December 2006

Legal Update

A WRA Publication Exclusively for the Designated REALTOR®

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2006 REALTOR® Highlights

As another year passes by, REALTORS® may wonder if they have missed something important among all of the new developments that have evolved as part of the fast-paced real estate industry. Business obligations and the many real estate transactions that signal a successful year may also mean that members have not always been able to keep up with all of their publications and real estate news services. This *Legal Update* attempts to bring members up to date on any legal information or practice tips that may have slipped by during a busy year. Further information about the topics covered is available at the end of each issue summary.

The *Update* begins with a review of the legal resources available to members on the Wisconsin REALTORS® Association (WRA) Web site. A wealth of legal information is available with the click of a mouse. The *Update* then turns to the new development highlights for 2006. These summary items are arranged by topic, including agency law, office management and practice, real estate transactions, disclosure and land use.

Legal Department Resources

Members should be sure that they know how to access these valuable resources because they provide a quick way to retrieve legal information 24 hours a day. Resources include the Legal Hotline, the Legal Hotline library, legal department Web site resources, REALTOR® Resource pages and the new Broker-in-a-Box.

The Legal Hotline

Who Can Call the WRA Legal Hotline?

The Legal Hotline is a service provided exclusively to the members of the WRA and their attorneys. WRA dues pay for this service for members; the service is not available to the public. For this reason, REALTORS® should not refer clients and customers to the Hotline.

What Subject Areas Does the Hotline Cover?

The Hotline offers information on real estate practice, license law, DRL administrative regulations, the REALTOR® Code of Ethics, listing contracts, offers to purchase, forms use, disclosures, agency law, office management, general real estate law and other related issues. Questions outside the scope of the Hotline service, such as tax or securities law, will be directed to private attorneys or appropriate authorities.

Hotline Questions Via Voice Mail, Fax, Mail or E-mail

The Legal Hotline is open Monday through Friday from 8:30 a.m. to 4:30 p.m. WRA members' questions may be submitted at any time by voice mail to 800-799-4468 or 608-242-2296; e-mailed via the WRA Web site at www.wra.org/hotline question; faxed to 608-242-2279; or mailed to 4801 Forest Run Road, Suite 201, Madison, WI 53704-7337.

When submitting a question to the Hotline, a WRA member should be sure to give his or her name (spell the last name if leaving a voice mail message), the telephone number where he or she can be reached, a brief summary or at least the topic of the question, and the best time for the attorney's call-back.

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What Happens When the Attorney Calls Me Back?

After a question has been submitted, an attorney covering the Hotline that day will return your call, help identify important issues and discuss remaining questions and concerns. The Legal Hotline is a legal information service and does not create an attorney-client relationship.

The Hotline may receive up to 50 or more questions on a given day. Calls are returned in the order received unless a specific call-back time has been designated. To expedite this process and receive a faster response, submit legal questions to the Hotline number above and not to individual attorneys or the Hotline message center (800-844-4046).

A written response will be provided upon request or if the broker requires written responses to all questions submitted from agents within that company. When an agent calls the Hotline, the agent's designated REALTOR® will receive a copy of any written response because the broker/employer is legally responsible for supervising the real estate activities of his or her sales force. Written responses may be provided by mail, fax or e-mail.

Legal Hotline Library

A library of many of the Hotline questions and answers appearing in the WRA's weekly e-mail Hot Tips service are posted on the WRA Web site at www.wra.org/Legal/Hottips/default.asp. The questions members want to ask may also have been on the minds of fellow REALTORS® so the answer to a member's question may already be readily available. Hot tips library categories are accessed by topic, with 18 main categories and multiple sub-topics.

WRA REALTOR® Resource Pages

A great deal of helpful real estate legal information has been compiled by the WRA legal department on the REALTOR® Resource pages. Topics range from the no-call laws to translation issues, to predatory lending and mortgage application issues, and may be helpful not only to REALTORS® but to clients and customers as well. Each topic has its own page with information relating to that topic. There are links to appropriate *Wisconsin Real Estate Magazine* articles, *Legal Update*s, Legal Hotline hot tips, as well as state statutes and government agencies and other helpful resources pertinent to the topic. The Resource pages table of contents appears at www.wra.org/Resources/resource_pages/default.htm, or visit the REALTOR® Resources tab on the WRA home page and click on the link to WRA Resource pages.

Agency Law

The License Law Modernization Act, which became effective on July 1, 2006, brings Wisconsin's license law closer to the industry's best practices and better meets consumer expectations for brokerage services.

Pre-Agency: Brokerage Services Before the Agency Relationship is Chosen

There is an initial stage in the interactions between a broker and a consumer when it is not necessary to require the consumer to choose an agency relationship. Wis. Stat. § 452.134(1)(a) provides, "a broker may provide brokerage services to any person in a transaction, whether or not the broker has entered into an agency agreement with a party to the transaction or the broker has been engaged to provide brokerage services in the transaction as a subagent."

A buyer first meeting a salesperson and receiving information about the marketplace is not always ready to determine if they are willing to enter into a long-term buyer agency agreement – at least not until they get to

know the agent a bit. Salespeople doing listing presentations may provide market data and pricing recommendations before they (hopefully) get a listing contract. In each case, brokerage services are being provided to a consumer before a formal agency relationship has been established. Accordingly, § 452.134(1)(b) allows licensees to provide brokerage services to parties without having any agency relationship in place, up to the time when negotiations begin. This initial pre-agency role of providing information to consumers may include showings, but appropriate agency disclosures must be given and an agency relationship must be established before negotiations begin.

In the pre-agency stage, the agent has the role of a neutral and objective information provider who represents neither party because agency relationships are not yet determined. The agent does not take on the role of being an advocate for any party in this preliminary stage where the consumer is simply collecting information.

§ 452.133(5) requires that all licensees providing pre-agency services to consumers owe those consumers the duties owed to all parties. In addition, the pre-agency licensee is not allowed to give advice or provide opinions adverse to the interests of the other party per § 452.133(5). For example, a broker providing information to a prospective buyer may not provide any opinions or advice contrary to the interests of the sellers of the properties the buyer is contemplating.

Negotiation Triggers Agency Disclosures

The beginning of negotiation is the deadline for the consumer's choice of the type of agency relationship they would like to have. Either the consumer must enter into an agency contract and become a client, or the agent must give the consumer a customer agency disclosure form signifying that the consumer is a customer and the broker is providing brokerage services as a subagent. § 452.135(1)(a) indicates, "A broker may not negotiate on behalf of a party who is not the broker's client unless the broker provides to the party a copy of the … written disclosure statement."

§ 452.01(5m) defines "negotiate" to mean providing a party assistance within the scope of the knowledge, skills and training required under Chapter 452 of the Wisconsin Statutes in developing a proposal or agreement relating to a transaction. Negotiation includes:

- Acting as an intermediary by facilitating or participating in communications between parties related to the parties' interests in a transaction. Providing advice or opinions on matters that are material to a transaction in which a person is engaged or intends to engage is not necessarily negotiation. Showing a property does not necessarily in and of itself constitute negotiation.
- Completing, when requested by a party, DRL-approved forms or other documents to reflect the party's proposal in a manner that accurately reflects the party's intent.
- Presenting proposals from the other parties to the transaction and giving the client or customer a general explanation of the proposal's provisions.

Negotiations begin when the discussions with the person evolve from the "providing information" phase to the person enters the "offer" or "proposal development" phase. Negotiations begin when the conversation shifts from market or property information to contract terms, when the conversation focuses on altering or changing what is included with the property or there are other give-and-take discussions. Negotiations may or may not begin during a showing, depending upon what is discussed.

Broker Disclosure to Customers

The Broker Disclosure to Customers is used when the broker will be the subagent of the listing broker and will work as the selling or cooperating broker. The Broker Disclosure to Customers is also used if the listing agent or another agent of the listing broker is going to work with the buyer or when the buyer's agent or another agent of the buyer's broker is going to work with the seller.

Subagency: Working Cooperatively for Another Broker in a Customer Relationship

A subagent is a broker who is engaged by another broker (usually a listing broker) to provide brokerage services in a transaction. In the usual case the listing broker is making an offer of cooperation and compensation to subagents if they help the listing broker sell the listed property. In this context, subagents are cooperating brokers helping the listing broker sell the property.

These cooperating brokers are agents of the other broker, but not of the other broker's client. For example, a cooperating broker working with a buyer is the subagent of the listing broker, but is not an agent of the seller. As a result, subagents are not subject to the duties owed to clients because they are not in a client relationship with any party.

A subagent owes the customer he or she is providing brokerage services to (the buyer), in a current or potential transaction, the duties owed to all persons in a transaction. An agent owes all parties the duty to:

- Provide brokerage services honestly and fairly;
- Provide brokerage services with reasonable skill and care;

- Disclose material adverse facts in writing and in a timely manner unless otherwise prohibited by law;
- Keep confidential information;
- Provide accurate information about market conditions upon request unless prohibited by law;
- Safeguard trust funds and other property; and
- Present offers and other proposals in an objective and unbiased manner, disclosing the advantages and disadvantages of the proposals.

A subagent also owes the client of the principal broker, that is, the seller in this example, the duty of loyalty:

- A subagent may not give advice or opinions to the parties in the transaction that is contrary to the interests of the seller (the client of the principal broker) unless otherwise required by law.
- A subagent cannot put his or her interests ahead of the interests of the principal broker, that is, the listing broker in this example.

In short, a subagent of a listing broker who is helping a buyer/customer with the potential purchase of the listed property can't put his or her interests ahead of the sellers' interests or provide the buyer with advice or opinions that are contrary to the interests of the seller unless otherwise required by law. The subagent cannot give the buyer an opinion that the property is overpriced or advise the buyer to offer less than list price. Thus, the seller is assured that subagents will not be giving information or advice to buyers/customers contrary to the interests of the seller. If the buyer wants this type of opinion or advice, the buyer will need to enter into a buyer agency relationship.

Licensees do, however, advise customers on a variety of real estate issues such as what neighborhoods have features that might best meet the buyer's indicated needs, where appreciation may be most likely or the areas the most or least likely to experience significant new development.

Duties of Brokers Owed Only to Clients

Wis. Stat. § 452.133(2) defines the duties, in addition to the duties owed to all persons, that a broker owes only to the broker's clients. These duties focus on the role of a broker as the provider of information and advice to a client in a transaction.

1. **Loyalty.** The broker has a duty to loyally represent the client's interests by putting the interests of the client ahead of the interests of the broker and any other party. The broker cannot disclose information or give advice to the other parties that is contrary to the client's interests unless otherwise required by law.
2. **Information and Advice.** The broker must also give the client, upon request, information and advice on matters that are material to the transaction and that are within the scope of a real estate licensee's knowledge, skills and training. This advice can favor the client's interests ahead of the other party.
3. **Disclosure of Material Information.** A broker must disclose to the client all information known to the broker that is material to the transaction and not known by the client or discoverable by reasonably vigilant observation. This duty to disclose material facts, however, does not permit the broker to disclose other parties' confidential information or information that cannot otherwise be disclosed under law.
4. **Obedience Under the Terms of the Agency Agreement.** The duty of obedience dictates that a broker must fulfill those obligations set forth in the agency agreement and any order given by the client that is within the scope of the agency agreement, provided that the obligation or order is not inconsistent with any other duty.
5. **Negotiation.** The broker has the duty to negotiate on behalf of the client, but it is a duty that a client may waive. § 452.01(5m) defines "negotiate" to mean providing a party assistance within the scope of

the knowledge, skills, and training required under Chapter 452 of the Wisconsin Statutes in developing a proposal or agreement relating to a transaction. Negotiation includes:

- Acting as an intermediary by facilitating or participating in communications between parties related to the parties' interests in a transaction. Providing advice or opinions on matters that are material to a transaction in which a person is engaged or intends to engage is not necessarily negotiation. Showing a property does not necessarily in and of itself constitute negotiation.
- Completing, when requested by a party, DRL-approved forms or other documents to reflect the party's proposal in a manner that accurately reflects the party's intent.
- Presenting proposals from the other parties to the transaction and giving the client or customer a general explanation of the proposal's provisions.

Broker Disclosure to Clients

The Broker Disclosure to Clients form contains the mandatory disclosure language for clients. Provisions explaining the representation choices appear in the Broker Consent to Clients form which the clients may receive as a separate document, and which will be eventually incorporated into the listing contracts, buyer agency agreement and other agency agreements as the DRL revises these forms.

Clients are given the opportunity to consent to the type of representation they would like when the agency agreement is executed. The Broker Disclosure to Clients form gives clients a choice of multiple representation with designated agency, multiple representation without designated agency or no multiple representation relationships. The client is asked to consent to or reject multiple representation relationships.

Multiple Representation

A multiple representation relationship exists if a broker has an agency agreement with more than one client who is a party in the same transaction, in other words, two or more of a brokerage company's clients are parties in the same transaction. A broker may not provide brokerage services in any multiple representation relationship without the written consent of all of the broker's participating clients.

In a multiple representation relationship without designated agency, the broker and the broker's agents cannot place the interests of one client ahead of the interests of any other client involved in the negotiations or transaction. This tends to put the agents working with the clients/parties in a neutral mode where they may not give advice and provide strategies focused exclusively on advancing the position and interests of a specific client.

A basic multiple representation relationship may be created if that was the relationship selected by both clients, if one client selected designated agency and the other selected basic multiple representation, or if both had initially selected designated agency and one client later withdrew the consent to designated agency. Wis. Stat. § 452.134(4) instructs that if a broker's client in a multiple representation relationship does not consent to designated agency or withdraws consent to designated agency, the broker and the broker's employees may not place the interests of any client ahead of the interests of any other in the negotiations.

Multiple representation with designated agency is a simple concept whereby the listing agent and the buyer's agent provide the same services to the seller/client and buyer/client, respectively, that they ordinarily would. The only difference is that the listing agent and the buyer's agent each work for the same broker/company instead of each working for a different company. Each agent may provide opinions and advice to assist the client in the negotiations, whether or not the information, opinions and advice place the interests of one of the broker's clients ahead of the interests of another. By definition there must be at least two agents involved in a multiple representation with designated agency – no agent can negotiate for more than one client in the transaction. With designated agency, each party has his or her own agent or agents who negotiate just for him or her in any given transaction.

(From the April 2006 *Legal Update*, "Chapter 452 Modernization Act," www.wra.org/LU0604; and the June 2006 *Legal Update*, "Revised Agency Law Implementation," www.wra.org/LU0606)

Agency Representation on Line 1 of the Offer

The following suggestions for completing line 1 of the offer to purchase forms are based upon the agency representation of the agent drafting the offer: whose interests does that agent represent? Until the DRL-approved offer to purchase forms are revised to take into account the revised agency law provisions, licensees will do the best they can with the existing offer forms. The choices on line 1 may be a bit different when the new forms are completed, but for now these temporary fixes are acceptable.

How does an agent fill out the top line of the offer when the agent is a subagent?

The subagent is an agent of the listing broker but also owes limited duties to the seller. The subagent is working to benefit both the listing broker and the seller so the offer may appropriately be completed to indicate that the subagent is "agent of seller." The seller would have already received the Broker Disclosure to Clients form that explains subagency and thus should not be misled by this label for the subagent.

How does an agent fill out the top line of the offer if the agent is acting as a designated agent?

When a designated agent drafts an offer, that agent is participating in a designated agency relationship, but at the same time is representing the interests of one party or the other in the transaction. If the agent drafting the offer is a designated agent with a buyer agency agreement with the buyer, that agent is representing the buyer in the same manner that he or she would if that agent was from a different outside broker/company and had a buyer agency agreement with the buyer. The agency representation and the agency duties are essentially the same. Therefore, it is appropriate for the designated agent representing the buyer to complete the offer to indicate that he is an "agent of buyer."

How does an agent fill out the top line of the offer if the agent is acting in a multiple representation without designated agency relationship?

When an agent in a multiple representation without designated agency drafts the offer, that agent is not able to advocate for the buyer or represent the buyer's interests in a manner that places the interests of the buyer ahead of the interests of the seller. The agent must be helpful and competent, but also objective and neutral. Accordingly, it is appropriate for this agent to complete the offer to indicate that he is a "dual agent." Granted the term "dual agent" is not defined in the statutes and is a holdover from pre-July 1 practice, but it will suffice until the offer forms are updated.

(From the June 2006 *Legal Update*, "Revised Agency Law Implementation," www.wra.org/LU0606)

Office Policy & Management

Office management topics that every office should review to ensure compliance include the federal telephone solicitation, fax and CAN-SPAM law and rules; DRL broker supervision regulations; the Real Estate Settlement Procedures Act (RESPA); best practices when required to order services for a client or when signing on behalf of a business; protecting against identity theft; rules for legal real estate advertising and ADA requirements for providing services to clients and customers.

Telephone Solicitation Law

FTC and FCC Federal Regulation

The Federal Trade Commission (FTC) regulates both interstate telephone solicitations and the National Do-Not-Call Registry, while the Federal Communications Commission (FCC) regulates interstate calls and intrastate calls when state law is not more restrictive (Wisconsin law is regarded as more restrictive).

Calls to a consumer's residence or cell phone that encourage purchase, rental or investment in property, goods or services are regulated. For REALTORS®, this includes cold calling, calls to owners with cancelled or expired listings, calls to FSBOs and calls to consumers referred by others. REALTORS® placing these calls should check whether the phone number is on the National Registry, if an exception does not apply, in order to avoid potential liability. The exceptions to the federal Do-Not-Call rules include established business relationships, prior written permission and personal relationships.

Internal Do-Not-Call Lists

Other regulations enacted pursuant to the Telephone Consumer Protection Act of 1991 include provisions requiring those who engage in any telephone solicitation to home telephone numbers to maintain a company-specific or internal do-not-call list (47 CFR 64.1200). Every such company must maintain a list of persons who ask not to receive telemarketing calls and also must have a written policy, "available upon demand," explaining the company's procedures for maintaining this list. This rule is discussed on page 4 of *Legal Update* 03.08, "Federal 'Do Not Call' and 'Do Not Fax' Regulations," online at www.wra.org/LU0308.

The rule may apply even if the company does not do cold calling or traditional telemarketing. Any telephone call where a property or service is advertised or offered to the other party may be enough to pull a broker into the category of a telemarketer.

On the National Association of REALTORS® (NAR)dmin

Web site there is an outline of a do-not-call compliance policy including a company-specific do-not-call policy. See "Creating an Office Policy for DNC Rules," online at www.realtor.org/letterlw.nsf/pages/1203officepolicy.

Penalties for violating federal no-call law include fines of up to $11,000 per violation, private actions seeking damages of $500 plus possible attorney fees and costs and DRL disciplinary actions.

See NAR's "Field Guide to Anti-Solicitation Laws: Do-Not-Call, Do-Not-Fax, and Do-Not-E-mail" at www.realtor.org/libweb.nsf/pages/fg707 for additional information and compliance tools.

DATCP Telephone Solicitation Rules

A "telephone solicitation" is defined by the Department of Agriculture, Trade and Consumer Protection (DATCP) as an unsolicited telephone call that encourages the consumer to purchase property, goods or services, or a call that is part of a plan or scheme to encourage the consumer to buy property, goods or services. These "telephone solicitation" calls include traditional telemarketing activity and calls a REALTOR® makes

to his or her clients or customers regarding transactions. No agent can legally make a telephone solicitation call to a Wisconsin residence unless the broker is registered with DATCP or unless the purpose of the call is exempt. For instance, a call made in response to the consumer's affirmative request for that call, or a telephone call to a current client, would be exempt. Read Pages 3-6 of the July 2004 *Legal Update*, "Legal Action Issues Update," online at www.wra.org/LU0407, for a detailed discussion of the rules and exemptions.

Brokers who allow or require cold calling will need to comply with DATCP's telephone solicitation registration requirements and fees. If a broker/company is registered with DATCP and pays its fees, then the agents can make telephone solicitation calls as long as the telephone numbers called are not on the Do Not Call List.

- ***REALTOR® Resources Page – Telemarketing Solicitation Rules & the No-Call List.*** See the Telemarketing Solicitation Rules & the No-Call List REALTOR® Resource page at www.wra.org/nocall for additional federal and Wisconsin no-call information.

FTC CAN-SPAM Rules

The federal CAN-SPAM Act applies to all solicited and unsolicited commercial e-mails, defined as "any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service." This includes e-mails that promote or sell a product or service for a fee, such as REALTOR® e-mails offering properties or brokerage services. CAN-SPAM requires all commercial e-mails to include these elements:

- A legitimate return e-mail address and a valid physical postal address
- A clear and conspicuous notice of the recipient's opportunity to "opt out" of any future commercial e-mail
- A mechanism or an active e-mail address that the recipient may use to ask to not receive further e-mail
- A clear and conspicuous notice that the message is an advertisement or a solicitation
- Clear notice in the subject heading if a message includes pornographic or sexual content

CAN-SPAM Rules for Wireless Devices

REALTORS® who send commercial e-mails to wireless devices such as PDAs, pagers and cell phones must first check the FCC's list of wireless domain names. The FCC rules for mobile services commercial messages (MSCM) impose a $250 fine for each commercial e-mail sent to any domain name on the list absent express prior permission from the MSCM recipient. Consent can be obtained verbally or in writing.

For additional CAN-SPAM information, see the February 2006 *Legal Update*, "Real Estate Advertising," online at www.wra.org/LU0602.

Federal Fax Legislation

The Junk Fax Prevention Act and rules regulate faxes sent without the recipient's prior consent that advertise the commercial availability or quality of any property, goods or services. The law does not apply to faxes sent in ongoing transactions.

To send an unsolicited fax advertisement regarding properties or services, REALTORS® must have permission (written, electronic or verbal) or meet the following requirements:

1. Established Business Relationship (EBR)

An EBR is a prior or existing relationship formed by voluntary two-way communication between a person or entity (sender) and a residential or business subscriber (recipient) – with or without consideration – on the basis of an inquiry, application, purchase or transaction by the recipient regarding products or services offered by the sender, provided the relationship has not been previously terminated by either party. There are no time limits for an EBR. An EBR exists with former clients and customers or any consumer who inquires about brokerage services. REALTORS® need an EBR to send faxes about listings to other brokerages, but an EBR will be present with other brokerages who have been in cooperative transactions with the sender or who have inquired (by e-mail, phone, etc.) about any of the sender's listings.

2. Voluntary Receipt of the Recipient's Fax Number

The EBR was in existence and the sender had the recipient's fax number as of July 9, 2005; or the fax number was provided voluntarily by the recipient (via business card, letterhead, fax cover sheet or phone); or is publicly available in a published directory, advertisement or Web site.

3. Opt Out on First Page of Faxes

Clear and conspicuous opt-out instructions must appear on the cover sheet or first page of the fax indicating that the recipient has the right to opt out of future unsolicited fax advertisements. The opt-out message must provide (1) a domestic telephone number and fax number where the recipient may send an opt-out request and (2) a cost-free means for opt outs if the phone and fax numbers involve a charge. A cost-free opt-out mechanism includes a local or toll-free telephone number, e-mail address or Web site. The sender's failure to comply within 30 days is illegal.

The FCC declined to provide opt-out language. Possible opt-out language might read, "You may request that the sender of this faxed message not send any future unsolicited advertisements to any facsimile number(s) that you designate. The sender is required by law to comply with your opt-out

request within 30 days. To opt out of further facsimile advertisements from this sender, please call _____ or fax _____ [additional cost-free means must be provided if the phone or fax number is not toll-free or local] [or e-mail _____ (if desired)] [or visit ___ (Web site) (if desired)]."

The penalties for violating the federal fax law are $500 per facsimile and treble damages may be imposed for willful violations.

- ***REALTOR® Resources Page – FCC Fax Regulations.*** See the FCC Fax Regulations REALTOR® Resource page at www.wra.org/faxregs for additional do-not-fax information.
- ***Wisconsin Real Estate Magazine.*** See "New FCC Fax Rules Clarify Junk Fax Law" in the September 2006 edition at news.wra.org/story.asp?a=551.

Broker Supervision

Wis. Admin. Code § RL 17.08 requires every broker-employer to supervise the activities of any licensee employed by the broker-employer. Supervision includes, but is not limited to:

- Reasonably reviewing transaction documents, including trust account records, prior to the closing of the transaction
- Providing all agents with written procedures for handling listing contracts, offers to purchase and other documents relating to transactions (office policy manual)
- Providing all licensees with reasonable access to a supervising broker for consultation regarding real estate practice issues
- Notifying all salespeople where a copy of the DRL rules can be found (it is available online at drl.wi.gov/boards/reb/code/codebook.htm)

Current Licenses. § RL 17.07 places the burden on the broker-employer to confirm that every licensee employed by the broker not only has a current license at the time of hiring, but also to confirm the timely renewal of that license each biennium. Failure to ensure that every agent has renewed his or her license before allowing the agent to continue to practice real estate on behalf of the broker is a common source of discipline by the DRL.

Supervision of Teams. Agents cannot personally employ licensed persons to engage in real estate practice. Companies employ these licensees and must supervise them, even if they are assigned to a "team." A broker designated by the company must supervise all "team members" and personal assistants providing licensed services. A company may delegate these supervisory duties to the team leader (if he or she has a broker's license), but the company remains liable for any damages arising from the brokerage services provided by these team members.

The § RL 17.08 broker supervision rules provide that a real estate company licensed as a business entity must delegate or assign its supervision duties to individuals holding broker licenses. A broker-employer who is not a business entity also may delegate supervisory duties. A broker-employer may delegate the duty to supervise licensed employees – or different elements of the supervisory duties – to one or more supervising brokers. For example, a company may assign one broker at company headquarters the duty of reviewing all contracts while other brokers may be assigned as the contact for agents working in certain geographical areas.

A delegation of supervisory duties must:

1. Be in writing and signed by or on behalf of the delegating broker-employer
2. Identify the duty or duties delegated
3. Be signed by the supervising broker to whom the delegation is made

- ***Broker Supervision Newsletter.*** See "Implementing the New Broker Supervision Rules, Part I" in the November 2005 edition, online at www.wra.org/online_pubs/broker_supervision/2005/br0511.asp, and "Implementing the New Broker Supervision Rules, Part II" in the February 2006 edition, online at www.wra.org/online_pubs/broker_supervision/2006/br0602.asp.

RESPA

RESPA covers real estate transactions involving a federally related mortgage loan – the vast majority of residential closings financed by a mortgage loan or other lien (first or subordinate position) on one-to-four-family residential property.

Section 8 Unearned Fees

The unearned fee rule under Section 8(b) of RESPA states, "Splitting charges. No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed."

Tips for Broker Transaction or Administrative Fees

- Avoid charging additional fees for goods and services that were previously provided and included in the base commission.
- Labeling fees as "transaction fees" or administrative fees" may call unwanted attention.
- Fully disclose the fee to the client prior to the client entering into the agency relationship.
- Make sure the fee is for services actually provided.
- Make sure the services are reasonably priced and avoid excessive fees or profits.

Promotion and Education: Advertising and Sponsorships

Settlement service providers, such as mortgage bankers, mortgage brokers,

title insurance companies and title agents, can provide normal promotional and educational activities under RESPA. These activities must not defray the expenses that the real estate licensee otherwise would have had to pay and cannot be in exchange for or tied in any way to referrals. A real estate agent and mortgage broker may jointly advertise their services in a real estate magazine, provided each pays a pro rata share of the costs. A hazard insurance company may provide note pads, pens or other office materials branded with the hazard insurance company's name, but cannot provide materials with the real estate broker's name because this would defray part of the broker's normal promotional expense.

(From the November 2006 *Legal Update*, "RESPA and the Real Estate Broker," www.wra.org/LU0611)

Ordering Services for a Party

Prudent practice dictates that REALTORS® avoid hiring contractors for parties and instead furnish a list of appropriately credentialed professionals for the parties' use in hiring contractors for their transactions. Unfortunately, it is nearly impossible to completely avoid ordering services for parties, so the key is often to manage the risk as best as possible.

Supervising brokers may wish to incorporate the following rules into their office policies for those instances when ordering services for a party cannot be avoided:

1. Always try to arrange for the services of a contractor or inspector in writing (or follow up a phone call with a written confirmation) specifying that the party is the client, the party will be paying for the service and the agent is simply relaying the information as an agent for the party. See the model service request form on Page 12 of the May 2004 *Legal Update*, "Avoiding Liability When Signing and Making Referrals,"(www.wra.org/LU0405).
2. Obtain written authorization from the party, including disclaimers protecting the broker and agent from responsibility for any negligent performance by the contractor or inspector. See the "Model Authorization and Release from Liability" on Page 13 of the May 2004 *Legal Update*, "Avoiding Liability When Signing and Making Referrals," (www.wra.org/LU0405).
3. Any contractor hired or included on a list of contractors should hold all applicable credentials for the type of work being performed. At a minimum, ensure that the inspector (or other trades person, tester, etc.) is reasonably believed to be competent. Brokers ordering services can be found liable for negligent hiring.
4. If the nature of the work requires it, be sure to specify the performance standards of the person being hired. For example, anyone hired to do work which disturbs LBP must give the federal pre-renovation notice when applicable and must agree to follow lead-safe work practices.

✔ ***Broker Supervision Newsletter.*** See "If You Really Have to Order Services for Parties …" in the March 2006 edition, online at www.wra.org/online_pubs/broker_supervision/2006/br0603.asp.

Authority to Sign for a Business Entity

Conducting a real estate brokerage business as a corporation, limited liability company (LLC) or some other entity may substantially insulate individual brokers and their assets from personal liability. Properly authorized and executed signatures on behalf of brokers can help ensure that brokers and agents are not exposed to unintentional personal liability. Signatures on contracts on behalf of the broker entity should state the corporate or other organizational status of the company and the capacity of the person signing to avoid the possibility of personal liability for the signing agent.

Corporation: any one officer of a corporation is authorized to sign conveyances in the corporate name, unless a different authorization appears in the corporation's articles of incorporation or in a certified corporate resolution that has been recorded with the register of deeds office. The named persons do not have to be officers of the corporation.

Limited Liability Company: In a member-managed LLC, each member is an agent of the LLC and may sign documents and bind the LLC if the member is apparently carrying on the ordinary course of business for the LLC, unless the person he or she is dealing with is aware that the member has no authority to act. If one or more managers centrally manage the LLC, each manager is an agent of the LLC and can execute documents and bind the LLC.

General partnerships: All partners generally are owners of the partnership, may execute documents – including conveyances – in the partnership name to bind the partnership, and are jointly and severally liable for the contractual debts so incurred by the partnership during the course of the partnership's usual business. The same rules apply to the general partners in a limited partnership.

Independent Contractor Agreement Authorization: The independent contractor agreement should limit the authority of the agent to sign on behalf of the broker/company. Authorization may be limited to listing contracts, buyer agency agreements, extensions to listings or buyer agency agreements, closing statements and receipts for earnest money.

Limiting the authority of agents to sign is only the first step needed to protect the brokerage from becom-

ing party to unauthorized real estate and business contracts. The second step requires that third parties also be made aware that the agent's authority to bind the company is limited. One excellent example of this is the TERMINATION OF LISTING provision found in the DRL-approved listing contracts.

Clearly Stated Capacity: An individual entering into a contract on behalf of a corporation or LLC may become personally liable on the contract if the entity status and the individual's capacity as an agent, corporate officer, etc., is not clearly disclosed. When an agent contracts on behalf of a disclosed principal, the agent does not become personally liable to the other contracting party. Under common law agency principles, however, an agent is considered a party to the contract and held liable for its breach if the other contracting party is never notified that the principal is a corporation or some other business entity. If the agent with whom the party contracts is a partner, sole proprietor or member of a voluntary association, the party may expect that agent to be personally liable on the contract. If the agent is contracting for a corporation or an LLC, on the other hand, the agent is not liable unless he or she expressly assumed such liability.

REALTOR® Practice Tips: All contracts, including listing contracts, that are executed on behalf of a broker entity should always be signed in the formal entity name and the person signing on behalf of the broker entity should designate his or her capacity, for instance, as agent, corporate officer, or LLC member. The formal name may be followed by any widely used trade name in order to avoid confusing consumers. The signature line for a corporate broker would indicate the broker's name as "XYZ Corporation d/b/a Hometown Realty," and the person signing on behalf of the broker would indicate his or her name and capacity on the line or in the area where the person's name is printed or typed, for instance, "Sam Smith, Vice President," or "Judy Johnson, agent." This is critical to protect the signing agent or broker from personal liability under the contract.

(From the March 2006 *Legal Update*, "Brokerage Entities and Agent Signatures," www.wra.org/LU0603)

Identity Theft

The home buying or renting process can become a nightmare for consumers who discover they have a credit report that is tainted through identity (ID) theft or fraud. People whose identities have been stolen can spend years – and thousands of dollars – cleaning up the mess the thieves have made of a good name and credit record. ID theft is a traumatic experience that often endangers a consumer's ability to purchase a property.

Use of Personal Information in Real Estate Transactions

Real estate brokers and agents, property managers and landlords may often come into possession of consumers' personal identification information such as their Social Security numbers (SSNs). In addition, REALTORS®, landlords and property managers will typically use some consumer report information in their daily practice. For brokers, a buyer's credit report and a seller's Comprehensive Loss Underwriting Exchange (CLUE) report are examples of consumer information reports that may be used in transactions. Landlords and property managers will also likely use credit reports and other reports indicating tenant histories when screening tenants for rental properties. A "consumer report" is generally any report on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics or mode of living prepared by or obtained from an agency that collects such information.

Social Security Numbers

Use of the SSN as a general identifier has grown to the point where it is the most commonly used and convenient identifier for all types of record-keeping systems in the U.S. SSN is required or appropriately requested only by governmental agencies such as the Internal Revenue Service (IRS), employers and lenders. In general, any other request for a person's SSN is not necessary and the individual has the right to refuse. For example, utility companies and other services ask for a SSN, but they do not need it – they can do a credit check or identify the person in their records by alternative means.

What Real Estate Brokers, Landlords and Property Managers Can Do to Help Prevent ID Theft

Real estate professionals can help reduce the risk of ID theft for the consumers they work with by safeguarding all personal information in their files, by properly disposing of consumer report information records and by minimizing the personal information collected in the first place. With ID theft and mortgage fraud on the rise, companies would be well served by implementing computer data security policies to induce consumer trust and protect themselves from lawsuits.

1. Computer and Internet Policies

Since so much information is stored on computers, basic computer safety policies can help protect any personal data within the system from being pirated by identity thieves.

a. Virus protection software must be installed on all computers and updated regularly.

b. No one should open attachments sent by strangers, click on hyperlinks or download programs from untrustworthy sources.

c. Install an anti-spyware program to combat poor system performance and protect personal information.

d. Install a firewall program to provide security against hackers.

e. Use a secure browser with the most up-to-date encryption capabilities that will encrypt or scramble information sent over the Internet.

f. Use a strong password with a combination of letters (upper and lower case), numbers and symbols for laptop, and don't use an automatic log-in feature.

g. Before disposing of a computer, use a "wipe" program to overwrite the entire hard drive.

h. Back up computer data at least weekly.

i. Ensure the physical security of files, laptops and PDAs – lock them up.

j. Run background checks on employees who have access to personal information.

2. Consumer Information Disposal for REALTORS®

To comply with the FTC rule companies must establish policies and procedures for the proper disposal of consumer information. Most REALTORS® will shred consumer report information. Crosscut shredders are the best choice. Electronic media – such as computer hard drives and floppy disks – should be destroyed or completely erased. Using a document destruction contractor is also an effective strategy.

3. Don't Collect Unneeded Personal Information

One of the best ways to protect a business' most valuable assets – its clients and customers – is to not collect personal identifying information that is not really needed. Brokers and landlords may evaluate whether all of the information that they collect is needed to efficiently conduct business, and avoid asking for other personal or financial information unless there is a specific purpose. Collection of financial information in a real estate transaction, for instance, may be left to lenders and financial institutions.

Real estate brokers do not need the SSNs of their customers and clients in their records – the parties may simply write their SSNs directly onto the Wisconsin Real Estate Transfer Tax Return at closing or provide their SSNs to the closing agent, who will need the SSNs for filing Form 1099-S with the IRS. Property managers and landlords may also wish to discuss with their CRAs what identifying information is needed to effectively obtain consumer reports and assess whether SSNs and birth dates must be requested on their rental application forms.

(From the October 2006 *Legal Update*, "Protecting Against Identity Theft," www.wra.org/LU0610)

Real Estate Advertising

"Advertise" means "to tell about or praise (a product, service, etc.) publicly, as through newspapers, handbills, radio, etc., so as to make people want to buy it" (from Webster's New World Dictionary 2nd ed. 1970). Advertising may be communicated in the newspaper, MLS, telephone book yellow pages, outdoor advertising signs, billboards, television, radio, magazines, periodicals, leaflets, brochures, homes magazines, sales presentations, public speeches, graphics, pictures, telephone calls, letters, facsimile transmissions, e-mail, Web sites, PowerPoint, face-to-face conversations and other media. The basic § RL 24.04 advertising rules apply to all of these media.

1. Licensees are prohibited from advertising in a manner that is false, deceptive or misleading.

2. A licensee (broker or salesperson) working for another broker or a real estate company must advertise under the supervision of and in the name of that employing broker.

3. Property may be advertised only with the consent of the owner.

4. Brokers can advertise a property only at the price agreed upon with the owner.

Wis. Stat. § 100.18 — The False Advertising Statute

Wis. Stat. § 100.18(1) states in relevant part, "No person, firm, corporation or association, or agent or employee thereof, with intent to sell ... real estate..., or with

intent to induce the public in any manner to enter into any contract or obligation relating to the purchase ... of any real estate ..., shall make ... an advertisement, announcement, statement or representation of any kind to the public relating to such purchase [or] sale ... of such real estate ... or to the terms or conditions thereof, which advertisement, announcement, statement or representation contains any assertion, representation or statement of fact which is untrue, deceptive or misleading." Real estate licensees may be found liable for false advertising under § 100.18 with respect to false representations knowingly made prior to the acceptance of the offer.

Attribute the Source of Information

A Wisconsin licensee can be found liable to a buyer for inaccurate statements made by the broker which appear to the buyer to have been made from the broker's own personal knowledge. Accordingly, it is recommended that REALTORS® specifically attribute data used in advertisements, such as acreage, square footage and assessed values, to its source, and use general disclaimers.

Internet Advertising

The FTC requires that disclosures required to prevent Internet advertising from being misleading and ensure that consumers receive material information about the terms of a transaction must be clear and conspicuous.

Regulation Z: Truth in Lending and Advertising

If an ad for available financing uses a "triggering term," the ad must also disclose other major terms, including the annual percentage rate. The triggering terms are the amount of the down payment, the amount of any payment, the number of payments or the period of repayment, or the amount of the finance charge. If an ad uses a triggering term, it must also include the amount or percentage of the down payment, the terms of repayment and the annual percentage rate.

Fair Housing and Advertising

Real estate advertisements may not state a discriminatory preference or limitation on account of race, color, national origin, religion, sex or gender, familial status, disability, sexual orientation, marital status, lawful source of income, ancestry, age or any other protected class under local ordinances. **DESCRIBE THE PROPERTY, NOT THE DESIRED TENANT OR BUYER!**

(From the February 2006 *Legal Update*, "Real Estate Advertising," www.wra.org/LU0602)

ADA Requirements for Auxiliary Aids

To meet the goals of the Americans with Disabilities Act (ADA), the law establishes requirements for private businesses of all sizes that provide goods or services to the public, referred to as "public accommodations." The ADA establishes requirements for 12 categories of public accommodations, including stores and shops, restaurants and bars, service establishments, theaters, hotels, recreation facilities, private museums, schools and real estate offices. Private clubs and religious organizations are exempt.

Individuals who own, operate, lease or lease to a business that serves the public all are covered by the ADA and have compliance obligations for existing facilities. It makes good business sense to make a business, including a real estate office, more accessible so that all people can patronize an establishment and purchase goods and services. For further information regarding barrier removal standards, see *Legal Update* 01.10, "Accessible Offices and Homes – A Guide to the ADA and Visitability," online at www.wra.org/LU0110.

A public accommodation is also required to make reasonable modifications in policies, practices or procedures when the modifications are necessary to provide goods, services, facilities, privileges or advantages to persons with disabilities. Title III of the ADA covers a variety of places of public accommodation, including real estate offices, which may be held responsible for the provision of auxiliary aids to people with disabilities to ensure effective communication. Effective communication must be "conveyed effectively, accurately, and impartially, through the use of any necessary specialized vocabulary."

The Department of Justice has indicated that public accommodations should ask an individual with a disability before providing a particular auxiliary aid or service. Communications in complex areas such as health, legal matters and finances may require an interpreter for effective communication. A public accommodation may deny an auxiliary aid only if it can demonstrate that providing the aid would fundamentally alter the nature of the service or would constitute an "undue burden" or expense.

If a person who is deaf or hard of hearing requests an interpreter, a qualified interpreter generally must be provided. Information about the various levels and ratings for interpreters can be found at www.dhfs.wisconsin.gov/sensory/WITA/wita.htm. Whenever an interpreter is retained to work with a client or customer, it is wise to have the person sign a written consent to the use of the specific interpreter and to have the interpreter sign a statement confirming that all interpretation was performed accurately.

(From the May 2006 *Legal Update*, "Complying with the ADA," www.wra.org/LU0605)

Real Estate Transactions

Pointers for real estate transactions address topics such as contract law basics, RESPA, selling incentives,

financing provisions, earnest money matters, consequences of failing to have home inspection, funding issues at closing, electronic transfer returns, early termination of listing contracts, choice of remedies, licensees/buyers, commission when property is condemned and cultural diversity.

Contract Law Basics

Real estate contracts such as listing contracts, offers, land contracts and deeds must be in writing to be valid and enforceable according to Wis. Stat. §§ 240.10 and 706.02.

The three essential elements of an enforceable contract are the offer, acceptance and consideration.

All material terms of the offer must be expressed in certain and definite language. According to the Wisconsin Supreme Court, in ***Gerruth Realty Co. v. Pire***, 17 Wis. 2d 89, 115 N.W.2d 557 (1962), an offer to purchase may be void for indefiniteness if the financing contingency or any other provision is not drafted with enough details. However, a contract may not be void despite indefinite language if the parties' subsequent actions clarify their intent at the time they entered into the contract.

The Wisconsin Court of Appeals, in ***Nodolf v. Nelson***, 103 Wis. 2d 656, 660, 309 N.W.2d 397 (Ct. App. 1981), explained that a contract is illusory when the contract is conditioned on a fact or event wholly under the control of one party. A financing contingency renders the contract incurably illusory and unenforceable if the contingency grants to one party the exclusive right to determine whether suitable financing has been obtained. A contract that is illusory is no contract at all and is void.

If the method of acceptance is specified in the offer, the acceptance must precisely follow the specified method or a contract will not be formed. This is clearly the case with the DRL-approved real estate offer to purchase forms which specify the methods by which the seller can indicate that the offer to purchase has become a binding contract. The buyer can withdraw the offer at any time prior to binding acceptance.

Wis. Stat. § 240.10(1) contains the requirements for legally enforceable real estate listing contracts and buyer agency agreements. An agency agreement which does not comply with each requirement is void. Without a valid listing contract, a broker has no authority to act and no legitimate basis for asserting a right to compensation.

The listing requirements under § 240.10(1) are:

1. The contract must be in writing.
2. The property must be described.
3. The list price and commission must be specified.
4. The listing term must be specified.
5. The contract must be signed by whoever is agreeing to pay the commission.

§ 240.10(1) requires that the buyer agency agreement be in writing, state the purchase price desired and the buyer agency fee that will be paid, indicate the period during which the broker will perform, and be signed by the buyer. The property need not be described if the buyer's broker's mission is to locate a type of property.

When completing an offer to purchase, REALTORS® must be certain to complete the form in a comprehensive manner so that the parties can derive optimal benefit from the form provisions. REALTORS® should:

- Fill in all blanks in an offer.
- Define important or potentially controversial terms used in the offer.
- If a contract fails to state a deadline, the court will assume that performance is to occur within a reasonable time, considering the circumstances.

Wis. Admin. Code § RL 16.06 (8) provides that, "A licensee shall use approved forms and prepare addenda in such a manner as to adequately accomplish the contractual intent of the person for whom the licensee uses the forms and prepares the addenda." Under § RL 16.06(3), licensees may cross out provisions on approved forms to reflect the intent of a party, but the crossed-out area must remain legible.

§ RL 16.06 (6) indicates that, "A licensee may alter an approved exclusive right-to-sell listing contract to create an exclusive agency listing or an open listing." "Exclusive agency listing" means a written listing agreement containing all of the elements of an exclusive right to sell listing, except that the owner retains the right to sell the property himself or herself without owing the listing broker a commission. "Open listing" means a written listing agreement, which may be given to any number of brokers, with the first broker to secure a buyer under the terms of the listing agreement earning the commission.

(From the September 2006 *Legal Update*, "Contract Law Basics," www.wra.org/LU0609)

RESPA

RESPA covers real estate transactions involving a federally related mortgage loan – the vast majority of residential closings financed by a mortgage loan or other lien (first or subordinate position) on one-to-four-family residential property.

Illegal Referrals and Kickbacks

Section 8 (a) of RESPA prohibits any person from giving or accepting any fee, kickback or thing of value, pursuant to any agreement or understanding, for the referral of settlement service business involving a federally related mortgage loan. Receiving compensation simply for referring a

buyer, seller or other person to a settlement service provider is prohibited and is not a compensable service. However, if an employee receives a referral fee for referring business to the employer, there is no violation of Section 8 of RESPA. When two or more entitles are involved, such as a company and an affiliate or associate, then there may be a violation. For example, if a real estate company charges its agents a transaction fee and has an affiliated title company, and the company waives the transaction fee if the parties are referred to the affiliated title company, the waiver of the transaction fee would appear to be a "thing of value."

Affiliated Business Arrangements

An affiliated business arrangement (ABA) exists when a person in a position to refer settlement business, such as a real estate broker, or an "associate" of such person, has an affiliate relationship with, or a direct or beneficial ownership interest of more than 1 percent in, an entity to which the business is referred, such as a joint venture title or mortgage entity. A referral to an affiliated settlement service provider is not an illegal kickback under RESPA if the following conditions are met.

First, the broker or other party who refers business to an affiliated or owned settlement service provider must provide a separate written disclosure statement to each consumer who is being referred. The disclosure must be in the RESPA Affiliated Business Arrangement Disclosure Statement format and state the nature of the relationship, explaining the ownership and financial interest between the referring party and each settlement service provider being referred. The disclosure statement must also give an estimated price or range of prices generally charged by the affiliated settlement service providers.

Second, the person being referred must not be required to use the affiliated settlement service provider's business. And third, the only thing of value that is received from the arrangement is a return on the ownership interest or franchise relationship between the affiliated providers.

Sham Settlement Service Companies are Illegal

The U.S. Department of Housing and Urban Development (HUD) carefully monitors ABAs to ensure they are simply not "sham companies." A sham company may be formed for the sole purpose of appearing to meet the ABA exception to RESPA's prohibition against referral fees. Some settlement service providers have been known to join together to form companies that do little or no work and are intended to hide the payment of excessive fees or referral fees. If an entity is not a bona fide settlement service provider and serves primarily as a conduit for referral fees, the ABA violates RESPA and is illegal.

For example, a lender and a real estate broker may jointly fund a new subsidiary that purports to be a mortgage broker but which has no staff and minimal funding, does no work, receives all business by referrals from the broker, out-sources all work to the lender and pays dividends to both parent companies (the broker and the lender). Such a sham arrangement pays the broker who does no work and bears no business risk in return.

Seller-Mandated Title Insurance Selection – RESPA Section 9

Section 9 of RESPA does not allow a seller of a property, or his or her agent, to require a buyer, as a condition of selling the property, to purchase owner's title insurance from any particular title company. Required use means that a person must use a particular settlement service provider in order to have access to some distinct service or property, and the person will pay for the settlement service of the particular provider.

Mortgage Broker Fee Guidelines

In determining whether a payment from a lender to a mortgage broker is legal under RESPA, two critical questions must be answered:

- Were goods or facilities actually furnished and/or were services were actually performed for the compensation paid?
- Was the compensation reasonably related to the value of the goods or facilities that were actually furnished and/or the services that were actually performed?

(From the November 2006 *Legal Update*, "RESPA and the Real Estate Broker," www.wra.org/LU0611)

Selling Incentives

1. Listing brokers may offer buyer incentives in any amount as cash or as an item of personal property such as a home warranty plan, gift certificate, appliance or charitable donation in the buyer's name.

   All brokers offering party incentives must ensure the incentive does not constitute an illegal referral to a non-licensee (fee-splitting); and adhere to the advertising rules found in the Code of Ethics and Wisconsin law. The Code of Ethics in Standard of Practice 12-3 provides that REALTORS® must "exercise care and candor in any such advertising or other public or private representations so that any party interested in receiving or otherwise benefiting from the offer will have clear, thorough, advance understanding of all the terms and conditions of the offer. ..."

2. When a seller offers an incentive to a buyer, the terms of the incentive should be precisely stated in the offer to purchase.

3. A listing broker may offer a bonus to cooperating brokers (subagents or buyer's brokers) in addition to commission. The listing broker may offer the bonus in the remarks section of the MLS. However, cooperating

brokers interested in receiving the bonus should enter into a separate compensation agreement with the listing broker that addresses the terms of the bonus.

4. Sellers may also offer bonuses to cooperating brokers. A seller may advertise the bonus personally or may rely upon the listing broker to do so, i.e., in the remarks section of the MLS. These bonuses may be difficult for cooperating brokers to enforce.

✔ ***Broker Supervision Newsletter.*** See "Selling Incentives" in the October 2006 edition at www.wra.org/online_pubs/broker_supervision/2006/br0610.asp.

Financing Issues

The concept of a pre-approval letter is that it should, more so than a pre-qualification letter, demonstrate that the buyer has had his or her income and credit reviewed before the lender determined how much the buyer is qualified to finance. To assure that is what the seller receives, a pre-approval letter may be defined in the offer as a document that shows the lender has completed income and credit verification. In addition, a seller could require a buyer to deliver this pre-approval (as well as evidence of loan application and fee payment) within a certain number of days of acceptance.

The DRL-approved financing contingency cautions lenders and brokers not to deliver loan commitments until the buyer has approved them. The term "loan commitment" can be defined and the buyer can be required to deliver a commitment letter meeting this definition. There will never be a commitment without conditions, but a loan commitment may be defined as a document which indicates that the appraisal has been completed, the buyer's income has been verified, the buyer's credit has been underwritten, and the commitment is not subject to the sale of the buyer's property or other conditions.

✔ ***Broker Supervision Newsletter.*** See "Addressing Seller's Issues Related to Financing When Negotiating Offers " in the January 2006 edition at www.wra.org/online_pubs/broker_supervision/2006/br0601.asp.

Earnest Money Management

- **Wis. Admin. Code § RL 18.033(1)** simply requires a broker to open a real estate trust account if he receives real estate trust funds.

- **Lines 248-249 of the WB-11** provide that earnest money shall be paid to and held in the trust account of the listing broker, unless the parties agree otherwise.

- **Earnest Money Check Not Payable to Listing Broker.** While failure to make the earnest money payable to the listing broker is arguably a breach of the buyer's duties under the offer, it is questionable whether this is a material breach. A broker may ask the buyer to write a new check made payable to the listing broker. If this is not possible, the cooperating broker can deposit the earnest money check into his trust account and forward the earnest money to the listing broker once the check has cleared the bank. The third choice is to endorse the earnest money check over to the listing broker "without recourse," so that the cooperating broker is not liable to pay any third party: "Pay to the Order of (Listing Broker's Name) Endorsed Without Recourse (Cooperating Broker's Signature)."

- **§ RL 18.033(2)** allows a broker to close his trust account as soon as no funds remain in the account.

- The broker may choose to take action and establish a safe harbor for the disbursement of the funds, per **lines 257-271 of the WB-11**, but the broker is not obligated to solve the situation for the parties and may simply continue to hold the funds in the trust account until they become abandoned property after five years.

- **Wis. Admin. Code § RL 18.09**, which can be found online at www.legis.state.wi.us/rsb/code/rl/rl018.pdf, describes seven safe harbors when a broker may disburse trust funds, including earnest money (EM), without liability and the notification rules that must be followed when the parties dispute entitlement to the monies:

1. To the payor upon the rejection, expiration or withdrawal of an offer prior to binding acceptance
2. As directed in a written earnest money disbursement agreement, such as a cancellation agreement and mutual release (CAMR), signed by all parties having an interest in the trust funds (does not include provisions in the offer)
3. To a court having jurisdiction over a civil action involving the parties that have an interest in the trust funds
4. As directed by an order of the court
5. Upon a good faith decision based upon the advice of an impartial attorney
6. Upon authorization granted within the contract
7. As otherwise provided by law

✔ ***Broker Supervision Newsletter.*** See "Basic Earnest Money Management" in the May 2006 edition at www.wra.org/online_pubs/broker_supervision/2006/br0605.asp, and "Earnest Money Disbursement" in the August 2006 edition at www.wra.org/online_pubs/broker_supervision/2006/br0608.asp.

Failure to Have Home Inspection

In the ***Malzewski v. Rapkin*** case, 2006 WI App 183, the Real Estate Condition Report (RECR) was completed to indicate that the sellers were "aware of defects in the basement or foundation (including cracks, seepage and bulges); during very heavy rainstorms, there might be a little seepage in the walls/floors. The seller has regraded to correct this when it has happened." The buyers

waived the inspection contingency. Approximately one year after they closed, a foundations contractor estimated that it would cost $25,600 to repair the failing basement walls.

The buyers sued the sellers for failing to disclose cracks in the basement walls, alleging breach of contractual warranty, intentional misrepresentation, theft-by-fraud, Wis. Stat. § 100.18 false advertising, strict-responsibility misrepresentation and negligent misrepresentation. During discovery, the sellers admitted the basement walls had 12-foot-long, three-eighths-inch-wide cracks, which they filled in with masonry cement. The sellers moved for summary judgment, claiming they had fully disclosed the condition of the house on the RECR, and that there was no evidence that they knew the cracks were a defect under the RECR and Wis. Stat. § 709.03.

The trial court concluded as a matter of law that the sellers did not know there was a defect in the house and granted the sellers' motion for summary judgment. The Court of Appeals, however, analyzed the justifiable reliance element in the claims made by the buyers. The Court concluded that the buyers failed to show reasonable reliance on the sellers' RECR, which was required to sustain all but one of their claims.

For example, the buyers alleged that the sellers breached their contractual warranty when they falsely represented that the only problem with the basement was slight seepage. However, because the buyers waived their right to a home inspection, their reliance on the RECR was unreasonable as a matter of law. By closing the transaction without exercising their right to a home inspection, even when they were aware of potential seepage defects, the buyers waived their right to pursue a claim based on RECR representations.

To sustain a Wis. Stat. § 100.18 false advertising claim, the plaintiff must prove that the plaintiff sustained a pecuniary loss because of an advertisement, announcement, statement or representation made by the defendant that was untrue, deceptive or misleading. Reasonable reliance is not an element of false advertising, but may still be considered at trial in determining whether the purchaser in fact relied on the seller's representation.

REALTOR® Practice Tips. The sellers apparently did not view the cracks as a defect, nor did they consider that the seepage problem might reoccur. The buyers and their attorney, on the other hand, challenged this failure to disclose the complete picture as misrepresentation.

REALTOR® Practice Tips: A buyer who waives the home inspection will have a difficult time later sustaining any misrepresentation claims.

REALTOR® Resources Page – Disclosure. See the Disclosure REALTOR® Resource page at www.wra.org/disclosure for more information regarding brokers' and sellers' obligations to disclose.

Wisconsin Real Estate Magazine. See "Failure to Have Home Inspection" in the September 2006 edition at news.wra.org/story.asp?a=554.

Funding Issues at Closing

Over the last year, REALTORS®, title companies, lenders, consumers and regulators have sought a solution to the problem of mortgages that are not funded at closing. In some instances, loan and funding approval is not completed until the funding source has conducted a final review of the closing documents following settlement. In other instances, loan funds are only wired to the settlement agent at specific times of the day (often leaving the parties waiting, sometimes until the following day).

At one time, after meetings between the Department of Financial Institutions (DFI) and the WRA, it appeared that Wisconsin's "Good Funds Law" in Wis. Stat. § 708.10 would be applied by the DFI to assist in preventing this occurrence. In the DFI's own words, "loan funds must be guaranteed by the lender before a borrower is allowed to make a complete settlement on his or her loan." By August 2006, the DFI had apparently changed its position. It now states that § 708.10 is not intended to assist in the immediate possession of good funds or to prevent delays in closings. Just because the issue of unfunded closings was not contemplated at the time of the statute's enactment in 1996 does not mean it cannot be applied today. As a consequence, the WRA will work with the mortgage lending and title industry along with the DFI to identify possible legislative solutions.

Currently there is no perfect answer to this problem. In the meantime, there are a number of steps to consider:

- Make certain the buyer and seller are informed of this problem and understand the possible consequences to both parties.
- Collect the names of lenders who have a track record of funding at closing and make this list available to buyers.
- Educate the lenders. While many lenders are seeking to control their exposure by incorporating additional review/approval procedures, they have also been unpleasantly surprised to learn that their customers' loans were not funded on time due to their new procedures.
- Ask the closing office if they are aware of funding issues with the lender in the specific transaction and schedule the closing accordingly. Scheduling closings early or late in the day may increase the chance of funding delays.
- Consider incorporating additional language into the offer to purchase – for example, "Buyer is obligated to have the total purchase price, including mortgage loan proceeds,

available at the time of closing. Buyer agrees to determine when Buyer's loan proceeds will be funded to ensure that the funds will be available at the time of closing."

- Even stronger language in the offer might provide that (1) the buyer must use a lender that provides written verification that the funding will be available at the time of closing, and (2) the buyer must provide the lender's written verification to the seller within a specified time after acceptance of the offer to purchase, or the seller may terminate the contract.
- Include a liquidated damages provision in the offer – an agreed-upon dollar amount per hour/partial day/day that the buyer will pay if the mortgage funds are not available within ___ hours of the completion and execution of the closing documents.
- Recognize that back-to-back closings should only be scheduled if the lender in the first closing has guaranteed that funds will be available at the scheduled time for closing.

➧ ***Wisconsin Real Estate Magazine.*** See "Are No Funds 'Good Funds'?" in the October 2006 edition at news.wra.org/story.asp?a=571, and "How to Minimize funding Issues at Closing" in the January 2006 edition at news.wra.org/story.asp?a=161.

eRETR Saves Time and Money

E-filing of real estate transfer returns is now available for most counties in Wisconsin. One of the most significant benefits of Electronic Real Estate Transfer Returns (eRETR) is that the new e-filing process will make the data available immediately after a transaction is recorded, instead of three to four months as is the case with paper transfer returns. The system also provides customizable form templates that greatly reduce form preparation time and costs.

The electronic filing of an eRETR form sends the information to the county register of deeds and displays a summary and receipt page. The receipt page should accompany the deed and the transfer fee to the county Register of Deeds after closing. You must also provide a copy of the receipt to all grantors and grantees. After the county register of deeds records the property transfer, the eRETR system e-mails you a notice of the document number, confirming that the transfer return and deed were recorded. Regardless of who goes online and prepares the real estate transfer return, the grantor and grantee are responsible for the information.

The Department of Revenue (DOR) eRETR home page at www.dor.state.wi.us/ust/retn.html shows where eRETR filing is currently available and provides links to the instructions, e-forms, eRETR training help and recording pages. An instruction manual for submitting an eRETR receipt is available at www.dor.state.wi.us/eretr/training/file.pdf, and the instructions for adding recording information to an eRETR is found at www.dor.state.wi.us/eretr/training/record.pdf.

➧ ***Wisconsin Real Estate Magazine.*** See "eRETR Saves Time and Money" in the February 2006 edition at news.wra.org/story.asp?a=318.

Early Termination of Listings

The seller may terminate the listing by verbal notice, by written letter or notice, or by amendment of the listing contract (changing the expiration date to an earlier date). Upon receipt of such notice from the seller, the broker has no right to refuse the seller or exact any price or penalty for the cancellation, unless originally stated in the listing contract, but may seek legal remedies for breach of contract. Depending on the nature of the termination, a notice, amendment or cancellation and mutual release (CAMR) may be an appropriate means for responding to the seller and documenting the termination.

The "Termination of Listing" section in the listing contract explicitly states that an agent does not have the authority to terminate or shorten the term of the listing *without the written consent of the agent's supervising broker.*

Allowable damages may include out-of pocket expenses for advertising, marketing, mileage, staging and time. Brokers may also consider including a liquidated damage clause (LDC) or early termination fee in their listing contracts.

If a seller terminates the listing term early or if the parties agree to an amendment shortening the term of the listing, the broker may still deliver written notice within three days of the termination of the contract to protect buyers who negotiated to acquire an interest in the property during the term of the listing.

✔ ***Broker Supervision Newsletter.*** See "Early Termination of Listing Contracts" in the September 2006 edition at www.wra.org/online_pubs/broker_supervision/2006/br0609.asp.

Choice of Remedies

When the land contract buyer discovered he could not complete the remodeling he intended, he stopped making land contract payment. The seller sued the buyer alleging breach of contract and waste stemming from a claim of negligent remodeling. The seller sought specific performance of the land contract, which resulted in his repurchase of the property for $86,000 via a sheriff's sale. The seller also sued the buyer under a negligent waste theory and won $86,731.41.

The Wisconsin Court of Appeals restated the remedies available for a breach of a land contract: (1) sue for the unpaid purchase price, (2) sue for specific performance, (3) declare the contract at an end and bring a quiet-

title action to remove the buyer's equitable right in the land, (4) sue for ejectment or (5) sue for strict foreclosure.

The equitable doctrine of election of remedies, however, bars a party from pursuing separate legal theories or forms of relief arising from a single set of facts. The court stated that this doctrine prevents the seller from obtaining double damages and the seller's pursuit of specific performance would have placed him in the same position as if the land contract had been fully performed if he had also sought a deficiency judgment against the buyer for the balance still due after the land contract foreclosure sale. Allowing the seller to sue for a second claim would put him in a better position than if the land contract had been fully performed.

REALTOR® Practice Tips: Parties who decide to pursue remedies in the legal system are well advised to first confer with an attorney to ensure that they do not unintentionally eliminate opportunities for the best award possible via an unwise choice of remedies.

Minor v. Jacek (No. 04-0645, Ct. App. 2005) (From the January 2006 , "Case Law Update," www.wra.org/LU0601)

Rules for Licensees Purchasing Listed Properties

1. In all cases, a REALTOR® making a personal purchase has an obligation under § RL 24.05(5) to verbally disclose his or her licensee status and intent to act as a principal to the seller or the listing agent. In addition, Article 4 of the Code of Ethics requires written disclosure of the REALTOR®'s position in the transaction before the contract is accepted.

2. Wis. Admin. Code § RL 24.13(3)(b) provides, "A listing broker or the listing broker's employee may not submit his or her own offer to purchase a property which the broker has listed if the broker or broker's employee has knowledge of the terms of any pending offer, except that a broker may arrange for a guaranteed sale at the time of listing." If a listing agent presented an offer to the seller from a prospective buyer or was aware of the terms of a forthcoming offer through discussions with a cooperating agent, she would be unable to present her own offer while the prospective buyer's offer was pending because she would have knowledge of the terms of another offer.

3. A licensee may request an incentive from the listing broker. However, under a recent Department of Regulation and Licensing (DRL) interpretation of § RL 24.05(4), the seller must consent in writing to this incentive no later than the time that the offer is accepted, so a recitation in the offer regarding the incentive will be the most efficient way to meet this requirement and avoid DRL enforcement actions. This interpretation was upheld in Dane County Circuit Court.

4. Another option (instead of requesting a buyer's incentive payment) is for the licensee/buyer to submit an offer with a purchase price reduced by the amount that otherwise would have been paid as the cooperative commission or that would have been requested as a buyer incentive payment.

5. The licensee/buyer may also request a buyer's incentive directly from the seller in her offer to purchase.

6. As an alternative, the broker of the licensee/buyer could act as the cooperating broker in the transaction, write the offer for the licensee/buyer and claim the cooperative commission from the listing broker.

✔ ***Broker Supervision Newsletter.*** See "Rules for Licensees Purchasing Listed Properties" in the April 2006 edition at www.wra.org/online_pubs/broker_supervision/2006/br0604.asp.

Commission Due in Condemnation Case

The Wisconsin Supreme Court held 6-1 in ***Sonday v. Dave Kohel Agency***, 2006 WI 92, that the transfer of property as the result of a condemnation action constitutes a sale for the purpose of the WB-5 Commercial Listing Contract. The WB-5 Commercial Listing Contract provides at line 49 that the broker's commission is earned if the "Seller sells or accepts an offer which creates an enforceable contract for the sale of all or any part of the Property." In a condemnation, title to the condemned property is conveyed to the government or other condemning agency, which, in turn, pays the owner compensation. The court concluded that a transfer of title in return for compensation constitutes a sale for the purposes of the WB-5, even if it is admittedly a forced sale.

Because the condemnation was considered a sale, the Court had to also determine the basis for the commission. The Court, in essence, considered the jurisdictional award paid to the sellers at the time title was transferred to be the sale price and awarded the broker a commission calculated on that amount.

The Court did not reach the commission question until after it had first analyzed whether the listing broker had properly established listing protection – the transfer to the condemning agency occurred during the listing contract override period. The Court reviewed the contractual definition of "negotiated," which it found to be clear and unambiguous. Listing protection was established based upon the fact that the broker had discussed "the potential terms upon which Buyer might acquire an interest in the Property." Specifically, the broker had initiated contact with the village and discussed a potential purchase price, which the village had refused. This was sufficient, the Court concluded, to qualify the village as a protected

buyer. The Wisconsin REALTORS® Association Legal Action Program filed an amicus curiae brief in this case.

For a copy of the opinion issued on July 11, 2006, visit www.wisbar.org/res/sup/2006/2004ap002322.htm.

(From the August 2006 *Legal Update*, "Legislative Update 2006," www.wra.org/LU0608)

Working with People from Southeast Asian Cultures

People who live in Southeast Asian countries may have a different approach to life and a different way of thinking about the world based upon their cultural heritage and traditions. REALTORS® and other business people are well-served to remember that clients and customers who came from these countries – or whose parents came from these countries – may continue to hold some of these values and observe some of these customs in their daily lives. Certainly every individual is different in their way of thinking and conducting business, and in the degree to which they honor the customs and traditions of their ancestors. Some may purposefully choose to honor the traditions and values of their homeland, while others may decide to change their perspective and adopt the mannerisms and lifestyle of the U.S. For others, cultural characteristics and beliefs may gradually change over time.

A Few Helpful Tips:

- The color white is associated with funerals and mourning in many Southeast Asian cultures, so do not send white flowers and avoid other gifts that may be white.
- When dining, your efforts to use chopsticks may be most appreciated, provided that you don't scatter your food about the restaurant. Remember to never stick your chopsticks vertically in a food bowl because it will resemble joss sticks, the incense sticks burned at funerals. Always use the clean back ends of the chopsticks for taking food from a communal platter or bowl if no serving utensils are provided.
- Green hats like "John Deere" signature caps may signify that you are a cuckold (your wife is cheating on you) so other head wear may be advisable.
- You may have to remove your shoes in Japanese homes or restaurants so make sure you have your best socks on!

Wisconsin Real Estate Magazine. See "Working with Peoples from Southeast Asian Cultures," in the April 2006 edition at news.wra.org/story.asp?a=359.

REALTOR® Resources Page – Cultural Diversity Resources. For additional information about the Islamic faith and Latino, Southeast Asian and other cultures, visit the Cultural Diversity REALTOR® Resources page at www.wra.org/culturaldiversity. This resource page features information regarding various cultures, business practices, mannerisms, terminology and other customs that may be helpful for REALTORS® and others conducting business with clients and customers from a variety of ethnic backgrounds.

REALTOR® Resources Page – Translation Issues. For real estate transaction materials in Spanish and other languages, and for information about translation and interpretation issues and a "Consent for Interpretation Services" form, see the WRA Translation Resource Page at www.wra.org/Translation.

Disclosure

Disclosure issues highlighted in this section include defects and material adverse facts, disclosure when acreage appears to include lake bed, disclosure of orchard sites, burial site disclosure, the RECR responsibilities of a personal representative and potential insurance remedies for failure to disclose.

Defect and Material Adverse Fact Disclosures

It is the seller's responsibility to disclose defects he or she is aware of on the RECR, and it is the licensee's responsibility, under license law, to disclose material adverse facts or information suggesting the possibility of material adverse facts if that disclosure has not already been made in the transaction.

Seller's Duty to Disclose

All sellers subject to Wis. Stat. Ch. 709, whether broker-assisted or FSBO, must complete a Chapter 709 RECR or risk rescission of the offer to purchase. Chapter 709 generally applies to all persons who sell or otherwise transfer Wisconsin real estate containing one to four dwelling units. Certain sellers and transactions, however, are exempt. For example, personal representatives, trustees, conservators and other fiduciaries appointed by or subject to supervision by the court are exempt, but only if those people never occupied the property. Thus, if a personal representative lived in the property 20 years ago, that personal representative is not exempt and must complete an RECR. Transactions that don't require a real estate transfer return, such as gifts between spouses, tax sales, foreclosures, condemnations and transfers by will are also outside the scope of the RECR requirements. Sellers also may (1) choose to complete the RECR to the best of their knowledge; (2) retain a professional or expert to provide an inspection report to be used as the basis for completing the RECR; (3) refuse to complete the RECR and sell "as is," thereby risking buyer rescission, or (4) refuse to complete the RECR, sell the property "as is" and refuse to accept any offers from buyers who do not waive their Chapter 709 rescission rights.

What Does the Seller Disclose?

The RECR is not a warranty but rather a statement of the seller's knowledge of the property offered for sale based upon the seller's general aware-

ness of the property and any information that came to the seller by way of notice from a governmental agency or others. The seller is completing the RECR based upon the information and knowledge the seller has with respect to the listed property conditions. Many of these conditions involve defects associated with the property. A "defect" is a condition that would have a significant adverse effect on the value of the property; that would significantly impair the health or safety of future occupants of the property; or that, if not repaired, removed or replaced, would significantly shorten or adversely affect the expected normal life of the premises. The WRA's annotated version of the RECR prompts the seller by giving examples of conditions and defects that the seller is legally required to address in the Chapter 709 RECR. Many conditions not necessarily related to the physical condition of the property, such as nearby proposed or existing uses, may be within the scope of the catchall Statement C.27 because they may have a significant adverse effect on the value of the property. This determination may be highly subjective absent an appraisal projecting the effect the development will have on property values.

Key Practice Point for Licensees with Respect to the Seller's RECR

Do Not Give the Seller Legal Advice! Listing agents asking the seller to complete the RECR may give the seller a general explanation of the Chapter 709 seller disclosure law and the RECR form. Agents can tell the sellers that copies of the RECR will be given to prospective buyers when they tour the house and explain that a buyer making an offer may be able to rescind the offer if the buyer does not receive an RECR. Agents may also mention that if problems come up later with the property, the buyer's attorney will closely examine the RECR to make sure the seller did not fail to reveal any pertinent information. If sellers have questions, however, about whether a specific item constitutes a defect, the seller should be referred to legal counsel. Agents should tell sellers that if they are uncertain, it may be safest to explain the condition on the RECR, but if the seller wants a legal opinion, she would have to contact an attorney.

Licensee Duty to Disclose

A Wisconsin licensee's duty to disclose property conditions and other information affecting a transaction comes from Wis. Stat. § 453.133 and Wis. Admin. Code § RL 24.07. Exceptions to the overall duty are carved out in Wis. Stat. § 452.23. The licensee's specific duty to disclose material adverse facts to all parties to a transaction is from Wis. Stat. § 452.133(1)(c). "Adverse fact" and "material adverse fact" are defined in Wis. Stat. § 452.01. In addition, if the licensee knows or is aware of information suggesting the possibility of a material adverse fact, she must disclose pursuant to § RL 24.07(3).

What is a Material Adverse Fact?

An adverse fact means a condition or occurrence that is generally recognized by a competent licensee as:

1. Significantly and adversely affecting the value of the property;
2. Significantly reducing the structural integrity of improvements to real estate; or
3. Presenting a significant health risk to occupants of the property.

In addition, information that indicates that a party to a transaction is not able to or does not intend to meet his or her obligations under a contract or agreement made concerning the transaction is an adverse fact. An adverse fact becomes material (material adverse fact) when a party indicates it is of such significance, or it is generally recognized by a competent licensee as being of such significance to a reasonable party, it affects or would affect the party's decision to enter into a contract or agreement concerning a transaction or it affects or would affect the party's decision about the terms of such a contract or agreement.

Central Points of Material Adverse Fact Disclosure

- § RL 24.07(2) requires the licensee to disclose the fact in writing and in a timely manner to all parties to the transaction, even if the licensee's client would direct her not to disclose.
- The duty to disclose does not apply if the disclosure is prohibited by law.
- The duty to disclose supersedes the licensee's duty of confidentially to her client, even in situations where the seller requests the licensee to not disclose.
- The licensee has a duty to disclose information that contradicts or is materially inconsistent with the information in the RECR or any report prepared by a qualified third party.
- In the case of information *suggesting the possibility of a material adverse fact,* the licensee will be practicing competently if she makes timely written disclosure of the information suggesting the material adverse fact to all parties to the transaction, recommends the parties obtain expert assistance to inspect or investigate the situation and, if directed by the parties, drafts appropriate inspection or investigation contingencies.

✔ ***Broker Supervision Newsletter.*** See "Defect and Material Adverse Fact Disclosure" in the June 2006 edition at www.wra.org/online_pubs/broker_supervision/2006/br0606.asp.

Waterfront Property Boundaries

Not all Wisconsin lakes have been surveyed and some property owners not only "own," but also pay taxes on a parcel that includes all or part of a lake. Regrettably, some of these owners have sold their parcels and the real estate brokers, county tax-

ing authorities, parties and others involved in the transaction apparently have missed the fact that the acreage includes a lake. In one reported case, the property sold was represented to be 16 acres, notwithstanding that 12 of those acres were lake bed.

While REALTORS® are not surveyors, they often may – if they obtain a map and walk the property – be able to discern that something does not add up. Brokers working with properties abutting lakes should be very careful to fulfill the disclosure duties they owe to their clients and customers by taking the following steps:

1. Duty to Inspect

Both listing and cooperating brokers have the duty to inspect the property, per Wis. Admin. Code § RL 24.07(1). "A licensee, when engaging in real estate practice which involves real estate improved with a structure, shall conduct a reasonably competent and diligent inspection of accessible areas of the structure and immediately surrounding areas of the property to detect observable, material adverse facts. A licensee, when engaging in real estate practice which involves vacant land, shall, if the vacant land is accessible, conduct a reasonably competent and diligent inspection of the vacant land to detect observable material adverse facts."

2. Material Adverse Facts

If an agent, as a competent licensee, notices what appears to be a discrepancy regarding a property description or acreage, this may be an adverse fact, particularly when it may have a significant adverse affect on the value of the property. It would likely be material because buyers want to know exactly how many acres of land they are purchasing and have been known to rescind contracts and file lawsuits if the property they purchased contains less acreage than they originally contemplated.

Because REALTORS® are not trained as surveyors or assessors, they should refrain from making any definitive conclusions regarding acreage or a legal description. Instead, they should treat their observations as information suggesting the possibility of material adverse facts.

3. Disclosure Of Information Suggesting Material Adverse Facts

Wis. Admin. Code § RL 24.07(3) provides, "A licensee, when engaging in real estate practice, who becomes aware of information suggesting the possibility of material adverse facts to the transaction, shall be practicing competently if the licensee discloses to the parties the information suggesting the possibility of material adverse facts to the transaction in writing and in a timely fashion, recommends the parties obtain expert assistance to inspect or investigate for possible material adverse facts to the transaction, and, if directed by the parties, drafts appropriate inspection or investigation contingencies. … A licensee is not required to retain third-party inspectors or investigators to perform investigations of information suggesting the possibility of a material adverse fact to the transaction."

4. Qualified Independent Inspection Report

Having a survey is the definitive way to resolve such questions. In addition, Wis. Stat. § 452.23(2)(b) provides that no licensee disclosure is required if a written report that discloses the information has been prepared by a qualified third party, such as a surveyor, and provided to the parties.

5. Skills and Training

Wis. Admin. Code § RL 24.03(2)(d) establishes an agent's inspection standard of performance: "Licensees are not required to have the technical knowledge, skills or training possessed by competent third-party inspectors and investigators of real estate and related areas." A licensee is not trained to survey property or correct the records at the county assessor's office. What the brokers in this type of situation need to do is spot the issue, disclose it and urge the retention of experts.

6. Qualify Acreage Representations! Attribute the Source!

A Wisconsin licensee can be found liable to a buyer for inaccurate statements made by the broker which appear to the buyer to have been made from the broker's own personal knowledge. A buyer is entitled to rely on the factual statements made by a professional. Accordingly, when a broker receives data from the seller, the county treasurer's office or another third party and restates the information in the MLS, data sheets or other advertising as if it were fact, the broker may be responsible for the accuracy of the information. Accordingly, licensees are urged to specifically attribute data used in advertisements, such as acreage, square footage and assessed values, to its source.

Wisconsin Real Estate Magazine. See "Please Don't Sell the Lakes," in the November 2006 edition.

Old Orchards May Be Contaminated by Lead Arsenate Pesticides

REALTORS® all know that chemical contamination or health hazards on a property must be disclosed by the seller in the property condition report or in the offer to purchase, and if the seller fails to do so and this is known to the real estate broker, the broker must disclose this as a material adverse fact or information suggesting the possibility of a material adverse fact.

In response to concerns about health risks associated with pesticides used in Wisconsin orchards up until the 1960s, the WRA worked cooperatively with the Department of Natural Resources (DNR) and the Department of Agriculture, Trade and Consumer Protection (DATCP) in 2002 to devel-

op a special Lead/Arsenic Pesticide Addendum. This addendum prompts the seller to disclose any information the seller has about use of the property as an orchard prior to 1960 and about any use of lead or arsenic-based pesticides. The addendum also gives the buyer the opportunity to test for residual levels of pesticides in the soils.

How do lead and arsenic get into the soils?

Lead and arsenic occur naturally in soils. The other principal historical sources of lead (leaded gasoline, lead-based paint) and arsenic (arsenic pesticides) are now outlawed in the U.S.

Why was lead arsenate used in the past?

Lead and arsenic compounds were used as pesticides on apple and cherry orchards from the late-1800s to the mid-1900s. Lead arsenate was a popular insecticide used for moth control in commercial orchards, and in smaller but still substantial amounts in home gardens and orchards for mosquito control.

Why is this still important today?

These compounds don't break down and aren't very mobile, so they are often still found in the soil today.

What are the health risks?

Lead and arsenic enter the human body primarily by ingestion. Preschool-age children are the most vulnerable because children play in soil and are likely to place their hands and other objects into their mouths, they absorb lead and arsenic more readily than adults and they are likely to have nutrient deficiencies that may facilitate lead and arsenic absorption.

In other words, this is very similar to the dangers to children posed by lead-based paint (LBP).

Allowing children to play in the soils around the outside of the house may be dangerous if lead and arsenic from pesticides or LBP is in the soil. Childhood exposure to lead can cause developmental and nervous system problems, and high levels can also affect the nervous system and kidneys of adults. Long-term exposure to arsenic can cause several types of cancer.

Where are lead and arsenic found in former orchard sites?

Higher concentrations tend to occur where the former trees stood; lower concentrations appear between the former tree sites. Chemical analysis of soil will determine if there are any elevated concentrations of lead or arsenic.

REALTOR® Practice Tips: REALTORS® should be sure that they are aware of the Lead/Arsenic Pesticide Addendum and use it regularly with sites that have been orchards. The Lead/Arsenic Pesticide Addendum is available online at www.datcp.state.wi.us/arm/agriculture/pest-fert/pesticides/accp/pdf/lead_arsenic_addendum.pdf. In WRA Zip Forms, the addendum is listed under the Purchase Category as WRAADP.

Lead and Arsenic in Soil of Old Fruit Orchards FAQ: www.datcp.state.wi.us/arm/agriculture/pest-fert/pesticides/accp/pdf/pbasq&a.pdf.

(From the October 9, 2006, DR Hottips).

Do Not Disturb Burial Sites

People have been living in Wisconsin for perhaps 13,000 years, and for that time have been burying their dead in its soil. Burial sites are the most sensitive of cultural resources (i.e. archaeological, architectural and historical sites and structures) and the most protected.

In Wisconsin, burial sites are any place where human remains are below the surface, including all Native American mounds. The burial sites law (Wis. Stat. § 157.70) applies to any property, regardless of ownership or the activities conducted. It applies to a developer creating a new subdivision, or a property owner excavating for a pool or a house foundation. REALTORS® may become involved with such sites in the course of representing their clients.

A property may contain an alleged burial, such as the report of a burial mound that had been leveled (but where the burial may still survive), or an old town cemetery, long ago abandoned. When such information comes to light, it is wise to suggest at least some minimal investigation of historical records (maps, local histories, state archaeological site files). If substantial evidence of a burial site is found, it is important that this information be disclosed to a potential buyer. If human remains are found during earth-moving activities, the property owner must cease activity and contact the Burial Sites Office of the Wisconsin Historical Society (608-264-6503). A permit will be required to disturb the remains. Wis. Stat. § 157.70 (8) provides penalties for an individual who intentionally disturbs a burial site without prior authorization from the Wisconsin Historical Society.

If a property contains a previously identified cemetery or mound, it may have been catalogued per § 157.70(1)(c). If a catalogued site is to be disturbed, an application must be submitted to the Historical Society, which may deny the application and the proposed activity.

If you have questions about Wisconsin's burial site statutes, call the Burial Sites Preservation Office at the Wisconsin Historical Society at 608-264-6502 or Phil Salkin at the Wisconsin REALTORS® Association at 608-241-2047.

Wisconsin Real Estate Magazine. See "Cultural Resources Aren't Always Visible," in the December 2005 edition at news.wra.org/story.asp?a=18.

RECR – Personal Representative Exception

***Tanner v. Williams* (No. 02-1706, Ct. App. 2003)**

The buyer purchased a house from an estate; the personal representative (PR) had never lived in the property. After closing, the buyer discovered water problems in the basement. The buyer had had a home inspector inspect the property prior to closing, but the inspector did not discover any water problems. The buyer sued the estate and the listing broker, alleging intentional misrepresentation and fraud. The buyer claimed the PR knew of the problem and had a duty to disclose the defect. The PR asserted she had no knowledge of the problem and no duty to make representations or disclose defects. The court found for the PR and the buyer appealed.

The Court of Appeals acknowledged that silence might constitute misrepresentation in a real estate transaction when the seller has a duty to disclose. However, a PR has no duty to complete the RECR) if she has never resided in the property.

REALTOR® Practice Tips: Personal representatives and other fiduciaries selling residential real estate are not obligated to complete a RECR unless they have occupied the property. Buyers in these situations must be extra diligent in ascertaining the condition of the property being purchased.

(From the January 2006 *Legal Update*, "Case Law Update," www.wra.org/LU0601).

Insurance Company May Cover Damages in Negligence Suit

***Jares v. Ullrich*, 2003 WI App 156**

The buyers sued the sellers for failing to disclose any animal infestation or any other defects on the RECR when they sold their home. Following closing, the buyers discovered that significant portions of the house were "infested with raccoons and other animals, dead animal bodies, their nests, feces, urine, and other matter in the walls and underneath the floors." The buyers sought damages for the costs of repair and restoration and loss of use of the property for two months. The trial court found that the sellers' insurance company had no duty to defend the sellers because there was no causative link between the alleged negligence and the property damage. The sellers appealed to the Wisconsin Court of Appeals.

The insurance policy, the Court noted, defined property damage as "physical injury to or destruction of tangible property, including its loss of use." The Court found that this definition was sufficiently addressed when the buyers alleged their inability to occupy the property – a loss of use – as a result of the animal infestation, which the sellers had failed to disclose.

REALTOR® Practice Tips: Sellers who are sued by buyers for property damages may wish to investigate whether their insurance carrier will provide a defense and cover any resulting damages.

Land Use

The land use topics discussed in this *Update* include:

- Association standing to sue
- Notice of zoning change proposals
- Right-to-repair procedures
- Repair of nonconforming structures
- Brownfield conditions for remediation closure
- Rational bases for municipal assessments
- Impact fee modifications
- Tree trimming in utility easements
- Development moratoria
- Eminent domain
- Pier rules
- Waterfront owner's rights to use lake bed
- Historic properties

Association Standing to Sue

In ***Metropolitan Builders v. Village of Germantown***, 2005 WI App 103, the village of Germantown assessed impact fees against developers for the purpose of building a public swimming pool, but as costs increased dramatically over the years, later decided to instead build a spray ground (a playground with water features). The Metropolitan Builders Association of Greater Milwaukee (MBA) challenged the new purpose before the village board. The village, in response, enacted an ordinance confirming that the spray ground was a proper use and declaring that the MBA had no standing to challenge this. The MBA sued.

The Wisconsin Court of Appeals concluded that the MBA had standing to challenge the use of the impact fees as long as any of the members of its organization had the legal right to do so: the challenged action must result in actual injury and the injured's interest must be entitled to protection by law. Allowing the MBA to stand in the shoes of its members promotes judicial economy by eliminating the need for separate lawsuits and removes any stigma or potential retaliation that might plague members filing separately.

Regarding the propriety of using the swimming pool impact fees for a spray ground, the court observed that the village is restricted to spending the funds only for capital costs. The Court found that the village was most concerned with providing a facility for a youth aquatic or recreational center, not specifically a swimming pool. Accordingly, the Court held that a spray ground was a legally proper use of the impact fees,

but that any fees left over must be returned to the current owners of the properties assessed the impact fees.

REALTOR® Practice Tips: The WRA and other trade associations have standing to sue on behalf of members as long as one member could have legally brought an individual challenge.

(From the January 2006 *Legal Update*, "Case Law Update," www.wra.org/LU0601)

Individual Notice for Proposed Zoning Actions

A city, village, town or county must follow statutory procedures in adopting or amending a zoning ordinance – the municipality must give notice and hold a public hearing. A county, city or village gives notice of its proposed action by publishing it twice in an area newspaper likely to give notice in the area. A town, however, did not need to give this notice for proposed zoning ordinances until recent legislative changes were implemented effective April 11, 2006. Under these legislative revisions, if a municipality's proposed ordinance or amendment has the effect of changing the allowable use of any property, the notice in the newspaper must contain a map or description of the affected property and a statement that a map may be obtained from the local zoning agency.

More significantly, a person may now request personal notice of any proposed zoning ordinance or amendment that affects the allowable use of the person's property. The zoning agency may charge for the cost of providing the notice, which may be delivered in any reasonable manner agreed to by the person and the local government, including fax and e-mail. These new provisions do not apply to the city of Milwaukee. A city, village, town or county that proposes to adopt or amend a comprehensive plan must similarly maintain a list of persons who submit a written request to receive notice of the proposed ordinance and provide notice accordingly.

These new notice provisions will help property owners better protect their property rights by giving them direct notice of proposed changes to zoning and comprehensive plans that could impact the use and value of their property.

(From the August 2006 *Legal Update*, "Legislative Update 2006," www.wra.org/LU0608)

Claims Against Home Building Contractors – Right to Repair

Wis. Stat. §§ 101.148 and 895.07 establish a process for resolving construction defect disputes between building contractors and homeowners.

Contractors who construct or remodel a person's residence must give the consumer a brochure explaining the procedures to follow before suing a contractor or a window or door supplier. The Department of Commerce (DOC) will prepare this brochure.

If a homeowner or condominium association is concerned about a possible construction defect, they must give written notice detailing the alleged construction defect to the contractor at least 90 working days before suing the contractor. The contractor may respond to the notice with a written offer to inspect the property, make repairs, settle the claim with a monetary payment, or reject the claim. If the claim is rejected or the contractor fails to timely respond, the owner can sue the contractor. Owners who reject settlement offers must state their reasons.

If the homeowner sues the contractor without following the procedures, the court will dismiss the action.

(From the August 2006 *Legal Update*, "Legislative Update 2006," www.wra.org/LU0608)

Nonconforming Structures Destroyed by Natural Disasters

A "nonconforming structure" is a home or building that does not meet one of the dimensional requirements found in the current zoning ordinance. This could be a setback requirement, height requirement, lot coverage ratio or any other regulation relating to the size or the placement of a building on a lot. Generally, a building becomes nonconforming when the regulations are changed after the home or building is constructed.

When a home is classified as "nonconforming," significant restrictions are often placed on the ability to improve, expand or replace the building. Previously, only a home in an area regulated by county shoreland zoning could be rebuilt and only if it was destroyed by wind, fire, flood or vandalism. Legislative revisions now allow all nonconforming structures to be rebuilt or restored if destroyed by natural disasters no matter where they are located. The natural forces that trigger this provision have been expanded to include damage or destruction by mold, snow or ice as well as violent wind, vandalism, fire or flood.

(From the August 2006 *Legal Update*, "Legislative Update 2006," www.wra.org/LU0608)

Brownfield Deed Restrictions Eliminated

The newly enacted Wis. Stat. § 292.12 changes the way the DNR, DATCP and DOC implement closures involving land use conditions to address residual contamination. In essence, the state agencies no longer rely on deed restrictions to ensure that land use conditions placed on a property at the time of closure are maintained over time. Instead, the agencies have specific statutory authority to place these land use conditions on a property, and make the owner of the proper

ty responsible for complying with the conditions set out by the state agency.

The public is advised of these conditions through an Internet registry of properties with this type of closure approval, instead of individual deed restrictions for each property. The GIS Registry of Closed Remediation Sites, online at www.dnr.state.wi.us/org/aw/rr/gis/index.htm, will include detailed letters that spell out the conditions that must be maintained to ensure that the residual contamination is properly managed. The DNR will continue to conduct audits of a certain number of these properties with land use conditions.

For further information about Brownfields land use conditions, visit dnr.wi.gov/org/aw/rr/rbrownfields/legislation.htm.

Municipal Assessments Require Reasonable Basis

The Wisconsin Supreme Court held in ***Steinbach v. Green Lake Sanitary District***, 2006 WI 63, that a special assessment for sewer access levied against 18 condominium unit owners was not reasonable. The sanitary district had saddled the unit owners with an assessment that was 18 times as large as the charge paid by other dwelling owners. The Court found that there was no reasonable relationship between the sewer availability charges assessed against each unit owner and the cost of installing one lateral stub, not 18, leading from the sewer main to the site of the condominium building. Other multiple dwelling sites were assessed only one sewer availability charge and the unit owners did not derive any greater benefit from the lateral stub than other multiple unit property occupants and owners.

The Wisconsin REALTORS® Association Legal Action Program filed an amicus curiae brief in this case.

(From the August 2006 *Legal Update*, "Legislative Update 2006," www.wra.org/LU0608)

Impact Fee Revisions

Impact fees are fees assessed by municipalities against developers to offset the cost of facilities and services such as parks and sewers that become necessary due to the resulting expansion of the community. Current impact fee law in Wis. Stat. § 66.0617 permits a city, village, town or county to impose an impact fee on a developer to pay capital costs to construct certain public facilities that are necessary to accommodate land development. Such public facilities include highways; facilities for treating sewage, storm water and surface water; facilities for pumping, storing and distributing water; parks, playgrounds and other recreational facilities; fire protection, emergency medical and law enforcement facilities; and libraries.

An important impact fee reform bill was signed into law on May 30, 2006, to clean up loopholes in the law. The revised law:

- Requires impact fees to be paid within two weeks of the time a building permit or occupancy permit is issued instead of when the subdivision plat is approved
- Eliminates the ability of counties to impose impact fees
- Rejects one of the holdings in the ***Metropolitan Builders Association of Greater Milwaukee v. Village of Germantown*** case, and clarifies that impact fees collected for one purpose cannot be used for another
- Requires regular public reporting in the annual municipal budget and requires impact fees to be kept in separate accounts
- Closes a loophole in Wisconsin's subdivision law (Wis. Stat. Ch. 236) that allowed fees for infrastructure in new subdivisions to be charged without meeting the impact fee procedural and statutory requirements
- Prohibits the use of impact fees to pay for most types of recreational facilities (other than parks, playgrounds and athletic fields) or any type of vehicle
- Prohibits a municipality, town or county, as a condition of a subdivision or other land division approval, from imposing any fees or other charges to fund the acquisition or improvement of land, infrastructure or other real or personal property.
- Requires any land dedication, easement or other public improvement required by a municipality, town or county, as a condition of a subdivision or other land division approval, to bear a rational relationship to a need resulting from the subdivision or other division of land

(From the August 2006 *Legal Update*, "Legislative Update 2006," www.wra.org/LU0608)

Tree Trimming in Utility Easements

Thousands of miles of power lines criss-cross the state, delivering the electricity used in homes and businesses. The utility companies hold easements for the vast majority of these lines that cross private property that spell out specific rights and obligations.

An easement between a utility and a landowner allows the utility to build, operate and maintain a power line while the landowner retains general ownership and control of the land. Most land uses that do not interfere with the power line are allowed, including farming, grazing, gardening, hunting, biking, hiking, snowmobiling and parking. Some types of buildings or structures may be allowed within the right-of-way, but occupied dwellings are not permissible. Landowners with utility easements on their properties should contact the utility before excavating, planting or doing any development in the right-of-way to ensure compatibility with the terms of the easement.

Utility companies are required by state law to keep the right-of-way clear of tall trees that could interfere with the safe and reliable operation of the power line and control weeds and brush around transmission facilities. Tree and brush trimming and removal activities generally are conducted in utility corridors on five-year cycles.

Easements typically allow the utility company access to the right-of-way. Generally, the utility will contact property owners before conducting any maintenance work on the right-of-way.

Wisconsin Real Estate Magazine. See "Buyers, Sellers Need to Know," in the January 2006 edition at news.wra.org/story.asp?a=166.

Development Moratoria

Over the last several years, many communities throughout Wisconsin have enacted moratoria on new development as a means to stop or control growth. A development moratorium is a temporary halt to some or all types of real estate development and can be accomplished by prohibiting the issuance of building permits, zoning changes or subdivision plats.

Although Wisconsin's Smart Growth Law does not authorize or encourage the use of moratoria, some rural communities enact a development moratorium because they believe it is a necessary first step to creating a comprehensive plan. Other rural communities enact development moratoria because they feel that new development is a threat to the rural character they want to preserve.

Because a moratorium can prevent all development or land divisions during the time in which the moratorium is effective, the value of affected property during this time is greatly reduced.

Placing a moratorium on development is unfair to long-term residents wishing to sell or develop their property in the near future and may create great uncertainty in the marketplace. Moratoria undermine the expectations that property owners have in current regulations. People purchase property with the reasonable expectation that they will be able to use it in a manner consistent with zoning and planning regulations. However, a moratorium can prevent property owners from using their property in a manner that is specifically allowed for in the comprehensive plan or zoning ordinance.

Wisconsin Real Estate Magazine. See "The Dangers of Development Moratoria," in the November 2005 edition at news.wra.org/story.asp?a=23.

Eminent Domain

Eminent domain is the power of the government to take private property for "public use" without the owner's consent. This power to take property belongs to multiple levels of government and requires no constitutional recognition because it is founded on the law of necessity. The power of eminent domain is subject to two primary limitations: the requirement for due process and the requirement of just compensation.

The traditional use of the eminent domain power is for public projects like highways, parks and bridges. States also typically have laws permitting condemnation to eliminate blight or, in other words, slum clearance. Blight is typically defined to involve factors such as obsolescence, faulty design or arrangement, inadequate sanitary facilities, deleterious land use, obsolete layout, excessive land coverage, lack of ventilation and overcrowding or dilapidation, which threaten public health, safety or welfare. The act of eliminating blight itself is seen as a public purpose and a public use, even if the property is transferred to private property holders.

Over the years the federal courts have expanded the definition of a public use to include any conceivable public purpose. At first a property might be condemned as part of a slum clearance to improve housing, but before long, slums were being condemned and cleared for commercial or industrial development. Most recently, economically viable properties have been condemned and cleared out so that more desirable private development might take place.

The *Kelo* Decision

The U.S. Supreme Court ruled on June 23, 2005, in ***Kelo v. City of New London***, that local communities could condemn private property through their power of eminent domain for purposes of economic development. The Court's decision in ***Kelo*** sent shock waves throughout the country. Property owners fear that any property (including an owner-occupied house) can be condemned if the community believes that the property can be used for a higher and better purpose. Dissenting Justice Sandra Day O'Connor wrote in ***Kelo***, "the specter of condemnation hangs over all property … nothing is to prevent the state from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory."

Wis. Stat. § 32.03(6)

In response to ***Kelo***, Wis. Stat. § 32.03(6) was added to Chapter 32 of the Wisconsin Statutes – the Eminent Domain law. This provision prohibits the condemnation of property that is not blighted if the property is going to be conveyed or leased to a private entity.

The provision defines "blighted property" as "any property that, by reason of abandonment, dilapidation, deterioration, age or obsolescence, inadequate provisions for ventilation, light, air, or sanitation, high density of population and overcrowding, faulty lot layout in relation to size, adequacy, accessibility, or usefulness, unsanitary or unsafe conditions, deterioration of site or other improvements, or the existence of conditions that endanger life or property by fire

or other causes, or any combination of such factors, is detrimental to the public health, safety, or welfare."

Wis. Stat. § 32.03(6)(a) adds an additional requirement for single-family homes and other one-dwelling unit properties. Even if such a property otherwise meets the conditions for a blighted property, the property is not considered blighted unless it meets one of two additional conditions: (1) it is not occupied by the owner, the owner's spouse or specified individuals related to the owner, or (2) the crime rate in, on or adjacent to the property is at least three times higher than in the rest of the community. This provision applies only to condemnations by a county, town, village, city or school district, the Department of Health and Family Services, the Department of Corrections, the Board of Regents of the University of Wisconsin System, other public boards or commissions, a housing authority, a redevelopment authority, a community development authority, a local cultural arts district or a local exposition district. Other entities, such as the DOT, that may acquire property by condemnation are not subject to the limitations in this new provision.

If a condemning governmental agency or entity intends to convey or lease the property to a private entity, that body must make written findings and provide a copy of the findings to the property owner. The findings must include a description of the scope of the redevelopment project encompassing the property, a legal description of the redevelopment area that includes the property, the purpose of the condemnation, a finding that the owner's property is blighted and the reasons for that finding.

(From the July 2006 *Legal Update*, "Eminent Domain," www.wra.org/LU0607)

Pier Rules

New statutory pier standards were passed into law in 2004 (see Wis. Stat. § 30.12(1g)(f)). Under these standards, a pier does not need a permit if it meets the following dimensional requirements: (1) no greater than six feet wide; (2) does not extend into water deeper than three feet or beyond a length necessary to moor your boat, whichever is greater; and (3) no more than two boat slips for the first 50 feet of water frontage, and one additional boat slip for every additional 50 feet of water frontage. If a property owner wants to place a pier that exceeds these requirements, a permit must be obtained from the DNR.

Since that time, the DNR introduced controversial emergency rules, which were suspended by the Legislature. In the fall of 2005, the DNR introduced another version of the pier rules, but the Legislature objected to the rules and returned them to the DNR to make unspecified revisions. To date, the rules have not been approved by the Legislature and therefore are not currently in effect.

In response to the DNR's proposed rules, the state Legislature passed Assembly Bill 850 to permanently protect more piers than would be grandfathered under the DNR rules. In May 2006, the Governor vetoed AB 850 because it slightly modified an earlier version of the bill. Instead the Governor issued Executive Order #148 (www.wisgov.state.wi.us/jour¬nal_media_detail.asp?prid=1985), directing the DNR to exercise enforcement discretion to ensure family piers will not be affected and that everyone maintains the right to have access to Wisconsin's lakes. Under the executive order, all existing piers with a loading platform less than 200 square feet are exempt from the permit process, as are existing piers between 200 and 300 square feet as long as they are not wider than 10 feet.

Concerns with the effectiveness of the Executive Order might arise given that an executive order cannot override state statute, and the order contains provisions that are inconsistent with Wis. Stat. § 30.12(1g)(f). Furthermore, the executive order is only a temporary measure and does not have the force and effect of law. Under the executive order, the DNR enjoys enforcement discretion, may charge $50 for general permits and $300 for individual permits and retains broad discretionary authority to require any existing pier without a permit to apply for an individual permit if the DNR determines that the pier may result in, among other things, "significant adverse impacts to public rights and interests."

At some point in the future, new statutes and/or administrative rules will have to be adopted in order to permanently change current law.

(From the August 2006 *Legal Update*, "Legislative Update 2006," www.wra.org/LU0608)

Lakefront Property and the OHWM

Unfortunately, not all Wisconsin lakes have been surveyed and some property owners not only "own," but also pay taxes on a parcel that includes all or part of a lake. This is a problem because Wisconsin lakes are public resources and owned in common by all Wisconsin citizens under the Public Trust Doctrine. The Wisconsin Supreme Court has ruled that the state owns title to lake beds, and that the ordinary high water mark (OHWM) establishes the boundary between public lake bed and private land. The lakefront property owner only owns the land above the OHWM – where the regular action of water against the bank leaves a distinct mark.

OHWM Disparities

The OHWM isn't typically identified on surveys and may be difficult to see on some sites. As a result, some prop-

erty owners have recently discovered that when the OHWM is identified, land they thought was theirs is actually public lake bed. If the OHWM is not where the owner thought it had been, setbacks and other zoning dimensions may be impacted. Some structures may now be considered nonconforming and some other county zoning restrictions may now apply.

Lake Access: "Keep Your Feet Wet"

Regardless of bed ownership, the general public must follow the law to legally gain access to public waters. Adjacent property owners have exclusive use of dry or exposed lake bed below the OHWM. Such areas may be posted, but not fenced. If private land surrounds a land-locked lake, the general public must obtain the landowner's permission to enter. For lakes and flowages, users must be in the water with no right to use the exposed shoreline without the owner's consent.

➧ ***Wisconsin Real Estate Magazine.*** See "Please Don't Sell the Lakes!" in the November 2006 edition.

Historic Property Myths and Truths

Listing a property on the National Register of Historic Places (National Register) can have real economic benefits for owners by increasing property values and providing significant tax breaks.

Listing in the National Register in Wisconsin does not restrict what private property owners do with their property. The owner may even demolish the property, but the local municipality first will be required to hold the demolition permit for 30 days so that the State Historic Preservation Office may photograph the building.

National Register status makes owners eligible for historic property rehabilitation and maintenance tax credits. The state of Wisconsin provides a five-percent piggyback for the program when the work is preapproved. The state also has a 25 percent rehabilitation income tax credit for pre-approved work for owners of qualifying residential properties. Houses listed in historic neighborhoods tend to have at least stable, but usually increasing, property values. In many communities, National Register-listed neighborhoods (called historic districts) are a highly desirable realty niche attracting buyers looking for well-maintained and well-preserved historic period homes.

For information about the State and the National Register program in Wisconsin, visit www.wisconsinhistory.org/hp/register/index.asp. More information on the rehabilitation income tax credit program is available at www.wisconsinhistory.org/hp/owners.asp.

➧ ***Wisconsin Real Estate Magazine.*** See "Historic Property Myths and Truths," in the December 2005 edition at news.wra.org/story.asp?a=1.

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