

APPENDIX D: ALTERNATIVE BROKERS

1. Introduction

This Appendix summarizes information gathered from and about "alternative" real estate brokers -- those brokerage firms which usually feature, as a central component of their marketing strategies, sales commission rates substantially below those prevalent in their local markets, and commonly may link these lower rates to packages of brokerage service which differ substantially from the services provided by more "traditional" firms. The information for this Appendix was obtained from past and present alternative brokers.

As a first step in our effort to gather information about these businesses, approximately 25 alternative firms were located in various communities throughout the United States and interviews were conducted with their operators in person or by phone. On the basis of these interviews, a questionnaire was then designed and sent to all alternative brokerage firms we were able to identify. Slightly more than 150 responses were received.

We requested that all responding firms provide us with copies of any standard form contracts or other materials they had adopted. Each firm was encouraged to provide us with whatever additional documentation they chose on their operations, their successes, their problems, and their failures.

We also sought out and received additional information, forms and documentation from brokers who had once operated alternative firms but had closed those businesses at some point prior to our investigation.

What follows is a compilation based on the information provided to us. This Appendix discusses the background and experience of the individual alternative broker, the structure and operations of such businesses, the geographic areas in which such firms operate, the impact the alternatives believe they have had on real estate brokerage in those areas, the fees charges by alternative firms and the services they provide, the problems they have encountered, the successes they claim to have achieved, and a compendium of their shared opinions on a number of topics relating to the business of real estate brokerage. Where possible, we have generated quantified information. However, much of the information given to us was in the form of anecdotes and impressions, and

* See exhibit to Staff Report, Alternative Broker Survey Methodology (September 1980), which explains in detail the methodology of selecting alternative brokers for both the interviews and the survey. The Exhibit also explains how the questionnaire was designed and the results tallied.

our sample of brokers was by no means scientific. We have attempted to summarize our data while simultaneously avoiding being personally judgmental either as to its accuracy or its completeness.

For purposes of our investigation of the real estate brokerage industry, we included primarily licensed real estate brokers who provide alternative service. We have, however, also included a small number of unlicensed operators of "consultant services." We have deemed operators whose commission rates are generally at least 2% below the prevalent commission rate in their local market to be alternatives. Likewise, operators who charge a flat fee at least 30 percent below the average dollar amount collected as a standard commission in their local market were also deemed "alternatives."¹

We have treated brokers who may occasionally negotiate a lower than "standard" commission to obtain a particular listing as "traditional" rather than as alternative brokers.

In focusing on the "familiar" variety of alternative firms, we nonetheless wish to emphasize that not all of these firms provide the same services. Some alternatives do charge less for precisely the same services provided by other, traditional firms. Other alternatives offer considerably fewer services, but feature price savings. Still others primarily seek to act as "buyer's" rather than as "seller's" brokers.

2. Organizational Profile

Alternative brokers were located throughout the United States and operate in a wide range of population areas. Table 1 below sets forth the demographic and statistical information discussed in this section for the alternatives surveyed. Although the exact number of alternatives is unknown, at the time the Alternative Broker Questionnaire was mailed, in the Fall of 1979, over 700 potential alternatives had been identified in 49 states. A total of 156 responded to the survey. Of these, 149 were alternative brokers (i.e., offered services requiring a state broker's or salesman's license) and seven were consultation services (i.e., offered services not requiring a license). Respondents represented 32 states and operated in cities and population areas ranging from under 100,000 to over 1,000,000.

¹ A few firms which we included in our sample as "alternatives" charged fees which in the aggregate were somewhat higher than our "2 percent less than the prevailing rate" standard. These were firms which had a variety of different marketing plans and fee schedules and which appeared to be conducting business on a basis which differed greatly from the norm in their market.

The questionnaires were completed primarily by the principals of the alternative brokerages. The majority of respondents were licensed brokers. These brokers had been licensed an average of eight years. A lesser number of the respondents were salespersons; they had been licensed approximately 5-1/2 years. Survey results indicated the majority were independent brokers, but a large minority were franchisees and the franchising of alternative brokerages appears to be a growing phenomenon throughout the country. Prior to the survey nine alternative franchisors and 200 alternative franchisees were identified. One franchisor had 81 franchises at that time, located mainly in the South, East, and Midwest. A second major franchisor had 45 franchises, located mainly in the West. Interviews with franchisors and franchisees, and examination of the survey data show that the vast majority of franchisees had opened their offices in the two years prior to 1979.

Survey results give an indication of the backgrounds of the responding alternative brokers. The typical alternative broker comes from a traditional real estate background. A majority of respondents had been employed by traditional brokerage firms for approximately 10 years before becoming alternatives. Additionally, most alternatives worked as licensed salesmen for a traditional brokerage before becoming alternatives: the average length of this prior experience was approximately four years.

The business formats chosen by the responding alternative brokers vary. Survey results indicate that about 60% of brokerages are corporations, 30% are sole proprietorships, and 10% are partnerships. The survey indicates that although a few alternative brokerages have been in business for over 15 years, the majority had opened their doors only a few years prior to our survey. That the majority of alternatives are recent entries into the real estate market is underscored by the fact that the mean opening year of business for the group surveyed in 1979 was 1977.

Eighty percent of the alternative brokerage firms had only one office location. The typical alternative office is staffed by five or fewer licensees; survey results indicate approximately 80% of the alternatives' offices were in that category. Alternatives do not rely on part-time help to a great degree; over 60% do not employ part-time licensees at all. Most alternative brokerages are not large operations. Over 20% of alternatives report their licensees and other employees specialize exclusively in the functions they perform (e.g., some licensees may specialize in obtaining listings; other licensees may specialize in selling office listings). Alternative brokers vary in the way they compensate employees: most pay a commission, a lesser number pay

TABLE 1

number of alternatives who started in business;	<u>1976 and before</u> 30	<u>1977 and after</u> 107		
number of alternatives who operate as;	<u>independent brokers</u> 83	<u>franchise brokers</u> 59		
number of alternatives on the MLS and not on the MLS	<u>non MLS</u> 101	<u>MLS</u> 36		
number of alternatives who report profit as	<u>marginal</u> 64	<u>average</u> 49	<u>very profitable</u> 11	
prior experience of alternatives given in average number of years	<u>traditional broker</u> 10.1	<u>alternative broker</u> 5.25		
	<u>traditional salesperson</u> 5.0	<u>alternative salesperson</u> 4.4		
number of alternatives organized as a	<u>corporation</u> 84	<u>partnership</u> 15	<u>proprietor</u> 55	
number of alternatives with one or more locations	<u>one</u> 111	<u>two</u> 19	<u>three</u> 5	<u>four</u> 4
number of alternatives who offer various compensation plans	<u>salary</u> 10	<u>commission</u> 89	<u>combination sal. & comm.</u> 22	<u>other</u> 1
number of alternatives in various population areas	<u>less than 100m</u> 24	<u>100-200m</u> 36	<u>250-500m</u> 21	
	<u>500-1,000m</u> 24	<u>more than 1,000m</u> 36		

a combination of salary and commission, and a small number pay straight salary.

Some alternative brokers belong to trade associations and other industry organizations. Somewhat less than half of the alternatives surveyed are members of the National Association of Realtors, local Realtor Boards, and multiple listing services. Only a small percentage of alternatives reported that they are members of the "alternative" trade association, the National Association of Real Estate Service Agencies (NARESA).

Why did alternative brokers decide to attempt the alternative approach? Interviews with alternatives throughout the country indicate that the main reason was because they saw a large untapped consumer demand for a real estate service through which consumers could sell and buy homes for less than the prevalent 6% or 7% commission rate. Alternatives felt they could meet this need and provide service below the typical price. They said that through an alternative approach they felt they could keep their own operating expenses down, and pass those savings on to the consumer.

3. Business Operations

a. Background

The number of alternative brokerage firms grew rapidly during the late 1970s, a period when real estate prices generally were spiralling upward. These firms may be conveniently divided into those which use the multiple listing services, and those which do not. A sizable majority of the firms we surveyed, 61%, fell into the category of non-MLS firms. About 15 percent of all of the firms in our survey offered both MLS service and a plan which involved marketing off of the MLS. These plans were offered to consumers as primary and secondary options (see Table 1).

There did not appear to be any major difference in profitability between independent operators and franchisees on the one hand or between those alternative firms which used MLS service and those which did not on the other. Firms whose profitability ranged from marginal to highly lucrative were found in somewhat equal proportions in all categories (see Table 3).

Those responding alternative brokers who operated apart from the MLS generally offered a service package which was similar to that provided by traditional brokers with one very major exception: responsibility for showing the home was transferred from the broker to the seller. A slight majority of MLS plans offered by alternative brokers, however, required the broker to show the home (see Table 4).

Listings which were marketed by alternatives without using MLS service outnumbered listings offered by them for sale through the MLS by a ratio of about three to two. Brokers operating through the MLS sell a higher percentage of their listings, and achieve a markedly higher incidence of sales involving a cooperating broker, than do alternatives who seek to sell without MLS service. The average sales price for homes achieved through both MLS and non-MLS marketing plans was the same. The figure was somewhat lower, however, than the average reported market price for the typical home in the alternatives' local market. Non-MLS plans recorded a slightly lower average time between listing and sale than did plans which used the MLS. Both figures, however, were below the average time-on-market reported for properties in their local markets (see Table 4).

We believe this reflects the fact that in some instances, sellers will take the lower cost of using an alternative broker into consideration and reduce the asking price for their homes by a proportionate amount. This appears to result in lower average asking prices for comparable homes, and that appears to lead to faster sales. A few MLS alternative brokers have sought to add even further to buyers' incentives by offering a direct rebate of a portion of their commission to buyers. Billing methods spotlight a sharp distinction between the MLS/non-MLS approaches. A majority of the non-MLS brokerage plans are for a flat fee, while the MLS plans normally employ a commission percentage rate. Alternative brokers who use non-MLS plans realized a lower average return per home they sold than did the alternatives who sold through their MLS (see Table 4).

TABLE 2

	<u>Independents</u>	<u>Franchisees</u>
Percentage of Brokers who offer:		
1) Only MLS plans	35%	7%
2) Only non-MLS plans	42%	84%
3) Both MLS and non-MLS plans	23%	9%
Number of Brokers who commenced business:		
1) 1976 and before	20	1
2) 1977 and after	54	57
Distribution of brokers by population areas:		
1) Under 100,000	10	14
2) 100,000 - 250,000	20	15
3) 250,000 - 500,000	11	9
4) 500,000 - 1,000,000	17	7
5) Over - 1,000,000	22	12

TABLE 3

<u>Type of Alternative Broker</u>	<u>Profitability Profile</u>		
	<u>Margin</u>	<u>Average</u>	<u>Very Profitable</u>
All Brokers	52%	39%	9%
Independent Brokers	54%	40%	6%
Franchise Brokers	49%	37%	14%
Non-MLS Brokers	55%	35%	10%
MLS Brokers	47%	50%	3%

TABLE 4

	<u>MLS PLANS</u>	<u>NON-MLS PLANS</u>	<u>MARKET AVERAGE</u>
Listings	3863	6039	-
Plans in which the seller shows home	47%	84%	-
Plans in which the broker shows home	53%	16%	-
Average price of resale home	58,000	58,000	62,000
Average time to sell listings	52 days	45 days	58 days
Percentage of listings sold	62.4%	54.2%	-
Cooperating sales as a percentage of listings	29.4%	2.5%	-
Percentage of brokers charging a flat fee commission	25%	75%	-
Percentage of brokers charging a percentage commission rate	75%	25%	-
Average commission in dollars	\$1490	932	-
Average commission as a percentage of selling price	4.2%	2.93%	-

b. Obtaining Listings

This undertaking consumed an average of 48% of the productive time of alternative brokers surveyed.

Media advertising garners about 45% of new listings, with newspaper ads being primary. Referrals and repeat customers account for an additional 29% of listings. Sale signs, personal solicitation, and other means make up the remainder.

Frequently, an exclusive listing agreement is used which is similar to the contract form employed by traditional brokers. The alternative broker contracts typically contain fewer contingencies than those of traditional brokers, and in many instances considerable latitude is built into the agreement to allow the seller to cancel if he/she so desires.

During 1978 alternative brokers had a mean average of 71 listings per firm. One large company had 680 listings. The time of listing to sale ranged from 11 to 180 days, with a 47 day average. Percentage of listings sold averaged 57%.

c. Broker Services

1. Basic Approaches

Alternative brokers provide a bundled service package; that is, the customer does not normally negotiate for one or more individual parts of the package, e.g., advertising. However there is no established broker policy to preclude such an eventuality.

Alternative brokers typically provide the following services:

- appraise home;
- list property on MLS (applies to MLS plans only);
- prepare property fact sheet;
- furnish seller with specific oral and written guidance regarding how to show a home;
- supply seller with for sale signs, flags, etc.;
- prepare and pay for media advertising of the seller's home (Note: some firms require this cost to be borne by the seller);
- refer prospective buyers to seller;

- conduct sales negotiations;
- process transaction through escrow, e.g., write contract, obtain financing; and
- consult with and advise seller during all proceedings.

A slight majority of all MLS plans offer a full-service package that is essentially the same as that available from traditional brokers. It encompasses all of the services previously enumerated. Additionally, the broker is responsible for showing the home.

(2) Appraisals

Accurate appraisals are a point of emphasis among brokers intent upon realistic pricing in order to move property. The objective is volume sales and in order to establish credibility, brokers must deliver timely sales at prices agreed upon by sellers.

(3) Selling

(a) Sources

Survey results disclosed that alternative brokers spend an average of 30% of their time in sales-related activities.

Approximately 31% of buyers were procured as a result of newspaper advertising. Sale signs accounted for 30%. An additional 3% were obtained through radio/TV efforts. Referrals, past customers, and other sources constituted the rest.

Alternative brokers selling through the MLS rely, of course, on MLS placement, buttressed by advertising, to move listings. Alternatives selling apart from the MLS, obviously, base their sales efforts entirely on advertising, sale signs, referrals, etc.

(b) Non-MLS Plans

In 84% of the non-MLS plans proffered by responding alternatives, the seller is totally responsible for showing the home to prospective buyers attracted by sale signs placed on the property or referred to the seller through the broker's office. The seller is furnished with specific guidance regarding how to show a home and is supplied with a property fact sheet, sale signs, and other aids. Some franchise brokers show slides of homes for sale to interested buyers prior to such buyers' inspection of the properties.

Brokers assumed the responsibility of showing the home in 16% of non-MLS plans.

(c) MLS Plans

On the other hand, 53% of all MLS plans offered by alternatives designated showing of the home as a broker function. Brokers reported in 47% of MLS plans that sellers were responsible for showing the home (same format used as for typical non-MLS plans).

(d) Negotiations

Most alternatives conduct sales negotiations in the same manner as traditional brokers. The buyer and the seller are generally kept apart. A buyer's offer is received and then transmitted to the seller. The counter-offer (if any) is then relayed back to the buyer. A few brokers confine their participation to bringing buyer and seller together face to face, and they merely facilitate the negotiations.

(4) Sales

(a) MLS Plans

Percentage of listings sold for alternative brokers selling through the MLS ranged from 23% to 94%, averaging 62%. Sales of their listings involving a cooperating (selling) broker ranged from a low of 2% to a high of 80%, with the average being 29.4%. Many traditional brokers will not co-broke on alternative broker listings and avoid showing these homes to their buyer clients. Consequently, such listings frequently receive less than adequate exposure on the MLS. The overall result is that alternatives have a lower ratio of cooperative sales than do traditionals.

Sales of other brokers' listings averaged 16% of total sales.

(b) Non-MLS Plans

Alternatives selling apart from the MLS do not normally co-broke in the regular sense of that term; they engage principally in marketing their own listings. Survey results disclosed that they sell 53% of their listings.

In those few instances where MLS brokers have client buyers interested in non-MLS broker listings, the MLS broker is usually paid a buyer referral fee. The amount varies, ranging from \$200 up to 3% of the sale price. This cost is normally borne by the seller. Cooperative sales averaged about 2.5%.

Sales of other brokers' listings averaged 2.5% of total sales (as previously defined under MLS Plans).

(5) Closing

Work involving closing activities consumes an average of 28% of the operational time expended by all alternative brokers. Included are writing contracts, arranging financing, processing transactions through escrow, etc.

(6) Buyers Representation

MLS alternative brokers who make available a buyer's package act in effect as a buyer's agent. The buyer may purchase any property on the MLS through the alternative who functions in the capacity of a selling broker to consummate the sale. The alternative rebates to the buyer an agreed upon percentage of the commission received from the traditional listing broker.

d. Broker Costs

(1) MLS Plans

The usual method of compensation for alternative brokers selling through the MLS is to charge a commission rate, that is, a percentage of the sales price of the home. The average rate obtained by the alternative brokers survey was about 4%, against an average reported market rate of 6.4%. Of all MLS plans reported in the survey, 75% used the commission percentage rate method. Only 25% employed a flat fee.

In those instances where traditional brokers sell listings of alternatives, the latter will often co-broke by means of a 50/50 split. For example, if the alternative broker has an exclusive listing agreement calling for a 4% commission he will split 50/50 with the traditional (selling) broker. In an area where the going rate is 6% or 7% this means that the selling broker would be receiving less than his normal cut (50% of 6% or 7% rate). As a consequence, many traditional brokers will co-broke with alternatives only when they need the business. Additionally, a retaliatory measure often employed by traditional brokers is to refuse a customary 50/50 split when traditional broker listings are sold by alternatives. In such case the alternative (selling) broker will be given 50% of his customary commission rate, e.g., 50% of a 4% rate rather than 50% of 6%.

Some alternative firms, in order to induce traditional brokers to co-broke on their listings, will give them the same percentage amount they would normally receive if they were co-broking with another traditional broker. For example, an alternative charging a 4% commission rate in a 6% market area would give the traditional selling broker his usual 3% and retain 1% for himself.

Alternative brokers offering a buyer's package (acting as a selling broker on a traditional broker listing) will sometimes rebate to the buyer the difference between the 3% commission

received as the selling broker and the fee agreed to by the buyer. Usually the alternative broker will keep 1% and rebate 2%. If a flat fee is charged, e.g., \$995, the difference between 3% and \$995 will be refunded. Another variation of payment in the buyer's package is to have the seller agree to reduce his price. In either case, the seller normally agrees in writing. The net proceeds to the seller are the same in both situations and the traditional listing broker receives his full 3% commission.

(2) Non-MLS Plans

It was determined from the survey that 75% of alternative brokers selling under this format charge a flat fee, irrespective of the sales price of the home. A reduced commission rate is used by 25%. The flat fee schedule varies from broker to broker in different sections of the country. Companies using the fee system averaged \$932 per sale against an average reported market commission of \$3,950. Some firms use a sliding scale. For example, in 1979 one midwestern broker (five franchise offices) obtained a fee of \$895 for all homes sold for less than \$20,000. The fee was advanced by \$200 for each additional \$10,000 increase in sales price over \$20,000. Should houses be sold for amounts in excess of \$120,000 a commission rate of 2-1/2% of the sales price would be assessed.

An advance fee is assessed by 50% of these brokers, which constitutes full payment. An initial advance fee is collected by some firms, followed by the balance subsequent to the sale of the home and close of escrow. Survey information indicated that alternatives have experienced difficulties because of the extremely detailed advance fee accounting requirements mandated by law in many states. The remaining flat fee brokers are paid the entire commission after sale proceedings have been concluded.

e. Consultation Services

(1) Operations

The survey disclosed that a number of alternative consulting firms have specialized in providing various services to assist the homeowner in accomplishing the sale of his/her home without retaining a real estate broker. One such company, a franchisor, has established 11 franchise consultant firms in Illinois and Indiana.

These alternative companies confine their activities strictly to consulting. Some are operated by licensed brokers/salespersons. Others are run solely by non-licensees. The firms do not undertake any general responsibility to sell a client's home (as in a broker's exclusive listing agreement). Their mission is restricted to assisting the owner in selling his/her own home by providing specific services.

(2) Services

The services are typically sold as a package deal involving a total fee, normally paid in advance, ranging from \$375 to

\$785. In some instances the fee is paid subsequent to the sale of the home, or a small advance fee is required followed by payment of the remainder after the sale has been concluded. A few firms market their services on an individual basis at a specific charge per option selected. The consumer client is not obligated to purchase a full package. Companies operating exclusively as registry firms usually provide very limited services, concentrating primarily on "registering" (advertising) the seller's home in a sale-by-owner publication.

Consultation services typically:

- provide a market analysis of the property;
- arrange for advertising of home in sale-by-owner publication;
- provide guidelines for showing the home;
- furnish sale-by-owner display signs, property fact sheets, photo brochures of home, etc.;
- provide appointment and answering service;
- provide instructions on qualifying a buyer;
- assist in opening an escrow or obtaining financing; and
- provide assistance through the close of escrow.

4. Problems

Most alternative brokers experience difficulties in carrying out their operations. This conclusion is supported by in-depth interviews, materials submitted by alternatives, and the alternative broker survey results. This section will discuss these problems of alternative brokers.

A note concerning the survey data is in order here. The survey provided a list of potential problems which alternatives might experience. The list was constructed from interviews with alternative brokers conducted prior to the survey in which they outlined problems they had experienced. Alternative respondents to the survey were asked to indicate whether each problem was experienced by their firm. Alternatives indicated whether each problem was a frequent problem, an occasional problem, or was never a problem.

Further, alternatives were asked to respond twice to each problem: once concerning the firm's first year of operation and once concerning the firm's present year of operation. The survey was attempting, among other things, to determine whether problems diminished or became more severe over time. Examination of survey results indicates a slight tendency for problems, on average, to diminish over time. Many alternatives had been in business a year or less at the time of the survey, and thus responded only to the

first year problems. Additionally, previous interviews indicated that many alternatives had gone out of business over the previous several years for various reasons, several because of the problems they experienced.² Many brokers who may have experienced increasing problems over time were not included in the survey data because they were not identified or could not be reached for the survey. Therefore, while reported problems appear from our survey results to have decreased over the life of the alternative firms, caution requires us to note this could be because of bias in sampling and not because of any actual decrease in problems for alternative brokers.

Accordingly, unless otherwise stated, the survey results set forth in this section reflect the frequency of problems experienced by alternatives in the first year of their operation and reported to us. In most cases tables provide the absolute number of alternatives who responded to the question (total), and how many chose each of the three responses: frequent, occasional, and never. The tables also provide the percentages of alternatives selecting each response.

a. Angry Criticism and Personal Threats; Vandalism

When a new alternative broker begins operation, the broker, his employees, and his family are often the targets of angry criticism and personal threats from area brokers and salespersons. The criticism and threats are made both in person and by phone. In some calls the caller identifies himself; in others, the caller remains anonymous.

Some of the angry criticism is "harmless." For example, area licensees might challenge the legality of the operation, question the broker's ability to provide the services promised for the fees charged, or merely express feelings that they do not care for the broker or his operation. Some make it clear that they intend to hinder the alternative's business: some inform the alternative that his listings will be boycotted; others say they will work to put him out of business.

The anonymous harassment is often threatening. An alternative in Los Angeles, California, was told by an anonymous caller she would be "blown away" if she did not close her business.³ An alternative in Jacksonville, Florida, received numerous anonymous telephone calls at work and at home. Many calls were placed after midnight to her residence. One caller informed her: "We saw you leave alone last night." This woman was also followed by different people both while in her automobile and while on

² See, e.g., Edward Lichtman, Real Estate Broker, Hollywood, FL, Correspondence and Exhibits received November 16, 1979.

³ Report of Interview with Gina Williams, Real Estate Broker, Los Angeles, CA (January 31, 1979).

foot. Eventually she contacted the FBI.⁴

TABLE 5

	Angry criticism and personal threats		Vandalism	
	total = 120		total = 115	
	<u>N</u>	<u>%</u>	<u>N</u>	<u>%</u>
Frequent	50	41.7	21	18.3
Occasional	54	45	70	60.9
Never	16	13.3	24	20.9

Examination of Table 5 above indicates that over 85% of the alternative brokers surveyed have experienced angry criticism or personal threats. Over 40% consider the problem frequent; 45% consider the problem occasional.

Table 5 also indicates that vandalism is a problem of the alternatives. All but 20% of the alternatives surveyed experienced vandalism; over 18% considered it a frequent problem. Interviews indicate that stealing and destruction of "for sale" signs and marring of a seller's property are forms of vandalism which often beset alternatives.⁵ The seller of one alternative's listings was called one morning by an anonymous caller and asked to look at the "for sale" sign on her property. The sign had been smashed. She was told that if she continued to list her home with the alternative she would end up looking like the sign. As a result of this incident the seller, a 65-year-old woman, dropped the listing with the alternative.

There are other forms of vandalism in addition to destruction of signs. A Studio City, California alternative had a nameplate stolen from her residence.⁷ A Tacoma, Washington alternative's office was vandalized when someone entered the office at night by breaking a window. The office was spread with paint and a bomb was left behind. The bomb exploded and resulted in major

⁴ Patricia Sokolsky, Real Estate Consultant, Jacksonville FL, Official Transcript of Proceedings before FTC (June 20, 1979).

⁵ See, e.g., Report of Interview with John Morais, Real Estate Broker, Sacramento, CA (February 16, 1979).

⁶ Gina Williams, supra note 3.

⁷ Report of Interview with Donna Gould, Real Estate Salesperson, Studio City, CA (January 19, 1979).

property damage.⁸

b. Disparagement and Pirating Listings

Table 6

	Disparagement Total = 121		Lost listings because of disparagement Total = 116		Pirating Total = 115	
	<u>N</u>	<u>%</u>	<u>N</u>	<u>%</u>	<u>N</u>	<u>%</u>
Frequent	89	73.6	49	42.2	46	40
Occasional	24	19.8	47	40.5	47	40.9
Never	8	6.6	20	17.2	22	19.1

Table 6 demonstrates that disparagement is a severe problem to the alternatives surveyed. Over 73% indicated it is a frequent problem.

When a home owner decides to sell his home he often contacts several brokers before placing the listing; additionally, brokers go from door to door and use the phone to "cold canvass" listings. In short, there is a great deal of verbal contact between brokers and the general public. Many alternatives have indicated they believe traditional use these opportunities to disparage alternatives. However, such general disparagement might not come to the alternatives' attention.

Alternatives are keenly aware that traditional brokers disparage alternatives and their services to clients. For example, a Livonia, Michigan alternative initiated a reduced commission selling program in 1973. His clients were told by traditional brokers that the homes would not sell because the alternative was not a member of the MLS. The alternative then joined several MLS's, paying over \$2,500 to join one in particular. The alternative continued to offer his services to sellers at a reduced commission, but fashioned the transaction such that a traditional broker acting as a cooperating broker (selling broker) would receive the same commission he would receive on a "traditional" co-op sale, i.e., 3%. The broker did this, "to eliminate bad mouthing." But the bad mouthing continued. The traditional brokers continued to advise the alternative's sellers that he was not an MLS member.

Further, they advised sellers that no other brokers showed the alternative's properties. To combat this, the alternative showed his clients copies of executed cooperative purchases involving traditional brokers. Even this did not deter the traditional brokers; they merely informed the clients that such cooperative

⁸ Report of Interview with John P. Nagle, Real Estate Broker, Tacoma, WA (March 28, 1979).

purchases were the exception, and that in general the alternative was being "black balled." The alternative summarizes his present plight: his clients are continually advised by traditional brokers that they will receive less service and fewer showings than would be the case with a traditional broker.⁹

A Hollywood, Florida alternative who marketed his homes on the MLS had a particularly damaging experience. A letter bearing the local Board of Realtors letterhead was sent to 17 clients who had listed their homes with the alternative. The letter was from "United Realtors" and carried the following message:

As a homeowner who has listed their home for sale with _____, please be advised that numerous Realtors, associated with the Multiple Listing System, have chosen not to show or sell your home, due to the unethical conduct of _____ towards their fellow Realtors. [Emphasis in original]

When confronted by the alternative, the local Board denied knowledge the letter or its author. Although the letter was not sent or sanctioned by the Board, it had its effect on the alternative's clients

In addition to demonstrating that disparagement itself is a problem to alternatives, Table 6 shows that alternatives have lost actual listings because of it. Over 80% report they have lost listings through disparagement; over 42% indicate this is a frequent problem. Table 6 further shows that pirating is experienced by most alternatives; the survey results for pirating are almost identical to those concerning the problem of lost listings through disparagement

Disparagement of alternatives and pirating of listings go hand in hand. Pirating is a successful attempt by one broker to steal the client of another broker, even though the latter has executed an exclusive listing agreement with the seller. Alternatives have experienced such pirating of their listings, notwithstanding that the NAR Code of Ethics and state agency laws specifically preclude brokers from soliciting sellers who are under exclusive listing agreements.

Often a pirating traditional broker will approach the alternative client, disparage the alternative and his business, and attempt to secure the listing for himself. Clients listing with alternative thus hear a great deal of disparagement from several traditional brokers, and because they hear the same story so often they accept it. Eventually, they drop their listing with the alternative and place it with one of the traditionals.

⁹ Terry R. Abraham, Real Estate Broker, Livonia MI, Correspondence and Exhibits received June 26, 1979.

¹⁰ See Edward Lichtman Correspondence and Exhibits, supra note 2.

A Rockville, Maryland alternative opened two offices in the summer of 1979 and during the first five months generated 45 listings. All clients were signed to exclusive agreements and "for sale" signs on the properties made clear the homes were under the exclusive agency of the alternative. But traditionals did not honor these agreements. Numerous attempts were made by traditionals to pirate the listings. One particular client reported that 14 different agents contacted him and encouraged him to drop his listing with the alternative and place it with them. The alternative reports he lost 15 of the 45 listings he obtained during his first five months. He further notes it is difficult to attribute all these withdrawals to disparagement and pirating by traditionals. He states, however:

We rarely find out the reasons for withdrawing of listings. It can be safely stated that such withdrawals, in most cases, are based on the fact that conventional brokers refuse to show properties listed by us. In turn, agents go to sellers and make statements such as: 'These people take your money up front and once they have it they'll run; they've received their fees and are no longer interested in the sale of the property involved; and we can sell the house faster than they can because we belong to the MLS.' These are some of the tactics which have been reported to us, and we are sure that there are other tactics used as well.¹¹

Finally, the experience of a Memphis, Tennessee alternative demonstrates that pirating of exclusive listings is a severe problem. This alternative, a former traditional broker and a former president of the Memphis Board, after becoming aware of his listings being pirated, attempted to stop it. He contacted numerous traditionals and wrote them letters; he requested they honor his exclusive agreements with clients and his marketing methods. However, the violations continued. He has documented 19 specific violations of his listing agreements, with dates, names of agents involved, and the addresses of the properties. The pirating continues now. He maintains that he is being hindered from freely operating, and the general public is being harassed.¹²

c. Refusals By Traditional Brokers To Show Alternatives'
Listings; Alteration of Terms Cooperation; Discriminatory
Commission Splits

To be successful, most real restate brokers depend upon active cooperation from fellow brokers in the community. For instance,

¹¹ Gerd M. Strauss, Real Estate Broker, Rockville MD, Correspondence and Exhibits received December 3, 1979.

¹² Carlin Stuart, Real Estate Broker, Memphis TN, Questionnaire and Exhibits received December 3, 1979.

the typical MLS broker places his properties on the MLS and depends upon other brokers to show them. Lacking such cooperation, the sales volume of his own listings would be greatly diminished. Likewise, the typical broker directs potential buyers to homes under exclusive contract with other brokers and depends upon their cooperation to make sales. Lacking this cooperation, his sales as a "selling broker" are diminished. In short, lack of cooperation can seriously damage, if not completely destroy, a broker. The category of problems to be discussed in this section relates to the cooperation, or lack of it, which alternatives receive from other brokers in their communities.

TABLE 7

	Refusal of Brokers to show alternatives' listings Total = 103		Alteration of terms of cooperation Total = 108		Discriminatory splits Total = 97	
	<u>N</u>	<u>%</u>	<u>N</u>	<u>%</u>	<u>N</u>	<u>%</u>
Frequent	55	53.4	21	19.4	24	24.7
Occasional	32	31.3	34	31.5	19	19.6
Never	16	15.5	53	49.1	54	55.7

Table 7 shows that over 80% of the alternatives surveyed have encountered the problem of other brokers refusing to show their listings. Over 50% indicate this is a frequent problem. A Los Angeles, California alternative is aware of other brokers crossing off her properties from their MLS listings. This way they make certain that "their" potential buyers are not shown the properties. Additionally, this alternative has been informed by numerous brokers that they will not show any of her properties because of the reduced commission they would receive vis-a-vis a "traditional" co-op sale. She has also had inquiries on particular listings in which brokers have indicated they might have an interested buyer. When they learned of the commission involved they informed her they would not write an offer on the home because of the lower commission.¹³

A Studio City, California alternative has had similar experience. One particular example involved a "distress" sale wherein she was the listing broker. The seller had bought a new home, was anxious to sell, and had established an asking price the alternative broker insists was below market value by any standard. She feels a serious buyer looking for such a home would have snapped it up immediately if only shown the property. But other brokers refused to show the home. She was told that several brokers that because of the reduced commission they would not show the home, even if they thought their buyers would be interested. She inquired of

¹³ Gina Williams, supra note 3.

these brokers whether they would put their commission ahead of their buyers. She was told that they would.¹⁴

Sometimes a potential buyer becomes aware of an alternative's listing through an advertisement or a sign on the property. But, if the buyer is "working" with a traditional broker he may be steered away from the home. For instance, brokers in El Paso, Texas have told inquiring buyers that homes listed on the MLS by an alternative were sold, even though they had not been sold. This problem became so severe in one case that a listing client wanted to cancel his contract with the alternative. The client's reason was that he had called five or six local real estate brokerages, posing as an interested buyer, and had been told the house was sold.¹⁵

Another problem alternatives experience is alteration of their terms of cooperation. Table 7 indicates over 50% of the alternatives surveyed have experienced it. The problem occurs when an alternative is the listing broker, and particularly besets alternatives who sell homes on the MLS. For example, the alternative who takes a listing agreement calling for a 4% commission, instead of the prevailing 6%, will often offer the prevailing split e.g., 50/50, to any MLS broker who sells the property. Thus, in such a cooperative sale the selling broker would receive a 2% commission instead of the usual 3% commission. A Canyon Country, California alternative faces the problem that traditional brokers routinely disregard the terms of his MLS listings, including the split offered. One traditional broker made a presentation directly to one of the alternative's sellers. He told the seller that if a sale were to be made he must receive a 3% commission, and he did not care what the alternative got. The alternative labels this unethical, and points out that the selling broker is actually his sub-agent and has no right to do this.¹⁶

The third problem reported in Table 7, discriminatory splits, occurs when the alternative acts as a selling broker. Over 40% of all surveyed experienced the problem. It should be noted, however, that of the alternatives surveyed who operate on the MLS, over 70% experience the problem. Over 40% of this sub-group indicate it a frequent problem; almost 30% say it is an occasional problem.¹⁷

The problem is typified by an Erlanger, Kentucky alternative who belongs to the MLS. She does not consider fair the fact that

14 Donna Gould, supra note 7.

15 Report of Interview with Bob Park, Real Estate Broker, El Paso, TX (September 21, 1978).

16 Report of Interview with Darby Dunckel, Real Estate Broker, Canyon Country, CA (February 7, 1979).

17 See entire survey results, Alternative Brokers Survey.

listing brokers split the commission with her firm on a different basis than they do with traditional brokers. The standard practice in her MLS is for the commission (i.e., 6%) to be split 50/50 between the listing broker and the selling broker. The MLS listings reflect that the listing broker offers any cooperating MLS selling member half the total commission (i.e., 3%) if he or she produces a buyer. The alternative notes, however, that when she is the selling broker the commission splits published by the MLS do not apply. She has received at least 19 letters from MLS brokers stating they had devised a special commission split policy that would apply in the event she was the selling broker. The majority of these brokers stated her firm would receive \$600 in such transactions. This amount is vastly less than they would pay any other MLS member who likewise procured a buyer. Several brokers stated her share would be \$200; one said \$150. The alternative says she is aware of why she was singled out for this treatment; it is directly related to the fact that she charges customers less for brokerage services. Because she takes her own listings at a flat fee of \$1,200 and offers a cooperating broker the prevailing 50/50 commission split, a cooperating broker would make less selling her listing (i.e., \$600) than he or she would on another listing. The alternative believes the punitive splits are retaliation against her for reducing her fees and thereby providing cooperative brokers with less than what prevails.¹⁸

d. Unfair Grievance or Legal Action; Board of Realtors Refuses to Enforce Code of Ethics

TABLE 8

	Unfair grievance or legal action (actual or threatened) Total = 114		Board of Realtors refuses to enforce code of ethics Total = 97	
	<u>N</u>	<u>%</u>	<u>N</u>	<u>%</u>
Frequent	11	9.6	18	18.6
Occasional	37	32.5	17	17.5
Never	66	57.9	62	63.9

An alternative in El Paso, Texas reports that over half his time and efforts are spent fighting various problems caused by traditional brokers. He includes in such problems, "... answering unfounded complaints filed by other Realtors with the professional standards committee and Texas Real Estate Commission."¹⁹ Table 8

¹⁸ Joan Dixon, Real Estate Broker, Erlanger, KY, Correspondence and Exhibits received June 21, 1979.

¹⁹ Bob Park, Real Estate Broker, Questionnaire and Exhibits received November 23, 1979.

shows that over 40% of the alternatives surveyed have experienced unfair grievances or legal actions, either actual or threatened. This problem is much more harsh at least for their first year of operation for alternatives who operate on the MLS.²⁰

Generally, the problem arises when a traditional broker uses the local Board or a state agency apparatus to lodge a complaint against an alternative. But sometimes the Board, itself, initiates or threatens such an action. For instance, an alternative in Chicago Heights, Illinois placed an advertisement in a local paper. The advertisement indicated that a seller utilizing the alternative's services would pay a 5% commission for brokerage services. It contrasted this with an example whereby a seller would pay a 7% commission (the prevailing fee); the ad made the point that a seller could save \$1,000 on a \$50,000 home by listing with the alternative.

As a result of the advertisement the alternative broker received a letter from the executive vice president of the local Board, who was also an executive of the MLS. This letter stated:

[Y]our advertising. . . intimates that you are fixing a price. It also suggests that others have fixed a price.

In order that we can avoid any kind of legal ramifications, I hope you will cease and desist the type of advertising done by your company.

In a phone call immediately following this letter the executive informed the alternative that the "heat" was on him (the Board executive) from Board members because the advertisement was embarrassing them. He stated the matter was being discussed with Board executive officers on a state level, and they would be meeting soon.²¹

The first problem discussed in this section concerns the situation where a broker, Board, or MLS utilizes or threatens to utilize the apparatus of a Board, MLS, or state agency to investigate or bring action against an alternative. The second problem, also set forth in Table 8, concerns the situation where an alternative turns to a local Board for help, alleging Board members are violating the Board's own code of ethics, while "competing" with the alternative. The problem occurs when the Board is unresponsive. Over 35% of those surveyed have experienced this problem.

An alternative in Memphis, Tennessee exemplifies this second problem. Shortly after adopting a flat fee approach the alternative,

²⁰ See Staff Report, Table IV.E.1.

²¹ William J. Motluck, Real Estate Broker, Chicago Heights, IL, Correspondence and Exhibits received December 4, 1979.

a former traditional broker and former president of the Board, experienced personal harassment from Board members. Additionally, his listings were pirated by other Board members. The alternative states "word was put out" that his listing agreements were not exclusive, but were fair game for all brokers. He wrote letters to the Board and asked them to put a stop to the pirating. He approached the executive director of the Board and asked that all members be notified that his operation was entirely legitimate and his listings were exclusive (which was the case). After recounting his harassment and pirating experiences to the officer he said he was asked, "what do you expect?" Two years later the same problem still existed. But because the executive personnel of the Board had turned over, the alternative again attempted to approach the Board for relief. Again the Board failed to address the problem.²²

e. Refusals By State Agencies To Enforce Law; Discriminatory Law Enforcement By State

TABLE 9

	State does not enforce law		Discriminatory law enforcement	
	<u>N</u>	<u>%</u>	<u>N</u>	<u>%</u>
Frequent	20	18.3	12	10.6
Occasional	8	7.3	9	8
Never	81	74.3	92	81.4

As Table 9 indicates, some of the alternative brokers surveyed have had difficulties with state agencies. Over 25% have indicated a state agency has failed to protect them. Remarks made on questionnaires by two Arizona brokers allude to this problem. Both are franchisees of the same franchisor; one operates in Phoenix, the other in Tucson. Both stated they have been subject to severe traditional broker harassment and pirating, and both asked the state for relief from the problem. The Phoenix alternative states, "I have written volumes to the Real Estate Department and get no satisfaction."²³ The Tucson alternative writes:

Our clients are hammered with outright solicitation and lies by the thousands by conventional real estate people, until they finally give in and withdraw from our service. Of our 705 listings last year, 199 withdrew

²² Report of Interview with Carlin Stuart, Real Estate Broker, Memphis, TN (March 31, 1979). See also Stuart Questionnaire and Exhibits.

²³ Patricia Van, Real Estate Broker, Phoenix, AZ, Questionnaire received November 11, 1979.

in 90 days or less. When it's 5,000 of them and 15 of us it gets a little rough. It's also very difficult to get our clients to come forward because they really don't care about us, they just want the house sold. The state says that they are here to protect the public, not to protect one company from another, and so will do nothing to intervene.²⁴

Whereas the above two Arizona alternatives complain the state has done nothing to protect them or alleviate their problems, other alternatives report the state has actually hindered their operations. Table 9 shows that over 10% of those surveyed say they have frequently experienced such discriminatory law enforcement. A Jacksonville, Florida alternative broker related her experiences with the Real Estate Commission in a hearing taken as part of this investigation.

She established a real estate service directed at home owners who wanted to sell their own homes without the assistance of a broker. For a flat fee of under \$400, her company would photograph the client's home and design advertising copy; her company and the client would determine when and where the advertisement would run. Additionally, to help the client market the home various materials would be provided, including a brochure and "sale by owner" and "open house" signs. The other aspect of her program was a telephone answering service. Callers interested in an advertised property would be given information concerning that property. The caller's name and phone number would be logged; this information would be given only to the relevant client.

Thus, she established an advertising agency and an answering service. She did not execute listing agreements with clients, only service agreements. She was not a licensed broker and saw no reason why she would need a license to conduct her particular business. But, she was contacted by phone and subsequently visited by the local representative of the Real Estate Commission before she even signed her first client to a service agreement.

She states that because his attitude on the phone was "one of intimidation," she instructed an employee to take notes during the subsequent meeting. Speaking from these notes, she testified about meeting with the representative. Basically, he told her she could not perform any of the intended services without a real estate license, so she would have to close her business. The representative suggested he had a few broker friends who would be willing to help her get out of her lease, so she would not be faced with that heavy expense.

²⁴ Bruce M. Hamilton, Real Estate Broker, Tucson, AZ, Questionnaire received November 19, 1979.

She informed the representative that she felt she could provide her services without a license and did not intend to close.

Additionally, her notes indicate the following comments were made by the representative of the Real Estate Commission:

The first big flak that you will get is from the Consumer Affairs Office. You're going to have all those home sellers saying that you took their check for \$360 and did him no good."

"You still won't be able to do any business because what kind of fool would give you money in advance before they sold their home? There's no way you're going to do it. I don't see how in the world you ever thought you could start something like this.

He finally informed her that if she did commence business he would cut out her advertisements and send them to the Real Estate Commission's General Counsel and get a reading. Further, she would appear before a hearing examiner, and the Department of Administration would come up with a decision as to how soon they would close her down.

Shortly after running her first advertisement she received a subpoena. She was ordered to give a deposition just two days late and was required to produce all her records. Her deposition took over an hour and was taped. Approximately a month and a half later she was served with a summons and a complaint for injunction. The complaint alleged she was acting as a broker without a license.

Her attorney then filed the necessary pleadings to request charges be dismissed. Based on materials submitted by her attorney, a State Judge dismissed the Real Estate Commission's complaint. The Real Estate Commission then filed an amended complaint. As a result, the alternative broker was on trial four months later. This trial resulted in a favorable decision for her but the Real Estate Commission appealed this decision to the Appellate Court. The alternative broker believes there were no grounds for this appeal.

Four months later the alternative was in Appellate Court and received a unanimous ruling in her favor. Again, immediately following this decision the Real Estate Commission appealed, this time to the State Supreme Court. Five more months went by before the Supreme Court, too, voted unanimously in her favor. Finally, the complaint was dismissed.

Thus, she had won the battle with the Real Estate Commission. But the victory was not without cost. She had spent over a year and a half in the fight and had expended vast amounts of time and money in the effort. Throughout, the publicity nearly destroyed her business. Additionally, traditional brokers used the incident to disparage her company to the general public. Traditionals made such statements as: "She's going to jail," "She is illegal," and

"The State of Florida is suing her, go down to the courthouse and look at the records."²⁵

f. Advertising Problems With Newspapers And State Agencies

Another problem which confronts alternative brokers concerns advertising. Some newspapers will not allow alternatives to advertise in their real estate or classified sections; some require modifications before they will accept an advertisement. State agencies also review alternatives' advertisements and order them modified or withdrawn. The alternative broker survey asked each respondent to indicate whether he or she had experienced advertising problems with either the media or the state. The results are set forth in Table 10.

TABLE 10

	<u>N</u>	<u>%</u>		<u>N</u>	<u>%</u>
Has media refused your ads or required them modified			Has a state agency denied approval of your ads or required them modified		
Total = 138			Total = 129		
Yes	47	34		26	20
No	91	66		103	80

Nearly 35% of alternatives indicated they had experienced either a refusal by the media to run their advertisements or were required by a publication to modify advertisements before they were published. An alternative franchisor has reported some of the problems his franchisees have encountered. For example, the Charlotte Observer would not allow his North Carolina franchisee to say "save commission" or make comparisons between his fees and the going commission rate in advertisements placed in the paper. The alternative reports that the advertisements which eventually ran were "so soft" they were useless.

The franchisor's Memphis, Tennessee franchisee also had a problem with a local paper. He ran an advertisement which was extremely effective and resulted in a great public response. The advertisement set forth the alternative's flat fee and contrasted it with the prevailing commission charged by most brokers. After this advertisement ran just once, however, the paper refused to publish it again. Eventually the paper agreed to accept the advertisement, but only if it were modified. The paper's advertising manager advised the alternative that the paper did not want to create undue aggravation among local brokers; thus, "negative comparisons" would not be allowed. The alternative's advertisement,

²⁵ See Sokolsky Transcript, supra note 4.

therefore, could not say "save commission," but had to say "save thousands." The word "commissioned broker" could not be used, but the alternative could say "regular real estate company." The alternative could not make comparisons between his fees and a 6% or 7% commission.

The same franchisor who reports the above two incidents states that many of his other franchisees have experienced problems with various newspapers, including: the Milwaukee Journal (Wisconsin); News Sentinel and Journal Gazette (Fort Wayne, Indiana); Philadelphia Enquirer (Pennsylvania); and the Miami Herald (Florida).²⁶

A Marlton, New Jersey alternative broker provides an example of outright refusal by the media to accept advertisements. The alternative, who charges a \$950 flat fee to sell homes, originally was permitted to advertise his services in Homes magazine, published by R.L. White Co. After two advertisements, however, the alternative received a letter from the publisher which stated:

Homes magazine is produced for the exclusive use of local Realtors and Agents. Your ad . . . does not qualify.

Our publishing policy is not to accept advertising that may result in loss of business. (Your) advertising is controversial and we are threatened by loss of revenue because of your advertising. I am sure you can find other media to advertise (your) properties.

After receiving the above letter the alternative phoned the magazine's publisher. The publisher allegedly advised the alternative that the reason for his refusal to print the advertisement was that he had received a letter from a traditional broker threatening to "withdraw his advertising and encourage others to do the same" if the alternative's advertisements continued to appear in the magazine.²⁷

Table 10 indicates that 20% of the alternative brokers surveyed experienced advertising problems with a state agency. A Los Angeles, California alternative exemplifies this problem. In California any broker who advertises or charges a seller an advance fee, (i.e., receives a fee "up front" when the listing agreement is signed) is subject to regulation by the Department of Real Estate. As required, the alternative submitted her proposed

26 See Hal Firestone, Real Estate Broker and Franchisor, Atlanta, GA, Correspondence and Exhibits received December 4, 1979.

27 Dale Strack, Real Estate Broker, Marlton, NJ, Correspondence and Exhibits received November 20, 1979.

advertising to the DRE before publishing it. After reviewing the copy, a DRE representative informed the alternative she could not run it without major modifications. The alternative asked the representative what would happen if she ran the advertisement anyway. She states she was informed she would be "hit with a cease and desist order." The alternative decided not to fight and made the required alterations.

The alternative states that much of the punch was edited out of her advertisement. Her original copy has compared her \$995 selling fee with "the standard 6% commission." She was required to remove this language because "all brokers do not charge 6%." Further, she alleges she was not allowed to make the comparison between her "real estate commission of \$995 vs. \$4,000, \$5,000 or more." This was changed to "save thousands of dollars in real estate commissions." She claims she was required to change a statement which contrasted his \$995 selling fee with the fee charge by other brokers: "That's thousands of dollars less than conventional real estate brokers charge (6% of selling price is the usual commission)." She was required to change this to: "That's thousands of dollars less than real estate brokers who charge 6% commission." 28

g. Discussion

Before leaving the subject of the problems of alternative brokers, two final points will be made. First, the problems set forth in the preceding sections do not exhaust the problems alleged by alternatives. Rather, they are some of the problems which many alternatives have indicated are the most troubling. Some of the problems not discussed include the following.

- 1) Laws in some states hinder alternative forms of brokerage. For example, some states do not allow alternatives to charge advance fees; some states do not allow "buyer's representative" programs.
- 2) Alternatives have been denied membership in MLS's. Additionally MLS's have changed their rules after alternatives have joined, and the changed rules have had the effect of hindering the operations of the alternatives.
- 3) The general public holds to the mistaken belief that real estate commissions are either fixed by law or are otherwise non-negotiable. Alternative brokers have great

28 See Gina Williams, supra note 3.

difficulty combatting this belief; many traditional brokers do nothing that dispels it. Survey results indicate that over 90% of the alternatives surveyed have encountered the problem.

The second point concerns the cause of the problems alternatives experience. A single cause is said by the alternative brokers to be behind most problems: other brokers who fear competition. The consensus of alternatives as expressed in in-depth interviews, materials submitted, and comments made on the survey is that many traditional brokers cause problems for alternatives because they fear their own real estate profits will be reduced if alternatives succeed, and especially if the "movement" grows. Thus, some traditional brokers engage in such practices as personal criticism, harassment, vandalism, disparagement, pirating, refusals to show alternatives' listings, alteration of terms of cooperation, and punitive splits.

The majority of the problems surveyed alternatives have with Boards are, likewise, attributed to individual traditional brokers and groups of brokers utilizing the Board's mechanisms to stifle the competition of alternatives. Alternatives allege they are subjected to overt Board hostility, frivolous grievance proceedings, lack of responsiveness to claims that Board members are violating the Board's own ethics, and so on.

Also, many of the problems which interviewed alternatives experience with state agencies are said to be brought about by traditional brokers, working as individuals or groups, to stifle the competition of alternatives. Alternatives charge that state agencies are sometimes sympathetic to the traditionals' desire to hinder their alternative operations, and in some cases even put them out of business. This is often said to be the case because of the very composition of some state real estate regulatory agencies; many are comprised of a majority of present or past traditional brokers with close ties to practicing traditionals. Thus, alternatives complain that they are pursued by state agencies, and that state agencies are unresponsive to the complaints of alternative brokers.

Finally, the problems alternative brokers allege they have with the advertising media are attributed to traditional brokers. Traditional brokers are said to preclude alternatives from advertising, or cause alternatives to "soften" advertisements by applying pressure on the media. For example, traditional brokers may threaten to withdraw their accounts from newspaper if alternatives are permitted to advertise.

5. Trade Associations And Referrals Systems²⁹

a. National, State, And Local Associations³⁰

About 40% of the alternative brokers surveyed were members of the National Association of Realtors and belonged to local Boards of Realtors. Survey results further reflected that 43% claimed membership in local multiple listing services.

Alternatives who sell through a Board-affiliated MLS are, of course, members of that organization and usually also belong to a local board of Realtors, the state Realtor Association, and the National Association of Realtors. In many cases, these alternatives were originally in business as traditional brokers and their membership in a local board dates back to that period of time. Frequently, since becoming alternatives, they perceive that their participation in Board activities has been curtailed because of the perceived hostility of fellow Realtors. Their ability to fully operate within the MLS structure also may have been significantly impaired to the extent that traditional brokers have refused to co-broke.

Those alternative brokers who sell through means other than the MLS do not belong to that organization. However, some brokers in this category are members of a local Board, as well as the state and national Associations. Most have held such membership dating back to their tenure as traditional brokers. Board activity on their part has often been minimal because of antipathy detected from other members.

29 The views contained in this section, as in other sections of this Appendix, represent various opinions and recommendations proffered by alternative brokers/salespersons across the nation. The perceptions are set forth in this Appendix not as necessarily true, but because they are widely shared. They were obtained from interview reports and from questionnaires, correspondence and other related materials submitted by alternatives.

30 See, e.g., Report of Interview with Robert Y. Wier, Real Estate Broker, Tulsa, OK (March 9, 1979); Report of Interview with Charles Baca, Real Estate Broker, La Canada, CA (February 9, 1979); Carlin Stuart, supra note 12; Darby Dunckel, supra note 16; and John Morais, supra note 5.

b. National Association of Real Estate Service Agencies (NARES)

This loosely-knit organization of alternative brokers and salespersons, initially started in 1976, was formally organized in October 1977 at a national convention held in Houston, Texas. Representatives from about 60 alternative firms attended. The first two NARESA presidents worked as alternative brokers in the Houston area. Since that time association activity has markedly declined and membership has dwindled accordingly.

Under the aegis of John Little, an alternative broker operating in West Palm Beach, Florida, and a charter member of NARESA, an attempt is being made by some of the more established alternatives to incorporate NARESA (with a possible name change in the offing); designate officers, including the appointment of an executive director and a board of directors; establish membership criteria; and develop a code of ethics.

c. Referral Systems³²

In certain areas alternative brokers have established informal systems involving mutual referral of clients. Also, a few firms are operating as referral agencies for consumers and other brokers seeking to deal with alternatives situated in specific geographic locations.

6. Broker Perceptions And Recommendations

a. Role Of The Broker³³

The traditional broker is collectively viewed by the alternative brokers we surveyed as primarily representing himself rather than the interests of the seller or the buyer. His prime motivating impetus is believed to be the commission which is

31 See John Little, Real Estate Broker, West Palm Beach, FL, Official Transcript of Proceedings before FTC, June 22, 1979, Reports of Interviews with John Little (February 12, 1979 and March 12, 1980); Report of Interview with Thomas Moore, Real Estate Broker, San Diego, CA (February 12, 1979); Report of Interview with G. Daland Webb, Real Estate Broker, Bailey's Crossroads, VA (February 28, 1978); and Report of Interview with James B. Williams, Real Estate Broker, Portland, OR (March 9, 1979).

32 See Sheldon E. Suroff, Real Estate Broker, Hazelwood, MO, Correspondence and Exhibits received January 4, 1980; Donna Gould, supra note 7; and James Williams, supra note 31.

33 See note 29, supra. See also, e.g., Report of Interview with Richard Dural, Real Estate Salesperson, Tempe, AZ (September 20, 1978); Thomas Moore, supra note 31; John Morais, supra note 5; Report of Interview with Dan Penner, Real Estate Attorney, Fort Worth, TX (September 26, 1978).

entirely dependent upon the closing of a sale. The desire to obtain a commission fee has led to tactics of playing off the buyer and seller against one another with the broker's interest remaining paramount, according to this view.

Some brokers surveyed detect a basic conflict in the sub-agency relationship involving the seller, the buyer, and the listing and selling brokers. They feel that the buyer is inadequately represented. Recommendations included mandatory disclosure to consumers (sellers/buyers) of the broker's responsibilities with respect to the seller and the buyer, and changes in state law to allow buyer's representation to function in an unfettered manner.

Most alternative brokers believe that the average consumer is not aware of the fact that the commission is negotiable. He or she usually perceives the commission as a fixed item, one set by law or somehow established by custom through the Board of Realtors which, itself, is seen as a quasi-official organization. The consumer is also generally uninformed as to the specific nature of the duties performed by the broker and is oftentimes unsure as to the responsibilities for which a broker is accountable.

b. Federal Trade Commission (FTC)³⁴

The FTC could be instrumental in spearheading a drive to induce uniformity in real estate law, regulation, and licensing procedures among the states, according to alternative brokers surveyed.

Alleviation of the harassment of alternative brokers and the establishment of open MLSs with equal access to all licensed brokers (Realtor and non-Realtor) through a trade regulation rule was proposed.

Although alternatives usually have encountered little difficulty in advertising on radio and television, many newspapers across the country, large and small, have refused to accept their advertisements. It has been alleged that the real estate industry has less clout with the broadcast media, but that traditional brokers are heavy newspaper advertisers and have brought pressure to bear in an attempt to shut out the alternatives. Access to newspaper advertising is held to be a vitally necessary component for the attraction of both buyers and sellers. An end to this kind of advertising discrimination by means of a trade regulation rule was suggested.

³⁴ See note 29, supra. See also, e.g., Report of Interview with Hal Firestone, Real Estate Broker, Atlanta, GA (March 16, 1979); John Nagle, supra note 8; Terry Abraham, supra note 9; Richard Dural, supra note 33; and John Little, supra note 31.

It was also proposed that mandatory disclosure to the consumer, setting forth the broker's role in the home sale transaction and his responsibilities to the seller and buyer be further incorporated in a trade regulation rule.

c. State Agencies³⁵

The alternative brokers say that the domination of state real estate regulatory agencies by Realtors has made these bodies unduly subject to the influence of the National Association of Realtors, the state Associations, and the local Boards of Realtors. Non-Realtor brokers lack representation and in many instances, the entire concept of the alternative broker has been met with suspicion and latent hostility by the state commissions.

The initiation of legislation at the state level to facilitate the operations of buyer's representatives was frequently recommended as a remedial measure to insure the rights of the buyer and alleviate the conflict inherent in the sub-agency interpretation.

d. Boards And MLSs³⁶

A majority of MLS organizations are operated through a local Board of Realtors. Almost 90% of alternative brokers surveyed who belong to an MLS reported that membership in the Board is a prerequisite for joining the MLS. Board policies and objectives are said to dominate MLS activities.

Many alternative brokers feel strongly that access to the MLS should be open to all brokers, Realtor and non-Realtor alike. They are of the further opinion that the MLS should be split off from the local Board and function as an independent entity free from Board politics. In this way they believe all member brokers would come to be treated impartially and the organizational emphasis concentrated on operational and technological development.

35 See note 29, supra. See also, e.g., James Williams, supra note 31; John Little, supra note 31; Bob Park, supra note 15; G. Daland Webb, supra note 31; and Report of Interview with Alice S. Maher, Real Estate Salesperson, Fairfax, VA (September 28, 1978).

36 See note 29, supra. See also, e.g., Bob Park, supra note 15; Gina Williams, supra note 3; Carlin Stuart, supra note 12; Alice Maher, supra note 35; and G. Daland Webb, supra note 31.

e. New Technology And Business Formats³⁷

Most alternatives made highly favorable comments concerning the advent of the computer in the real estate brokerage industry. They do not expect it to radically change the overall way of doing business, but say it is fast becoming a key marketing tool. The computer can immediately deliver significant listing information, such as price, square footage, number of rooms, geographical location, and financing; similar data regarding sales transactions; figures on comparables (specific past sales comparable in price to current listings); and a great deal of other information.

Alternative brokers report that their operations have been improved through use of computer technology. In some offices where the computer is in-house, cassette pictures of homes listed for sale are tied in to the system. Some computer service firms cover a particular metropolitan area or region, publishing essential information (usually monthly or more often) regarding all area sales. Subscribing brokers utilize this tool to keep abreast of market developments and for background information in establishing comparables and other appraisal techniques.

A majority of the alternatives view franchising as the "wave of the future," both for themselves and traditional brokers. Many successful alternatives are involved in franchise operations. They predict that the small independent broker will be unable to compete in the long run because of the economies of scale associated with franchising in obtaining advertising, referrals, name recognition, supplies, etc. The average independent may well be viable only in the smaller cities and towns. They suggest that it may be possible for an independent broker (alternative or traditional) to represent a large non-real estate company on a contract basis or to operate as a concession in a major national retail firm.

f. Consumer Needs³⁸

Alternative brokers stressed to us the concepts of service and cost savings. In many instances the latter are tied to a less than full service package; i.e., the seller shows his or her own home. However, a majority of all MLS plans offered by alternatives include full service at a reduced commission rate.

37 See note 29, supra. See also, e.g., Hal Firestone, supra note 34; John Nagle, supra note 8; Carlin Stuart, supra note 12; and Robert Wier, supra note 30.

38 See note 29, supra. See also, e.g., Report of Interview with Don Taylor, Real Estate Broker, Anaheim, CA (February 28, 1979); Gina Williams, supra note 3; Thomas Moore, supra note 31; and Darby Dunckel, supra note 16.

g. Future Trends³⁹

The public response to the services and fees offered by the alternative brokers has reportedly been positive. Alternatives stress that their perception that the demand is there and that consumer needs can be met. They believe that the number of alternative brokers will continue to increase as publicity relating to their costs and services impinges more broadly on the consciousness of the general public.

They say, collectively, that franchise operations will be the vehicle of the future for both traditional and alternative brokers. Independent alternatives will look either toward opening branch offices or joining existing franchise organizations.

³⁹ See note 29, supra. See also, e.g., Robert Wier, supra note 30; John Morais, supra note 5; Hal Firestone, supra note 34; and Charles Baca, supra note 30.

1. Monopolies and Price Commission Reports

The British government has conducted two recent investigations of the real estate brokerage industry in that country. The first investigation was conducted by the British Monopolies Commission and resulted in a report published on February 20, 1969. The report recommended that the fee schedules and certain anticompetitive rules of the various national and local trade associations be abolished. The British government issued such an order in 1970.

Subsequently, the British Price Commission undertook an investigation to determine the effects of the 1970 order banning the fee schedules. This investigation resulted in a report which was presented to Parliament in August, 1979. This report concluded that at least non-price competition had increased following the 1970 order. The most important contribution to this increase in competition was the entry of "commercially," as opposed to traditional "professionally," oriented firms.¹ Fee competition, while undertaken by certain new entrants, was still not a common practice.²

The authors of the report also felt that exclusive-right-to-sell contracts and contracts containing clauses calling for the payment of the commission upon the production by the broker of a "ready, willing, and able" purchaser, regardless of whether the sale was concluded, were unfair.³ These types of contracts were apparently new in Britain. Generally, sellers were accustomed to paying a commission only if the broker procured the buyer and a sale resulted.

The materials in these two reports allow for certain comparisons between the U.S. industry and the British industry. Basically, the British industry is at a state of evolution similar to that of the U.S. industry before MLSs became predominant.

The British reports also briefly looked at the brokerage

1 British Price Commission, Charges, Costs and Margins of Estate Agents (1979) (hereinafter cited as "1979 British Report"), at 36.

2 Id.

3 Id. at 67.