

2005 WRA LICENSE LAW TASK FORCE – CHAPTER 452 MODERNIZATION RECOMMENDATION OVERVIEW

I. INTRODUCTION

On January 21st, 2005 the Wisconsin REALTORS[®] Association Board of Directors approved a proposal to modernize Chapter 452 of the Wisconsin Statutes. The proposal was developed over a three-year period by the WRA's License Law Task Force. The goal of the modernization proposal is to ensure that Wisconsin's license law meets consumer expectations for brokerage services, that it conforms to industry best practices and that Wisconsin's license law does not unreasonably interfere with emerging business models. The Board of Directors reviewed the proposal to ensure that it did not interfere with the ability of any broker to practice under any particular business model and that the proposal did not favor any particular segment of the industry, i.e. large brokers versus small brokers. This is an abbreviated form of the report. The full text of the report can be found on the home page of the WRA Web site: <http://www.wra.org/> If you have any questions regarding this overview or the full report please contact Rick Staff at: rickstaff@wra.org

The recommendations can be broken down into the following categories:

- **Fill In The Gaps In License Law**
- **Address Agency Issues Of Concern To Licensees And Consumers**
- **Minimize Unnecessary Complexity**

II. OVERVIEW OF ISSUES

A. Fill In Gaps In The License Law

The Task Force recognized that there are a number of areas in which the current license law fails to adequately address significant brokerage practice issues. These issues are:

- The Need To Regulate Brokerage Practice Prior To "Negotiations."
- The need to define subagency relationships.
- The need to clarify the scope of broker liability for the acts of an agent.
- The need to clarify the fact that Chapter 452 overrides any inconsistent common law.

B. Address Agency Issues Of Concern To Licensees And Consumers

The Task Force recognized that there are many issues relating to agency relationships and the agency disclosures given to consumer which need to be addressed. These issues are:

- The current rule which requires agency relationships whenever brokerage services are being provided. The Task Force recognized that this rule is impossible to comply with when brokers provide brokerage services (e.g. a CMA) before a client signs a listing or a buyer agency agreement and unreasonable to require of all consumers and licensees when they, for example, meet for the first time at a

property. Neither consumers nor licensees should be required to leap into agency relationships immediately.

- The fact that the current multiple representation law takes away important negotiation services from the parties. Knowing that confidentiality and loyalty duties protect clients from broker abuse (current multiple representation rules assume brokers will break the law and take advantage of one client or the other) the Task Force recommends that separate agents from one company can safely provide negotiation services for seller and buyer clients. This assures all parties full negotiation services regardless of which broker they choose to work with. This elimination of multiple representation restrictions benefits all consumers who choose to be in transactions where both parties are represented by two agents from the same company.
- Limited service brokerage models have raised concerns in the industry because the industry has not developed effective cooperation practices on either side of the transaction. This situation is nearly identical to the somewhat difficult emergence of buyer agency practices in the 80's. In response to issues raised by limited service brokerage the Task Force report defines which duties owed to clients are waivable and which are not. The report clarifies that only the duties to provide information and advice to the client on real estate matters and the duty to negotiate on behalf of the client are waivable. Brokers obtaining waivers of these duties must provide detailed written disclosures and cautions to their client and the waiver extends to all brokers in the transaction. This proposal recognizes that limited service brokerage is a lawful and ethical form of practice and that the protections provided for consumers and other licensees in the proposal is the appropriate way for a trade association to address practice issues raised by this emerging business model.

C. Minimize Unnecessary Complexity

The proposal would replace the current agency disclosure with a plain English agency disclosure. Numerous other sections of Chapter 452 are revised to clarify their meaning. See the full Task Force report for the complete text of the proposal. <http://www.wra.org/>

III. DISCUSSION OF TASK FORCE REPORT RECOMMENDATIONS WITH DRAFT LANGUAGE

A. Fill In The Gaps In License Law

The Need To Regulate Brokerage Practice Prior To “Negotiations.”

The DRL and the industry has historically recognized that brokerage services begins when a licensee provides information and advice to assist parties to accomplish their goals in the transaction. Because current law defines brokerage as beginning with the negotiation of agreements the Task Force recommended that Chapter 452 be revised to recognize pre-negotiation brokerage services (providing information and advice on real estate matters) by modifying the definitions of “broker” and “negotiate.”

PROPOSED LANGUAGE

452.01 Definitions. In this chapter:

452.01(2) "Broker" means any person not excluded by sub. (3), who does any of the following:

(a) For a party, and for commission, money or other thing of value, provides information and advice to the party on real estate matters in order to assist the party to accomplish the party's expressed goals in a transaction. For the purpose of this subsection providing information and advice includes showing a party real estate or a timeshare. For the purpose of this subsection real estate matters are matters material to a party's transaction which are within the scope of the knowledge, skills and training required for licensure as a broker or salesperson under this chapter and include, but are not limited to, market information as well as contract, legal and regulatory issues.

452.01(5m) "Negotiate" means to assist the parties in developing proposals and agreements within the scope of the knowledge, skills and training required for licensure as a broker or salesperson under this chapter including but not limited to:

(a) Acting as an intermediary to facilitate or participate in communications between the parties related to the parties' interests in a transaction. Providing information and advice to the party on real estate matters or showing a party real estate does not, in and of itself constitute acting as an intermediary to facilitate or participate in communications between the parties.

The Need To Define Subagency Relationships.

The second major gap in the regulatory model was the failure to distinguish between the duties owed to clients by brokers who enter into agency agreements versus the duties owed those clients by brokers who accept offers of subagency. Due to the failure to recognize this important distinction the current law has caused many licensees and consumers to mistakenly believe that a subagent owes the same duties to the client as the principal broker does. This is not a correct reading of the law of agency and is not a realistic standard for consumers or licensees.

Cooperating brokers who are acting as subagents are the agents of the principal broker. The WRA believes that subagents should be subject to loyalty duties to the principal broker's client to ensure consistency with consumer expectations, industry best practices and the duties owed to the principal broker. However, subagents should not be subject to other duties owed to the principal broker's client because their relationship to the principal broker does not make them the agent of the client. This is best illustrated by the application of the duty to comply with the terms of the agency agreement. A subagent does not ever see an agency agreement and clearly should not be subject to its obligations.

PROPOSED LANGUAGE

(3m) "Client" means a party to a transaction who is has entered into an agency agreement between the party and a broker. The agent of the client is the broker who is a party to the

agency agreement. Other brokers who are acting as subagents of the broker are agents of the broker but owe the client the duties specified in 452.133(1) and (3).

(?) “Subagent” means a broker who is authorized by another broker to perform services in a transaction, on behalf of the other broker, under the authority of and within the scope of an agency agreement between the other broker and the other broker’s client in the transaction. The subagent’s client is the other broker who is the party to the agency agreement not the other broker’s client.

(3) DUTIES UNDER SUBAGENCY RELATIONSHIP. In addition to his or her duties under sub. (1), a broker who is acting as the subagent of another broker in a transaction shall not place the interests of the broker ahead of the interests of the other broker’s client in the transaction or provide non-client parties in the transaction advice or opinions that are contrary to the interests of the broker’s client unless required by law.

The need to clarify the scope of broker liability for the acts of an agent.

A year or so ago a broker was sued under Wis. Stat. § 452.12 because an agent was in a car accident and someone was injured. While the case was dismissed, no binding precedent interpreting § 452.12 will result from the summary judgment. This case does clearly point out that there are plenty of legal theories that may be used to establish broker liability and that litigants should not be given the opportunity to misapply Chapter 452 to create additional theories of broker liability. Accordingly, the Task Force revision makes it clear that broker liability under Chapter 452 is limited to liability arising out of an agent’s brokerage service activities only.

PROPOSED LANGUAGE

452.12 Licenses.

(3) BROKER'S LIABILITY FOR ACTS OF EMPLOYEES. (a) Each broker is responsible for the real estate brokerage services provided on behalf of the broker by acts of any broker, salesperson or time-share salesperson licensed or registered under the broker employed by the broker.

The need to clarify the fact that Chapter 452 overrides any inconsistent common law.

Current license law only refers to “fiduciary duties” when it stated that any conflicts between common law agency and the statute would be resolved in favor of the statute. Because common law agency is broader in scope than the definition of “fiduciary duties” the revision addresses any additional conflicts that might exist between the statute and common law.

PROPOSED LANGUAGE

452.139 Changes in common law duties and liabilities of brokers and parties.

(1) COMMON LAW FIDUCIARY DUTIES OF BROKER. The duties of a broker specified in this chapter or in rules promulgated under this chapter shall supersede ~~any fiduciary duties of a broker to a party based on~~ common law duties or obligations to the

extent that those common law ~~fiduciary~~ duties or obligations are inconsistent with the duties specified in this chapter or in rules promulgated under this chapter.

B. Address Agency Issues Of Concern To Licensees And Consumers

Brokerage services and agency relationships -Initial pre-agency relationships with parties.

In recognizing that brokerage services begin prior to negotiation the question of what agency relationships should exist with consumers during this period arose. The Task Force observed that there is an initial stage in the relationship in which it may be inappropriate to require that there be an agency relationship with the consumer. Salespeople doing listing presentations provide market data and opinions of value before they (hopefully) get a listing contract. A buyer first meeting a salesperson and receiving information about the marketplace is not ordinarily ready to determine if they are willing to enter into a long term buyer agency agreement until they get to know the agent a bit. In many situations the broker and the party are able to enter into an agency relationship immediately. However, it is not appropriate to prohibit any brokerage services being provided to the consumer in those situations in which the consumers needs preliminary information before making a decision regarding agency representation.

With this in mind the Task Force proposed that brokers may provide limited brokerage services to parties without an agency relationship prior to engaging in negotiations. This initial role of providing information and advice on real estate matters may include showings prior to negotiations but the salesperson would not be allowed to negotiate or provide opinions that are contrary to the interests of any other party. The salesperson would be required to establish an agency relationship and present an agency disclosure before beginning negotiations or providing opinions that are contrary to the interests of any other party.

In this pre-agency stage the salesperson would owe all parties significant duties under the license law - the traditional duties owed to all parties as well as the duty to “not place the interests of the broker ahead of the interests of any party in the transaction or provide any party in the transaction advice or opinions that are contrary to the interests of any other party unless required by law.” This latter provision would ensure that the salesperson stayed in the role of providing information and advice on real estate matters without taking on any advocacy role. If the agent or the party wishes to exceed this limited pre-agency advisory role they must enter into an agency relationship with a party. The most common example may be an out-of-town buyer who meets a salesperson at a property for a showing as an initial contact. Although the salesperson and the party could immediately elect seller or buyer agency, if they choose to simply have the salesperson provide pre-agency brokerage services that day, the salesperson could provide a variety of information and advice regarding the property, the market, neighborhoods, etc. However, because the salesperson does not represent either the seller or the buyer the agent would not give either party *“opinions or advice that are contrary to the interests of another party unless required by law.”*

This provision protects the interests of sellers and listing brokers because they know that the salesperson conducting the showing will not be permitted to give advice or opinions contrary to the interests of the seller. In other words these agents showing the property cannot act contrary to the interests of the seller or the listing broker any more than a subagent could. Of course, allowing this pre-agency service does not limit those brokers and parties who are willing and able to immediately enter into an agency relationship without any preliminary services.

In summary, it is universally agreed that brokers do provide consumers brokerage services before agency relationships are established. This is consistent with consumer expectations and with the safeguards built into the law it would also reflect current best practices. The Task Force recognized that salespeople in these pre-agency roles must be neutral in their dealings between the parties. At such time as the salesperson is able to enter into an agency or subagency relationship, the salesperson's loyalty duties become clear and appropriate opinions and advice can then be given.

PROPOSED LANGUAGE

452.132 Agency Relationships

(1) Agency Relationships.

(a) A broker shall not be required to have an agency relationship with a party or a subagency relationship with a broker when providing brokerage services prior to conducting negotiations on behalf of a party in a transaction.

(b) When conducting negotiations on behalf of a party in a transaction the broker shall be acting under the authority of an agency agreement with a party in the transaction or a subagency relationship with a broker who has an agency agreement with a party in the transaction.

452.133(4) Duties without agency or subagency relationship In addition to his or her duties under sub. (1), a broker who does not have an agency relationship with any party or a subagency relationship with any broker in the transaction shall not place the interests of the broker ahead of the interests of any party in the transaction or provide any party in the transaction advice or opinions that are contrary to the interests of any other party unless required by law.

Current multiple representation law takes away important negotiation services from the parties despite the fact that current consumer protections minimize consumer risk in these multiple representation relationships.

Current multiple representation regulations (do not put the interests of one party ahead of the other) are based on the concern that licensees would violate the confidentiality and loyalty duties owed to a client who is negotiating with other clients of the licensee's broker. The result of the current regulations regarding multiple representation is that both of the "multiple representation" clients sacrifice significant negotiation services when they enter into a multiple representation situation. The Task Force noted the frequency with which buyers seek out listing brokers which indicates a limited consumer concern for multiple representation conflicts. Given that there is no evidence that agents working with customers negotiating on company listings are violating the customer's

confidentiality or fair treatment rights the Task Force does not see that there is a greater risk of abuse when a broker has two agents negotiating on behalf on two clients in a transaction. In other words, if all licensees are working to accomplish the intent of the parties they are working with and the parties are protected by confidentiality duties as well as the loyalty duties (prohibition against putting the broker's interests ahead of the client's), the Task Force believes that two licensees from one company can provide full negotiation services to both clients in a transaction without violating confidentiality or , loyalty duties owed to either client.

Rather than adding designated agency as another complicated layer on the already too complicated law, the proposal would simply provide that there be no reduction of services if two different agents from one company are negotiating on behalf of two clients of the company. On the other hand, the Task Force continues to support the current dual agency model in the situation where one individual agent is negotiating on behalf of two clients in a transaction. This proposal, in the view of the Task Force, is consistent with consumer expectations. The WRA Directors considered whether or not the proposal would favor large companies versus small and determined that all brokers currently practicing multiple representation will benefit equally from this proposal, regardless of company size.

PROPOSED LANGUAGE

452.137 Brokers providing services to more than one client in a transaction.

(1) A broker who has an agency agreement with and is providing brokerage services to more than one client in a transaction owes all clients the duties as specified in s. 452.133 (1) and (2) except that when the broker, acting through an individual licensee, other than a business entity, is negotiating on behalf of more than one client in a transaction the licensee may not place the interests of any client ahead of the interests of another client during the negotiations.

(2) If a broker is providing brokerage (2) services to more than one client in a transaction, no client may be considered to know any information that the broker knows unless the broker informs the client of that information or the client has other actual knowledge of that information.

Clarify that a broker owes a duty to a client to provide information and advice to the client on real estate matters and to negotiate on behalf of the client.

The heart of the definition of brokerage has always been the role of the broker as a negotiator. The proposal takes the current duty of negotiation, expands the definition for clarity purposes and makes it a waivable duty owed to clients (See following discussion regarding waivability).

PROPOSED LANGUAGE

452.133(2) DUTIES TO A CLIENT UNDER AGENCY AGREEMENT. In addition to ~~his or her~~ the duties under sub. (1), a broker ~~providing brokerage services to his or her client~~ who has an agency agreement with a client shall owe the following duties to the client when providing brokerage services to the client within the scope of the agency agreement:

(a) When requested by the client, to provide information and advice to the client on real estate matters within the scope of the knowledge, skills and training required for licensure as a broker or salesperson under this chapter in order to assist the client to accomplish the party's expressed goals in the transaction. For the purpose of this subsection real estate matters are matters material to a party's transaction and include, but are not limited to, market information as well as contract, legal and regulatory issues.

(e) To negotiate as defined in 452.01(5m)(a)-(d).

452.01(5m) "Negotiate" means to assist the parties in developing proposals and agreements within the scope of the knowledge, skills and training required for licensure as a broker or salesperson under this chapter including but not limited to:

(a) Acting as an intermediary to facilitate or participate in communications between the parties related to the parties' interests in a transaction. Providing information and advice to the party on real estate matters or showing a party real estate does not, in and of itself constitute acting as an intermediary to facilitate or participate in communications between the parties.

(b) (ab) Facilitating or participating in the parties' discussion of the terms of a contract or agreement concerning a transaction.

(bc) Completing, when requested by a party, appropriate department-approved forms or other writings to document the party's proposal consistent with the party's intent.

(ed) Presenting to a party the proposals of other parties to the transaction and ~~informing the party receiving a proposal of the advantages and disadvantages of the proposal~~ giving a general explanation of the provisions of the proposal.

Define which duties owed to parties and to clients are waivable.

In response to issues raised by limited service brokerage models the Task Force report defines which duties owed to parties and to clients are waivable and which are not. The report clarifies that only the duties to provide information and advice to the client on real estate matters and the duty to negotiate on behalf of the client are waivable. Brokers obtaining waivers of these duties must provide detailed written disclosures, refer the client to legal counsel or other service providers (because the work will need to be done to complete the transaction) and tell the client that the waiver extends to all brokers in the transaction. This change frees cooperating brokers from current license law duties to take over negotiations on behalf of the limited service broker and shifts the burden to the seller to get the help necessary to complete negotiations and get the deal closed. This proposal recognizes that limited service brokerage is a lawful and ethical form of practice and that the protection provided for consumers and other licensees in the proposal is the appropriate way for a trade association to address practice issues raised by this emerging business model.

PROPOSED LANGUAGE

(5) WAIVABILITY OF DUTIES The duties at 452.133(1)(a)-(f), (2) (b)-(d) and (3) are not waivable. All or part of the duties at 452.133(2)(a) and (e) may be waived by a client. A broker shall ensure that when a client waives all or part of the duties under 452.133(2) (a) or (e) for a broker who is a party to an agency agreement with the client that the party

is provided with a written statement which includes the full text of the duty waived, the elements of the duty being waived, a statement that no other broker owes the waived duties to the client and that the waiver of broker duties may require the party to retain legal counsel or other service providers to assist the party to fulfill the client's transactional goals and contractual duties through the conclusion of the transaction.

C. Minimize Unnecessary Complexity

The proposal would replace the current agency disclosure with a plain English agency disclosure.

Numerous sections of the statutes also are revised to clarify language – See full text of the report for these items.

AGENCY DISCLOSURE

The proposal establishes statutory plain-English agency disclosures for clients and customers. The timing of the disclosures reflects the original theory of agency disclosure – prior to beginning negotiations a broker must disclose their agency relationship so that the parties are not disadvantaged in the negotiations.

PROPOSED LANGUAGE

452.135 Agency Disclosure

(1) Disclosure of Agency Relationships and Duties To Parties

- (a) Prior to negotiating for a customer the broker shall provide the customer the following disclosure in writing.

BROKER DISCLOSURE TO CUSTOMERS

It is important for you to understand the duties the broker owes a customer under Wisconsin license law. You are a customer of the broker and may receive services from the broker or a salesperson acting on behalf of the broker. The broker's duties to you apply whenever the broker is providing you brokerage services. Note that the broker is either the agent of another party in the transaction or the subagent of another broker who is an agent of another party in the transaction. The duties the broker owes you as the broker's customer are:

- To treat you fairly and honestly.
- To use reasonable skill and care when providing you brokerage services.
- To protect your confidentiality. Unless the law requires it the broker will not disclose your confidential information or the confidential information of other parties.
- To disclose in writing known defects affecting the property and other material adverse facts affecting the transaction. The broker may also provide you with information and advice to help you in the transaction. This information and advice cannot be contrary to the interests of the broker's client or the broker offering subagency (or that broker's client) unless required by law
- To safeguard any trust funds or other property held by the broker.

Please review this information carefully. If you have any questions please ask your agent or contact your attorney for additional information or legal advice, as appropriate. This disclosure is required by Wisconsin law and is based on the statutory language found at

Wisconsin statute sections 452.133 and 452.135. Please note that a broker's role is limited to providing brokerage services. You should consult your attorney for legal advice, your tax advisor for tax advice, a home inspector for a professional inspection, etc.

- (b) Prior to negotiating for a client the broker shall provide the customer the following disclosure in the agency agreement or other writing.

BROKER DISCLOSURE TO CLIENTS

By entering into an agency agreement with broker (i.e. a listing or buyer agency, etc.) you have become the broker's client. The broker's duties owed to all parties are:

- To treat you fairly and honestly.
- To use reasonable skill and care when providing you brokerage services.
- To protect your confidentiality. Unless the law requires it the broker will not disclose your confidential information or the confidential information of other parties.
- To disclose in writing known defects affecting the property and other material adverse facts affecting the transaction. To safeguard any trust funds or other property held by the broker.

The additional duties owed a client by the broker are:

- When you request it the broker will give you information and advice regarding real estate matters affecting your transaction unless you release the broker from this duty.
- The agent must provide you with information about all material facts affecting the transaction (not just adverse material facts).
- The broker will fulfill all obligations under your agency agreement, as well as fulfilling your other lawful requests within the scope of the agency agreement.
- The broker will negotiate on your behalf unless you release the broker from this duty.
- The broker will not put the broker's interests ahead of yours or give non-client parties information or advice that is contrary to your interests (unless required by law). If broker has agency agreements with more than one party in the transaction and different agents are negotiating for each client there will be no change in the services and duties of the broker. If one agent is negotiating on behalf of more than one client in a transaction the agent may not place the interests of any client ahead of the interests of another client during the negotiations.

SUBAGENCY Note that if you authorize it in your agency agreement the broker may enter into agreements with other brokers to provide you additional brokerage assistance on broker's behalf. These brokers are known as subagents and they are agents of broker. Subagents working under broker will not put their interests ahead of yours or give non-client parties advice or opinions that are contrary to your interests (unless required by law).

Please review this information carefully. If you have any questions please ask your agent or your attorney for additional information or legal advice, as appropriate. This disclosure is required by Wisconsin law and is based on the statutory language found at Wisconsin statute sections 452.133 and 452.135. Please note that a broker's role is limited to

providing brokerage services. You should consult your attorney for legal advice, your tax advisor for tax advice, a home inspector for a professional inspection, etc.