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Legal Update

A WRA Publication Exclusively for the Designated REALTOR®

Inside This Issue

Best of the Legal Hotline - Offer to Purchase Issues

Back again by popular demand is the Best of the Legal Hotline. The Legal Hotline is a Wisconsin REALTORS® Association service designed to help members who have legal questions that arise in their real estate transactions. This service is provided exclusively to WRA members and their legal counsel by the WRA Legal Department staff.

This *Legal Update* reviews some of the offer to purchase questions most frequently asked during CE classes and on the Hotline over the past several months. This *Update* departs a bit from the format used in other Best of the Hotline updates because background information is provided in some sections. The Hotline questions and answers in this *Update* focus on offer to purchase and related issues. Topics covered include attorney approval contingencies, procedures for the delivery of documents and written notices, faxing all pages of a contract, withdrawing offers, counteroffers, equitable title and resales, the assignment of offers, personal property and bills of sale, fixtures, negligent hiring and referrals of contractors, and an update on LBP compliance issues. This *Update* begins with a review of Legal Hotline procedures for WRA members who wish to take advantage of this valuable membership benefit.

Legal Hotline Process

When a question is submitted to the Legal Hotline, the Hotline assistant must first record the necessary information and verify membership. Once this is done, a Hotline attorney calls the member and discusses the member's question. The caller has the option of requesting a written response summarizing the information the attorney has provided. The caller's Designated REALTOR® (DR), or managing broker, may also file an override which requires all hotline calls from that DR's office(s) be followed up in writing. In that case, the written follow-up will be automatic.

> The Legal Hotline is a Wisconsin REALTORS® Association service designed to help members who have legal questions that arise in their real estate transactions.

Who Can Use the WRA Legal Hotline?

Every WRA member has unlimited Legal Hotline privileges. Because WRA dues pay for this service, however, non-members other than members' legal counsel are not allowed access to the Hotline. REALTORS® should refer their buyers and sellers to private legal counsel for assistance rather than the Legal Hotline.

What Subject Areas are Covered by the Hotline?

Generally, the Hotline will respond to any question related to real estate practice. The Hotline offers informa-

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tion on Department of Regulation and Licensing (DRL) regulations, the Code of Ethics, listing contracts, offers to purchase, forms use, disclosures, agency law, office management, general real estate law and other related issues. If the Hotline does not have the information necessary to answer the inquiry, the caller will be directed to the appropriate sources.

How and When Can I Reach the Hotline?

The Legal Hotline attorneys process Hotline calls Monday through Friday from 8:30 a.m. to 4:30 p.m. The WRA Legal Hotline has its own toll-free direct access telephone numbers which you may call 24 hours a day at (800) 799-4468 or (608) 242-2296. During non-business hours, you may leave a message for the Legal Services staff by dialing either of the Legal Hotline numbers listed above. You can also contact the Hotline 24 hours a day via fax at (608) 242-2279 or by e-mail using the Legal Hotline submission form found at http://www.wra.org on the Legal Services page. Questions may also be mailed to the Hotline at the Wisconsin REALTORS® Association, 4801 Forest Run Road, Suite 201, Madison, WI 53704.

The WRA is working on a standard system that will allow the attorneys to e-mail their Hotline responses to members. Watch the *Wisconsin REALTOR®* and *Legal Update* for more information.

What Happens When a Hotline Question is Submitted?

The Hotline assistant records the caller's name and telephone number, the best time to call, and a summary of the caller's question, then verifies the caller's membership. This screening process is necessary for each call to maintain the WRA members' exclusive access to the Hotline and to maintain the Hotline's status under the Internal Revenue Code as a membership service.

Can a Member Talk to an Attorney Right Away?

All calls must first go through the screening process. Generally, the attorney is on the telephone with another call. If a caller's question is urgent, the caller should explain the situation and indicate that it is urgent when submitting the question. This information will then be relayed to the attorney who will make every effort to respond to the call as soon as possible.

What Happens When the Attorney Calls the Member Back?

One of the Hotline attorneys will return the member's call, help the member identify important issues, and discuss the member's questions and concerns. The Hotline attorneys use their knowledge and experience to provide members with the information necessary to evaluate the situation described and any possible alternative actions.

If the Hotline attorney calls you back and you are unavailable, you should return the call to the number left by the attorney. For WRA staff attorneys, this will most likely be the general WRA numbers: (800) 279-1972 or (608) 241-2047. Please note that attempting to contact the Hotline attorneys directly before your question has been submitted to the Hotline assistant will slow down the process for everyone.

Members must remember that the Hotline is a legal information service and not an attorney-client relationship. In order to provide legal advice, a complete understanding of the member's practice and the particular transaction would be required. This is not possible in the Hotline format.

Due to the large number of calls processed each day, the Hotline attorneys generally will also not be able to do extensive research on any one question, particularly if that research lies outside of the general area of real estate practice. If the call indicates that specific legal advice or extensive research is needed, the Hotline attorney will suggest that the member consult with private legal counsel.

Will I Get a Written Response?

Members have the option to waive written responses to Legal Hotline questions where the member does not feel the written response is necessary, unless his or her DR overrides this option. It is recommended that callers indicate whether they are expecting a written response to avoid any confusion or unnecessary delays. In addition, the WRA Legal Hotline attorneys have the authority to provide a written response to any questions where, in the discretion of the attorney, issues requiring DR supervision are addressed.

Written responses summarize the question presented and the information discussed. They are addressed to the member and his or her DR. The DR receives a copy of the question and written response because the employer/broker is legally responsible for supervising the real estate activities of his or her sales force.

Offer to Purchase Questions and Answers

The following are some of the questions most frequently asked by WRA members over the past several months and the answers given by the Hotline attorneys. These questions are grouped by topic for easy reference.

Contingencies

The Wisconsin courts have construed contingencies, like the financing contingency and inspection contingency, to be conditions precedent to the buyer's performance. A contract that is subject to a contingency or condition is not enforceable until that condition has been fulfilled. A contract subject to a condition is not void, but the condition delays the enforceability of the contract until the condition has been satisfied. For example, if an offer is subject to an appraisal contingency, the contract is not enforceable if the appraisal is less than the purchase price.

However, if the contract is subject to contingencies that are too vague or indefinite, the contract will be found illusory and unenforceable. The court of appeals has indicated that there can be no agreement or contract if satisfaction of the condition turns "upon the whim or caprice of the party to be satisfied." The contract is illusory if the performance of one contracting party is optional or entirely with that party's discretion and control. These "subject to satisfaction" contingencies are subjective, so one party rarely will have any way to know what will satisfy the other party. The courts will also have no way to know what satisfies the that party and, consequently, will not be able to determine whether or not the contingency has been met.

If the contract is subject to contingencies that are too vague or indefinite, the contract will be found illusory and unenforceable.

For example, the Wisconsin courts have found contingencies based upon the "proper amount of financing" or "a satisfactory inspection" to be so vague as to leave the parties with no meeting of the minds unless the surrounding circumstances clarify the parties' intent. Similarly, if the offer is contingent upon the seller finding "suitable housing," a judge would likely find the contract to be unenforceable because there are no standards delineating what would be suitable housing - the contingency leaves that to the discretion of the seller.

Attorney Approval Contingency

A Kenosha County judge ruled that an attorney approval contingency, which was at the sole discretion and judgment of the attorney and buyer, rendered the contract unenforceable as an illusory contract. What kind of attorney approval provision would be enforceable?

Upon review of the judge's decision, it is clear that the contingency at issue gave both the attorney and the buyer wide-open discretion to back out of the offer for any reason or for no reason at all. There were no third party standards, the attorney's approval was not limited to legal concerns, nor was it even limited to the attorney.

An attorney approval provision must contain adequate detail, but, unfortunately, there is no clear guidance regarding how much detail will be enough. Although the decision of the Kenosha County judge is not a binding precedent upon REALTORS® in Kenosha County or the rest of the state, all licensees should carefully review any attorney approval contingencies that they use in their addenda.

Some brokers use a provision that not only has the attorney review the offer and indicate any objections, but the attorney also negotiates modifications to the contract. This suggests that the contract is not really accepted or binding because it still is under negotiation. These attorney approval contingencies allow the attorneys to continue the negotiation process for the first several days after acceptance right up to the final attorney approval deadline. This type of provision may not pass judicial scrutiny if challenged in court.

In many attorney approval provisions, the only objective standard is that the attorneys cannot change the price or the dates. Although we do not know for sure how a court may

rule, it would seem that such a provision lacks sufficient detail to avoid being labeled an illusory provision that makes the contract unenforceable.

An attorney approval provision that will withstand judicial scrutiny will likely need to limit the attorney's review to specified legal aspects of the contract and may specify a procedure similar to the one in the standard inspection contingency: the attorney renders a written report of legal defects (legal description, title, provisions sufficiently definite to be enforceable, etc.), the party gives a notice stating the defects to which the party objects and what changes should be made to make the contract acceptable, and the other party has a right to cure, all with definite deadlines.

Sample attorney approval contingencies are available in the 2000 edition of the Wisconsin Real Estate Clause Manual co-authored by Scott Minter and Rick Staff. The manual is available by calling (800) 279-1972 or online at http://www.wra.org.

Delivery of Documents and Written Notices

Unless the offer is modified to specify additional delivery methods or to delete one of the delivery methods included in the offer to purchase language, the only methods of delivery that are legally effective are mail or commercial delivery service, personal delivery, and fax transmission.

Mail or Commercial Delivery

A document or written notice may be mailed provided all postage and fees are prepaid. A written notice that is received with postage due would not meet this standard. A document or written notice may also be delivered via a commercial delivery service such as UPS or Federal Express, provided that all fees are prepaid or properly charged to an account with the delivery service.

The offer permits each party to provide a delivery address. The sole purpose of this address is for use in addressing documents and written notices that are mailed or commercially delivered. This address has no effect for personal or fax deliveries.

A document or written notice may be addressed either to the party or to the party's designated "recipient for delivery." This allows a party to designate the licensee he or she is working with, or any other person, to serve as the recipient of his or her mailed or commercially delivered documents and written notices.

The designated recipient for delivery is an appropriate recipient for personal delivery only when that recipient is an individual.

Thus, a document or written notice that is mailed or commercially delivered must be addressed:

(1) To either the party or the party's designated recipient for delivery, and

(2) At the party's designated delivery address.

If party S names agent X as his recipient for delivery and X's office address as the delivery address, a written notice may be addressed to either party S or agent X at agent X's office address. If it is addressed to party S at party S's home or business address, it has been addressed incorrectly and the delivery is not effective. The same result occurs if it is addressed to agent X at agent X's home office address - the delivery is ineffective.

Personal Delivery

Personal delivery means that the document or written notice is personally given to either the party or the party's designated recipient for delivery if an individual has been designated. Leaving a written notice under the party's doormat at her home is not a sufficient personal delivery, at least not until the party comes home and finds the written notice. Leaving a document in the office mailbox of the party's agent is not a sufficient personal delivery, at least not until the agent picks up his mail at his office.

Thus, a document or written notice may be personally handed to party S or agent X when he or she answers the front door at home, walks down the street, or works out at the health club. It generally does not matter where person is - what matters is that the person has been given the document or written notice.

The designated recipient for delivery is an appropriate recipient for personal delivery only when that recipient is an individual. For instance, if a broker entity such as a real estate brokerage corporation or LLC is named as the designated recipient for delivery, there can be no personal delivery to that entity.

If the buyer is working with a subagent of the seller and the listing agent has either the offer or a counter-offer from the buyer in hand, does this constitute a valid delivery?

Because the language in the offer limits delivery to those methods specifically approved by the parties in the offer, personal delivery to an agent is not personal delivery to the party, unless the offer or an addendum states that personal delivery to an agent is an acceptable means of delivery. The state-approved forms do not authorize personal delivery to an agent.

Can the buyer use a real estate office's address for delivery, or must the buyer indicate a specific person for delivery, like the agent working with the buyer in the transaction?

Pursuant to the terms of the WB-11 offer to purchase, any designated recipient for delivery is named at line 27 or 29. Line 31 provides that if an individual (a human being as

opposed to a company) is named at line 27 or 29, personal delivery may be accomplished by giving the document personally to the designated individual.

It is up to the brokers and their parties to determine whether they prefer to designate the company or the agent as recipient for delivery. Designating an agent as recipient for delivery has the added benefit of allowing delivery to be made by personal delivery to the agent. On the other hand, many companies prefer to have all deliveries sent to a centralized processing location as this can provide increased efficiency and better control over transaction documents. There is no right or wrong answer.

Fax Transmission

The document or written notice is delivered via fax when it is transmitted to the fax number stated by the party in the contract. If the party designates the fax number of his or her attorney, the document or written notice must be transmitted to that number for it to be a valid delivery. It does not matter if the party is not there when the document is faxed. If the document is faxed to the party's office or home fax number although the party designated the attorney's fax number, it has been faxed incorrectly and the delivery is not effective.

Is a broker acting competently if the broker has designated the broker's fax number for delivery to seller, a faxed amendment is not picked up for two days after transmission to the broker's fax number, and the amendment is not presented in time for acceptance?

When a broker agrees to use his or her fax number as the destination for fax delivery to the seller, the broker accepts the responsibility to handle documents faxed on behalf of the seller in a timely and professional manner. In order to determine if the broker was acting competently in not picking up the fax for two days and then failing to deliver it in time for acceptance, a full analysis of the facts and circumstances would be required. However, if the analysis indicated that, given standards of competent practice in the marketplace, the delay in presenting the amendment was a result of negligent practice and did result in damages to the parties, there may arguably be some liability on the part of the broker who failed to timely process and deliver the fax. The parties should be referred to legal counsel for advice as to their legal rights.

The selling agent did not complete any of the blanks in the "delivery" area of the offer. Nothing was inserted, not even dashes. What effect does this have?

Because no number was provided for faxing and no address was provided for mailing, neither faxing nor mailing are available as methods of delivery in the transaction. Personal delivery is the only available method for delivery of documents and notices. This would be unfortunate for a buyer facing an imminent delivery deadline. The selling agent is expected to put dashes in the blanks, if mail and fax delivery were not intended to be available as options. If the licensee merely forgot to fill in the forms, the agent drafting the offer was not complying with the DRL's minimum standards of competent practice. The seller may counter to complete this area, but assuming the seller wishes to accept the offer, an amendment completing the delivery area would be appropriate.

Faxing All Contract Pages

If a listing agent is receiving an offer from a co-broke or sending an offer to a co-broke, is it necessary to send pages 2 & 4? A selling agent refuses to deliver a copy of all of the pages of the offer when faxing it to the listing broker.

Yes, the complete contract represents the agreement of the parties and should be submitted in its entirety. Failure to fax all pages is incompetent practice. A listing broker may be liable for damages caused by a selling agent's failure to fax all pages of the offer. Wis. Admin. Code Chap. RL 15 provides that licensees shall provide exact and complete copies of documents to any person who has signed the document.

An agent has faxed an offer to the listing agent that consists of three one-sided pages that are somewhat illegible. Should this offer be presented this way? Should the listing agent get the original?

To ensure that both parties know all terms and conditions of the offer, the listing agent should obtain a copy of all pages of the offer and all attachments before presenting the offer to the seller. The DRL considers the practice of only faxing the pages of an offer that contain "fill-in-the-blanks" and not faxing pages that contain only "boilerplate" to be incompetent practice.

Withdrawing Offers

The listing agent was waiting to deliver an accepted offer to the subagent when the buyer called up and withdrew the offer. What is the status of the offer?

A party who has made an offer (or counteroffer) is, in all but a relatively few situations, able to withdraw the offer any time prior to its binding acceptance. The law requires the party withdrawing the offer to notify the person in receipt of the offer that the offer is withdrawn. If the notice of withdrawal arrives before a binding acceptance (per the terms of the contract) the offer becomes null and void. Any attempt at acceptance of the offer thereafter (even if prior to the stated time limit for acceptance) will have no legal effect.

Notice of withdrawal does not technically have to be in writing. However, the party attempting to withdraw the offer must make certain that proof is available that the offer has not already been accepted. If it

can be verified (and hopefully documented) that the offer had not been accepted, then notice of withdrawal is less likely to be challenged.

A prudent practice is to immediately fax or mail the signed offer upon receipt from the seller. This will reduce the buyer's window of opportunity to withdraw. Waiting to personally deliver the offer to the cooperating agent may be courteous, but it likely does not satisfy the listing broker's duties to the seller. The best practice is to fax or mail first and then follow up with personal delivery to the cooperating agent.

The seller signed the offer and gave it to the listing broker to deliver it to the buyer. Upon return to her office the listing agent found a new (and better) offer on her desk. The seller wants to accept the second offer. How should the listing broker deal with the signatures on the first offer?

The seller may withdraw the signed offer prior to delivery and accept the second offer. It would be appropriate to document seller's withdrawal on the face of the first offer to insure no accidental delivery occurred. The listing broker should gather all copies of the first offer and note clearly in the signature area that the seller withdrew the offer prior to delivery. It would be preferable to have seller make these notations.

The seller has delivered a counteroffer to the buyer. The buyer hasn't accepted the counteroffer yet. A new offer was just delivered to the listing broker. The new offer is for substantially more money. The listing broker cannot get in touch with seller. Can the listing broker withdraw the counteroffer so that seller can accept the new offer?

Only with the seller's authorization. While on its face the second offer may appear to be better for the seller, the seller may have reasons to stick with the contract already under negotiation. The listing broker's duty is to continue to try to reach the seller to determine what the seller would like to do at this time.

Counteroffers

The buyer offered to purchase a residential condominium unit and the sellers countered. On the offer, the sellers initialed the offer in the space for indicating a rejection. However, they did draft and submit a counteroffer that has been signed by both the buyer and the sellers. Because the sellers initialed the offer as rejected, does the offer need to be amended to correct this?

The counteroffer acted as a rejection of the first offer and as a new offer which incorporates the unchanged terms of the original offer. The seller's indication that the first offer was rejected is consistent with the issuance of a counteroffer.

The seller is going to counter the offer submitted by the buyer. Does the offer have to be countered by the time the offer expires? If the offer is countered after the date for acceptance, must the acceptance date be extended to cover the date the offer was countered?

The counteroffer is essentially a new offer which incorporates many, if not most, of the terms and provisions of the previous offer. The counter-offer acts as a rejection of the prior offer. Therefore, the date for acceptance in the previous offer is immaterial because that offer is not being accepted.

The counteroffer may be written after expiration of the acceptance period in the offer without reference to the offer's acceptance date. The only relevant issue regarding acceptance deadlines for the counteroffer is the deadline for acceptance of the counteroffer.

The seller delivered a counteroffer to the buyer but now has changed her mind. Can she go back and accept the buyer's offer? There is still time left under the acceptance deadline.

No. A counteroffer can be understood as a new offer which is being issued by a party that has previously received an unacceptable offer. The legal effect of writing and delivering a counteroffer is the same as the rejection of the previous offer and the presentation of a new offer to the party who had submitted the previous offer. The reason we don't reject the offer and write a whole new offer is simply to avoid the unnecessary drafting of an offer whose terms are 95 percent identical to an offer previously written. By using the counteroffer form, only the terms that vary from the original offer are written out and all terms remaining the same from the original offer are incorporated by reference. This approach helps keep some sense of continuity in the negotiations and saves time.

A counteroffer can be understood as a new offer which is being issued by a party that has previously received an unacceptable offer.

In the simplest situation, the seller counters the buyer's offer. After the buyer's receipt of the seller's counteroffer, the seller attempts to withdraw the counteroffer so the original offer can be accepted (with time remaining for acceptance).

In this situation, the seller clearly would be unable to accept buyer's initial offer because seller's counteroffer acted as a rejection. A rejected offer is null and void and cannot be accepted. Either party may offer a new counteroffer, which once properly accepted and delivered may create a binding contract.

How do you number counteroffers?

At the top of the WB-44, the parties are to state the number of the particular counteroffer in the sequence of the negotiations (the number is writ-

ten in the blank line provided) and indicate whether the counteroffer was originated by the seller or by the buyer (by striking). The number designation refers to the total number of counteroffers that have been issued in the transaction, not to the number of counteroffers issued by the particular party. For example, the third counteroffer issued in a back-and-forth negotiation would be: "Counter-Offer No. 3 by (Buyer/Seller)."

Can the buyer counter with "Counter-Offer No. 3 by Buyer" after the seller rejected the buyer's Counter-Offer No. 2?

Yes. While most often a counteroffer is written in response to another party's offer or counteroffer, this is not the only possible use of the form. If the seller had rejected a buyer's previous counteroffer, the buyer could simply issue another counteroffer. This is because each counteroffer is a new offer that incorporates all of the language of the original offer, except as modified in the latest counteroffer.

The buyer rejected the seller's counteroffer five days ago by initialing the line on the counter that indicates that it is rejected. Can the buyer revive the offer with a new counteroffer to the seller today?

A counteroffer is effectively the same as the party who previously received an unacceptable offer issuing a new offer. Writing and delivering a counteroffer is legally equivalent to a rejection of the previous offer and the presentation of a new offer to the party who had submitted the previous offer; it is simply easier than drafting a new offer when most of the terms are already written in the previous offer. Using a counteroffer helps keep some sense of continuity in the negotiations and saves time.

Resale/Equitable Title

If a buyer gets an offer accepted, may the buyer market the property and resell it to a third party before the buyer closes on his or her acquisition of the property?

If a buyer has equitable title to a property, the buyer legally has sufficient interests in the property to proceed with the resale of all or part of the property being purchased. Under the legal doctrine of "equitable conversion," the buyer has equitable title when the parties enter into an enforceable contract for the sale of an interest in real estate (like an offer to purchase or a land contract).

In *Kubly v. Department of Revenue*, the court addressed the question of whether equitable title transfers at the time of acceptance if the offer is contingent upon the occurrence of certain events. Specifically, the court in *Kubly* was dealing with the question of when the seller's equitable title in the property would transfer. In determining that equitable title does not pass until all conditions precedent (contingencies) are satisfied, the *Kubly* court reasoned:

> "Restatement, 1 Contracts, p. 359, sec. 250 (a), recognizes conditions precedent in contract law, and states that, when such a condition is provided, the fact upon which the condition is based must occur 'before a duty of immediate performance of a promise arises,' unless the same has been excused. The insertion of a condition precedent in a contract does not render the same void but only delays the enforceability of the contract until the condition precedent has taken place." (Citation omitted)

Therefore, if the offer between the owner and the buyer is contingency-free, acceptance of the contract causes equitable title to transfer. If the contract between the owner and the buyer is subject to conditions precedent, equitable title does not transfer until the conditions are satisfied.

If the buyer has a contingency-free offer or option giving him or her equitable title, then the agent may list the property for the buyer. The listing and any offers to purchase must be conditioned upon the buyer closing on the purchase of the property.

If the agent's company has the listing for the property the buyer is purchasing, however, the licensee must also obtain the written consent of the first seller before concurrently listing the property a second time for the buyer. This avoids the appearance of any conflict of interest. The first seller might otherwise question why any purchasers the licensee obtains for the buyer were not obtained as purchasers for the seller under the first listing. This would especially be true if the offers obtained for the buyer were more favorable than those offered by buyer.

Any marketing activities physically taking place on the property also require the written consent of the first seller who does still hold title to the property and who may also still occupy the property. Such activities might include such things as survey work, showings and signs. If these guidelines are observed, a licensee may market a property for resale by the buyer on a contingent basis.

Assignment of Offers

The assignment of contract rights generates debate between different Wisconsin attorneys who have learned different analyses of this issue. The debate generally is whether one party can assign a contract like an offer to purchase to another person unilaterally - or must the other party consent? One way to avoid this discussion is to have the assigning party referenced in the contract as "individual X and/or assigns." There seems to be universal agreement that this "and/or assigns" phrase assures X's right to unilaterally assign the contract. If there is no such label, however, uncertainty about the party's rights to assign the contract may be raised by some sellers or their attorneys.

The following discussion of the concepts of assignment and delegation

are stated in terms of a real estate transaction where a buyer wants to assign his or her rights in an offer to purchase to another buyer. This buyer may also have to assign or delegate any duties or obligations yet to be completed.

Generally speaking, contractual rights, like a buyer's rights under an offer to purchase, may be assigned without the consent of the other party. An assignment is the transfer by a party of all of his or her rights to and interests in some kind of property - here an offer to purchase - to another party. In an offer to purchase, Buyer 1 typically would be assigning his or her rights under the offer to Buyer 2. The right that is assigned is to have the seller perform as set forth in the contract: to deed the property when all terms and conditions have been met and the purchase price has been paid. In other words, an assignment is a transfer of rights to receive and benefit from another party's performance.

Under the technical theories of the common law, assignment must be distinguished from delegation. A delegation of a duty occurs when a second person is given the power to act for another -- the authority to perform a task on behalf and in the place of the first party. A delegation is a transfer of a duty or obligation to perform. For example, a buyer may delegate his duty to seek the zoning change specified in the zoning contingency, and to carry out all of the other contingencies in the offer using good faith and due diligence.

Some attorneys raise issues regarding the ability of a buyer to assign his or her rights under an offer under theories that are generally not applicable to the buyer's right to assign an offer to purchase. For example, a contract is not assignable when the substitution of Buyer 2 for Buyer 1 would materially change the seller's duty, materially increase the seller's burden or risk, or materially impair the seller's chance of obtaining return performance. Because an assignment of an offer to purchase does not release Buyer 1 from the buyer's obligations under the contract, this should not ordinarily be an issue. In addition, a right that is personal may not be assigned without the consent of the other party. A contract may be personal when it requires performance of personal services or involves a relationship of confidence. A construction contract might not be assignable by a builder because it is "personal," but offer to purchase rights are not ordinarily "personal."

In an assignment of a buyer's rights under an offer to purchase, Buyer 1 must clearly show his or her intent to transfer the right to performance to Buyer 2, thereby ending Buyer 1's entitlement and creating Buyer 2's right to performance. This is accomplished with a written assignment agreement between Buyer 1 and Buyer 2. Wis. Stat. § 706.02 requires that any assignment of rights that affect an interest in land must be in writing and comply with the other formal requirements for a real estate conveyance. This includes assignments of offers to purchase, leases (or subleases or lease assignments) having a term of more than one year, mortgages and land contracts.

The assignment or delegation of a performance of a contractual duty under an offer to purchase does not discharge Buyer 1's liability for fulfilling that obligation or liability in the event of a breach. If Buyer 1 assigns and delegates the performance of an obligation, Buyer 1 is not relieved of responsibility even if the seller consents to the delegation. On the other hand, Buyer 2's performance of the duty will discharge Buyer 1's duty to the seller.

Although this seems like a lot of complicated legal detail, it basically means that a buyer can assign his or her interests in an offer to another buyer and delegate the performance of the buyer's contractual obligations. The consent of the seller is not required if the performance assigned is not of a personal nature. The buyer remains liable if the new buyer does not perform, so the assistance of an attorney is recommended for the buyer seeking to assign his or her rights and obligations under the offer. The assignment must be in writing.

It still may be best to amend the offer and have the original buyer, the new buyer, and the seller sign it, but the seller's signature ultimately may not be required unless the obligation assigned or duties delegated are of a personal nature. In such an amendment, Buyer 1 would assign his rights under the offer and delegate the performance of Buyer 1's duties and obligations under the offer to Buyer 2. It may be prudent to have Buyer 2 agree to accept the assignment of rights and agree to perform the delegated duties and obligations. The seller would consent to the assignment and delegation between the buyers. Buyer 1 would remain liable if Buyer 2 did not perform.

What are the rights of the buyer and the seller if the buyer assigns the buyer's interests under the offer to another buyer? Does the offer have to be written "and/or assigns"?

The buyer generally may assign the buyer's interests under the offer to another buyer and delegate the performance of the buyer's contractual duties without the consent of the seller. This assignment, however, will not relieve the original buyer of liability for the new buyer's performance. If the new buyer does not pay or otherwise perform under the contract, the seller may be able to hold the original buyer liable. The offer does not have to be written "and/or assigns" but that is helpful in eliminating confusion and avoiding legal disputes.

A buyer wrote an offer to purchase, although the buyer cannot get a loan. His parents, however, can get financing. The buyer is assigning the contract to his parents and seller has agreed. Just the parents and the sell-

ers have signed, but the son has not. Please advise.

Although an assignment is similar to an amendment, the creation of and extinguishing of rights and obligations by the parties involved in the transaction is legally more complex than an amendment. Minimally, the buyer should sign the amendment generating the assignment to his parents. To address the details and determine the legal effect of the language used in the assignment, the parties may wish to discuss the assignment with legal counsel.

While the buyer of a property is in the process of getting financing, a second buyer comes in and wants the property, but is not willing to go into a secondary position. The second buyer's interest is in buying out the first offer. Can the first buyer assign the offer to purchase to a second buyer?

Yes, an assignment can be done, but confidentiality of offers rules in Wis. Stat. § RL 24.12 would prohibit a licensee from giving the first buyer's name and other contract information to the second buyer. The listing agent may approach the first buyer to see if that buyer is interested in having a discussion with the second buyer and help put the two buyers in touch. An attorney is recommended to draft the document to address all assignment and delegation issues.

Someone wrote an offer that referred to the buyer as "buyer's name and/or assignees." That buyer accepted the counter-offer and at the same time provided a notice that added an additional person as a buyer on all further paperwork. Can a buyer just give a notice to put the other person on the deed or do they need to do an amendment?

Generally speaking, contractual rights, like a buyer's rights under an offer to purchase, may be assigned. The buyer was referenced in the original offer to purchase as "buyer and/or assigns." The "and/or assigns" phrase notifies the seller of the buyer's right and intent to unilaterally assign the contract, without the consent of the seller.

In some transactions it may be necessary to have an amendment to the offer to purchase adding the additional buyer and signed by the first buyer, the new buyer and the seller to satisfy a lender or other third party who may not be satisfied with a copy of the assignment document.

Personal Property and Bills of Sale

A listed property, owned by an estate, has a lot of junk lying all over. The personal representative does not want to deal with removing these articles. What is the listing broker's legal liability if someone trips over something and gets hurt?

The listing broker and the seller (the estate) may be liable for injuries suffered by persons viewing the property under the conditions described. Although the seller indemnifies the listing broker per a provision in the listing contract, this provision does not guarantee that the listing broker would be made whole if sued. Perhaps the attorney for the estate may be of some help in addressing the problem. If the listing broker cannot get the property picked up, he will need to determine whether the risk of liability is great enough to terminate the listing.

Re: Reference to bill of sale on WRA Addendum R for rental properties. The parties do not wish to give a value to the personal property. How should the broker proceed?

The personal property sold should be transferred by bill of sale. Lenders may want an allocation of value, and a valuation of the real property sold will be required to prepare the transfer return. It is not the broker's responsibility to allocate the value of the real and personal property. If the value of the personal property were substantial, however, it would be a violation of license law to indicate in the offer that the personal property has no value.

The parties may modify Addendum R to eliminate the reference to the value of the personal property in the chart. The broker may indicate in the offer that the personal property will be transferred by bill of sale for one dollar and other good and valuable consideration. It will be beneficial if the parties provide that they will later assign a value because that amount may then be deducted from the value of the real property on the real estate transfer return. The parties may wish to confer with their attorneys or accountants in this regard.

When must a bill of sale be used?

The commercial forms require that all personal property included in the purchase price shall be conveyed at closing by bill of sale. This is generally true, however, for any personal property that is being transferred as part of a real estate closing — all personal property included in the purchase price should be conveyed at closing by bill of sale. If a schedule of personal property has been prepared as part of the offer to purchase, as in a rental property offer, a business offer or a commercial offer, the schedule may simply be attached to the updated WB-25 Bill of Sale form and incorporated by reference at line 26.

A bill of sale is a document used to transfer title to personal property. The WB-25 Bill of Sale is the DRL-approved form which licensees should use for this purpose. The WB-25 warrants free and clear title to the personal property (except for any liens and encumbrances which are made exceptions). It does not, however, provide any warranties regarding the condition of the personal property. If such warranties are desired, the parties must provide for them in the offer.

Although the use of a bill of sale is generally straightforward, lenders often raise a related worrisome issue

with respect to the inclusion of personal property in the purchase price.

Re: Treatment of personal property on residential offers to purchase. Lenders often ask REALTORS® to write a residential offer to purchase, or to amend an accepted offer to purchase, to indicate that the personal property (most often a stove and refrigerator) is "left at the convenience of seller," is "left without monetary consideration," or is "of no value." Some brokers have one of these phrases or a similar phrase in their standard office addendum. Many lenders insist that it is perfectly legal to use this type of language in offers to purchase. Is this correct if the personal property clearly has value?

No, use of these phrases may involve fraud and may lead to a distortion and misstatement of the purchase price. Each phrase is examined in detail below. It is assumed that the personal property / appliances involved in this discussion are not junk and do have some actual value.

The phrase "left at the convenience of seller" suggests that the seller is not going to use the personal property / appliances, but does not want to go to the bother of properly disposing of it. This may be true in some transactions. However, the monetary / tax consequence of this arrangement would seem to be that the seller is gifting the personal property to the buyer or simply deserting it. This being the case, the offer should be amended to deduct the value of the personal property / appliances from the purchase if the buyer wrote the offer to include the personal property / appliances in the purchase price. If this adjustment is not made, the purchase price is overstated.

The phrase "are left without monetary consideration" suggests that the seller is gifting the personal property / appliances to the buyer. This being the case, the offer should be amended to deduct the value of the personal property / appliances from the purchase if the buyer wrote the offer to include the personal property / appliances in the purchase price. If this adjustment is not made, the purchase price is overstated.

The statement that the property is "of no value" is simply false (assuming property does have some actual value) and should never be used unless the items under discussion are really worthless junk. Even old used appliances and personal property may have some resale value. The parties may consult with a personal property appraiser, an auctioneer or a used appliance dealer; review the want ads in the local newspaper; or simply agree upon a reasonable estimated value. Furthermore, this personal property may be crucial to the buyer who makes his or her offer based upon the premise that this property will be included in the sale or who does not have the resources to purchase new appliances or personal property at the time of the home purchase. Note that it is not the licensee's job to determine or track down the value used.

If the personal property at issue was new high-grade appliances purchased two months ago for $5,000, or if the personal property includes two washers, two dryers, two piers and two boats, there is no question that any offer (or offer addendum) that states that the personal property was "left at the convenience of the seller" or is "of no value" would be fraudulent. When the personal property at stake is a used stove and refrigerator, the numbers are smaller but the issue remains the same.

If it were really true that the personal property has no value and is left at the convenience of the seller, then what would happen if the seller takes it with him or her? Who would be responsible if the seller takes this property - the seller for taking it or the selling agent for using this language in the offer, language that apparently has led the seller to think that he or she may change his or her mind? The buyers may seek damages for this "no value" personal property, but what can the monetary damages be if the buyer already agreed that the personal property had no value. In this situation, the buyer may end up filing a complaint with the DRL against the agent who wrote the offer language that allowed the seller to waltz off with the personal property. This serves to emphasize that use of these lender phrases can be detrimental to the parties as well as simply being untrue.

What is the best way for a REALTOR® to handle a situation in which there is personal property included in a residential offer to purchase?

One solution may be to see if the lender will accept a statement to the effect that the personal property is included in the offer for "one dollar and other good consideration." This has the benefit of suggesting that the personal property has minimal value while still allowing for the possibility that the "other good consideration" may be hundreds or even thousands of dollars. With this phraseology, the agent who includes this language does not have to lie.

Another solution may be for the offer to purchase to indicate that the buyer is purchasing certain personal property / appliances from the seller outside of closing. The parties may have a separate agreement concerning the price and the buyer can pay the seller by separate check. Another way may be to simply write the offer as always, with the preprinted offer provisions indicating that any listed property on 13 & 14 are included in the purchase price. If the lender approaches and requests a "no value" statement, the parties may decline to comply and may offer, instead, a price allocation. Either way, it is appropriate to have a WB-25 Bill of Sale at closing to convey the personal property. Members may also wish to reconsider any statements of "no value" that may be included in their preprinted offer addenda.

If the included personal property does have value, the lender may need a price allocation between real property and personal property. The lender may not want to lend based upon personal property, and may need the price allocation data so that the value of the personal property may be deducted on the Wisconsin Real Estate Transfer Return. Thus it may be beneficial if the parties can agree early on upon the value of the personal property outside of the offer to purchase. Leaving the valuation process in the hands of the parties helps protect licensees who are not personal property appraisers and not qualified by virtue of their real estate licenses to determine personal property values. REALTORS® may document these agreements provided that a reasonable person would view the agreed value as reasonable. On the other hand, REALTORS® should not draft any agreement where the agreed value is clearly fraudulent.

Leaving the valuation process in the hands of the parties helps protect licensees who are not personal property appraisers and not qualified by virtue of their real estate licenses to determine personal property values.

A real estate licensee who writes false statements into an offer to purchase is contributing to the parties making false statements, i.e., committing fraud. If misstated purchase prices are then inserted into the Wisconsin Real Estate Transfer Tax Return, the parties' fraud is repeated to the Wisconsin Department of Revenue. Wis. Stat. §77.27 states, "Penalty for falsifying value. Any person who intentionally falsifies value on a return required to be filed under this subchapter may for each such offense be fined not more than $1,000 or imprisoned in the county jail not more than one year, or both."

The lender has instructed the selling agent to amend the offer to state that the personal property has no monetary value and is being left at the convenience of the buyer. Is this correct?

The contents may be listed and sold with the property. Personal property sold should be transferred by bill of sale. Lenders may want an allocation of value and a valuation of the real property sold will be required to prepare the transfer return. It is not the selling agent's responsibility to allocate the value of the real and personal property. Because the selling agent knows that the value of the personal property is substantial, it would be a violation of license law to indicate in the offer that the personal property has no value. The selling agent may indicate in the offer that the personal property will be transferred by bill of sale for one dollar and other good and valuable consideration. The selling agent may also say the parties will allocate the value of personal property prior to closing.

Fixtures

As a general rule, a fixture is an item of property which under certain circumstances may be treated legally as personal property but which has become so attached to land or buildings, or is used in such close association with the land or buildings, that it is treated as a part of the land. The courts have attempted to lay down certain tests to determine when an article takes on the character of a fixture. (1) Is the article physically attached? Is it easily removable without damage to the premises? If it cannot be removed without serious damage either to the item or premises, it is practically conclusive that it is a fixture. (2) Is there a special adaptation between the article and the premises? (3) What is the intent of the person attaching the article to the premises? Are there general community "customs"? None of these tests are conclusive on their own nor do they operate mechanically. When in doubt, the parties should clearly agree in advance on the nature of such items. The seller must expressly reserve the right to remove the item; the broker must make clear to the buyer that the item is not included.

The offer determines the agreement between the buyer and seller. In order for the buyer to have the property included in the sale, this would have to be written into the offer. The listing contract really only expresses what seller is willing to have included in the offer and still have it meet acceptable terms. (One must always remember the function of the listing contract: to establish the terms of an offer which, if procured, earns the broker a commission.) Similarly, an MLS or office data sheet only reflect what property is available while the offer establishes the parties' agreement about personal property.

In an MLS remarks sheet, the listing agent noted the invisible fencing. The buyer did not ask for the invisible fencing in the offer to purchase. They asked what the sellers were going to leave regarding the invisible fencing. The fence is under the ground, so that is considered a fixture. There is a control panel that is mounted on the wall with two screws. Is the control panel part of the invisible fence system?

It may be argued that the control box is a fixture because it was screwed into the garage wall and it goes with the underground components of the system, similar to a satellite dish system.

Two items were on an MLS sheet--a satellite dish that is located 100 ft. from the home on a concrete slab and component parts; and a wood stove in the living room. Neither of these items was mentioned in the offer as included or excluded. What is seller's obligation if buyer would want the items?

Per the offer to purchase, the satellite dish and component parts are clearly fixtures. They must stay because they are automatically included unless it is written in to exclude them.

The situation with the stove is less clear. Per the definition of fixtures (lines 124-133 of the WB-11), it may be possible to agree either way. If it is a fixture, it must stay. If it is not a fixture, it may be removed.

Re: A discrepancy on whether window treatments are included or excluded in the offer. The property has $3,000 in custom-made window treatments - mostly fancy shades. The offer to purchase provides that all "window treatments" are excluded from the purchase price. The selling agent now claims that the shades are not window treatments and that they included in the offer because they are fixtures.

While the window shades are in the offer to purchase definition of fixtures, the written-in exclusion for all window treatments may override that provision. The question is whether the parties intended "window treatments" to include window shades. In the abstract, "window treatments" is a very broad, general term that arguably may include window shades and other window coverings and adornments.

Negligent Hiring of Contractors Can Mean Liability for REALTORS®

The United States District Court for the Eastern District of Wisconsin decided two lead-based paint (LBP) cases impacting broker liability in 1999. The two decisions, "Chapman One" and "Chapman Two" involved a transaction in which the buyer applied for Federal Housing Administration (FHA) financing. The FHA appraisal revealed pealing and chipping paint. As instructed by the appraiser, who was approved by the Department of Housing and Urban Development (HUD), the listing broker hired a painter to scrape and repaint much of the property's exterior. After the painter was finished, the appraiser determined that the property met HUD standards.

After the buyer moved into the property, the buyer's four-year-old child was discovered to be suffering from elevated lead blood levels. The suit accused the broker of being negligent in hiring the painter, failing to supervise and inspect the painter's work, and failing to disclose the LBP to the buyer. In Chapman One, the court ruled that the as-is clause in the buyer's offer did not protect the broker from the negligence claims because exculpatory clauses like an as-is clause must specifically and expressly address negligence claims in order to bar them. In Chapman Two the court held that the professional services exclusion in the broker's business-owner's liability policy did not exclude coverage for the broker's negligence in hiring and supervising the painter or the failure to disclose the LBP.

Clients and customers may ask REALTORS® to refer them to inspectors and contractors. Although this may be beneficial to the consumer to have such a recommendation, this practice may pose serious legal risks for the licensee if this referral to a contractor, or request that the licensee hire a contractor, is not handled properly.

Buyer's Agent Not Responsible for Actions of Recommended Pest Control Company

In contrast to REALTOR® liability when hiring contractors for clients and customers, a Kentucky court ruled that a real estate agent did not guarantee the competency of a pest control company when the agent recommended it to a buyer. The buyers discovered that their new home was infested with termites. The buyers sued the seller, the mortgage holder, the listing agent, their broker, the pest control company who inspected and treated the property prior to sale, and the appraiser. When the trial court ruled in favor of all the defendants the buyers appealed to the Court of Appeals of Kentucky.

The court considered whether the buyer's broker could be liable to the buyers for recommending the pest control company to them. In order for their loan application to be approved, the buyers were required to have a termite inspection. The buyers asked their buyer's agent for a list of pest control companies, and he provided them with the names of three companies. The buyers then hired the selected pest control company to perform the inspection. The court considered whether the buyer's broker breached his fiduciary duty to the buyers by recommending a pest control company that allegedly did not perform its required duties in a satisfactory manner. The court ruled that making a recommendation does not guarantee performance when the buyer's broker also had given the buyers the names of two other pest control companies.

Practice Tips for REALTORS®

When helping parties find professional inspectors and contractors (like the painter and the pest control company in the cases described above), REALTORS® should always take the following steps:

- **Prepare a list of professional inspectors and contractors.** Do not recommend or endorse a particular expert, because a "recommendation" may result in liability. Instead, maintain a list with at least three names of lenders, title insurers, inspectors and professionals in each field, containing any available references from past users. Any affiliations your company has with any of the professionals on the list should be disclosed at the time the list is distributed. Put the list on a sheet of company letterhead, and include a disclaimer that you can't

personally endorse these professionals.

- **Avoid referral fees.** It is wise to not ask for or accept a referral fee from any name on the referral list. Earning a fee just for referring business (except to other real estate brokers) violates the Real Estate Settlement Procedures Act (RESPA) if the contractor or company is a RESPA settlement service provider like a home inspector, appraiser or title company. The best policy is to not take referral fees unless you actually do new work.
- **Let inspectors and contractors do their jobs.** Do not accompany the inspector through the house, because this may imply that you are supervising the inspector. Reinforce the concept that the buyer hired the inspector so the buyer should deal directly with the inspector. Similarly, do not volunteer to inspect work performed on the house - again, you are not the contractors' supervisor and you are not the appropriate expert to inspect this work.
- **Get specific authorization if you must hire contractors.** Real estate agents should recognize that it is not a part of their duties to hire contractors for the parties. The better practice is to give the parties a list of local contractors, have the parties determine which contractor best meets their needs, and have them hire the contractor. If an agent finds that it is necessary to personally hire contractors in a particular situation, the agent should have the parties give a specific written authorization to hire contractors and a liability release for any damages caused by the contractor. Any contractor hired or included on a list of contractors should hold all applicable credentials for the type of work being performed. Include in any agreement with contractor a statement specifying who is the responsible party and an agreement by the contractor to follow all safe work practices required by applicable law.
- **Always be aware of LBP.** Don't assume that representatives of federal agencies are knowledgeable when it comes to compliance with the federal LBP law. FHA loan applicants are commonly required to scrape and paint LBP in order to receive their loans. Rarely does the FHA tell the buyers about safe LBP work practices or that certified lead professionals might be legally required to perform the work. REALTORS® should make sure that written disclosures warning of the possible dangers of LBP have been made in writing to the buyer and urge that safe work practices be used at all times. REALTOR® disclosures may take the form of an Addendum S or an Addendum L (the WRA's LBP disclosure forms for sale and rental transactions) or assurance of compliance with the federal Renovations Disclosure Rule.

LBP Compliance Update

When dealing with a situation where contractors are working in a building where there is or may be LBP (be careful about any housing built before 1978), REALTORS® should follow the guidelines for finding or hiring professional inspectors and contractors. In addition, REALTORS® should educate the parties and contractors about the federal Renovations Disclosure Rule.

Federal LBP Renovations Disclosure Rule

EPA regulations require renovators and remodelers working for compensation to distribute LBP information to owners and occupants of target housing before commencing work. The pamphlet is the same *Protect Your Family from Lead in Your Home* pamphlet that sellers and landlords of target housing are required to give to buyers and tenants.

Renovation is defined in the rule to mean the modification of any existing structure or portion thereof that disturbs painted surfaces, unless that activity is performed as part of an LBP abatement. The rule, however, excludes minor repair and maintenance activities (including minor electrical work and plumbing) that disrupt no more than two square feet of painted surface per component, emergency renovation operations, and renovations in target housing if a certified LBP inspector has given a written opinion that the components affected by the renovation are free from LBP.

This rule does not cover only those contractors who label themselves are remodelers or renovators. Renovators are defined as any persons who perform renovations for compensation. It applies to anyone who disturbs more than two square feet of a painted surface or component while on the job in target housing. Thus, this rule may apply to plumbers, drywallers, electricians, property management firms and some landlords, as well as to general contractors, renovation firms, and home improvement contractors. It applies to owners renovating their own apartment buildings using maintenance staff and neighborhood handymen providing services to those in the neighborhood in exchanges for money, goods or services. However, work that is performed for free and work performed in one's own home are not covered.

Under the rule, there are delivery and record-keeping requirements for the distribution of the federal LBP pamphlet. No more than 60 days before beginning renovation work in any residential dwelling unit in target housing, the renovator shall either (1) provide the owner with a copy of the pamphlet and obtain a written acknowledgement that the owner has received the pamphlet, or (2) send the pamphlet to the owner by certified mail at least seven days prior to the renovation. In addition, if a ten-

ant and not the owner occupies the unit, the renovator shall either (1) provide an adult occupant of the unit with a copy of the pamphlet and obtain a written acknowledgement that the occupant has received the pamphlet, (2) certify in writing that a pamphlet has been delivered to the dwelling unit and that the renovator has been unsuccessful in obtaining a written acknowledgement for an adult occupant, or (3) send the pamphlet to the occupant by certified mail at least seven days prior to the renovation.

There are also slightly different rules for the renovations are going to be in common areas of the property. Common areas include those portions of a building or property generally accessible to all residents and users of the property such as hallways, stairways, laundry and recreational rooms, playgrounds, community centers, and boundary fences. No more than 60 days before beginning renovation work in common areas of multi-family housing (more than four units) that is target housing, the renovator shall either (1) provide the owner with a copy of the pamphlet and obtain a written acknowledgement that the owner has received the pamphlet, or (2) send the pamphlet to the owner by certified mail at least seven days prior to the renovation. The renovator must also either give written notice or ensure that written notice is given to each unit. The notice must describe the general nature and location of the planned renovations, give the expected starting and ending dates, and explain how the occupant can obtain a copy of the pamphlet from the renovator at no charge. The renovator must also prepare a written statement documenting all of the steps taken to notify the occupants, and provide a revised notice to occupants if the scope or the dates of the renovations change.

Buyers must retain the right to unconditionally amend or terminate an offer based on the information contained in the lead disclosures.

For more information about the federal LBP Renovations Disclosure Rule, see *Legal Updates 99.08* and *00.04*.

Federal LBP Disclosure Rule

HUD and the U.S. Environmental Protection Agency (EPA) have made further interpretative clarifications of the requirements for compliance with the federal LBP disclosure rules. HUD and EPA have issued three interpretative guidance documents for the real estate industry (see http://www.epa.gov/lead/ leadbase.htm), but have now issued further guidance in the form of answers to questions posed by NAR and IREM.

1. Timing of Seller's LBP Disclosures

The required LBP disclosures may be given to the purchaser after a seller has accepted a buyer's offer, as long as the buyer has the unconditional right to cancel the purchase contract after receipt of the LBP disclosures and is allowed 10 days to conduct an inspection for LBP hazards. Buyers must retain the right to unconditionally amend or terminate an offer based on the information contained in the lead disclosures. They must be able to unilaterally cancel the offer without losing their earnest money or suffering any other adverse effects. This delayed delivery of the seller's LBP disclosures also must not impede a buyer's ability to conduct a lead inspection within a 10-day period.

For further discussion of these timing guidelines, see pages 6-9 of the *Interpretive Guidance For The Real Estate Community On The Requirements For Disclosure Of Information Concerning Lead-Based Paint In Housing (Part III)* dated August 2, 2000, and prepared by the Office of Lead Hazard Control, U.S. Department of Housing and Urban Development, Washington, D.C. 20410 and the Office of Pollution Prevention and Toxics, U.S. Environmental Protection Agency, Washington, D.C. 20460: http://www.epa.gov/lead/ig3rjm.pdf

This means that the seller need not necessarily deliver Addendum S or other LBP disclosures to the buyer before the offer is accepted, but this will work only if there is a contingency or some other mechanism in the offer to purchase giving the buyer the absolute right to unilaterally cancel the contract after buyer's receipt of the seller's LBP disclosures. The offer can be accepted before the seller gives the buyer a completed Addendum S only if the buyer retains an absolute "out." Such a right does not appear in the standard language of the DRL-approved offer to purchase forms, so such a provision would have to be drafted and inserted into the offer to purchase.

2. Original Signatures and Use of Counterparts

A seller or landlord may complete and sign one original LBP disclosure form like an Addendum S or Addendum L and make photocopies to give to prospective buyers and tenants. A prospective buyer or tenant may complete and sign a copy of the form and return it to the owner. HUD and EPA have confirmed that completion of a federal LBP disclosure form in counterparts (two separate documents) satisfies the owner's disclosure obligations, provided that HUD and EPA can access the original signatures of all parties. HUD and EPA will issue guidance on the use of electronic versions of the federal LBP disclosure forms at a later date, once the federal rules implementing federal electronic commerce legislation are enacted.

3. Disclosure by Joint Owners

Only one owner is required to com-

plete and execute the federal LBP disclosure form when two or more individuals own the property, as long as all known LBP hazard information and records are disclosed. HUD and EPA's focus is on the proper disclosure of information and the execution of the LBP disclosure form by someone legally authorized to sign on behalf of the parties. Only one owner is needed to execute the form, but omission of any LBP information that is known to any of the owners would violate the federal LBP disclosure rules.

4. Protect Your Family From Lead in Your Home Pamphlet

It is acceptable to continue to distribute the 1995 version of the EPA's "Protect Your Family From Lead in Your Home" pamphlet, even though the publication was revised in 1999. The 1999 version can be found at http://www.epa.gov/lead/lead-pdfe.pdf. The EPA is in the process of further revising the pamphlet in 2001. Although older versions of the pamphlet may still be used in the short run, HUD and EPA recommend that everyone switch to the 2001 version as soon as possible once it becomes available.

HUD and EPA have also clarified that buyers do not need to acknowledge receipt of information like LBP testing reports when no such information or reports are provided. They emphasize that there is no required standard form or mandatory language (other than the Lead Warning Statement) in the sample LBP disclosure form. Any language changes cannot mischaracterize or misstate the disclosure obligations.

Conclusion

The Legal Hotline is a service that is available to all WRA members. The Hotline receives numerous calls covering a wide range of real estate related topics. Members should never hesitate to call the Hotline because they feel their question is too simple or a little unusual. The Hotline is a learning experience for everyone involved. Not every call c an be answered immediately because some calls put a new twist on a familiar situation or challenge the attorneys to do a bit of additional research. New information learned through this process is often shared with the membership through the Wisconsin REALTOR® or the *Legal Update*. WRA members who have not tried the Hotline are encouraged to use it when they need legal information.

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