387, 390, 138 N.W. 849, 850 (1912).

216. Ducummon v. Johnson, 252 Iowa 1192, 110 N.W.2d 271 (1961).

217. Christensen v. Miller, 160 N.W.2d 509, 511 (Iowa 1968); Cassady v. Seeley, 69 Iowa 509, 510, 29 N.W. 432, 432 (1886).

218. Gatton v. Stephen, 239 N.W.2d 159, 162 (Iowa 1976).

219. *Id.* at 162-63.

and the buyer's offer permitted the acceleration of that date, at owner's option, the broker produced a ready, willing and able buyer.[220] However, any terms expressed or implied in the listing which are not "trivial" must be acceptable to the prospective buyer before the broker earns the commission.[221]

If the listing is silent on the method of payment of the purchase price, then a cash sale is presumed.[222]

3. *Ready, Willing and Able on Other Satisfactory Terms*

If the broker is not able to supply a buyer on the listing terms, he might nevertheless earn a commission if he produces a ready, willing and able buyer on terms otherwise satisfactory to the owner. If the prospective buyer should desire not to make an offer on the terms stated in the listing agreement, he may make an offer on different terms which the owner may accept. Or, the parties may proceed through a series of offers and counter-offers ultimately resulting in terms acceptable to the owner. The terms in the listing agreement are generally viewed as the seller's beginning point for negotiations.[223] As a result, in either of the above situations[224] the broker has earned a commission.[225]

Normally such negotiations result in a contract of sale between the owner and the buyer. The contract of sale is itself competent evidence to demonstrate that there is a ready, willing and able buyer on terms acceptable to the owner.[226] However, it is not necessary that a contract of sale actually be entered into by the parties. Where the buyer made an offer on a standard form and the owner counter-offered with substantially similar terms but on a different form, the broker was considered to have supplied a ready, willing and able buyer on terms acceptable to the owner.[227] Also, when the owner indicates that the buyer's offer is acceptable, if he should

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220. Christensen v. Miller, 160 N.W.2d 509 (Iowa 1968); *see* Collins v. Padden, 120 Iowa 381, 94 N.W. 905 (1903).

221. *See* Fjelland v. Wemhoff, 249 N.W.2d 634 (Iowa 1977); Boling & Monroe Realty Co. v. Anders, 192 Iowa 1154, 186 N.W. 45 (1922).

222. Iowa Sec. Co. v. Shaefer, 256 Iowa 219, 224, 126 N.W.2d 922, 925 (1964).

223. *See* Comment, *Recovery of Commissions on Sales After Termination of Contract*, 8 ARK. L. REV. 156, 161 (1954) [hereinafter cited as Comment].

224. McHugh v. Johnson, 268 N.W.2d 225 (Iowa 1978); Tilden v. Zanias, 228 Iowa 708, 292 N.W. 835 (1940); Fisher v. Skidmore Land Co., 189 Iowa 833, 179 N.W. 152 (1920).

225. It would be permissible, of course, for the listing agreement to state that the broker will not receive a commission unless a certain net price is obtained. In such a case, a sale by the owner to a buyer produced by the broker at a price below that net price would not entitle the broker to a commission. *See* Morton v. Drichel, 237 Iowa 1209, 1212, 24 N.W.2d 812, 813-14 (1946); Comment, *supra* note 223, at 160-61.

226. Nagl v. Small, 159 Iowa 387, 391, 138 N.W. 849, 850 (1912); Boland v. Kistle, 92 Iowa 369, 371, 60 N.W. 632, 632 (1894).

227. Blunt v. Wentland, 250 Iowa 607, 93 N.W.2d 735 (1959).

later, without an adequate reason, change his mind and refuse to enter into a contract of sale, the broker has nevertheless supplied a ready, willing and able buyer.[228]

If the brokerage listing is not an exclusive agency or an exclusive right to sell, the owner is free to accept varying terms from a buyer presented by one broker while refusing to accept other varying terms from another broker's buyer.[229]

4. *Ready, Willing and Able—Definition of Terms*

It has been infrequent that the Iowa courts have defined the terms "ready," "willing" and "able." This has been particularly true with the former two terms.

READY—Ready has been said to mean that the proposed buyer is "ready to purchase on such terms as are agreeable to the owner at the time."[230]

WILLING—This term would appear to have no real difference in meaning from the former and is, in fact, redundant. It has been defined to mean that the proposed buyer is "willing to make the purchase on such terms,"[231] *i.e.*, terms agreeable to the owner. In effect these two terms simply appear to mean that the buyer is presently agreeable to purchasing the premises on terms acceptable to the owner.

ABLE—This term is the crucial one. It means more than that the buyer is physically or mentally able to make the purchase. It means that

> the purchaser must have the money at the time to make any cash payments that are required in order to meet the terms of the seller, and does not simply mean that the purchaser have property upon which he could raise the amount of money necessary, but, as stated, he must actually have the money to meet the cash payment and be in shape financially to meet any deferred payments.[232]

Elsewhere it has been stated that a buyer's financial ability is measured by his ability to meet the terms of the sale and not by his solvency or his ability to respond in damages.[233]

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228. Raymond v. Stinson, 196 Iowa 881, 882-83, 195 N.W. 588, 588-89 (1923); Fisher v. Skidmore Land Co., 189 Iowa 833, 840, 179 N.W. 152, 154-55 (1920).

229. Mullen v. Crawford, 183 Iowa 14, 166 N.W. 694 (1918).

230. Jones v. Ford, 154 Iowa 549, 554, 134 N.W. 569, 571 (1912).

231. *Id.*

232. *Id.* It should be noted that later in the same year the court decided *Nagl v. Small*, 159 Iowa 387, 138 N.W. 849 (1912) (Weaver & Evans, JJ., dissenting). Although *Nagl* does not overrule *Jones*, it would appear that the philosophy of the *Nagl* court was to consider the seller as making the decision on the buyer's financial ability at the seller's own risk. Once the buyer has been accepted the issue is precluded. *Id.* For a complete discussion see Parts IIC(5)-(7) *infra*.

233. Murphy v. Brown, 252 Iowa 764, 768, 108 N.W.2d 353, 355 (1961), *overruled on other grounds*, Miller v. Berkoski, 297 N.W.2d 334 (Iowa 1980). *See also* Reynor v. Mackrill, 181 Iowa 210, 216-17, 164 N.W. 335, 337 (1917).

The courts have usually stuck closely to the above test, especially where the down payment is paid by check. For the check to be adequate it must be shown to be covered by a deposit in the bank. If not, the buyer is not financially able.[234] Also, where the transaction involved a trade of real estate, the buyer was required to have title to the property to be traded in order to be financially able.[235]

However, at times the court has been willing to allow some variance from the strict application of the test. This has occurred when the variance did not appear to disadvantage the seller. Thus, where the buyer did not have the money with him when he negotiated with the owner, he was nevertheless found to be financially able since he could have raised it within two to three days.[236] In a similar situation were the buyer had a house upon which a mortgage had already been arranged, but not closed, the proceeds from which were to be used for the down payment, he was considered to be financially able.[237]

5. *Buyer Default—General Rule*

The preceeding section discussed the basic test used by the court in ascertaining whether the buyer is "able." However, the situation which evokes the greatest problem is that in which the broker produces a buyer who may have the down payment but who ultimately fails to close the transaction. The seller then seeks not to pay the broker a commission.

The rule which appears to prevail in Iowa is that when the broker produces a purchaser who is acceptable to the seller, a commission is earned even through though the buyer subsequently breaches the resulting contract of sale.[238] Prior to 1912 it did not appear that such was the law. The risk of the buyer's failure to close was on the broker.[239] In that year, the previously stated rule was decided upon by a divided court.[240] Thus, the risk of loss is on the seller and not the broker. If the buyer defaults and refuses to complete the sale the seller is still obligated to pay a commission.[241]

The rationale usually given for such a decision is that once the owner

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234. Fisher v. Skidmore Land Co., 189 Iowa 833, 837, 179 N.W. 152, 153-54 (1920); Knudson & Richardson v. Laurent, 159 Iowa 189, 193, 140 N.W. 392, 394 (1913).

235. Greenway v. Maynes, 196 Iowa 1298, 1301, 196 N.W. 1, 2 (1923). In *Ravenscroft v. Chesmore*, 108 N.W. 465 (Iowa 1906) (per curiam), having title on the date set for performance was ruled adequate.

236. McDermott v. Mahoney, 139 Iowa 292, 305-07, 115 N.W. 32, 37-38 (1908), *aff'd*, 139 Iowa 313, 116 N.W. 788 (1908).

237. Blunt v. Wentland, 250 Iowa 607, 93 N.W.2d 735 (1959).

238. Gordon v. Pfab, 246 N.W.2d 283, 289 (Iowa 1976) (dicta); Nickelsen v. Morehead, 238 Iowa 970, 972-74, 29 N.W.2d 195, 196-97 (1947).

239. McGinn v. Garber, 125 Iowa 533, 101 N.W. 279 (1904); Snyder v. Fidler, 125 Iowa 378, 101 N.W. 130 (1904); Flynn v. Jordal, 124 Iowa 457, 100 N.W. 326 (1904).

240. Nagl v. Small, 159 Iowa 387, 138 N.W. 849 (1912) (Weaver & Evans, JJ., dissenting).

241. *Id.*

has accepted the buyer he can not later be heard to deny that the buyer is not satisfactory.[242] An acceptance of the buyer implies an acceptance of the buyer's financial ability. Under that rationale the seller should be given an opportunity to make an investigation of the buyer's financial ability to complete the transaction. Although not entirely free from doubt, it would appear that seller has such a right.[243] It might also be observed that the seller should be able to obtain a judgment for damages from the buyer, which should include the amount of commission paid to the broker.

6. *Buyer Default—Comment*

In theory, if the seller is wary he should not have to be the ultimate bearer of the commission where the buyer defaults. Whenever a broker is entitled to a commission, the seller should have it within his power to recover it in a judgment for damages from the defaulting buyer. Unfortunately, however, this may be more theory than reality. Not only will the seller have to bear the transaction costs of any suit against the defaulting buyer,[244] but also he may not be able to obtain a realistically enforceable decree. If the buyer defaults because he does not have the funds to complete the purchase, there is no reason to believe that he will be able to obtain the funds necessary to pay the judgment.

Another consideration is that the seller is not likely to have the cash available to pay a commission unless he receives the proceeds of the sale. The commission is usually paid to the broker out of the sales price.[245] Perhaps a more appropriate remedy might be to deny recovery of the commission from the seller, but give the broker a cause of action against the buyer who misrepresents his financial ability to the broker.[246]

Furthermore, the assumption that a wary seller might be able to protect himself by investigating the buyer's financial ability may not be very realistic. The broker usually has better access to such information. In one Iowa decision the court stated:

> The parties herein occupied a fiduciary relationship. Plaintiffs found a buyer unknown to the defendant and the latter was necessarily interested in the financial responsibility of the purchaser with whom he was about to deal through an agent. Under such conditions the principal is

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242. *See* Fisher v. Skidmore Land Co., 189 Iowa 833, 843-44, 179 N.W. 152, 156 (1920).

243. *See* Murphy v. Brown, 252 Iowa 764, 108 N.W.2d 353 (1961), *overruled on other grounds*, Miller v. Berkoski, 297 N.W.2d 334 (Iowa 1980); Blunt v. Wentland, 250 Iowa 607, 93 N.W.2d 735 (1959); Fisher v. Skidmore Land Co., 189 Iowa 833, 179 N.W. 152 (1920).

244. These might be reduced if the seller had obtained a down payment sufficiently large to cover the commision plus other items of damage. Of course, there is no assurance that the seller will not incur transaction costs in defending the buyer's attempt to recover the down payment.

245. *See* Ellsworth Dobbs, Inc. v. Johnson, 50 N.J. 528, 236 A.2d 843 (1967).

246. *See id.*

> not bound to investigate the truth of the facts stated as an inducement for his signature to a contract, nor does it lie in the mouth of the agent to say that his statements should not have been believed by his principal.[247]

While the above case was based on misrepresentation, a misrepresentation may also occur where a party has a duty to investigate and reveal the facts.[248] A more appropriate rule would be one under which the broker is required to produce a buyer who actually closes the purchase in order to earn the commission.

Finally, one may question how much solid authority supports the previously stated rule as the law of Iowa. In many of the cases where the rule is stated, the facts do not require its application.[249] They are often cases wherein the owner refused to complete the sale;[250] they do not involve a defaulting buyer. (Under such facts a commission would be due even under the above proposed rule since the fault of nonclosure is on the seller.) In fact, in a fairly recent decision the court denied recovery of a commission. The owner and buyer had entered into a contract which the buyer could not perform. The court ignored the contract and said that the broker could not recover since the negotiations were unproductive and the parties withdrew in good faith.[251]

7. *Buyer Nonperformance—Conditions Precedent*

The seller does not take the risk of the buyer's inability to perform in all circumstances, however. Where a tentative contract of sale has been entered into by the seller and the proposed buyer with a condition precedent to binding the purchaser, no commission is earned until the condition precedent has occurred. In order for the broker to have produced a ready, willing and able buyer, the buyer's promise to perform must be valid, enforceable and binding.[252] Thus, where the buyer's obligation to complete the purchase is subject to his ability to obtain financing, the broker has not supplied a ready, willing and able buyer until the buyer has fulfilled the condition precedent.[253]

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247. Thompson v. Finch, 196 Iowa 1013, 1014-15, 195 N.W. 744, 744-45 (1923).

248. *Cf.* Miller v. Berkoski, 297 N.W.2d 334 (Iowa 1980) (The Iowa Supreme Court held that a broker has a duty to reveal to the seller all facts which might influence the seller's decision to enter the contract. In *Miller*, the broker failed to reveal, *inter alia*, that the broker had loaned part of the downpayment to the buyer.)

249. *See, e.g.*, Gordon v. Pfab, 246 N.W.2d 283, 289 (Iowa 1976) (dicta).

250. *See, e.g.*, Nagl v. Small, 159 Iowa 387, 138 N.W. 849 (1912).

251. Ross v. Miller, 254 Iowa 1364, 1369, 121 N.W.2d 124, 127 (1963).

252. Mullinger v. Clause, 178 N.W.2d 420, 428 (Iowa 1970); White v. Miller, 259 Iowa 609, 614-15, 145 N.W.2d 28, 32 (1966).

253. Mullinger v. Clause, 178 N.W.2d 420, 428 (Iowa 1970).

8. *Other Results Required by Listing Agreement*

DUE ON SALE OR CLOSING. The parties are, of course, competent to agree that the broker shall not earn a commission until some other result is produced. As a result, the seller's offer in the listing agreement may be to pay a commission if the sale is "consummated,"[254] or "if they made the deal,"[255] or if the sale is "completed and the final payment made."[256] Or, in a trade of properties, the offer may be to pay a commission upon "the transfer of the properties."[257] Under such a listing it is not an acceptance of the owner's offer merely to produce a ready, willing and able buyer; the result specified by the listing agreement must be achieved before the offer is accepted.

SALE AS AGENT. Where the broker is hired as agent in fact with the power and direction to consummate a sale, the listing is likely to be construed to require the broker to consummate a sale in order to earn a commission.[258]

D. *Procuring Cause*

1. *Procuring Cause—Introduction*

The cases have not always been precise in delineating the procuring cause issue from the ready, willing and able buyer issue. The followng appears to be a workable statement of the procuring cause issue: If there is present a ready, willing and able buyer as described in the previous subpart, is it the broker who is the proximate cause for the existence of that buyer, or is it someone else? The question is not whether or not the person who is produced will buy; that is the ready, willing and able buyer issue. The reason that the two are difficult to separate is that without knowing that some person is ready, willing and able to buy it is impossible to focus in on that person to determine who has produced him.

This dispute may take either of two forms: (1) Is it the broker or a third person who is the proximate cause? (2) Is it the broker or the seller who is the proximate cause? Furthermore, it may be important to ascertain when the buyer was produced, *i.e.*, during the term of the listing or after its expiration. As will be seen from the following discussion, a broker is the procuring cause of the sale when that broker brings the prospective buyer and seller together and they negotiate, without abandonment, until they ultimately agree upon a sale.

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254. Pound v. Brown, 258 Iowa 994, 1000, 140 N.W.2d 183, 187 (1966).

255. Greenway v. Maynes, 196 Iowa 1298, 1302, 196 N.W. 1, 2 (1923).

256. Tracy Land Co. v. Polk County Land & Loan Co., 131 Iowa 40, 41, 107 N.W. 1029, 1029 (1906).

257. Mealey v. Kanealy, 226 Iowa 1266, 1266, 286 N.W. 500, 501 (1939).

258. Blodgett v. Sioux City & St. P. Ry., 63 Iowa 606, 19 N.W. 799 (1884).

2. *During Term—Broker vs. Another Broker*

There are relatively few decided cases involving the question of whether it is one broker as opposed to another broker who is the procuring cause. Although the basic test is as stated in the prior section, it is often not true, when two brokers are involved, that one had absolutely no effect on the negotiations and the other is completely responsible for bringing the parties together. Nevertheless, only one broker can earn a commission.[259] In order to implement the stated test it appears that the courts have looked to see who it was who supplied the last increment necessary to get the prospect to be a willing purchaser. Even if a broker was influential in kindling or rekindling a purchaser's interest in the real estate

> this of itself entitle[s] him to nothing. This could have been true as to all of the agents. It was part of their competition. The rule remains that the winning agent must be the one who first procures the consent of the purchaser to enter into contract on terms satisfactory to the seller.[260]

The court has also stated that the broker must do more than merely introduce the parties in order to earn a commission.[261] Under such a test it would be possible for a broker who expends less effort than another broker (who introduced the seller and the buyer) to be the one entitled to a commission. This situation would arise when the former is the one who supplied the last increment necessary to cause the sale.

3. *During Term—Broker vs. Seller*

When the context of the dispute is whether it is the broker as opposed to the seller who procured the buyer, the basic test is more easily applied. If the broker brought the buyer and seller together, the negotiations continued without abandonment and they culminated in a sale, then the broker is the procuring cause. The fact that the seller might have supplied the last increment necessary to convince the buyer to purchase is not controlling. The seller could always be considered to have supplied that simply by lowering the price.

The first problem to be resolved is whether or not the broker, in fact, brought the parties together. Although a precise rule is difficult to ascertain from the cases, it does appear that the broker must be the party without whom the buyer and seller would not have gotten together.[262] Thus, where

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259. This assertion assumes that the listing is not an exclusive one. If it is an exclusive listing then one commission may be earned by one broker as the procuring cause, and the other may earn compensation as the listing broker. Thus, two separate commissions could be payable.

260. Tokheim v. Miller, 194 Iowa 337, 341, 189 N.W. 790, 792 (1922); *accord*, Armstrong v. Smith, 227 Iowa 450, 288 N.W. 621 (1939).

261. McCulloch Inv. Co. v. Spencer, 246 Iowa 433, 67 N.W.2d 924 (1955).

262. Wareham v. Atkinson, 215 Iowa 1096, 247 N.W. 534 (1933); Beamer v. Stuber, 164 Iowa 309, 145 N.W. 936 (1914). *But see* Rounds v. Allee, 116 Iowa 345, 89 N.W. 1098 (1902).

the buyer had previously known of the realty in question, had negotiated with the seller, and was only subsequently given data thereon by the broker, no commission was earned.[263] Nor was the broker the procuring cause where the buyer overheard the broker talking to someone else about the realty and then went to the seller and directly negotiated a purchase.[264] Also, where the buyer first approached the seller, they negotiated a sale, and the broker was called in merely to draft the contract of sale, the broker was not the procuring cause.[265]

The next problem is whether or not the negotiations set in motion by the broker continued without abandonment. In one case a broker showed a farm to a buyer who made an unacceptable offer on part of the real estate.[266] Subsequently, the buyer negotiated directly with the seller and arrived at a sale for a lower price.[267] The court held that the jury could find that the broker was the procuring cause.[268] The same result was also achieved[269] where a broker showed realty to a prospective buyer who was not then interested. Later the buyer returned to the broker who told him to go out and look at the property again.[270] A sale was then consummated directly between the seller and buyer on lower terms.[271]

Even though the broker may bring the parties together and assist in negotiations, if the negotiations are abandoned, and subsequently rekindled (without the broker's involvement), the broker is not the procuring cause.[272] These cases usually involve a termination of the negotiations, passage of some amount of time, and the sale becoming possible because of some independent, intervening event. Where negotiations had been terminated, and, after the passage of some time, the buyer originally introduced by the broker responded to seller's newspaper advertisement, the broker was not the procuring cause.[273] The same result has occurred in cases where the buyer, who was introduced to the seller by the broker, did not buy immediately because of a lack of financing.[274] Later, after the abandonment of the origi-

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263. Vint v. Corkery, 204 N.W.2d 921 (Iowa 1973).

264. Monson v. Carlstrom, 141 Iowa 183, 185, 119 N.W. 606, 607 (1909); *see* Whittle v. Klipper, 182 Iowa 270, 165 N.W. 425 (1917).

265. Ross v. Miller, 254 Iowa 1364, 1369, 121 N.W.2d 124, 127 (1963).

266. Moore v. Griffith, 234 Iowa 1024, 1025-26, 14 N.W.2d 644, 645 (1944).

267. *Id.* at 1026, 14 N.W.2d at 645.

268. *Id.* at 1027, 14 N.W.2d at 645.

269. Morton v. Drichel, 237 Iowa 1209, 24 N.W.2d 812 (1946).

270. *Id.* at 1213, 24 N.W.2d at 814.

271. *Id.* at 1210, 24 N.W.2d at 813.

272. *See* McCulloch Inv. Co. v. Spencer, 246 Iowa 433, 67 N.W.2d 924 (1955).

273. Kellogg v. Rhodes, 231 Iowa 1340, 4 N.W.2d 412 (1942).

274. Murray v. Kennan, 191 Iowa 998, 183 N.W. 491 (1920); Reeve v. Ness, 135 N.W. 575 (Iowa 1912). *But see* White v. Grovier, 237 Iowa 377, 21 N.W.2d 769 (1946).

A related circumstance in which the broker was determined not to be the procuring cause is where he, in effect, says that he "gives up" on being able to effectuate a sale to the prospective buyer. Later a sale is consummated without further efforts by the broker. McFarland v.

nal negotiations, the buyer did purchase when financing was obtained without the aid of the broker.

The fact the broker has to expend only minor efforts to procure the buyer does not negate the right to a commission. Where the broker already had a buyer and then obtained a listing from the seller whereafter a sale was concluded, the broker was the procuring cause.[275]

4. *After Expiration of Term—Abandonment of Negotiations*

The procuring cause issue may also arise where a prospective buyer is introduced by the broker during the term of the listing, but the buyer is not ready, willing and able to buy until after the expiration of the listing term. The seller may claim that, in order for the broker to earn a commission, the buyer must agree to purchase within the listing period. However, the same considerations discussed in the prior section regarding abandonment of negotiations apply here also. If the buyer and the seller enter into negotiations during the term of the listing which continue without abandonment or intervening cause and culminate in a sale after the expiration of the listing, the broker is the procuring cause, and earns a commission.[276] On the other hand, if the negotiations are abandoned, "a subsequent renewal of the negotiations followed by a sale by the principal at a lower price does not entitle the broker to a commission, since it cannot be said that he was the procuring cause of the sale."[277]

5. *After Expiration of Term—Protective Causes*

Rather than rely upon the procuring cause concept to entitle him to a commission a broker may insert a protective clause into the listing agreement. The gist of such a clause is that if a sale is made within a certain period of time after the expiration of the listing to a prospect introduced by the broker, a commission is earned: even if the broker were not the procuring cause of the sale. The terminology used varies. It may, for example, provide for a commission to be due if there is a sale to a prospect "recommended" or "submitted" by the broker, or with whom the broker

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Boucher, 153 Iowa 716, 134 N.W. 91 (1912). *Contra,* Gibson v. Hunt, 94 N.W. 277 (Iowa 1903).

275. Larson v. Thoma, 143 Iowa 338, 121 N.W. 1059 (1909).

276. Morton v. Drichel, 237 Iowa 1209, 24 N.W.2d 812 (1946); *see* Wheeler v. Waller, 197 N.W.2d 585 (Iowa 1972); Ross v. Miller, 254 Iowa 1364, 121 N.W.2d 124 (1963); Comment, note 223 *supra.*

277. Kellogg v. Rhodes, 231 Iowa 1340, 1344, 4 N.W.2d 412, 415 (1942); *accord,* Ross v. Miller, 254 Iowa 1364, 121 N.W.2d 124 (1963).

It would also appear that the seller and broker might specifically agree that no commission is to be earned unless the sale is consummated within the listing term. *Cf.* Kellogg v. Rhodes, 231 Iowa 1340, 1344, 4 N.W.2d 412, 414-15 (1942) (no commission earned unless sale consummated at price term set by agreement). However, factually such listings do not seem to occur. *See* Part IID(5) *infra.*

"negotiated."[278] Such a clause is usually found in an exclusive right to sell and, in effect, extends the broker's right to a commission regardless of whether the broker is the procuring cause.

While the protective clause is designed to extend the broker's right to a commission beyond the procuring cause standard, it is possible that a broker, who in fact is the procuring cause of a sale, will not fit within the protection of the protective clause. In such a case the broker apparently has waived the benefits of the procuring cause standard and no commission will be due. In one case[279] the protective clause gave the broker a commission if the property was sold, within one year after termination, to a party with whom the broker had "negotiated."[280] That term, the court said, meant that the broker must arouse the prospect's interest to such a point, prior to the termination of the listing, that he would be considered a likely purchaser.[281] The term invoked a much higher standard than that of simple procuring cause.[282] The broker, not meeting the standard of the protective clause and having waived the benefit of the procuring cause standard, did not receive a commission.

The Rules and Regulations of the Iowa Real Estate Commission also provide certain limits on the enforceability of such clauses with the aim of protecting the seller from the potential of owing two commissions. "To enforce a protective clause beyond the expiration of an exclusive listing contract, the broker must furnish to the owner prior to the expiration the names and addresses of all persons to whom the property was presented during the active term of the listing."[283]

6. *Seller Default*

In order for the broker to be considered to have produced a buyer it is not essential that the seller enter into a contract with the buyer. If the seller should refuse to execute a contract of sale with a buyer who is ready, willing and able, the broker's right to a commission is not defeated.[284]

If the broker is the procuring cause of a buyer with whom the owner enters a contract of sale, the broker's right to a commission is not affected by the fact that both the owner and the buyer subsequently agree to rescind

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278. *See* Vint v. Ashland, 258 Iowa 591, 139 N.W.2d 457 (1966).

279. *Id.*

280. *Id.* at 592-93, 139 N.W.2d at 458.

281. *Id.* at 594-97, 139 N.W.2d at 459-61.

282. *See* text accompanying note 262 *supra.*

283. IOWA AD. CODE § 700-1.19(117). The question may again be raised here as to whether this regulation may be enforced by a private seller as a defense to an action for commission. *See* text accompanying notes 294-96 *infra.*

284. Blunt v. Wentland, 250 Iowa 607, 93 N.W.2d 735 (1958); Raymond v. Stinson, 196 Iowa 881, 195 N.W. 588 (1923).

their contract and abandon the transaction.[285] Of course, the same would be true if the owner breaches the contract of sale and refuses to convey title to the buyer.[286] One exception to this rule has arisen. It is possible that the seller might not be sure if the terms of the sale are acceptable to him. If certain facts were known to exist, the sale would not be acceptable and no commission would be earned. If those facts are not immediately discernable, he might sign a contract of sale giving him the right to withdraw if those facts are subsequently discovered. For example, the seller might enter a contract of sale conditioned on the buyer's exchange property meeting certain requirements. In such a case the seller may rescind the conditioned contract and not owe a commission to the broker if the stated facts are discovered not to exist.[287]

Finally, once the broker has produced a ready, willing and able buyer, the fact that the seller then discovers that he does not have good title, and thus cannot complete the sale, does not defeat the broker's right to a commission.[288] This would be true even if the seller were unaware of the title defect when employing the broker.[289]

7. *Seller Default—Refund of Down Payment*

The Rules and Regulations of the Iowa Real Estate Commission deal with the broker's obligations respecting any down payment deposited with the broker by the buyer when there has been a seller default.

> When for any reason the owner fails or is unable to consummate the deal, the broker has no right to any portion of the money deposited with him by the purchaser, even though the commission is earned. The money must be returned to the purchaser and the broker should look to the owner for his compensation.[290]

8. *Necessity to Notify Seller as to Buyer*

The Iowa courts have not had an easy time in determining whether the broker has produced a buyer when the broker does not make known to the seller the existence and/or identity of the buyer. The beginning point of any

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285. Nickelsen v. Morehead, 238 Iowa 970, 29 N.W.2d 195 (1947); Smith v. Eells, 191 Iowa 1307, 184 N.W. 385 (1921). It would appear that the broker might consent to the recission thus negating his right to a commission. *Id.* at 1131, 184 N.W.2d at 387.

286. Reynor v. Mackrill, 181 Iowa 210, 164 N.W. 335 (1917).

287. Duke v. Graham, 163 Iowa 272, 143 N.W. 817 (1913).

288. McHugh v. Johnson, 268 N.W.2d 225 (Iowa 1978); Welch v. Young, 79 N.W. 59 (Iowa 1899).

289. *See* McHugh v. Johnson, 268 N.W.2d 225 (Iowa 1978); Welch v. Young, 79 N.W. 59 (1899). *But cf.* Blau v. Friedman, 26 N.J. 397, 140 A.2d 193 (1958) (no commission due when sellers, in good faith, believed they had good title when they employed the broker).

290. Iowa Ad. Code § 700-1.14(117). One might question if and how this regulation might be enforced by an individual affected thereby. *See* text accompanying notes 182-84 *supra*.

discussion should be with a statement of the general rule as laid down in the earlier cases. It was there said that the fact that the seller did not know that the purchaser with whom he had just signed had, in fact, been procured by the broker (and not by the seller's own efforts) did not deny the broker a commission.[291] The apparent rationale of these cases was that once the broker had found a ready, willing and able buyer the broker had performed as required in the listing. To have procured the buyer it was not required that the broker tell the seller that one had been found. The potential inequities of such a rule were quick to cause various exceptions to be recognized.

First, the court held that when the broker was employed to cause a sale of the real estate, rather than merely produce a buyer, the seller and buyer must be brought together so that a sale might be effected.[292] This was required since the listing required that the broker produce a sale and not merely produce a ready, willing and able buyer.[293]

A second exception was stated in a subsequent case. Where an agent found one buyer with whom the seller signed, and an earlier broker had not previously informed the seller that he had already procured another buyer, the earlier broker was not considered to have produced a buyer and thus he earned no commission.[294] This exception was later extended to the situation where the earlier broker had failed to advise the seller that he had found a buyer, and the same buyer was then led to sign with the seller by another agent.[295] It is obvious why this rule was necessary — to enable the seller to protect himself against two commissions.

A later case gave a different statement of the law.[296] Where the realty is sold at the listing price to a buyer found by the broker, a commission is earned even if the seller did not know that the broker produced the buyer.[297] However, where the realty is sold at less than the listing price to a buyer found by the broker, no commission is earned if the seller did not know that the broker found the buyer.[298] Based on the facts of the case these statements should be limited to circumstance where there is no other broker involved in the sale. Thus, the exceptions previously stated would continue to apply even if the realty is sold at the listing price.[299]

The court's apparent rationale for the second part of its rule was that,

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291. Rounds v. Allee, 116 Iowa 345, 89 N.W. 1098 (1902); *see* Boyd & Williams v. J.J. Watson & Co., 101 Iowa 214, 70 N.W. 120 (1897).

292. Sanden & Huso v. Ausenhus, 185 Iowa 389, 392, 168 N.W. 801, 802 (1918).

293. *Id.* at 393, 168 N.W.at 802.

294. Johnson Bros. v. Wright, 124 Iowa 61, 99 N.W. 103 (1904).

295. Gilbert v. McCullough, 146 Iowa 333, 125 N.W. 173 (1910).

296. Ducummon v. Johnson, 242 Iowa 488, 47 N.W.2d 231 (1951).

297. *Id.* at 492, 47 N.W.2d at 234.

298. *See id.* at 493, 47 N.W.2d at 234.

299. *See* text accompanying notes 294-95 *supra*. Where another broker induces a different buyer (or even the complaining broker's buyer) to sign a purchase agreement at the listing price. The complaining broker should not earn a commission.

without prior notice that the broker had produced the buyer, the seller cannot negotiate with knowledge of all the facts. As a result, the negotiated price might be less than it would have been had the seller known that he would have to pay a commission. However, by comparison, if the owner sells at the listing price there is no prejudice; the owner's agreement was to pay a commission to the broker if he produced a buyer at the listing price.

As a result, it is difficult to state precisely what the current state of the law is in Iowa. A summary of the cases would appear to suggest the following. If the complaining broker's failure to advise the seller that he has found a buyer results in the seller incurring a commission to another broker, the complaining broker has not produced a buyer and earns no commission. If no other broker is involved in the transaction and the broker's failure to advise the seller that he has found a buyer results in the seller signing a contract of sale with that buyer for less than the listing price, the broker has not produced a buyer and no commission is earned. However, even if the broker has failed to advise the seller that he has found a buyer (and no other broker is involved in the transaction) and the seller signs a contract of sale with that buyer at the listing price, then the broker has produced a ready, willing and able buyer and earns a commission.

9. *Unauthorized Sale or Withdrawal*

In the previous sections the discussion concerned the broker earning a commission by being the procuring cause of the sale. This would be the issue under a general listing, an exclusive agency or exclusive right to sell where the broker claims to have produced a buyer. However, under an exclusive agency or an exclusive right to sell the broker may also be entitled to compensation even if he has not procured a ready, willing and able buyer. Under an exclusive agency there may be a sale through another broker or an unauthorized withdrawal; under an exclusive right to sell there may be a sale through another broker, a sale to a buyer found by the seller, or an unauthorized withdrawal.[300]

In an exclusive agency or exclusive right to sell the owner's offer to pay a commission is made irrevocable by a subsidiary agreement. This subsidiary agreement is composed of the owner's offer not to withdraw the offer to pay a commission and the broker's acceptance of the offer not to withdraw either by his promise to use his best efforts to find a buyer or his actual initial efforts to find a buyer.[301] Depending upon the type of listing involved, if the owner should sell through another broker,[302] and/or his own efforts,[303]

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300. *See* Part IIA(3) *supra*.
301. *See* Part IIA(4) *supra*.
302. Boyd & Williams v. J.J. Watson & Co., 101 Iowa 214, 70 N.W. 120 (1897).
303. Attix, Noyes & Co. v. Pelan & Anderson, 5 Iowa 336 (1857).

or should withdraw the premises from sale,[304] a breach of the subsidiary contract has occurred. The broker is entitled to compensation therefor, even though such is not a commission. Since the broker's cause of action is for damages and not commission, the broker need not demonstrate that he produced a buyer.[305]

Although not expressly decided, it would appear to be logical that where the breach is due to a sale through another broker or to a sale to a buyer found by the seller's efforts, it is immaterial whether such sale ever closes. The compensation is due in this case not because the broker has produced a buyer, but rather because the subsidiary agreement not to withdraw has been breached. The agreement to sell to another buyer effectively withdraws the offer to pay a commission just as much as if the seller had expressly so stated.[306]

E. *Compensation and Termination*

1. *When Commission Earned—Amount*

If the broker is the procuring cause of a ready, willing and able buyer on the precise terms as set forth in the listing, then the commission is earned at that moment.[307]

The fact that the broker is unable to produce a buyer at the terms of the listing does not necessarily preclude the recovery of a commission. If the broker's buyer makes an offer which is acceptable to the seller, or if the seller counter-offers and the buyer accepts, a commission is earned at that point.[308]

In addition, in either of the above two cases, the broker must show that there is a listing agreement under which the broker was (1) hired and (2) promised a commission.[309]

The amount or method of computing the commission is established by the parties in the listing agreement. The commission, in the absence of an agreement to the contrary, is computed on the full sales price, even if improvements must be installed in order to sell at that price.[310]

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304. Ferguson v. Bovee, 239 Iowa 775, 32 N.W.2d 924 (1948).

305. *Id.* at 780-81, 32 N.W.2d at 926-27; *see* Attix, Noyes & Co. v. Pelan & Anderson, 5 Iowa 336, 343-44 (1857).

306. *See* Metcalf v. Kent, 104 Iowa 487, 73 N.W. 1037 (1898). *See also* Baumgartner v. Meek, 126 Cal. App. 2d 505, 272 P.2d 552 (1954).

307. Pond v. Anderson, 241 Iowa 1038, 44 N.W.2d 372 (1950); Wareham v. Atkinson, 215 Iowa 1096, 247 N.W. 534 (1933).

308. Pond v. Anderson 241 Iowa 1038, 44 N.W.2d 372 (1950); More v. Griffith, 234 Iowa 1024, 14 N.W.2d 644 (1944).

309. *See* Part IIB(4) *supra*.

310. Sackett v. Southern Land Co., 161 N.W. 448 (Iowa 1917).

2. *Reasonable Value of Services*

Where the broker is unable to show that, under the listing agreement, he was not only hired but also promised a commission, he may not obtain a commission.[311] However, if the broker was employed and did produce a buyer he will be entitled to the reasonable value of his services.[312] Since the broker has procured a ready, willing and able buyer, evidence as to the usual commission in the locality for such services is proper for the purpose of showing the reasonable value of the broker's services.[313]

3. *Damages—Unauthorized Sale or Withdrawal*

If there has been an unauthorized sale or withdrawal of the property under an exclusive agency or an exclusive right to sell, the broker's compensation is based upon the breach of the subsidiary contract not to withdraw.[314] In such a case it is entirely competent for the parties to liquidate their damages. Perhaps the dearth of cases in the area bespeaks the fact that this is often what the listing agreement provides. This may be accomplished by providing that if the owner sells through another broker, or to a buyer found through his own efforts, or withdraws the property from sale, the compensation or damages will be equal to the commission computed on the listing price or sale price. These damages have been readily upheld by the courts.[315] The cases so far have not questioned whether the sum so liquidated is a reasonable prognostication of the damages which might or do occur, or if the true damages are difficult to ascertain.[316]

Where the damages in this type of case have not been liquidated the courts have had some difficulty in delineating the proper measure of damages. Some courts have merely granted the broker the amount of commission which would have been earned if there had been a sale.[317] However, in many cases this may be inappropriate since, if there had been a sale, the broker would have incurred expenses to earn the commission—this results in an excessive recovery. Furthermore, the broker often is incapable of showing that he would have sold the premises but for the withdrawal. In such a case, granting damages measured by the commission may amount to a windfall recovery. However, in one case where the broker was able to show that he would have caused a sale had the premises not been withdrawn,

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311. *See* Part IIB(4) *supra.*

312. Ransom-Ellis Co. v. Eppelsheimer, 205 Iowa 809, 218 N.W. 566 (1928); Fisher & Ball v. Carter, 178 Iowa 636, 160 N.W. 15 (1916).

313. Hess v. Hayes, 146 Iowa 620, 125 N.W. 671 (1910); Staufer v. Bell, 99 Iowa 545, 68 N.W. 817 (1896).

314. *See* Parts IIA(4) & IID(9) *supra.*

315. Merle O. Milligan Co. v Claiborne, 213 Iowa 1088, 240 N.W. 694 (1932); Boyd & Williams v. J.J. Watson & Co., 101 Iowa 214, 70 N.W. 120 (1897).

316. *See* RESTATEMENT (SECOND) OF CONTRACTS § 370 (Tent. Draft No. 14, 1979).

317. *See generally* Wallace, *supra* note 112, at 367.

damages measured by the commission were awarded.[318]

If the seller has breached the subsidiary contract and is subject to damages, the proper measure, in the absence of a showing that the broker would have caused a sale but for the withdrawal, is the amount of money expended by the broker plus compensation for the reasonable value of the broker's services. The reasonable value of the services is not measured by the commission, but rather on the basis of the reasonable value of the time expended.[319]

4. *Who Must Pay Compensation*

If the owner lists the land with the broker, the owner is the person who is obligated to pay the compensation. On occasion, however, a person other than the owner may list the premises. If the listing party is the agent for the owner, then the owner has liability for the commission.[320] If the agency is not disclosed, however, the listing party may have liability.[321] It is also possible that a person who is not the legal title holder, but who has an interest in the premises, will engage the broker without any agency from the title-holder and become liable for the compensation.[322] Also, a third pary may have liability on the listing based on a promise in the nature of a guarantee.[323]

Where a husband was construed to be the agent for his wife in the listing of the wife's realty, the wife owed a commission.[324] However, where the husband, who was a co-owner of the real estate, was not considered to be the agent of his wife, he owed the entire commission.[325] Where the listing party was a referee in partition and owner of only a one-third interest in the realty, and did not reveal her limited capacity as a referee, she was held liable for the entire commission.[326]

5. *Method of Collection*

The usual method of collecting the brokerage commission is out of the proceeds of sale at the closing. In the event that the commission has not been collected in this manner, however, the broker may have other means.

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318. Hilgendorf v. Hague, 293 N.W.2d 272 (Iowa 1980). *See also* Patterson v. Johnson, 187 Iowa 633, 174 N.W. 363 (1919).

319. Ferguson v. Bovee, 239 Iowa 775, 32 N.W.2d 924 (1948); Attix, Noyes & Co. v. Pelan & Anderson, 5 Iowa 336 (1857); *accord*, RESTATEMENT (SECOND) OF AGENCY § 455 (1957).

320. Bird v. Phillips, 115 Iowa 703, 87 N.W. 414 (1901).

321. Jones v. Ford, 154 Iowa 549, 134 N.W. 569 (1912).

322. Hiller v. Betts, 204 Iowa 197, 215 N.W. 233 (1927).

323. *See* Estes v. Leibsohn, 248 Iowa 1173, 85 N.W.2d 15 (1957).

324. Bird v. Phillips, 115 Iowa 703, 87 N.W. 414 (1901).

325. McHugh v. Johnson, 268 N.W.2d 225 (Iowa 1978). *But see* Gatzemeyer v. Vogel, 544 F.2d 988 (8th Cir. 1976).

326. Jones v. Ford, 154 Iowa 544, 134 N.W. 569 (1912).

Of course, an action to collect the commission or damages would be available. The broker may also have a possessory lien on any funds from the transaction which came into his hands if not inconsistent with the brokerage listing agreement.[327]

It is doubtful that a broker, in a normal sales transaction, would have a sufficient interest to entitle him to a vendor's lien. However, if the contract of sale should give the broker a specific share of the purchase price, a vendor's lien might be available.[328] Even if the contract should give the broker a specific share of the purchase price this method would not appear to be very practical. Iowa Code section 557.18 requires a specific reservation of a vendor's lien to appear in the deed in order for the lien to be valid.

It appears that the broker would not be considered to have rendered a sufficient type of improvement to be given a mechanic's lien.[329]

6. *Multiple Listings*

A multiple listing is an arrangement whereby a number of brokers contractually agree that when one amongst them has a listing he may or will submit that listing to the group. It is agreed that if one of them, other than the listing broker, should be the one to procure a ready, willing and able buyer, the listing broker and the selling broker will share the commission received in a ratio either predetermined or determined ad hoc. The agreement may also provide for the commission to be shared by the multiple listing service *i.e.*, the entity which administers the dissemination of the listing information amongst the participating brokers. The usual practice is that the listing broker will only submit exclusive listings to the multiple listing service. In an open listing the seller will presumably carry the listing to several brokers.

While multiple listing arrangements are a relatively recent phenomenon, other ad hoc commission sharing agreements are not. The same general principles of law would seem to apply to both, although certain distinctions might exist.

When an owner of real estate employs a broker to find a buyer, that broker may engage another broker to assist him in finding a buyer. However, the listing broker has no inherent authority to make the seller's offer of a commission available to the other broker. The selling broker would normally have to look to the listing broker for his compensation and not to the

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327. *See* Parker v. Walsh, 200 Iowa 1086, 205 N.W. 853 (1925). The limitations of the Rules and Regulations of the Iowa Real Estate Commission must be considered. *See* IOWA AD. CODE §§ 700-1.14(117), -1.27 to -1.27(5) (117).

328. Moss v. Thomas, 218 Ala. 141, 117 So. 648 (1928); Tinsley v. Surfe, 99 Ill. App. 239 (1901).

329. *Cf.* Gollehon, Schemmer & Assoc., v. Fairway-Bettendorf Assoc., 268 N.W.2d 200 (Iowa 1978) (architects not entitled to a mechanic's lien).

seller.[330] The listing and selling broker will share this commission in accordance with their agreement.[331] Nevertheless, if the seller ratifies, or has knowledge of and accepts the benefits of, the other broker's sales activities, the seller will be deemed to have extended the offer to the other broker. In that case the selling broker could collect a commission directly from the seller.[332] In a multiple listing situation it would appear that the seller, at least if so advised,[333] would have prior knowledge that other brokers may be assisting in the sale. Thus it may be asserted that the selling broker would have a cause of action for the commission as well as the listing broker. However, this will not cause a double recovery. The same knowledge of the multiple listing would normally suggest to the seller that all brokers will share a single commission. Since the brokers allowed that belief to exist, and the seller relied thereon, the brokers should be estopped to assert any position to the contrary. Perhaps the brokers' actual agreement to share a single commission[334] might also be asserted by the seller as the intended third party beneficiary of the contract.

In addition, it is a common practice for local boards of real estate brokers to maintain an arbitration service. Under this service a dispute as to who is entitled to the single commission is submitted to a committee for binding arbitration.[335]

As amongst the cooperating brokers, they each owe a duty of good faith to the listing broker. It would be a breach of that duty for a broker to hold back a buyer until the listing broker's agency expired and then to attempt to collect a whole commission by arranging a sale as the sole broker.[336]

7. *Termination*

A brokerage listing agreement will terminate upon the expiration of a stated term contained therein. After that date the broker may no longer accept seller's offer to pay a commission by producing a buyer.[337] If the listing does not have a stated termination date, it will be considered as continu-

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330. Lenhart v. Bean, 181 Iowa 85, 88-90, 161 N.W. 464, 465 (1917).

331. Wheeler v. Waller, 197 N.W.2d 585, 587 (Iowa 1972).

332. Lenhart v. Bean, 181 Iowa 85, 88-90, 161 N.W. 464, 465 (1917); Munson v. Mabon, 135 Iowa 335, 112 N.W. 775 (1907).

333. *Cf.* Iowa Ad. Code § 700-1.23(1)(117)(broker may not negotiate with the seller while that broker knows that an exclusive agency is outstanding in another broker).

334. Such an assertion can be made if the agreement actually exists in writing or can otherwise be proved.

335. *See* Iowa Code chapter 679 concerning procedures and enforceability of private arbitration.

336. Wheeler v. Waller, 197 N.W.2d 585, 587 (Iowa 1972).

337. Iowa Sec. Co. v. Schaefer, 256 Iowa 219, 126 N.W.2d 922 (1964); Reynor v. Mackrill, 181 Iowa 210, 164 N.W. 335 (1917). Of course this termination is subject to the possibility that the broker is the procuring cause of a buyer who purchases later or is benefited by a protective clause. *See* Parts IID(4)-(5) *supra*.

ing for only a reasonable time.[338]

GENERAL LISTING. The seller's offer to pay a commission is automatically revoked by the prior sale of the realty, whether through another broker or the seller's own efforts.[339] Such revocation will occur automatically without notice thereof to the broker[340] unless the listing either expressly or impliedly requires the owner to notify the broker of a prior sale.[341]

Unless a specific term is specified, an owner is free to withdraw the real estate from sale entirely.[342] Such withdrawal must be effectively communicated to the broker.[343] However, after the broker has begun to expend efforts to find a buyer the owner may be unable to withdraw the premises from sale unless it is done in good faith. This would be especially true if the broker has a prospective buyer nearly to the point of making an offer and the owner withdraws in an attempt to defeat the commission.[344]

EXCLUSIVE LISTINGS. Under an exclusive right to sell listing, the owner does not have the right to terminate the offer because of a prior sale either through another broker or through the owner's own efforts. If such occurs the listing broker is entitled to damages for breach of the subsidiary contract to hold open.[345] In an exclusive agency the owner does not have the right to terminate the offer by means of a prior sale through another broker. However, he may revoke the offer by a prior sale to a purchaser found through his own efforts.[346]

If an exclusive agency or exclusive right to sell has a stated term and a specific prohibition on withdrawal from sale, the owner does not have a right to withdraw the property from sale during the stated term.[347]

8. *Termination—Death of Owner or Broker*

Under the principles of the law of agency the death of the principal is

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338. Goss v. Smith, 178 Iowa 348, 159 N.W. 984 (1916); Harris v. Moore, 134 Iowa 704, 112 N.W. 163 (1907). *See also* IOWA AD. CODE section 700-1.5(117) of the Rules and Regulations of the Iowa Real Estate Commission, which states that a listing without a definite termination date is "detrimental to the public interest." One might consider what private defenses could be asserted based thereon. *See* text accompanying notes 182-84 *supra*.

339. Johnson Bros. v. Wright, 124 Iowa 61, 99 N.W. 103 (1904); White & Hoskins v. Benton, 121 Iowa 354, 96 N.W. 876 (1903).

340. White & Hoskins v. Benton, 121 Iowa 354, 96 N.W. 876 (1903).

341. Tuffree v. Binford, 130 Iowa 532, 107 N.W. 425 (1906).

342. Milligan v. Owen, 123 Iowa 285, 289, 98 N.W. 792, 794 (1904); White & Hoskins v. Benton, 121 Iowa 354, 357, 96 N.W. 876, 877 (1903); Hunn v. Ashton, 121 Iowa 265, 96 N.W. 745 (1903).

343. Mosnat v. Berkheimer, 158 Iowa 177, 178, 139 N.W. 469, 470 (1913).

344. Raymond v. Stinson, 196 Iowa 881, 195 N.W. 588 (1923); *see* Morton v. Drichel, 237 Iowa 1209, 24 N.W.2d 812 (1946).

345. *See* Metcalfe v. Kent, 104 Iowa 487, 73 N.W. 1037 (1898).

346. *See* Tracy v. Abney, 122 Iowa 306, 98 N.W. 121 (1904).

347. *See* Wallace, *supra* note 112, at 352-53. *Cf.* Goss v. Smith, 178 Iowa 348, 159 N.W. 984 (1916) (if no stated term seller may not withdraw during reasonable time).

an automatic revocation of the agency.[348] Thus, under a general listing it has been stated that the death of the listing party will cause an automatic termination of the listing.[349]

It has not been decided, however, whether an exclusive agency or an exclusive right to sell should also be terminated by the owner's death. When the principal has specifically agreed not to revoke the broker's authority, that promise may be binding on his estate or personal representative.[350] The broker might thus accept the owner's offer after the owner's death. A withdrawal of the offer by the personal representative would also entitle the broker to damages. However, it is not necessarily true that an exclusive agency or an exclusive right to sell should be so interpreted. Given the usual circumstances, the owner and broker have not considered the possible death of the owner. If the fully informed owner were asked as to his intention in that event, he would likely state that the listing was intended to terminate at his death. Aside from the owner's personal considerations,[351] the personal representative would likely have considerable difficulty in delivering a marketable title, thus forcing an unanticipated default.[352] There may also be estate tax considerations which would suggest to the owner that upon his death the sale should not be made immediately.[353] Therefore, upon the facts, it might be determined that the listing was intended to terminate at the owner's death.[354]

If the agency is placed personally in the broker (and not in the firm), the death of the agent-broker also terminates the relationship.[355]

III. Broker Obligations and Authority

A. *Obligations to Principal*

1. *Secret Profit—Purchase by Broker*

Encompassed within the broker's duty of loyalty to his principal is a prohibition enjoining the broker from making a secret profit from the sale of his principal's real estate. Accordingly, a broker may not purchase the realty from his principal and then resell it to a third party at a profit. The broker

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348. Restatement (Second) of Agency § 120 (1957).

349. White & Hoskins v. Benton, 121 Iowa 354, 357, 96 N.W. 876, 877 (1903); *accord*, Restatement (Second) of Agency § 442A (1957).

350. *See* Restatement (Second) of Agency § 453, Comment c (1957); Restatement (Second) of Contracts §§ 35A & 45 (Tent. Draft Nos. 107, 1973).

351. If the premises are the owner's residence and if the owner was the chief source of family income it might be difficult for the surviving spouse to qualify immediately to finance a new house.

352. There may be time delays in obtaining clearances for inheritance taxes.

353. Such a sale may cause valuation difficulties for estate tax purposes.

354. This would also seem to be an appropriate case in which to interpret the document most strictly against the person who drafted it, the broker.

355. Reeve v. Shoemaker, 200 Iowa 983, 986, 205 N.W. 742, 743 (1925).

has a duty to bring the ultimate buyer and his principal together.[356] It is also not permissible for the broker to enter into an agreement with the purchaser to the effect that the broker, through the purchaser, will acquire at a low price and resell at a profit.[357] In addition it is improper for a broker, who has been employed to purchase land for his principal at the lowest possible price, to purchase the land and resell it to his principal at a higher price.[358]

While the courts have been very demanding in requiring that the broker not make a secret profit from the transaction, they have recognized that this may be waived by the principal's informed consent. In such a case it would be proper for the broker to purchase the principal's real estate.[359] Also, where the broker has been hired merely to lease the property or collect rents, no suspicion of fraud arises merely because the broker purchases the property. The assumption is that the parties are dealing at arm's length as to the sale.[360]

These obligations have been substantially incorporated into the Rules and Regulations of the Iowa Real Estate Commission.

> Licensee acting as buyer. A licensee shall not buy either directly or indirectly property listed with the licensee nor shall the licensee acquire any interest therein without first making licensee's true position clear to the owner. Satisfactory proof of this fact must be produced by the licensee upon request of the commission.[361]

While parol evidence would normally not be admissible to vary the terms of a written agreement, when fraud is alleged such evidence may be shown in order to prove the fraud.[362] Upon proof of the secret profit the principal is entitled to recover the entire proceeds.[363] It is immaterial that the principal has received the agreed purchase price and has suffered no loss.[364]

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356. Dwyer v. Wiese, 193 Iowa 208, 212, 187 N.W. 24, 26 (1922); Leonard v. Omstead, 141 Iowa 485, 490, 119 N.W. 973, 974 (1909).

357. Fred Brown & Co. v. Cash, 165 Iowa 221, 145 N.W. 80 (1914). *Cf.* Miller v. Berkoski, 297 N.W.2d 334 (Iowa 1980) (Although not the specific grounds for its decision against the broker, the court observed that the broker had arranged for the sale of the owner's property to a buyer who was partially financed by the broker. There was a subsequent resale to another buyer at a higher price. To have permitted this would have resulted in two commissions for essentially one sale and thus a secret profit.).

358. Lavalleur v. Hahn, 152 Iowa 649, 663, 132 N.W. 877, 882-83 (1911).

359. Fred Brown & Co. v. Cash, 165 Iowa 221, 145 N.W. 80 (1914).

360. Douglass v. Lougee, 147 Iowa 406, 411, 123 N.W. 967, 969 (1909).

361. IOWA AD. CODE § 700-1.9(117).

362. Lavalleur v. Hahn, 152 Iowa 649, 662, 132 N.W. 877, 882 (1911).

363. Fred Brown & Co. v. Cash, 165 Iowa 221, 224, 145 N.W. 80, 81 (1914).

364. Leonard v. Omstead, 141 Iowa 485, 487, 119 N.W. 973, 974 (1909).

2. *Secret Profit—Failure to Account for Entire Purchase Price*

Closely related to the broker's duty not to speculate in his principal's real estate is his duty to account to the principal for the entire purchase price. This type of a problem is most likely to arise when the broker is given a power to sell or when it is not necessary for the principal to ultimately execute the contract of sale. It might also arise if the broker fails to account for any downpayment which was paid to him to be held in trust[365] until the sale closes. If the broker fails to account, the seller would be entitled to recover any part of the purchase price not previously remitted to him.[366]

Substantially the same principle of accounting has been incorporated into the Rules and Regulations of the Iowa Real Estate Commission.

> It shall be mandatory for every broker to deliver to the seller in every real estate transaction wherein he acts as a real estate broker, at the time such transaction is consummated, a complete detailed statement, showing all of the receipts and disbursements handled by such broker. Also, the broker shall at the time deliver to the buyer a complete statement showing all moneys received in the transaction from such buyer and how and for what the same were disbursed.[367]

In enumerating actions for which discipline may be imposed on a licensee, the Iowa Code states that such includes "[f]ailing, within a reasonable time, to account for or to remit any moneys coming into his possession which belong to others."[368]

3. *Net Listings*

A net listing arises when the brokerage listing provides that the seller requires a certain "net" sum from the sale of the premises. Any money which the broker can induce the purchaser to pay over and above that sum may be kept by the broker as payment for his services.[369] The Iowa courts, while not necessarily approving of the arrangement, have not failed to enforce the listing if otherwise valid.[370] Nevertheless, such a listing might have the effect of causing the broker to be so concerned about making a sale at a large profit to himself that he loses a sale for his principal. In other words, it poses a potential conflict of interests for the broker. In recognition thereof

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365. *See* Iowa Code § 117.46 (1979). *See also* Part IIIA(9) *infra.*

366. Hiller v. Betts, 204 Iowa 197, 199-200, 215 N.W. 233, 234 (1927); Borst v. Lynch, 133 Iowa 567, 569-70, 110 N.W. 1031, 1032 (1907).

367. Iowa Ad. Code § 700-1.28(117).

368. Iowa Code § 117.34(7) (1979).

369. *See* O'Meara v. Lawrence, 159 Iowa 448, 449, 141 N.W. 312, 312 (1913); Attix, Noyes & Co. v. Pelan & Anderson, 5 Iowa 336, 340 (1857); Iowa Ad. Code § 700-1.23(2)(117).

On occasion a somewhat different connotation is given to the term. It may mean that the seller will not sell unless he receives a certain "net" sum, *i.e.*, minimum. In such a case the broker is not given any excess. Such a listing is not included in the discussion herein.

370. *See, e.g.*, Attix, Noyes & Co. v. Pelan & Anderson, 5 Iowa 336, 344 (1857).

the Iowa Real Estate Commission has, in effect, prohibited a licensee from using such a listing. "The taking of a net listing shall be unprofessional conduct."[371]

4. *Dual Agency*

The broker's duty of loyalty and good faith to his principal precludes the broker from secretly representing both sides to a transaction. If he is representng two principals he is incapable of negotiating or otherwise obtaining the best possible terms for one of them. Since the broker has breached his duty of loyalty to his principal by such conduct, he may not recover a commission.[372] If one of the principals to the transaction has knowledge of the dual agency and the other does not, the party acting in ignorance of that fact may obtain a recission of any agreement resulting therefrom.[373] The issue of dual agency is one to be decided by the jury and the person alleging the fraud has the burden of proof thereon.[374] It would also appear that it is immaterial that the principal has suffered no loss since the rule is preventative in nature.[375]

This rule has a number of exceptions. First, if the broker can obtain the consent of both parties to the transaction the broker is entitled to both commissions.[376] Second, according to one decision, if the broker is acting as a mere middleman in the transaction he may obtain a commission from both parties with or without their dual consent to the arrangement. A middleman simply undertakes to bring the parties together and do nothing more. He has no discretion or authority to negotiate or be a representative for either.[377] It is also not a violation of this rule for a broker to be employed by two parties where their interests are not conflicting. Thus, unless the broker agrees to represent one part exclusively he may list competing property of two parties for sale or lease.[378]

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371. IOWA AD. CODE § 700-1.23(2)(117). *Cf.* Miller v. Berkoski, 297 N.W.2d 334, 340-41 (Iowa 1980) (The court required full disclosure of all relevant information to the seller and said that the broker and seller are not to be considered as parties contracting at arm's length.).

372. Miller v. Berkoski, 297 N.W.2d 334, 339 (Iowa 1980); Stapp v. Godfrey, 158 Iowa 376, 384, 139 N.W. 893, 896 (1913); Casady v. Carraher, 119 Iowa 500, 502, 93 N.W. 386, 386 (1903).

373. Rodenkirch v. Layton, 189 Iowa 430, 440, 176 N.W. 897, 901 (1920); Stromberg v. Alexander, 171 Iowa 707, 716-17, 154 N.W. 414, 418 (1915).

374. Wareham v. Atkinson, 215 Iowa 1096, 1100, 247 N.W. 534, 536 (1933).

375. *See* Leonard v. Omstead, 141 Iowa 485, 487, 119 N.W. 973, 974 (1909).

376. Loots v. Knoke, 209 Iowa 447, 449, 228 N.W. 45, 46 (1929); Stapp v. Godfrey, 158 Iowa 376, 382, 139 N.W. 893, 895 (1913); Fryer v. Harker, 142 Iowa 708, 714, 121 N.W. 526, 528 (1909).

In *Casady v. Carraher*, 119 Iowa 500, 503, 93 N.W. 386, 387 (1903), when the seller accepted the broker's service of writing the contract after learning of the broker's dual agency, he waived his right to object and became bound to pay a commission.

377. Stapp v. Godfrey, 158 Iowa 376, 380, 139 N.W. 893, 894 (1913). One might question how often standard brokerage practices would fit this description.

378. Foley v. Mathias, 211 Iowa 160, 161-63, 233 N.W. 106, 106-07 (1930).

The Iowa Code provides that a broker may be subject to discipline for "[a]cting for more than one party in a transaction without the knowledge of all parties for whom he acts."[379]

5. *Commission Splitting and Disclosure of Information*

The broker's duty of loyalty is breached when, unknown to his principal, he agrees to split his commission with the broker of an adverse party or to pool his commission with that of the broker of an adverse party.[380] If he were to do so the arrangement might give the broker a self-interest which could lead to improper advice to his principal.

There may be no breach of duty where the broker, with the consent of the principal, gives the adverse party part of the commission to be earned on the transaction as an inducement to enter the transaction. The same is true where the broker, after disclosure to his principal, advances the purchaser a sum of money to be used as part of the down payment.[381] Such an arrangement is not necessarily inconsistent with the broker's duties to his principal and in fact might tend toward the production of the sale or other transaction sought. Until recently, the fact that the advancement was not disclosed to the principal did not preclude recovery.[382] However, the Iowa Supreme Court has now become very emphatic; as long as the advance is not otherwise inconsistant with the broker's fiduciary duties he may loan the sum only after he gives the principal *all* relevant information concerning the loan. Furthermore, a broker has a duty to disclose accurately to his principal all information coming to his attention regarding the transaction. A failure to do so violates the broker's fiduciary duties.[383] Of course, if because of business policy or if it is agreed that the broker is not to deal with the other party in such a way, there would be a breach of the broker's fiduciary duty even if full disclosure were made.[384]

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379. IOWA CODE § 117.34(4) (1979).

380. Miller v. Berkoski, 297 N.W.2d 334, 339 (Iowa 1980); *see* Whittle v. Klipper, 182 Iowa 270, 275, 165 N.W. 425, 427 (1917); RESTATEMENT (SECOND) OF AGENCY § 391, Comment c (1957).

381. Murphy v. Brown, 252 Iowa 764, 770-71, 108 N.W.2d 353, 356-57 (1961); Hoefling v. Borsen, 190 Iowa 645, 649-50, 180 N.W. 750, 752 (1921). *But see* Miller v. Berkoski, 297 N.W.2d 334 (Iowa 1980) (commission denied because of failure to make complete disclosure to principal).

382. Murphy v. Brown, 252 Iowa 764, 770-71, 108 N.W.2d 353, 356-57 (1961).

383. Miller v. Berkoski, 297 N.W.2d 334, 338-42 (Iowa 1980); RESTATEMENT (SECOND) OF AGENCY § 381 (1957). *See also* IOWA AD. CODE § 700-1.18(117) which provides:

> At the expiration of thirty days after an offer to buy has been made by a buyer and accepted by a seller, either party may demand and the broker shall furnish a detailed statement showing the current status of the transaction. On demand by either party the broker shall furnish a detailed current statement on thirty-day intervals thereafter until the transaction is closed.

Id.

384. RESTATEMENT (SECOND) OF AGENCY § 391, Comment b (1957).

In addition, the Rules and Regulations of the Iowa Real Estate Commission provide: "The offering of prizes or anything of value as an inducement to buy or sell real estate shall be considered payment of a commission to a person who is not a licensed broker or salesman under the provisions of this chapter and a violation thereof."[385] While this does not speak directly to the advancement of money by the broker to be used as a loan toward the down payment, it does appear to prohibit a gift or the giving of any other item of value by the broker to the adverse party as an inducement to enter the transaction. If this regulation were applied literally it would seem to prohibit such gifts or transfers of items of value even after full disclosure to the principal and even where it is not otherwise inconsistent with the broker's duties.[386]

6. *Presenting Highest Offer*

Among the broker's obligations to his principal is the duty to present all reasonable offers and, in particular, to present the highest offer.[387] If the highest offer is not presented and the principal accepts a less beneficial offer, the broker is liable in damages to the principal for an amount up to the difference between the two offers.[388] The broker's liability does not depend upon whether the agent realizes any profit from the failure to present the highest offer.[389]

This obligation is substantially restated in the Rules and Regulations of the Iowa Real Estate Commission: "Any and all offers to purchase received by any broker shall be promptly presented to the seller for his formal acceptance or rejection immediately upon receipt of such offer."[390]

7. *Duty of Loyalty—Miscellaneous*

The broker's duty of loyalty to his principal is not limited to those specific duties enumerated in the previous sections but is sufficiently broad to subject him to a duty "to act solely for the benefit of the principal in all matters connected with his agency."[391] Thus, a broker has an obligation not to disparage the transaction to the buyer or other party to the

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385. IOWA AD. CODE § 700-1.20(117).

386. *See also* IOWA CODE § 117.34(9) (1979) (authorizes disciplinary action for: "Paying a commission or any part thereof for performing any of the acts specified in this chapter to any person who is not a licensed broker, salesperson or apprentice salesperson under the provisions of this chapter or who is not engaged in the real estate business in another state").

387. Jones v. Sears, 258 Iowa 906, 908, 140 N.W.2d 854, 855 (1966); Githens v. Johnson, 195 Iowa 646, 649, 192 N.W. 270, 272 (1923).

388. Jones v. Sears, 258 Iowa 906, 910, 140 N.W.2d 854, 856 (1966).

389. Githens v. Johnson, 195 Iowa 646, 649, 192 N.W. 270, 272 (1923).

390. IOWA AD. CODE § 700-1.26(117).

391. RESTATEMENT (SECOND) OF AGENCY § 387 (1957).

transaction.[392]

For an additional enumeration of some of these specific obligations Iowa Code sections 117.29 and 117.34[393] should be consulted. These sections enumerate acts for which disciplinary proceedings may be brought.

8. *Malpractice of Services*

The agent's duty to perform his services carefully and skillfully has been well stated. He "is subject to a duty to the principal to act with standard care and with the skill which is standard in the locality for the kind of work which he is employed to perform and, in addition, to exercise any special skill that he has."[394] This is, in effect, a definition of agent malpractice. However, cases involving the application of such a standard to brokers have been uncommon.

Recently the Iowa Supreme court, while not specifically dealing with the above standard, did deal with broker malpractice. In *Wambsgans v. Price*,[395] the broker was inattentive to a listing which he had acquired. He finally obtained an offer on the listed premises. The sellers were under the belief that the sale was to be "as is;" however, F.H.A. financing required certain repairs.[396] When the sellers balked the broker threatened suit and told them that they must repair. The closing did not then occur promptly and the broker suggested that the buyers move in without any agreement as to rent.[397] The broker procrastinated until the buyers pulled out of the transaction. As a result thereof, and due to prior ill health, the seller's financial condition deteriorated and the house was subsequently lost on foreclosure.[398] The sellers sought to recover damages for mental anguish. The court approved such a theory of recovery, even if there be no physical injury, as long as (1) the broker's conduct was outrageous, (2) he had the intention to cause, or a reckless disregard of the possibility of causing, emotional distress, (3) the sellers suffered severe or extreme emotional distress, and (4) the broker's malperformance was the actual and proximate cause of the injury.[399]

9. *Trust Accounts*

Every real estate broker[400] must maintain a separate trust account in a bank or savings and loan association. In that account the broker must de-

392. Johnson v. Doubravsky, 181 Iowa 77, 82-84, 163 N.W. 589, 591 (1917).
393. Iowa Code §§ 117.29, .34 (1979).
394. Restatement (Second) of Agency § 379(1) (1957).
395. 274 N.W.2d 362 (Iowa 1979).
396. *Id.* at 364.
397. *Id.*
398. *Id.*
399. *Id.* at 365-66.
400. Except a broker-salesperson. Iowa Ad. Code § 700-2.4(117).

posit all down payments, earnest money deposits, collected rents, property management funds, or other trust funds received by the broker, or a salesperson or apprentice salesperson in his employ.[401] The broker may not commingle his personal funds in the trust account.[402] The broker must notify the Iowa Real Estate Commission of the name and location of the account and authorize the commission to examine the account.[403] If a broker is found to have violated the requirements imposed regarding trust accounts, disciplinary measures may be taken by the Commission. The validity of such measures has been upheld.[404]

In the event of a dispute between the buyer and seller as to who is entitled to funds in the trust account, the broker is directed to retain them in the account until a written release is obtained from all parties or a disposition is determined in a civil action.[405] In the absence of a civil action and after the passage of one year's time, the broker may pay out such funds in the account to the seller if the broker has made a good faith decision that that purchaser has abandoned any claim thereto.[406]

B. *Obligations to Others*

1. *Fiduciary Duty to Third Party*

It may be possible for a broker to have obligations to another party in a transaction, other than the listing party,[407] if the broker is also the agent for the other party.[408] This does not appear to be a commonly pled theory for buyer's recovery from a broker, but it has been recognized. While not finding it applicable to the facts of the specific case, the court in *Swift v. White*[409] did indicate that a broker might be an agent for both seller and

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401. Iowa Code § 117.46(1) (1979); Iowa Ad. Code § 700-1.27(117). All moneys must be deposited within seventy-two hours of receipt. Iowa Ad. Code § 700-1.27(1)(117).

402. Iowa Code § 117.46(4) (1979); Iowa Ad. Code § 700-1.27(117). The broker may, however, deposit up to $100 in the account from his own funds in order to cover bank service charges. Iowa Code § 117.46(4) (1979).

403. Iowa Code §§ 117.46(2), .46(3) (1979). The broker may maintain more than one trust account if the Iowa Real Estate Commission is notified thereof. Iowa Code § 117.46(5) (1979). The Commission employs auditors who audit trust accounts. Iowa Ad. Code § 700-2.4(1)(117).

404. Miller v. Iowa Real Estate Comm'n, 274 N.W.2d 288 (Iowa 1979).

405. Iowa Ad. Code § 700-1.27(3)(117). If, in the absence of civil litigation, the broker returns the deposit to the purchaser based on a good faith decision that a contingency in the sales contract has not been met, there is no grounds for disciplinary action even if the seller failed to agree to the return. Iowa Ad. Code § 700-1.27(4)(117).

406. Iowa Ad. Code § 700-1.27(5)(117). *See also* proposed rule changes in (ARC 1791) Notice of Intended Action, 3 Iowa Ad. Bulletin 1029-30 (1981).

407. *I.e.*, the party hiring the broker and paying the commission.

408. This raises an interesting dilemma. Since it is the seller who pays the brokeage commission and to whom the broker has a fiduciary duty in the ordinary real estate sale, is the broker engaging in a conflict of interests? *See* Stambler & Stein, *The Real Estate Broker—Schizophrenia or Conflict of Interests*, 28 J. of Bar Ass'n of D.C. 16 (1961).

409. 256 Iowa 1013, 129 N.W.2d 748 (1964).

buyer. "[A]n agent of one person may become the agent of another with whom he is dealing for such a purpose. . . ."[410] In order to avoid problems of dual commissions[411] this agency is likely to be gratuitous to the third person. Nevertheless "the duty of an agent acting gratuitously is the same as other agents. . . ."[412]

Since this theory could result in conflicting fiduciary duties, it would appear that its application would normally be limited to circumstances where the agency between the broker and the buyer is not adverse to that between the broker and the seller.[413] For example, the broker might become the buyer's agent to procure insurance on the premises[414] or to arrange financing.[415] Under normal circumstances such an agency would not appear to be adverse to that between the broker and seller. If the broker should then breach his duties under the agency with the buyer he would be subject to liability on account thereof.[416]

2. *Misrepresentation*

Another theory of liability to third parties, closely connected with that discussed in the prior section, is misrepresentation. If the broker makes fraudulent representations he may have liability therefor to third parties.[417] However, the broker is privileged to "misstate," in the negotiation process, those things which the principal himself is privileged to "misstate." Thus, the broker may advise a prospective purchaser that a certain sum is the seller's lowest price, which in fact is in excess of the minimum amount the seller would accept.[418] Such statements are "sellers' talk" or expressions of opinion as to value.

If the third party is able to establish all of the elements of an action in misrepresentation, the broker will have liability. An important element in that action is justifiable reliance by the buyer. The broker's conduct may be such that the buyer was put off his guard by the broker's statements and thus the buyer was not obliged to make a separate investigation of his own.[419] Where a broker affirmatively stated to the buyer that the seller's

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410. *Id.* at 1020, 129 N.W.2d at 752.

411. *See* Part IIIA(4) *supra.*

412. Swift v. White, 256 Iowa 1013, 1020, 129 N.W.2d 748, 752 (1964).

413. Of course the broker, in breach of his duty of loyalty, could specifically agree to perform acts which result in a conflict of interests.

414. *See* Estes v. Lloyd Hammerstad, Inc., 8 Wash. App. 22, 503 P.2d 1149 (1972).

415. *See* Depugh v. Brown, 158 Iowa 165, 138 N.W. 908 (1912).

416. *See id.*

417. Holcomb v. Hoffschneider, 297 N.W.2d 210, 211-13 (Iowa 1980); RESTATEMENT (SECOND) OF AGENCY § 348 (1957).

418. Bosley v. Monahan, 137 Iowa 650, 654-55, 112 N.W. 1102, 1103-04 (1907); RESTATEMENT (SECOND) OF AGENCY § 348, Comment d (1957).

419. Holcomb v. Hoffschneider, 297 N.W.2d 210, 212-13 (Iowa 1980); Depugh v. Brown, 158 Iowa 165, 172, 138 N.W. 908, 910 (1912).

title was free from encumbrances, and such fact was not true, the buyer had a cause of action against the broker for misrepresentation.[420] As to reliance the court stated:

> Where one is shown to have made statements of the character here in question, the law presumes that he intends that the same shall be relied upon. If the party to whom they are made does in good faith rely thereon, he may recover, notwithstanding it may appear that opportunities were open to him to ascertain the truth by investigation and examination.[421]

Where the broker repeatedly assured the buyer that the premises contained 6.6 acres, when it only contained 4.6 acres, this put the buyer off guard. His failure to take the opportunity to get his own survey did not negate his reliance on the misrepresentation.[422]

3. *Duty to Public at Large*

According to a developing body of law, by force of broker licensing statutes a broker owes a duty to the public not to engage in certain activities and he also has a duty to perform his services properly. If a third party to a transaction is injured by a broker's activity which violates the statute, he may recover. No agency or misrepresentation need be established.[423]

The theory is best explained in *Amato v. Latter & Blum, Inc.*[424] where a prospective buyer lost the purchase of a parcel of realty because the broker failed to communicate his high bid to the seller. The Louisiana court first observed that the Louisiana real estate broker licensing statute required the posting of a bond which is for the benefit of "anyone who is injured or damaged."[425] It then pointed out that real estate broker licensing is a valid exercise of the state's police power. Since the purpose for the exercise of the police power is to benefit and protect the public, the statute puts a duty upon the broker which is owed to the public, in general, and to each purchaser as a member of that public. There is no need for an agency relationship.[426]

The same result has been achieved in other states under their broker licensing statutes, even though the statutes did not require the broker to post a bond. These courts emphasized that under the statutes the broker was required to be "honest and truthful"[427] or "competent, honest, truthful,

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420. Riley v. Bell, 120 Iowa 618, 95 N.W. 170 (1903).

421. *Id.* at 626-27, 95 N.W. at 172. In addition, the fact that the broker had no actual knowledge as to the status of title which he misrepresented did not relieve him of liability. *Id.*

422. Holcomb v. Hoffschneider, 297 N.W.2d 210, 211-13 (Iowa 1980).

423. *See* Amato v. Latter & Blum, Inc., 227 La. 537, 79 So. 2d 873 (1955).

424. *Id.*

425. *Id.* at _, 79 So. 2d at 875.

426. *Id.* at _, 79 So. 2d at 875-76.

427. Ward v. Taggart, 51 Cal. 2d 736, _, 336 P.2d 534, 537 (1959) (Traynor, J.).

trustworthy, of good character, and bear a reputation for fair dealing."[428] Under Iowa Code section 117.34 the Iowa Real Estate Commission is given authority to discipline for certain activities. These activities appear substantially similar to those prohibited by the previously discussed statutes. They include, *inter alia*:

> 1. Making any substantial misrepresentation. . . .
> 3. Pursuing a continued and flagrant course of misrepresentation. . . .
> 8. Being unworthy or incompetent to act as a real estate broker in such a manner as to *safeguard the interests of the public*. . . .
> 11. Any other conduct [which] . . . demonstrates such bad faith, improper, fraudulent, or dishonest dealings as would have disqualified him from securing a license. . . .[429]

Thus, since the broker has a duty to safeguard the interests of the public, an action by the broker which evidences unworthiness or incompetence as a broker and injures a third party to a transaction would appear to be actionable by that person.[430]

4. *Antitrust Considerations*

A common phenomenon in recent years has been the standardization of fees and practices of real estate brokers in a given locality. This standardization has been particularly apparent among the members of some local real estate boards or multiple listing services. Such activity, if the proper jurisdictional basis is established, may result in a conspiracy in restraint of trade in violation of section 1 of the Sherman Act.[431] It may also amount to a violation of state antitrust laws.[432]

Recently such a case was decided by the United States Supreme Court. In *McLain v. Real Estate Board of New Orleans, Inc.*,[433] the defendants were charged, in a private antitrust action for treble damages, with a conspiracy to fix commissions charged on the sale of real estate. The Court held that jurisdiction may be established either by proof of the fact that the brokers' activities were in interstate commerce or, if the activities were local in nature, that they have an effect on some appreciable activity demonstrably in interstate commerce.[434] The Court stated that, in order to meet this latter

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428. Zichlen v. Dill, 157 Fla. 96, —, 25 So. 2d 4, 4 (1946).

429. Iowa Code § 117.34 (1979) (emphasis added).

430. Another example of this public duty may be observed in Iowa Ad. Code § 700-1.27(2)(117). It provides that "[w]ithholding earnest money when the *purchaser* is rightfully entitled to the return of the same shall be considered demonstrating unworthiness." *Id.* (emphasis added). It does not describe a fiduciary duty as such, but rather describes the activity as demonstrating unworthiness, which is the standard of care owed to the public. *See id.*

431. 15 U.S.C. § 1 (1976).

432. Iowa Code § 553.4 (1979).

433. 100 S. Ct. 502 (1980).

434. *Id.* at 508-10.

more relaxed test "it would be sufficient for petitioners to demonstrate a substantial effect on interstate commerce generated by respondents' brokerage activity. Petitioners need not make the more particularized showing of an effect on interstate commerce caused by the alleged conspiracy to fix commission rates. . . ."[435] The Court then noted that, if proved, the petitioners allegations might show sufficient effect on interstate commerce. They had alleged that the brokerage activity generated loans from interstate lenders, especially through the secondary mortgage market, as well as business for interstate title insurers.[436] The Court also noted that jurisdiction might arise from the interstate movement of people assisted by the defendants' sales.[437] Thus, it would appear that many of the results of brokers' activities would have a sufficient effect on interstate commerce to generate proper jurisdiction.[438]

If the jurisdictional basis is established as well as the agreement in restraint of trade, questions might be raised not only as to the uniformity of brokers' fees, but also as to the uniformity of provisions in brokerage agreements, restrictions on member advertising, or restrictive admission policies to membership in the real estate board or multiple listing service.[439]

C. *Brokers Authority to Bind*

1. *Broker's Authority to Sell*

In the usual transaction for which a broker is employed, the broker's sole authority is to find a buyer.[440] He does not have any inherent authority to bind the seller by entering a contract of sale with the buyer. This is true regardless of whether the listing is an open listing, exclusive agency or exclusive right to sell. The use of the words "sell" or "for sale" does not necessarily imply any greater authority.[441] The broker's sole authority is to find a

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435. *Id.* at 509.

436. *Id.* at 510-11.

437. *Id.*

438. There have also been a number of consent decrees entered in similar circumstances. *See, e.g.*, United States v. Metro MLS, Inc., [1974] 2 TRADE CASES ¶ 75,137; United States v. Real Estate Bd., [1973] 2 TRADE CASES ¶ 74,744; United States v. Cleveland Real Estate Bd., [1972] TRADE CASES ¶ 74,020.

439. *See* United States v. Metro MLS, Inc., [1974] 2 TRADE CASES ¶ 75,137; United States v. Real Estate Bd., [1973] 2 TRADE CASES ¶ 74,744; United States v. Cleveland Real Estate Bd., [1972] TRADE CASES ¶ 74,020; State v. Cedar Rapids Bd. of Realtors, 300 N.W.2d 127 (Iowa 1981). *See also* Oates v. Eastern Bergen Co. Multiple Listing Serv. Inc., 113 N.J. Super. 371, 273 A.2d 795 (Super. Ct. Ch. Div. 1971); Grillo v. Board of Realtors, 91 N.J. Super. 202, 219 A.2d 635 (Super. Ct. Ch. Div. 1966).

440. Of course, the nature of the transaction may be such that the broker is employed for the purpose of finding a person who will trade properties with the principal or sell to the principal.

441. Dodd v. Groos, 175 Iowa 47, 56, 156 N.W. 845, 848 (1916). However, in *Hopwood v. Corbin*, 63 Iowa 218, 221-22, 18 N.W. 911, 912-13 (1884), where the authority granted to the

ready, willing and able purchaser, present him to the seller and negotiate on behalf of the seller.[442] In order to grant the broker the authority to execute a contract of sale on behalf of the seller, the listing must clearly state that the broker is to have such authority.[443]

Even if the broker is given the authority to effectuate a sale on behalf of the owner, such authority may be revoked by the owner at any time prior to execution of a contract. Such is true even if the broker is given a particular time within which to perform.[444] In addition, if the broker submits the proposed contract to the seller who rejects it, the broker may not thereafter execute it on behalf of his principal. The authority which he previously had is revoked.[445]

2. *Broker's Authority to Sell—Exercise Thereof, Ratification*

Where a broker has authority to bind his principal to a sale, the exercise thereof must be strictly in accordance with the terms and limits of that authority. Any contract executed in excess of such authority does not bind the owner[446] nor does the broker earn a commission on account thereof.[447] Thus, a broker exceeded his authority by altering the terms of sale regarding the time and place of payment; this resulted in a non-binding contract.[448] Unless authorized to the contrary, the broker's authority is limited to a cash

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broker was to effect a sale, the broker was empowered to bind the owner.

442. Dodd v. Groos, 175 Iowa 47, 56, 156 N.W. 845, 848 (1916); *see* Balkema v. Searle, 116 Iowa 374, 377, 89 N.W. 1087, 1088 (1902). While the broker may have power to negotiate, such does not give any power to bind. The contracting must still be between seller and buyer.

443. The Iowa Supreme Court has stated that:

> Ordinarily a real estate agent's only duty is to find a purchaser ready, able, and willing to buy on the owner's terms or such as are acceptable to him, and he is not to be held to have authority to sell, unless this is to be inferred from unequivocal expression to that effect. Even where the words "for sale" or "sell" are used in connection with the employment of a real estate broker, the agency is not necessarily to be construed that to sell, but the circumstances may be such that finding a purchaser to whom the principal may sell is intended. . . . A real estate agent may be given authority to execute a contract for his principal, but it is an additional power not to be inferred from that to find a purchaser or to negotiate the terms of sale.

Dodd v. Groos, 175 Iowa 47, 56, 156 N.W. 845, 848 (1916). *See also* Dalton v. Treinen, 191 Iowa 1185, 1193-94, 181 N.W. 437, 440 (1921); Nelson v. Western Union Tel. Co., 162 Iowa 50, 55, 143 N.W. 833, 835 (1913); Stewart v. Pickering, 73 Iowa 652, 653, 35 N.W. 690, 691 (1887).

444. Knudson & Richardson v. Laurent, 159 Iowa 189, 192, 140 N.W. 392, 393 (1913). Of course, if the revocation not only terminates the authority to effectuate a sale but also broker's authority to find a buyer, there might be a breach of contract if the listing is an exclusive agency or an exclusive right to sell. *See* Part IIE(3) *supra*.

445. *See* Reichart v. Romey, 167 Iowa 252, 149 N.W. 232 (1914).

446. Buechler v. Olson, 184 Iowa 245, 189 N.W. 741 (1922); *see* Fleming v. Burke, 122 Iowa 433, 98 N.W. 288 (1904).

447. Anderson & Rowley v. Howard, 173 Iowa 4, 14, 155 N.W. 261, 263 (1915); Hunt v. Tuttle, 133 Iowa 647, 110 N.W. 1026 (1907).

448. Mitchell v. Hagge, 178 Iowa 926, 160 N.W. 287 (1916).

sale. Such authority was exceeded where the contract which the broker entered provided for a deferred payment.[449] Also, where the broker varied the authorized terms so that purchase money was to be delivered to a bank rather than at the seller's residence and the seller was to assign an existing lease, the broker did not earn a commission.[450]

Even where the broker enters a contract which exceeds his authority, if the seller has knowledge thereof and does not object he may ratify the sale.[451] Where the broker exceeds his authority, the contract may also become binding if the seller fails to deny the broker's authority and demands performance of the contract as made.[452] Also, in the absence of fraud, when the seller receives and retains the consideration under the broker's contract, he ratifies the sale and may not recover damages from the broker for an unauthorized sale.[453] However, under the stated facts of certain cases, ratification was not found to occur where the purchaser entered into possession of the land for a year's time[454] or merely because the seller indicated later that the contract was "all right."[455]

3. *Broker's Authority to Sell—Statute of Frauds*

Even if the broker is to have the authority to bind the owner to a sale of the premises, it does not appear to be necessary, under Iowa law, that the listing which grants that authority be in writing.[456] The common law rule, and that in force in most other jurisdictions, does not require the broker's authority to be in writing.[457] Unless the Iowa statute of frauds,[458] as enacted, modifies the common law provision it appears that the above rule would continue.[459] The Iowa statute does not appear to follow the so called "equal dignity" rule which would require that the agent be authorized in writing where the action, if performed directly by the principal, would have had to be in writing to meet the statute of frauds. The Iowa court has said that "[t]he decisions are quite generally to the effect that a written contract for the sale of land which the agent has signed on the parol authority of his

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449. Staten v. Hammer, 121 Iowa 499, 96 N.W. 964 (1903).
450. Anderson & Rowley v. Howard, 173 Iowa 4, 14-15, 155 N.W. 261, 263-64 (1915).
451. Sleeper v. Murphy, 120 Iowa 132, 94 N.W. 275 (1903).
452. Mathews v. Gilliss, 1 Iowa 242, 251-53 (1855).
453. Lunn v. Guthrie, 115 Iowa 501, 504-06, 88 N.W. 1060, 1061-62 (1902).
454. Wanless v. McCandless, 38 Iowa 20 (1873).
455. Woods v. Wilson, 177 Iowa 361, 366-67, 158 N.W. 495, 497 (1916).
456. *See* Dodd v. Groos, 175 Iowa 47, 56, 156 N.W. 845, 848 (1916).
457. *See, e.g.*, Brandon v. Pritchett, 126 Ga. 286, _, 55 S.E. 241, 242 (1906).
458. IOWA CODE § 622.32 (1979).
459. *See* RESTATEMENT (SECOND) OF AGENCY § 30(2) (1957). The Iowa Code provides that proof of certain contracts may not be introduced unless the contract "be in writing and signed by the party charged or his authorized agent." IOWA CODE § 622.32 (1979). It does not provide for the contract to be in writing and signed by the party charged or *his agent authorized in writing*. *See* RESTATEMENT (SECOND) OF AGENCY § 30(2), Comment b (1957).

principal is not within the statute of frauds, and may be enforced."[460]

4. *Broker's Authority to Sell—Fraudulent Statements*

Where a broker acts in excess of authority and makes fraudulent or deceptive statements in order to induce a purchaser to enter a contract of sale, the principal has no liability therefor.[461] However, if the seller insists upon retaining the purchase price or other fruits of the fraud after learning of the broker's actions, he will be subject to an action to recover the money fraudulently obtained.[462]

If the broker makes such a fraudulent representation in excess of seller's authority, the broker will have liability to the deceived purchaser for breach of an implied warranty of authority.[463]

D. *Income Taxation*

1. *Income Tax Deduction for Commissions Paid*

Except as described below, commissions paid to real estate brokers are treated as payments in the nature of capital expenditures and are not proper deductions under section 162 of the Internal Revenue Code.[464] Only expenditures of a recurring nature whose benefit is attributable to the taxable year and not attributable to a specific property are deductible thereunder. This does not mean a loss of tax benefit, however. Commissions which are paid on the purchase of real estate, whether by a dealer, investor or casual purchaser,[465] must be added to the basis of the property acquired.[466] Commissions which are paid on the sale of real estate by an investor or casual seller[467] must be used to reduce the sales proceeds in order to determine the amount realized from the transaction.[468]

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460. Dodd v. Groos, 175 Iowa 47, 56, 156 N.W. 845, 848 (1916); *see* Swartz v. Ballou, 47 Iowa 188 (1877); Bannon v. Bean, 9 Iowa 395 (1859).

461. Ellison v. Stockton, 185 Iowa 979, 984-86, 170 N.W. 435, 437 (1919); *see* Ritz v. MyMore Homes, Inc., 213 N.W.2d 470 (Iowa 1973).

462. Ellison v. Stockton, 185 Iowa 979, 992-93, 170 N.W. 435, 439 (1919).

463. Ritz v. MyMore Homes, Inc., 213 N.W.2d 470, 472 (1973). If the contract by which the broker sold the sellers land to the purchaser has an intergration clause therein, the broker may not assert it as a defense in a suit by the purchaser. The broker was not a party to the contract as principal and may not rely thereon. *Id.*

464. In order to be deductible under Internal Revenue Code section 162, not only must the payment be an ordinary and necessary expense incurred in a trade or business, but under Internal Revenue Code section 263, the payment must also not be in the nature of a capital expenditure.

465. *But see* Part IIID(2) *infra.*

466. Thompson v. Commissioner, 9 B.T.A. 1342, 1345-46 (1928); *cf.* Davis v. Commissioner, 4 T.C. 329 (1944), *aff'd*, 151 F.2d 441 (8th Cir. 1945), *cert. denied*, 327 U.S. 783 (1946) (commissions paid in connection with disposition of securities).

467. *But see* Part IIID(2) *infra.*

468. Giffin v. Commissioner, 19 B.T.A. 1243 (1930).

From this it may be observed that a dealer in real estate is entitled to a different treatment of brokerage commissions on the sale of realty. A real estate dealer is a person who is a merchant and who sells real estate to customers with a view toward the profits which may be derived.[469] Thus, a real estate developer who merchandises the sale of new homes would often fit into the dealer category. While commissions paid on the purchase of land by a dealer must be added to his basis,[470] it has been stated that commissions which he pays on the sale of land are deductible under Internal Revenue Code section 162.[471]

In the normal situation this deduction will yield no special advantage. A dealer in real estate realizes ordinary income from a sale. Whether the sales proceeds are reduced by the commissions paid on sale in order to arrive at the amount realized, or adjusted gross income is reduced by a deduction under section 162[472] of a like amount, would ordinarily be of no major significance. However, if the transaction were an installment sale[473] a significant difference would arise. As a deduction under section 162,[474] the entire amount would be duductible in the current taxyear. If the commission were treated as a reduction of the sales price in arriving at the amount realized, the benefit of the sum would be spread over the entire period of the installment sale.

2. *Income Tax Deduction for Commissions Paid—Purchase or Sale of Residence*

As noted in the previous section, the casual purchaser of real estate must treat a commission paid as an addition to the basis of the property

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469. *Cf.* Spreckels v. Helvering, 315 U.S. 626 (1942) (tax treatment of commissions paid to securities brokers by dealers in securities).

470. *See* note 466 *supra*.

471. Frankenstein v. Commissioner, 31 T.C. 431, 436 (1958); *see* Hindes v. United States, 371 F.2d 650 (5th Cir. 1967) (dicta); Giffin v. Commissioner, 19 B.T.A. 1243 (1930); Thompson v. Commissioner, 9 B.T.A. 1342 (1928); I.T. 2305, V-2 C.B. 108 (1926).

Some question might be raised as to the current viability of this position. It appears that this position has been adopted by analogy to the treatment of selling commissions paid to securities brokers by dealers in securities. In *Spreckels v. Helvering*, 315 U.S. 626 (1942), the U.S. Supreme Court approved the deductibility, under section 162, of commissions paid to securities brokers by dealers. In so doing, however, it observed that the reason was

> that there are practical considerations of accounting convenience which make it difficult for such dealers in many instances to set commissions off against the proceeds of individual sales as it would be for the merchant of other wares to treat his selling expenses only as a series of subtractions from the selling price realized on particular items of his stock.

Id. at 629. One might question whether a real estate dealer who usually sells one lot or parcel per sales transaction would have a similar difficulty in allocating the commission paid.

472. I.R.C. § 162.

473. *Id.* § 453.

474. *Id.* § 162.

acquired, and a casual seller of real estate must treat a commission paid as a reduction of the sales proceeds in determining the amount realized from the sale. Such a treatment would, as a basic proposition, apply to the purchase or sale of a taxpayer's principal residence.[475] However, under limited circumstances, and subject to a limitation in amount, brokerage commissions paid on the purchase or sale of a personal residence may be deducted directly as a moving expense.[476] This has the advantage of allowing the commission to be deducted from ordinary income rather than being used as a reduction in the amount of a capital gain.[477]

In order to be entitled to the deduction, the payment of the commission must be in connection with the sale of an old residence or purchase of a new residence[478] resulting from a move to a new principal place of work.[479] The dollar limitation of this deduction is $3000 reduced by any amounts deducted (up to $1500) for (1) travel, after obtaining employment, to find the new residence, and (2) meals or lodging in temporary quarters at the area of new employment.[480] Also included with the deduction for real estate commissions are sums paid with regard to the sale of the old residence or purchase of the new residence for attorney's fees, title fees, escrow fees, loan placement charges, transfer taxes and similar items.[481] Thus, in many cases it may not be possible to deduct the total brokerage commission under this section.[482] Any amount not so deducted may still be used to increase basis on a purchase of a residence, or decrease the amount realized on a sale of a residence.[483] Indeed, since amounts paid for travel to search for a new residence or temporary meals and lodging after arriving there might not otherwise be deductible, it would appear to be wise to deduct such items first (up to $1500) and only thereafter deduct real estate commissions or similar items in excess thereof up to $3000.

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475. *See* Treas. Reg. § 1.1034-1(c)(2) (1980).
476. I.R.C. § 217.
477. *Id.*; *see id.* §§ 1221, 1034 & 1202.
478. I.R.C. § 217(b)(2).
479. *Id.* § 217(c).
480. *Id.* § 217(b)(3).
481. *Id.* § 217(b)(2); Treas. Reg. § 1.217-2(b)(7) (1980). These items would also be included in computing the basis of property purchased, or the amount realized on sale, but for the provisions of this section.
482. I.R.C. § 217.
483. *Id.* § 217(e); Treas. Reg. § 1.217-2(e) (1980).