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The Montana Real Estate Agent: An Overview of the Law and a Proposed Listing Agreement

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The need for stringent controls governing the conduct of the real estate business has never been greater. We are mindful that speculation in land in Montana in the last several years has skyrocketed, with no apparent end in sight. This sale of land as a limitless commodity, rather than as one of our most precious and irreplaceable resources, has also given birth to a burgeoning real estate industry. The area is bustling with those who are either getting directly into the act of buying and selling for speculative reasons, or indirectly by acting as brokers and real estate agents. The rapid turnover of property is relentlessly encouraged by the brokers and agents. They are not, however, without their responsibilities to the public.¹

Public policy . . . is to protect the public from unscrupulous and insolvent real estate agents and brokers.²

I. INTRODUCTION

With statements like these issuing from the Montana Supreme Court, all brokers and attorneys who represent them are well advised to keep abreast of the latest case law developments in the real estate industry in Montana. The purpose of this article is to discuss and analyze the modern status of the real estate brokerage law in Montana. The discussion follows the pattern of a typical real estate transaction from the broker's vantage point.

A prospective seller will customarily engage a broker through an employment contract or listing agreement with the scope of the broker's agency dictated in the agreement. The agent then seeks out prospective buyers who usually execute an agreement to purchase or a "buy-sell" with the final formal documents being executed at closing. The majority of cases deal with the broker suing for his commission upon completion of one or more of the

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6. See infra notes 43-72 and accompanying text.


8. These usually include an installment land contract, a quitCLAIM deed (where the buyer relinquishes all interest in the property to the seller, which is to be filed if the buyer defaults), a warranty deed (seller to buyer—to be filed after the final payment is made), a notice of purchaser’s interest and escrow receipts. The notice of purchaser’s interest is filed at the County Clerk and Recorder’s office to place the purchaser’s name in the chain of title. See, e.g.,, Chadwick v. Giberson, --- Mont. ---, 618 P.2d 1213 (1980) (court notes that a notice of purchaser’s interest was placed of record) and Johnson v. Doran, 167 Mont. 501, 540 P.2d 306 (1975) (court notes that a “notice of sale” or “notice of interest” was placed of record). The escrow receipt is usually included when a third party institution will be holding the papers pending final payment by the buyers. It usually lists the contents of the escrow.

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above steps.\textsuperscript{9} The last part of the article proposes a listing agreement to maximize the broker’s chances of recovering a commission.\textsuperscript{10}

II. THE LISTING AGREEMENT—THE BROKER’S EMPLOYMENT CONTRACT

A broker’s services are usually engaged by the seller signing a listing agreement which may be exclusive,\textsuperscript{11} general, or open\textsuperscript{12} or may involve a multiple listing\textsuperscript{13} where the listing will be circulated to all members of the multiple listing service. The employment contract will occasionally provide for a “net listing,” the effect of which is that the buyer pays the broker’s commission; since the sale is to “net” the seller a certain sum, whatever amount exceeds that sum goes to the realtor.\textsuperscript{14}

A. Statute of Frauds

The broker’s authority to buy and sell real estate does not fall within the common law statute of frauds, but many states, includ-

\textsuperscript{9} See infra notes 95-141 and accompanying text.
\textsuperscript{10} See infra notes 142-75 and accompanying text.
\textsuperscript{12} In a general or open listing, more than one broker has the right to sell the property. The following Montana cases involve open listings: Barrett v. Ballard, \textit{Mont.}, 622 P.2d 180 (1980); Martin v. Vincent, \textit{Mont.}, 593 P.2d 45 (1979); Stromberg v. Seaton Ranch Co., 160 Mont. 293, 502 P.2d 41 (1972); Hart v. Billings Pub. Stockyards, 157 Mont. 345, 486 P.2d 120 (1971); Wood v. Strodtbeck, 142 Mont. 180, 382 P.2d 170 (1963) (original exclusive listing changed to general listing); Flinders v. Gilbert, 141 Mont. 442, 378 P.2d 385 (1963); Cobb v. Warren, 64 Mont. 10, 208 P. 928 (1922); Newman v. Dunleavy, 51 Mont. 149, 149 P. 970 (1915).
\textsuperscript{14} See, \textit{e.g.}, Bradt v. Strout Realty, 478 F. Supp. 1259 (D.C. Mont. 1979); Wright v. Bowlus, 62 Mont. 322, 205 P. 210 (1922); Cobb v. Warren, 64 Mont. 10, 208 P. 928 (1922); Wright Land and Inv. Co. v. Even, 57 Mont. 1, 186 P. 681 (1919); Shober v. Blackford, 46 Mont. 194, 127 P. 329 (1912).
ing Montana, have enacted statutes requiring these agreements to be in writing. Because the provisions of the statute requiring that the broker's authority be in writing are mandatory, an action on a quantum meruit basis (for the reasonable value of the realtor's services) must fail, as it would have the effect of nullifying the statute. The lack of a written agreement vitiates any cause of action the broker may have had for a commission. However, an agreement to secure a lessee or optionee is not within the statute nor are agreements between brokers to divide commissions.

It has been held that several writings may be taken together to comply with the statute. It presently appears to be an open question in Montana whether a check given to the realtor by the seller would satisfy the statute, although in one case the court hinted at this possibility. The fact that the check is executed after the broker's services have been rendered is no obstacle, and it is reasonable that the seller's personal check with sufficient information noted on it to satisfy the statute would form a sound basis for the broker's commission suit, in the absence of any other written


One author urges that brokers without a written listing agreement should be able to rely on equitable estoppel to overcome the defense of the statute of frauds, Oral Employment Contracts and Equitable Estoppel: The Real Estate Broker as Victim, 26 Hastings L.J. 1503 (1975).

18. Roscow v. Bara, 114 Mont. 246, 135 P.2d 364 (1943); Gantt v. Harper, 82 Mont. 393, 267 P. 296 (1928); Skinner v. Red Lodge Brewing Co., 79 Mont. 292, 256 P. 173 (1927). But see Deimler v. Ostler, ___ Mont. ___, 651 P.2d 41 (1982) (where a broker was granted a commission even though no listing was signed, when the sellers agreed to pay the commission in the buy-sell).


23. Reilly v. Maw, 146 Mont. 145, 149, 405 P.2d 440, 443 (1965) ("[N]or have plaintiffs relied upon [the check's] execution as being such a written memorandum as would satisfy the statute of frauds. We make no further comment thereon for these reasons"). See also Lewis v. Starlin, 127 Mont. 474, 267 P.2d 127 (1954) (where the court held that a check with "payment land" noted thereon was not sufficient to satisfy the statute).
agreement. A question related to the quantum meruit issue is whether part or full performance of the broker's obligations will serve to take an oral contract outside the statute. This question has been raised and addressed in Montana, and the answer seems to be that full performance by the broker does not vitiate the requirement for a writing.

B. Parol Evidence

One other aspect of brokers' listing agreements merits discussion. In Payne v. Buechler a broker's counsel attempted to introduce parol evidence regarding the execution of the listing, but the court found it inadmissible because the listing was plain and unambiguous on its face. Nonetheless, in view of two recent cases, the requirement that an ambiguity exist on the face of the document before parol evidence will be admitted may no longer exist, and counsel may be able to introduce such evidence in spite of an unambiguous listing agreement. This leads one to wonder just what the status of the parol evidence rule is in Montana. The reason for the rule is to uphold the sanctity of the written agreement which supersedes all previous oral negotiations. On the other hand, rigid application of any rule may result in unjust decisions. It appears that the present position of the court is that the parol evidence will be admitted when it is equitable to do so, regardless of whether an ambiguity exists on the face. A broker's counsel desiring the favorable use of parol evidence has other means at his disposal to get the evidence into the record. One exception to the codified parol evidence rule is that other evidence may be considered when a "mistake or imperfection of the writing is put in issue by the pleadings." If there is a substantial controversy regarding the in-

interpretation of a listing agreement, for example, which necessitates a lawsuit to resolve it, it should be relatively easy to draft a complaint or an answer to place an imperfection or mistake of the writing in issue.

III. THE AGENCY OF THE BROKER

Although the issue of the broker's agency arises periodically in the cases, the rules and concepts of agency law generally apply. Because the seller customarily employs the realtor to sell his property, the cases usually describe the broker as the seller's agent. Thus, the broker owes duties to the seller arising out of the agency. The broker, however, may also owe duties to the buyer that arise out of the broker's independent interests in the sale of the property.

A. The Duty of Full Disclosure to the Seller-Principal

One Montana case holds that a broker's fiduciary duty, including full disclosure of pertinent facts, arises even before the listing is signed. At first this seems to place a substantial burden on the agent, but some sellers enter into listing agreements only once or twice in a lifetime and these uninitiated participants should be protected. Also, few sellers realize that a buyer may obtain the property described in the listing by specific performance when no written agreements have passed directly between the buyer and seller. The failure to provide the seller with a copy of the listing


31. Assoc'd. Agency of Bozeman, Inc. v. Pasha, __ Mont. ___, 625 P.2d 39 (1981); Reilly v. Maw, 146 Mont. 145, 405 P.2d 440 (1965); Hughes v. Melby, 135 Mont. 415, 340 P.2d 511 (1959). But see Wright v. Lowe, 140 Cal. App. 2d 891, 296 P.2d 34 (1956) where the court found that the realtor employed by the seller was the buyer's agent in transmitting his offer to buy. The court was probably influenced by the fact that the seller's total realization from the sale was a negative $130 and that the seller had only a third-grade education.

Occasionally, however, a broker's services will be sought by a buyer seeking a piece of property in which case the broker will be the agent of the buyer. See, e.g., Wendy's of Montana v. Larsen, __ Mont. ___, 640 P.2d 464 (1982); Ball v. Wright, 118 Colo. 410, 195 P.2d 739 (1948).

32. Lyle v. Moore, __ Mont. ___, 599 P.2d 336 (1979). Justice Sheehy dissented, reasoning that the idea of fiduciary relationships was being strained to so hold.

agreement is fatal to the agent's right to a commission, but if the broker provides him with a copy of the listing and the seller subsequently loses it, the broker's commission action is not affected. The duty of full disclosure often arises when the agent buys the seller's property himself. In Flemmer v. Ming, for example, the agent bought the seller's motel after failing to sell it under the listing agreement. The agent did not advise the seller, who was inexperienced in corporate matters, of the difference between the agent's various closely-held corporations, which were buying the property. The court, under these circumstances, affirmed a denial of the agent's motion to dismiss the plaintiff's claim of fraud.

Similarly, in First Trust Co. of Montana v. McKenna, the defendant broker and another person (whom the seller found objectionable) bought the plaintiff's ranch after failing to find any other buyers. Within eleven days afterward, the land, cattle, hay and equipment were resold at about a $180,000 profit, in addition to a $45,000 commission. The broker argued that he had no duty

34. Carnell v. Watson, 176 Mont. 344, 578 P.2d 308 (1978) (where the court also cites Montana authority for the proposition that all subsequent modifications of the listing agreement must be in writing).
36. Unlike trustees and attorneys, a broker may enter a conflict of interest situation by buying his principal's property, Comment, Unprofessional Conduct by Real Estate Brokers: Conflict of Interest and Conflict in the Law, 11 Pac. L.J. 821 (1980). See Martin v. Vincent, ___ Mont. ___, 593 P.2d 45 (1979) (trial court's dismissal of broker's complaint, where the brokers attempted to buy the property, because of lack of disclosure reversed and remanded for further proceedings).

It would seem that the broker's best defense in this situation would be to have the owner execute a memorandum specifying that he (owner) understood that he is selling the property to the listing broker.

Mont. Code Ann. § 37-51-321(7) (1981) allows the Board of Realty Regulation to suspend or revoke the realtor's license for acting in the dual capacity of broker and undisclosed principal in a transaction.

38. The Flemmer case also demonstrates that the principal may recover punitive damages against the realtor. See also Johnson v. Doran, 167 Mont. 501, 540 P.2d 306 (1975) ($43,500 in punitive damages deemed not excessive) and Annot., 67 A.L.R.2d 952 (1959).
40. See also Starkweather v. Shaffer, 262 Or. 198, 497 P.2d 358 (1972) (broker buys principal's property and sells it a short time later for a quick profit). Cf. Becker v. Capwell, 270 Or. 200, 527 P.2d 120 (1974) (broker bought the property prior to the agency relationship and sold it to the principal without disclosing that he owned it; because principal could show no difference in value between the selling price and actual value, he could recover no

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to disclose after producing a ready, willing and able buyer with whom the seller orally agreed to sell the property. The court rejected this argument, finding that the broker's duty of full disclosure did not terminate as soon as the broker proposed to buy the land himself and that the broker's duty continued until he was legally bound to buy the property by the execution of a written agreement. 42

B. The Duty of Disclosure to the Buyer

Several jurisdictions have considered the question of whether a broker acting as the seller's agent owes a duty to the buyer to disclose material defects in the property. 43 In general, a duty to disclose information arises:

in cases where the defendant has special knowledge, or means of knowledge, not open to the plaintiff, and is aware that the plaintiff is acting under a misapprehension of facts which would be of importance to him, and would probably affect his decision. 44

A California court applied the foregoing principles in the leading case of Lingsch v. Savage. 45 The Lingsch court imposed a duty of disclosure on the broker by reasoning that the broker was a party to the transaction:

The real estate agent or broker representing the seller is a party to the business transaction. In most instances he has a personal interest in it and derives a profit from it. Where such an agent or broker possesses, along with the seller, the requisite knowledge . . . whether he acquires it from, or independently of, his principal, he is under the same duty of disclosure. 46

The court held that the broker's failure to disclose "facts materially affecting the value or desirability of the property" would

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41. See also Cooke v. Iverson, 94 Idaho 929, 500 P.2d 830 (1972) (agent's fiduciary relationship did not end upon completion of original contract but continued through entire transaction).

42. In Crowley v. Rorvig, 61 Mont. 245, 203 P. 496 (1921) a peripheral question involved whether a commission could be sought when two of the purchasers were wives of the agents. The court stated that the brokers assumed to act as agents of the seller after signing a listing agreement and found that the purchase contract was voidable at the principal's option, affirming the trial court's denial of the commission. See Annot., 26 A.L.R.2d 1307 (1952).


46. Id. at 733, 29 Cal Rptr. at 205.
render the broker "jointly and severally liable with the seller." 47

In Montana the recent decision in Mends v. Dykstra 48 extends the duty of disclosure to residential property transactions. The Mends court, however, discussed only the seller's duty based on special knowledge or ready access to material facts. Nonetheless, the court relied on a California jury instruction imposing the duty of disclosure on any party to a transaction. 49 If the Montana court finds that the broker is an interested party, then as in California, the broker will owe a duty of disclosure to the buyer. The court in Anderson v. Applebury 50 has already expressed a willingness to impose such a duty based on "a relation of trust or confidence between the parties."

A number of other jurisdictions have also held the broker personally liable for non-disclosure. In Miles v. McSwegin 51 a broker failed to disclose that a house was infested with termites. An Ohio court held the broker liable for fraud even though the broker learned of the infestation after the sale. A Washington court cited with approval a trial court's instruction imposing a duty on the broker to discover the truth or falsity of information furnished by the seller. 52 Failure to do so could amount to negligent misrepresentation or non-disclosure. This conclusion coincides with article nine of the Code of Ethics of the National Association of Realtors:

The realtor shall avoid exaggeration, misrepresentation, or concealment of pertinent facts. He has an affirmative obligation to discover adverse factors that a reasonably competent and diligent investigation would disclose. 53

A simple conclusion may be reached from this analysis: although the Montana case law is not developed, to avoid liability the broker would be wise to scrupulously disclose material defects to the buyer.

C. The Double Agent

Several cases discuss the possibility of double agency, viewing the broker as agent for both the buyer and seller. In Courtney v. Continental Land and Cattle Co. 54 the court found that a letter in

47. Id.
49. Id. at ____, 637 P.2d at 506 (citing BAJI 12:36 (6th ed. 1977)).
51. 58 Ohio St. 2d 97, 388 N.E.2d 161 (1979).
54. 17 Mont. 394, 43 P. 185 (1896).
which the plaintiff admitted he was acting as agent of both parties was legally admissible. The court apparently accepted the double agency premise. Another case rejected non-disclosure of a dual agency as a defense on a claim for a commission. The court stated that an agreement to pay for services cannot be avoided on the assertion that another person has agreed by separate contract to pay for the same services. It appears, however, that this holding was later refined in a ninth circuit case. The court held that where the agent had no discretionary power to negotiate the sale but was merely acting to bring the principals together so they could independently contract, the agent could recover from both principals, if both had agreed to pay him.

The Realtors' Code of Ethics does not prohibit dual agency if full disclosure is made to all parties, and listing forms discussed in recent Montana cases generally allow the broker to accept compensation from both parties in case of an exchange. Nonetheless, it may be a practical impossibility to effectively represent two competing interests in the case of a sale. The owner is attempting to obtain the highest price possible for his property and the purchaser is endeavoring to buy it at the lowest possible price. A broker negotiating the sale will probably advocate each side at some point in the transaction to reach a common figure. Thus, an agent attempting to collect fees from both parties as representing each principal's best interest is treading on shifting legal ground.

D. Agent's Authority

An agent does not enjoy general authority but is only authorized to do what is specifically mandated by his contract of employ-

58. See, e.g., Diehl and Assocs. v. Houtchens, 173 Mont. 372, 567 P.2d 930 (1977); See also Homefinders v. Lawrence, 80 Idaho 543, 335 P.2d 893 (1959) (where the court upholds a dual agency relationship on an exchange because such agency was disclosed to both parties).
59. See Ledirk Amusement Co. v. Scheckner, 133 N.J. Eq. 602, 33 A.2d 894 (1943) and McLure v. Luke, 154 F. 647 (9th Cir. 1907); Cf. Norville v. Palant, 25 Ariz. App. 606, 545 P.2d 454 (1976) (the continuation of a pre-existing relationship between the agent and the buyer militated strongly against a broker-principal relationship between the seller and agent) and Deimler v. Ostler, —— Mont. ——, 541 P.2d 41 (1982) (seller's contention that seller's agent was representing purchaser was rejected because seller could show no damages).
This authority may be given through a series of letters as well as through a single document. In *Hughes v. Melby* the court discussed the question of whether the listing agreement gave the broker authority to bind the sellers to an agreement for the sale of their property. The court reasoned that, since the employment contract authorized the agent to receive a down payment, he had implied authority to bind his principals in a sale agreement. *Shover v. Dean* held that if a listing agreement provides in effect that the broker shall get a commission if the land is sold to parties who become interested in the land through the realtor's agency, directly or indirectly, and the broker sets in motion the chain of events culminating in the sale of the property, it was error for the trial court to award a fee less than the maximum allowed by the agreement.

IV. THE EARNEST MONEY RECEIPT AND AGREEMENT TO SELL AND PURCHASE

When a prospective buyer wishes to enter a binding agreement to purchase the seller's property, he usually pays an amount of earnest money and executes a document entitled an "Earnest Money Receipt and Agreement to Sell and Purchase," commonly called a "buy-sell."
A number of cases have held that a purchaser can require the seller to specifically perform under the buy-sell, and most buy-sell's have language granting both buyer and seller the specific performance remedy. A purchaser can make out a stronger case for specific performance if he can show reliance on the terms of the buy-sell or grounds giving rise to estoppel. If the parties draft their own buy-sell, it must contain all the essentials of the contract, or a purchaser's cause of action for specific performance will fail.

Most of these agreements contain provisions that the seller will furnish the purchaser with an abstract of title, showing merchantable or marketable title, or a title insurance policy insuring vested title in the buyer. If the seller fails to fulfill these obligations, the buyer's earnest money is returned, but if the seller discharges these obligations and the buyer refuses to complete the sale, the earnest money is forfeited as liquidated damages. The sellers may not force the purchaser to accept their determination of the merchantability of title, in lieu of an abstract or insurance policy, and it has been held that the seller's tender of the abstract or title insurance is a condition precedent to the buyer's


It has also been held that a purchaser can obtain specific performance of a buy sell with an abatement in the purchase price for the portion of the property the seller was unable to convey. Hart v. Honrud, 131 Mont. 284, 309 P.2d 329 (1957).


70. In Gantt v. Harper, 82 Mont. 393, 267 P. 296 (1928), the court found that "marketable title" was equivalent to "clear title," which the court interpreted to mean a fee simple interest in the property. On modern forms there is usually a space provided for the insertion of mortgages or other encumbrances.

71. Woodbury v. Clermont, 236 F.2d 132 (9th Cir. 1956); Stafford v. Love, 151 Mont. 270, 442 P.2d 190 (1968).

The title clause may provide that if the seller's title is not merchantable, the earnest money will be returned to the purchaser and his rights terminated. This kind of clause has no reference to the situation where the vendor can provide the contracted-for title, but in bad faith fails to do so. Hart v. Honrud, 131 Mont. 284, 309 P.2d 329 (1957).


making the final payment on the purchase price.\textsuperscript{74} If the buyer waives the defects in the seller's title and purchases the property, he cannot later be heard to complain about the defective title.\textsuperscript{75}

When one buy-sell expires or becomes outdated, another can be entered into between the parties to take later events into account.\textsuperscript{76} If a buy-sell contains an express provision that its terms will be of no effect unless a contract for deed is executed within a specified time, the buyer and seller can nullify the time limitation by an executed oral agreement to waive it.\textsuperscript{77}

Most of these agreements to sell and purchase contain an "independent investigation" clause in which the buyer states that he has investigated the property on his own and is not relying on any representations made by others.\textsuperscript{78} While a seller cannot base a successful motion for summary judgment on one of these clauses,\textsuperscript{79} such a clause may at least prevent a buyer from claiming damages for fraudulent misrepresentation of the amount of land contained in the parcel he bought.\textsuperscript{80}

A realtor's attempted reliance on an independent investigation clause in a suit regarding the misrepresentation of lot locations was struck down in \textit{McCarty v. Lincoln Green, Inc.}\textsuperscript{81} because the pur-

\textsuperscript{74} Brown v. Griffin, 150 Mont. 498, 436 P.2d 695 (1968). In \textit{Brown} the purchaser's tender of performance was excused because of the seller's failure to provide the abstract or title policy. Similarly, in Chadwick v. Giberson, \textit{\textsuperscript{Mont.}} 618 P.2d 1213 (1980), the plaintiff purchaser was excused from tendering the balance of the down payment because the seller could not convey the contracted-for title.

\textsuperscript{75} Van Ettinger v. Pappin, 180 Mont. 1, 588 P.2d 988 (1978). In \textit{Van Ettinger} the buy-sell granted an easement to the purchaser and, prior to closing, the buyer determined that the easement was not for his benefit but closed the sale anyway. On appeal the court found that the buyer could not subsequently complain about the nonexistence of the easement.

It should also be kept in mind that a provision in the buy-sell where the broker assumed no responsibility in regard to the title did not insulate a broker from treble damages liability where he induced the purchasers to enter into the agreement, knowing that they wanted marketable title to all the land but aware that this could not be delivered. Stafford v. Love, 151 Mont. 270, 442 P.2d 190 (1968).

Treble damages may be awarded by virtue of \textit{\textsuperscript{Mont. Code Ann. \textsection 37-51-323(2) (1981).}}

\textsuperscript{76} Hollinger v. McMichael, 177 Mont. 144, 580 P.2d 927 (1978).

\textsuperscript{77} Reilly v. Maw, 146 Mont. 145, 405 P.2d 440 (1965).


\textsuperscript{80} Schultz v. Peake, 178 Mont. 261, 583 P.2d 425 (1978) (buyers were told the property consisted of 15 acres when it actually consisted of only 1.3 acres). However, in \textit{McCarty v. Lincoln Green, Inc.}, \textit{\textsuperscript{Mont.}} 629 P.2d 1221 (1980) the court stated that the holding in \textit{Schultz} was also based on the fact that the buyers had inspected the property numerous times.

\textsuperscript{81} \textit{\textsuperscript{Mont.}} 629 P.2d 1221 (1980).
chasers had inspected the wrong parcel. A real estate agent is best advised to guard against a misrepresentation suit by not relying on the clause itself but on the buyer's actual inspection of the correct property. 82

V. THE BROKER'S COMMISSION

A. MONTANA LAW

The vast majority of Montana cases involve realtors suing for commissions allegedly due. Characteristically, it is this aspect of the law where the least consistency appears, and an attorney seeking authority in aid of a broker's case will not be hard-pressed to find some support for his position.

The starting point for discussion is the premise that the broker has earned his commission when he has produced a buyer ready, willing and able to purchase the seller's property on the conditions specified in the listing agreement. 83 Language incorporating this idea is often found in the listing agreement. 84 The term "able" in the phrase "ready, willing and able" has been interpreted to mean financially able to complete the purchase. 85

An agent can forfeit his commission by violating any of the provisions of the Real Estate License Act. 86 Similarly, a broker's unilateral alteration of the listing agreement nullifies any right to a commission even though the alterations are later stricken. 87 If an agent contracts to procure a purchaser but the prospective purchaser only executes a lease and option to buy (and does not exer-

82. Van Ettinger v. Pappin, 180 Mont. 1, 588 P.2d 988 (1978) (because buyers had made an independent investigation, they were barred as a matter of law from claiming reliance on the realtor's alleged misrepresentations); Anderson v. Applebury, 172 Mont. 411, 567 P.2d 951 (1977) (plaintiff purchaser's cause of action for fraud and misrepresentation under the Montana Real Estate License Act was rejected where they had inspected the property themselves). See generally Annot., 8 A.L.R.3d 550 (1966).

83. First Trust Co. of Montana v. McKenna, Mont. ___ , 614 P.2d 1031 (1980); McDonald and Co. v. Fishtail Creek Ranch Ltd., 175 Mont. 53, 572 P.2d 195 (1977); Roscow v. Bara, 114 Mont. 246, 135 P.2d 364 (1943); Gantt v. Harper, 86 Mont. 69, 281 P. 915 (1929). But see Wood v. Strodtbeck, 142 Mont. 180, 382 P.2d 170 (1963) (where court affirmed decision that included statements that a broker must do more than produce a buyer who says he is ready and willing—buyer must be obligated to buy under an enforceable agreement).


87. Id.
cise the option), the broker forfeits his commission; however, where a broker is engaged to secure a lease or option but instead causes a third party to enter into a contract of sale, he is still entitled to his commission.

If a broker has been given a non-exclusive listing, it has been held that he must be the procuring cause of the sale and not just introduce the seller to the eventual buyer. On the other hand, if a broker has an exclusive listing and a sale of the property occurs within the period of the listing, a presumption arises that the broker made the sale. Some listings provide that the realtor will receive a commission for a certain period of time after the expiration of the listing where the broker places the eventual buyer in contact with the seller during the listing period, and if no time is specified, a reasonable time will be implied.

A complaint seeking a commission should allege that the plaintiff is licensed to deal in real estate in Montana. If an agent attempts to attach the proceeds of a house sale to satisfy his commission, he must allege by affidavit facts showing the seller's intent to dispose of the money and defraud the agent and that a debt is owed when the affidavit is filed.

88. Roscow v. Bara, 114 Mont. 246, 135 P.2d 364 (1943). See also Anderson v. Craig, 111 Mont. 182, 108 P.2d 205 (1940) (court found that the agreement executed by buyer and seller was not an option but a sale and granted the plaintiff broker his commission). See generally Annot., 42 A.L.R.3d 1430 (1972) and Annot., 32 A.L.R.3d 321 (1970).
90. Flinders v. Gilbert, 141 Mont. 492, 378 P.2d 385 (1963); Cobb v. Warren, 64 Mont. 10, 208 P. 928 (1922). But see Stromberg v. Seaton Ranch Co., 160 Mont. 293, 502 P.2d 41 (1979) (where the court rejected the argument that, under the nonexclusive listing agreement there, the broker had to establish that his efforts were the procuring cause of the sale).
94. MONT. CODE ANN. § 37-51-401 (1981). In Deimler v. Ostler, ___ Mont. ___, 651 P.2d 41 (1982), the court found that where the undisputed facts showed that the plaintiff was a licensed broker at the time the action arose, the statute was satisfied. In Nardi v. Smalley, ___ Mont. ___, 643 P.2d 228 (1982), the plaintiff did not allege that he was a licensed broker in his initial complaint but the court's pre-trial order amended the complaint to state that he was. The plaintiff also introduced his broker's license as his first exhibit at trial.
1. The Diehl Decision and Its Aftermath

A better view of when the right to a commission accrues may be gained by examining the more recent cases because, as will be seen, the “ready, willing and able” requirement is only the starting point. One of the most-cited cases is Diehl & Associates, Inc. v. Houtchens. In Diehl the plaintiff broker sued for a commission, arguing that he had fully performed his obligations undertaken in the listing agreement by obtaining the signatures of the prospective purchasers on a buy-sell. The broker contended that the failure to complete the sale was the seller’s fault and not his.

In a result-oriented opinion, the court focused on the words “sell or exchange” in the sentence of the listing describing the scope of the plaintiff’s agency. The court reasoned that, since no “sale” had taken place, plaintiff had no right to a commission. In so holding, the court ignored the listing clause providing that the agent earned his commission on the production of a ready and willing buyer. The court also distinguished two sorts of brokerage contracts:

We note the distinction between a brokerage contract which requires a broker to merely find a purchaser and a brokerage contract which requires a broker to sell, make or effect a sale. In the first case the broker earns his commission when he procures a

97. The listing agreement is set out in full in the opinion. The listing provided that the seller agreed to pay a commission if the broker found a buyer ready and willing to enter into a deal at the listed price and terms or at such other price and terms that would be acceptable to the seller.
98. For a case discussing the right to a commission when the broker is authorized to sell or exchange the property, and an exchange instead of a sale takes place, see Apple v. Henry, 66 Mont. 244, 213 P. 444 (1923).
99. The court thus holds that the execution of a buy-sell does not constitute a sale. There is, however, authority to the contrary. See Assoc’d. Agency of Bozeman, Inc. v. Pasha, 625 P.2d 38, 40 (1981) (“Neither [party], however, signed the earnest money receipt and agreement to sell and purchase necessary to complete the sale”); Stafford v. Love, 151 Mont. 270, 280, 442 P.2d 190, 195 (1968) (court rejected the argument that a buy-sell was not a contract for the sale of land with this language: “The Agreement to Sell and Purchase constituted a contract for the sale of land. . . .”); and Martin v. Vincent, 583 P.2d 46 (1979) (court repeatedly refers to the buy-sell as a “land sale contract”).

The majority rule is that, where there are no special conditions precedent to the earning of a commission, the broker should get his commission even though the buyer defaults on the contract. There are, however, an increasing number of jurisdictions that hold to the contrary. Annot., 12 A.L.R.4th 1083, 1088 (1982).

What would have been the result in Diehl if the listing had provided that the brokers were to be paid out of the first proceeds of the sale? See Brockway-Mecklenburg Co. v. Hilderman, 90 Mont. 317, 2 P.2d 1018 (1931). The buyer in Diehl deposited $500 as earnest money toward the purchase of the property.

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buyer able, ready and willing to purchase on the seller's terms. A broker employed to sell or effect a sale does not earn his commission until he completes the sale. Completion of the sale, where real property is involved, amounts to payment of the purchase price and conveyance of title.

The cases following Diehl have all but ignored this reasoning. About a year after Diehl was handed down, the court confronted a similar situation in Hollinger v. McMichael. In Hollinger the plaintiff broker and defendant seller executed a listing agreement virtually identical to that construed in Diehl, employing the broker to “sell or exchange” the property. The prospective buyers and the seller executed two buy-sell's, but the seller failed to complete the sale. Plaintiff sued for a commission and the court affirmed the district court's grant of summary judgment to the plaintiff. The court did not examine the language of the listing which it had relied on so heavily in Diehl but instead stated that the plaintiff had earned his commission under the listing by presenting defendant with a ready, willing and able buyer.

A closer look at these two cases indicates that in both the dispositive language in the listing was identical; in both, buy-sell's were signed, and in both the sale was not concluded. Yet in Diehl the broker's commission was denied, and in Hollinger the broker was granted summary judgment for his commission. The two hold-

100. 173 Mont. at 379, 567 P.2d at 935. The court cited the early case of O'Neill v. Wall, 103 Mont. 388, 62 P.2d 672 (1936) for the proposition that a sale of real estate does not occur until all payments have been made. Two previous cases, involving net listings, had similarly so held: Wright v. Bowlus, 62 Mont. 322, 205 P. 210 (1922) and Wright Land & Inv. Co. v. Even, 57 Mont. 1, 186 P. 68 (1919).

In Union Interchange, Inc. v. Parker, 138 Mont. 348, 357 P.2d 339 (1960), the court notes that several licensed brokers testified that they never accepted a fee until a sale was completed but there is no further explanation of this testimony.

Diehl was remanded for a determination by the district court of any expenses incurred by the broker related to the sale, which the broker was entitled to under a provision in the buy-sell. On remand, the sellers were awarded attorney fees, by virtue of the reciprocal attorney fee statute (Mont. Code Ann. § 28-3-704 (1981)), both for the suit and for the broker's second appeal on the attorney fee award. Diehl & Assocs. v. Houtchens, 180 Mont. 48, 588 P.2d 1014 (1979).


102. The court's opinion does not set forth the listing, but an examination of the parties' briefs indicates that the language of the agreement was very similar to the listing agreement in Diehl.

103. The court cited Diehl for the proposition that a broker is entitled to a commission when he produces a ready, willing and able purchaser on the terms specified in the listing but failed to address the actual Diehl holding.

ings are irreconcilable. 104

Diehl and Hollinger were cited and discussed in First Trust Co. of Montana v. McKenna, 105 where the court stated that a close reading of the cases revealed that the rule of law set was to protect a broker who has produced an eligible buyer. This language is questionable with regard to the Diehl holding because there the court denied the broker a commission on the grounds that the execution of the buy-sell did not not constitute a sale.

Diehl was again cited and discussed in Barrett v. Ballard, 106 a case handed down later in the same year as McKenna. In Barrett as a result of the broker’s advertising the sellers’ property, the buyer and seller came together and eventually executed a contract for deed at a price somewhat less than that called for in the original listing. 107 The district court awarded the broker a commission and the supreme court affirmed while distinguishing Diehl in which no sale took place. The court then stated that the law in Montana is well settled that the broker need not do everything to complete the sale but only be responsible for bringing the parties together 108 which, of course, flies squarely in the face of the Diehl holding. The Barrett court also found that the district court did not err in failing to give instructions based on Diehl’s distinction between the listing which requires the broker to find a purchaser and one which requires him to make the sale. The court, however, did not analyze the language of the listing itself as it did in Diehl. 109

About three months after Barrett was decided, the court again had occasion to comment on Diehl, this time in Associated Agency

104. Note that in Diehl the buyer failed to complete the sale whereas in Hollinger the seller failed to follow through. The broker’s right to a commission should not turn on such a fine distinction.

The only other possible way to distinguish the two cases is that in Hollinger financing commitments from the FHA were required and obtained prior to closing, whereas in Diehl there was no provision for financing commitments to be obtained.

Hollinger was remanded for an evidentiary hearing on attorney fees, and the plaintiff was successful in obtaining fees for work required for the appeal, which the district court had failed to award him. Hollinger v. McMichael, 105 Mont. 106, 594 P.2d 1120 (1979).


107. The listing was for $106,000 and the contract for deed was signed for “some $70,000.” Mont. at 106, 622 P.2d at 182-83.

108. The court cited Shober v. Dean, 39 Mont. 255, 102 P. 323 (1909) as the source of the quotation but did not elaborate on the fact that in Shober the court was addressing those comments to the question of how to interpret the term “indirectly” in the listing agreement. The listing agreement in Barrett did not contain the word “indirectly”.

109. The listing agreement gave the broker the “right to sell” the property, which is similar to the Diehl language where the broker was employed to “sell or exchange” the property.
of Bozeman, Inc. v. Pasha. In Pasha, which is the only case decided since Diehl where a broker sued for a commission without an enforceable agreement between the buyer and seller at the time of filing the complaint, the trial court awarded the plaintiff his commission and was affirmed on appeal. The court found no error in the lower court’s refusal to give instructions to the effect that a broker is never entitled to a commission until a binding written agreement is signed and the sale completed. The court also “expanded” the Diehl holding with the following language:

We acknowledge that this Court has stated that a broker employed to “sell or effect a sale” and exchange (as is the case here) does not earn his commission until the purchase price is paid, title is conveyed and the sale is completed. In an expansion of this holding, however, we must also conclude that a broker is still entitled to his commission even if the sale is not completed if a ready, willing and able buyer is procured and the failure to consummate was solely due to the wrongful acts or interference of the seller.

It would be more accurate to say that the court “retreated” from its harsh Diehl holding.

Nardi v. Smalley involved a listing agreement very similar to that in Diehl and Hollinger, including the “sell or exchange” language. The court granted the broker his commission where the buyer and seller entered into a contract for deed within the stipulated ninety-day period after the listing expired. Without citing or distinguishing Diehl, the court stated that the contract for deed was a “sale” because the buyer received an equitable interest in the property in return for the obligation to pay the purchase price.

B. Other Jurisdictions

Most jurisdictions in the United States follow the same ad hoc, case-by-case approach as is followed by the Montana Supreme Court with predictably inconsistent results. Other courts, however, have taken a firmer stance in outlining just what it is that a broker must do to gain a commission.

111. Id. at 43.
112. ___ Mont. ___, 643 P.2d 228 (1982).
113. See, e.g., Lee v. Desenberg, 2 Mich. App. 365, 139 N.W.2d 916 (1966) (in Michigan the owner becomes liable to the broker when the broker produces an enforceable contract and the owner neglects or refuses to complete the deal, sells to another, or takes such action as may prevent the completion of the transaction); Harley E. Rouda and Co. v. Springtime Co., 49 Ohio App. 2d 49, 359 N.E.2d 450 (1975) (a broker is entitled to his commission after the seller enters into an enforceable written contract with the buyer, even
In the landmark case of Ellsworth Dobbs, Inc. v. Johnson\(^{114}\), the Supreme Court of New Jersey broke with nearly a century of precedent and set out the conditions a broker must fulfill:

When a broker is engaged by an owner of property to find a purchaser for it, the broker earns his commission when (a) he produces a purchaser ready, willing and able to buy on the terms fixed by the owner, (b) the purchaser enters into a binding contract with the owner to do so, and (c) the purchaser completes the transaction by closing the title in accordance with the provisions of the contract. . . . In short, in the absence of default by the seller, the broker's right to commission against the seller comes into existence only when his buyer performs in accordance with the contract of sale.\(^{115}\)

The court continued by saying that whenever there is substantial inequality of bargaining power, any provision to the contrary of the above in a brokerage contract prepared by the broker would be unenforceable.\(^{116}\)

A few other states have adopted the Ellsworth Dobbs rationale entirely. Oregon was the first state to follow suit in 1971,\(^{117}\) with Kansas\(^{118}\) and Massachusetts\(^{119}\) not far behind.

In three states the legislatures have seen fit to intervene by enacting legislation addressed to the broker's commission issue.\(^{120}\) The Georgia statute simply states that the broker's commission is earned when he finds a ready, willing and able purchaser who offers to buy on the owner's terms.\(^{121}\) The Colorado statute requires

\(^{114}\) 50 N.J. 528, 236 A.2d 843.

\(^{115}\) Id. at 551, 236 A.2d at 855.

\(^{116}\) Id. at 555, 236 A.2d at 857-58.


\(^{119}\) Tristram's Landing, Inc. v. Wait, 367 Mass. 622, 327 N.E.2d 727 (1975). The court also noted, as did the Ellsworth Dobbs court, that any language to the contrary would be scrutinized carefully and if the agreement was "not fairly made," it may be unconscionable or against public policy.

\(^{120}\) Ga. Code Ann. § 4-213 (1982) provides:

The fact that property is placed in the hands of a broker to sell shall not prevent the owner from selling, unless otherwise agreed. The broker's commissions are earned when during the agency, he finds a purchaser ready, able, and willing to buy, and who actually offers to buy on the terms stipulated by the owner.
the purchase to be “consumated” or else defeated by the refusal or neglect of the owner before a Colorado broker is entitled to a commission.\textsuperscript{122} In Maryland, absent a contrary agreement, the commission is earned when the buyer and seller execute a written contract even though the buyer does not perform, unless such non-performance was due to the broker’s actions.\textsuperscript{123}

VI. A PROPOSED LISTING AGREEMENT\textsuperscript{124}

In view of the problems raised by the Montana case law, the following exclusive listing agreement\textsuperscript{125} is proposed in an attempt to maximize the realtor’s chances of obtaining a commission and at the same time to clarify the parties’ rights. The contracting parties

\textsuperscript{122} COLO. REV. STAT. § 12-61-201 (1978) provides:

No real estate agent or broker is entitled to a commission for finding a purchaser who is ready, willing, and able to complete the purchase of real estate as proposed by the owner until the same is consumated or is defeated by the refusal or neglect of the owner to consumate the same as agreed upon.

\textsuperscript{123} MD. REAL PROP. CODE ANN. § 14-105 (1974) provides:

In the absence of special agreement to the contrary, if a real estate broker employed to sell, buy, lease, or otherwise negotiate an estate, or a mortgage or loan secured by the property, procures in good faith a purchaser, vendor, lessor, lessee, mortgagor, mortgagee, borrower, or lender, as the case may be, and the person procured is accepted by the employer and enters into a valid, binding and enforceable written contract, in terms acceptable to the employer, of a sale, purchase, lease, mortgage, loan, or other contract, as the case may be, and the contract is accepted by the employer and signed by him, the broker is deemed to have earned the customary or agreed commission. He has earned the commission regardless of whether or not the contract entered into is performed, unless the performance of the contract is prevented, hindered, or delayed by any act of the broker.


124. The property description and terms of sale will necessarily vary with each listing, so these were omitted. Also, boilerplate provisions regarding entry onto the property by the customer and the termination date of the listing were omitted because they give rise to little litigation. For examples of these, see Diehl and Assoc. v. Houtchens, 180 Mont. 48, 588 P.2d 1014 (1974).

125. An exclusive listing is desirable because of the presumption that if the property is sold during the period of the listing, the broker having the listing caused the same. McDonal and Co. v. Fishtail Creek Ranch Ltd., 175 Mont. 53, 572 P.2d 195 (1977).


For a suggested nonexclusive brokerage agreement which was drafted to protect the seller (commission is earned when title closes on terms satisfactory to the seller), see Goldstein, When Does a Real Estate Broker Earn His Commission?, 27 PRAC. LAW. 43, 52-53 (1981). For a proposed exclusive listing drafted by laymen in an effort to rid the document of legalese, see Case & Needle, How to Make Real Estate Documents Readable, 7 REAL ESTAT. L.J. 320, 329-32 (1979).
can make the agent's compensation depend on any lawful condition. Nonetheless, the terms of the agreement are extremely important because the courts will examine them to determine whether the broker has earned his commission. Moreover, if the broker's attorney prepared the agreement, any ambiguity created will be interpreted against the broker.

**Paragraph 1**

You and your agents are hereby employed to find a buyer ready and willing to purchase the property described in this agreement at the selling price and terms noted or at such other price and terms as I accept.

**Analysis**

This paragraph was drafted in an effort to bring the listing within the scope of a brokerage contract that "requires a broker merely to find a purchaser" as discussed in Diehl. The concept of the broker being employed to "sell or exchange" the property is completely eliminated, eclipsing any vestiges of Diehl that may still remain. Inclusion of the "sell or exchange" language is unwise because this allows a court to deny the broker his commission if the buyer defaults on the buy-sell or to postpone the broker's commission until the final payment is made and title passes. Both results were approved by the Diehl holding and based on the "sell or exchange" language.

Also eliminated is the recital of consideration for the listing.

128. E.M. Beorke, Inc. v. Williams, 28 Wis. 2d 627, 137 N.W.2d 489 (1965); Ralph Hockman & Co. v. Fort Stanwix Mfg., 284 F. Supp. 995 (N.D.N.Y. 1967). In Kennedy v. Roach, 122 N.J. Super. 361, 300 A.2d 570 (1973) the appellate court reversed the trial court and granted the plaintiff his full commission as agreed by the parties. The court noted that the plaintiff was a TV repairman who only worked part-time as a real estate salesman and that the contract of sale was prepared by the seller's attorney.
129. See also Labbe v. Cyr, 150 Me. 342, 111 A.2d 330 (1954) where the court stated that a broker employed to sell, as opposed to a broker employed to find a purchaser, must effect a sale or procure a binding contract of sale from his customer before becoming entitled to his commission.
130. For other cases involving listing agreements with the "sell or exchange" phrase or similar language, see Brown v. Grimm, 258 Or. 55, 481 P.2d 63 (1971); Rogers v. Hendrix, 92 Idaho 141, 438 P.2d 653 (1968); Bradley v. Westerfield, 1 Ariz. App. 319, 402 P.2d 577 (1965); Wesley N. Taylor Co. v. Russell, 194 Cal. App. 2d 816, 15 Cal. Rptr. 357 (1961); Note, Special Conditions in Real Estate Brokerage Contracts, 32 Col. L. Rev. 1194, 1195 (1932) ("In the event of sale, 'if the property is sold', 'on sale', 'if a sale is effected' have all been held to refer to the signing of the contract of sale"—citing cases).
131. A consideration is not necessary to make an agent's authority binding on the principal, Mont. Code Ann. § 28-10-202 (1981), and a written instrument is presumptive evidence of consideration, Mont. Code Ann. § 28-2-804 (1981). Furthermore, the recital ap-
The "ready and willing" language was used because there is ample authority for the proposition that when a broker undertakes to produce a ready and willing buyer, no enforceable contract need be entered into by the seller and buyer for the broker to gain his commission.\textsuperscript{132}

The omission of the word "able" in the description of the buyer may defeat a seller's defense that the purchaser produced was unable to complete the sale, thus denying the agent his commission.\textsuperscript{133} If a prospective buyer offers terms which are at variance with those on the listing, and the seller accepts, the broker has a valid claim to a commission\textsuperscript{134} under the language of the last part of the clause.

\textbf{Paragraph 2}

I authorize you to accept a deposit on the purchase price and to execute a contract for the sale of the property as my agent on my behalf.

\textbf{Analysis}

In \textit{Hughes v. Melby}\textsuperscript{135} the court found that where a broker is authorized to receive a down payment he has the implied authority to enter into an agreement binding the sellers. To remove all doubts, the second phrase of the clause specifically states this.\textsuperscript{136}

\textsuperscript{132} Roscow v. Bara, 114 Mont. 246, 135 P.2d 364 (1943); Apple v. Henry, 66 Mont. 244, 213 P. 444 (1923); Laux v. Hogl, 45 Mont. 445, 123 P. 949 (1912).

\textsuperscript{133} But see Goetz v. Anderson, 274 N.W.2d 175 (N.D. 1978) where the court stated that the omission of the term "able" from the description of a buyer in the listing agreement does not relieve the broker of his duty to produce a buyer capable of purchasing on the terms specified by the broker's employer. See also Martin v. Clinton, 239 Or. 541, 398 P.2d 752 (1965) (the seller's agreement to pay a commission for finding a "ready willing" buyer would be interpreted to require a "ready willing and able" buyer) and Ellsworth Dobbs, Inc. v. Johnson, 50 N.J. 528, 236 A.2d 843 (1967) (whenever there is substantial inequality of bargaining power, a provision in the broker's listing, providing for payment of the commission before the contract if performed, will be deemed against public policy and unenforceable).

\textsuperscript{134} See generally Annot., 9 P.O.F.2d 115, 129-30 (1976).


\textsuperscript{136} The authority given to the agent to bind the principal on a contract for the sale of land must be in writing. MONT. CODE ANN. § 28-2-903(1)(d); Schwedes v. Romain, 179 Mont. 466, 587 P.2d 388 (1978). See also Stafford v. Love, 151 Mont. 270, 442 P.2d 190 (1968) (ordinarily the authority to execute a contract on behalf of the principal must be specifically conferred upon the agent by the listing agreement) and \textit{Restatement (Second)} of \textit{Agency} § 52 (1958).
The purpose of this clause is to give the broker the authority to bind the principal on a buy-sell or other sale document and to buttress the agent's argument that he has produced not only a ready and willing buyer but an enforceable sale agreement as well.

**Paragraph 3**

I agree to pay you a commission in cash for your services in an amount equal to ______% of the selling price if either of the following conditions is met:

1) you produce a buyer ready and willing to purchase the property described in this agreement at the selling price and terms noted or at such other price and terms as I accept; or

2) I am placed in contact with a buyer who has become interested in the property through your efforts directly or indirectly during the term of this agreement or within 180 days of its termination or a longer time if reasonable *and*

   a) I agree to sell, exchange, lease, or lend the property to or through the buyer, *and*

   b) such agreement ultimately results in an agreement to sell the property.

I further agree to pay the commission whether or not a written agreement for sale is executed.

**Analysis**

The "directly or indirectly" language in the first part of the second condition is taken from *Shober v. Dean.*[^137] The court held that by inserting "indirectly" in the contract, the parties intended the broker to recover his full commission if he set in motion a chain of events which culminated in the sale of the property. The "180 days" provision is the longest period (subsequent to the termination of the listing) discussed in the Montana cases,[^138] and a similar ninety-day provision was upheld in *Nardi v. Smalley.*[^139]

The "reasonable time" phrase attempts to bring *Stromberg v. Seaton Rancy Co.*[^140] into play, where the court found that in the absence of a stated time period, 285 days was a reasonable time. The final sentence is intended to lay to rest any arguments by the seller that the broker's commission does not mature until a binding


[^139]: ____ Mont. ___, 643 P.2d 228 (1982).

agreement is signed and guards against the situation where the broker produces a ready and willing buyer but the seller wrongfully refuses to consummate the sale, as discussed in *Pasha*.

**Paragraph 3A (alternative)**

In the event a written agreement is executed for the sale of said property, I hereby agree to pay you in cash a commission equal in amount to ____% of the selling price for your services in securing or procuring a purchaser.

**Analysis**

The above clause is inserted to grant the broker a commission if a buy-sell is executed and the purchaser defaults. The clause is the product of a nation-wide survey of those jurisdictions which allow the broker to recover a commission in these circumstances.\(^1\)

The survey indicates that the words “securing” or “procuring” were consistently relied on by the courts in granting a commission where the buyer defaults after signing an enforceable sale agreement.\(^2\)

This is the second method by which this proposed listing agreement seeks to avoid the situation that arose in *Diehl* and *Hollinger*, where a prospective buyer defaults after signing a buy-sell. The first method is the elimination of the “sell or exchange” language as discussed in connection with Paragraph 1.

**Paragraph 4**

This listing is an exclusive listing and I grant you the exclusive, sole right to deal with the property described in this agreement. I agree to pay you the entire commission if I or any other person sell, exchange, or lease the property or any part of it during the term of your employment or if I withdraw the property from the market during that time.

**Analysis**

This clause is similar to a clause discussed in *Diehl* and *Hollinger*. The “sell or exchange” language of the original clause is deleted in favor of the phrase “deal with.”

There is a distinction between an exclusive agency to sell and

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2. Four cases were found where the words “procuring” or “securing” a purchaser allowed the granting of a commission after the buyer’s default. See Cass Co. v. Nannarello, 274 S.C. 26, 262 S.E.2d 924 (1980); Winston v. Minkin, 63 Wis. 2d 46, 216 N.W.2d 38 (1974); Nelson v. Rosenblum Co., 289 Minn. 32, 182 N.W.2d 666 (1970); Ogden Savings & Trust Co. v. Blakely, 66 Utah 229, 241 P. 221 (1925).

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an exclusive right of sale. If the owner under an exclusive agency sells the property, no right to a commission accrues; however, if the seller has given the agent an exclusive right of sale, even a sale by the owner during the term of the listing results in a commission for the broker. The clearest way to guaranty that the agreement will be interpreted as an exclusive right of sale is to insert unequivocal language providing for the payment of a commission upon the sale of the property by the owner himself. This clause has been interpreted by the Montana Supreme Court as not allowing the owner to sell the property without forfeiting the commission.

The phrase regarding the withdrawal of authority has been upheld in two Montana cases but was held ineffective in a third where the broker did not explain the effect of the clause to the seller. The clause regarding the owner’s right to withdraw the property from the market penalizes the exercise of that right, an issue which arose in a Colorado case.

Paragraph 5

In case of suit or action on this contract, I agree to pay collection costs, court costs and reasonable attorney fees incurred by you at trial and on appeal.

Analysis

If a broker is successful in his commission suit, there must be a clause of this type in the contract or he will not be able to recover attorney fees from the principal. Although the clause has

145. Payne v. Buechler, ___ Mont. ___, 628 P.2d 646 (1981). See also Lyle v. Moore, ___ Mont. ___, 599 P.2d 336 (1979) (the clause was similarly interpreted, but since the broker did not disclose this fact to the sellers, no commission was awarded) and Platt & Heath Co. v. Wilmer, 87 Mont. 392, 288 P. 1021 (1930) (where the owner sold the property under a listing granting the broker the sole and exclusive right to sell, the broker was entitled to the commission).
147. See also McDonald and Co. v. Fishtail Creek Ranch Ltd., 175 Mont. 53, 572 P.2d 195 (1977) (held that the seller’s attempted early termination of the listing was not effective and granted the broker its commission).
149. Montana follows the American rule on attorney fees, which states that, absent a statute or contractual provision providing for attorney fees, no attorney fees may be
been recently upheld, it has also backfired several times, requiring the broker to pay the principal’s attorney fees by virtue of the reciprocal attorney fee statute.

Paragraph 6

I agree not to seek indemnity against the broker whose name appears below, or his agents, for the claims of other brokers to commissions regarding the property.

Analysis

This clause is designed to protect the broker from the seller seeking indemnity against him for other brokers' claims to commissions on the same property. It has been suggested that the indemnity clause should provide for the broker's indemnifying the seller for other claims but then limit the broker's liability to the commission actually paid him. From the realtor's standpoint, however, it seems preferable not to expose himself to indemnity from the outset.

Paragraph 7

I will convey the following part of the property by quitclaim deed only:

Analysis

This sentence, allowing space for property to be quitclaimed, is primarily for convenience and the buyer's information. The situation may arise where the seller owns less than fee simple title, and this sentence would prove important.

For example, in Stafford v. Love, approximately eighty acres granted. Town Pump, Inc. v. Diteman, Mont. 64 P.2d 212 (1981). There is no statute granting brokers attorney fees on successful commission suits so the recovery must be on a contractual basis.

152. MONT. CODE ANN. § 28-3-704 (1981). For another recent case interpreting this statute, see Sliters v. Lee, Mont. 641 P.2d 475 (1982) (assignor of note held not able to rely on contractual right to attorney fees for successfully defending against maker's third party action).
154. 151 Mont. 270, 442 P.2d 190 (1968). The broker's duty in interpreting abstracts of title was outlined in Butte Land & Inv. Co. v. Williams, 55 Mont. 39, 173 P. 550 (1918) where the court interpreted a clause in which the seller agreed to furnish an abstract of title to date of sale. The court held that it was the broker's duty simply to pass the abstract to the purchaser and let her decide whether to purchase the property, rather than interpret the
of the 750 acres for sale were in previously platted subdivisions, a part of which the sellers did not own. Their ownership of the balance was based on tax deed conveyances. The parties printed on the listing agreement the part of the property that could be conveyed by quitclaim deed only.

**Paragraph 8**

I certify that I have read and received a copy of this contract. I further certify that it has been called to my attention, and I understand, that if I sell the property myself during the term of this listing or if I revoke or attempt to revoke the agent’s right to sell, I will have to pay the stated commission.

**Analysis**

Under Montana law the failure to provide the principal with a copy of the listing vitiates a cause of action for the commission.\(^{155}\) Although probably not conclusive, the first sentence should strengthen a broker’s defense to the seller’s claim that he did not receive a copy of the listing. The second sentence was drafted to avoid the consequences of Lyle v. Moore,\(^{156}\) where the court found that the failure of the broker to call to the attention of the seller the provision prohibiting the owner selling the property barred any commission based on that provision.\(^{157}\)

**VII. Conclusion**

The discussion of the law on brokers in Montana makes several points clear. The listing agreement is a vital document in the broker’s trade, and statements spelling out the agent’s obligations should be carefully considered. Not only is the scope of the agent’s authority dictated by its provisions, but courts will look to the agreement to ascertain whether the broker has discharged his assumed obligations, entitling him to a commission.

Just what a broker must accomplish to be entitled to a commission is unclear in Montana. The statements in Diehl that payment of the purchase price and conveyance of title are needed before the right to a commission accrues are currently unsupported and should be expressly overruled. The court should clearly adopt a commercially reasonable definition of “sale.” Such a definition

abstract for her.


157. But see Guthrie v. Halloran, 90 Mont. 373, 3 P.2d 406 (1931) (a contract cannot be avoided on the defense of failing to read it before signing it).
was implied in Nardi, when the court held that the execution of a contract for deed is a sale.\textsuperscript{158} Nardi offers a more workable solution but leaves unanswered the question of whether the execution of a buy-sell is a sale as well. Hollinger, decided after Diehl, arguably implies that a buy-sell is a sale and satisfies "sell or exchange" language identical to that in Diehl. Furthermore, the fact that both buyers and sellers may require the other party to specifically perform a buy-sell\textsuperscript{159} makes it tantamount to a contract for deed in that respect. On the other hand, the statutory definition of "sale"\textsuperscript{160} requires that an interest in property be transferred to the buyer, and the buyer arguably does not receive equitable title on the execution of a buy-sell.\textsuperscript{161}

Under the present status of the law, brokers and attorneys who represent them must ponder exactly what constitutes a sale because there is no uniform rule of law that can be gleaned from the cases. The broker should seize the opportunity to moot this issue by drafting a clear listing agreement under which the broker's commission hinges on the production of a ready and willing buyer rather than a sale.

There is also the possibility of enacting legislation, as some states have done,\textsuperscript{162} to define statutorily the broker's obligation in obtaining a commission. In the alternative, the Montana Supreme Court could take a definitive stance as did the New Jersey court in Ellsworth Dobbs,\textsuperscript{163} specifically outlining what steps the agent must fulfill to gain his fee. If either of these latter two approaches is adopted, then the issue becomes whether the parties can, by lan-

\textsuperscript{158} Nardi v. Smalley, Mont. 643 P.2d 228 (1982). \textit{But see} Franzke v. Ferguson Co., 76 Mont. 150, 245 P. 962 (1926) (installment land contract was not a sale but merely an agreement to sell because no title passed immediately).

\textsuperscript{159} \textit{See supra} notes 76-78 and accompanying text.


\textsuperscript{161} Mont. Code Ann. § 30-11-108 (1981) states than an agreement to sell real property binds the seller to execute a conveyance sufficient to pass title to the property, inferring that the agreement to sell itself does not so pass the title. \textit{Cf.} Wright Land & Inv. Co. v. Even, 57 Mont. 1, 186 P. 681 (1919) (an agreement to sell and buy was not a sale because there was no transfer of title).

If the execution of a contract for deed, and not a buy/sell, is the triggering event, then the burden of the buyer's default is placed on the broker until closing. If the seller successfully sues for specific performance after default but prior to closing, has there been a sale so as to allow the broker to collect his commission? Some courts have granted the broker his commission under these circumstances, Annot., 12 A.L.R.4th 1083, 1137-38 (1982).

If the seller chooses not to sue for specific performance, and the broker's commission is denied, the seller has the power to determine whether the broker will get his commission which may run counter to the original agreement where the right to a commission turns on the production of a ready and willing buyer.

\textsuperscript{162} \textit{See supra} notes 138-41 and accompanying text.

\textsuperscript{163} \textit{See supra} notes 132-34 and accompanying text.
guage in the listing agreement, circumvent the conditions set forth. Absent legislation, these issues deserve the attention and action of the Montana Supreme Court as the state court of last resort for brokers in their commission cases.