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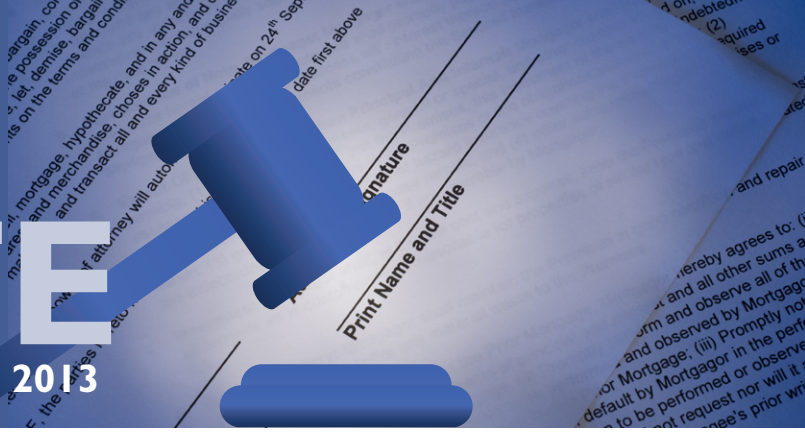

Contract Law Drafting Pointers

An in-depth knowledge of contract law is extremely important for REALTORS® in Wisconsin. In 1961, the Wisconsin Supreme Court created a narrow rule permitting real estate brokers to fill in the blank spaces on standard conveyance forms for clients and customers without violating the prohibition against laypersons practicing law. In *State ex rel. Reynolds v. Dinger*, 14 Wis. 2d 193, 109 N.W. 2d 685 (1961), the Supreme Court observed that completing contracts for parties is the practice of law, but granted a limited authorization for real estate licensees. The Court noted that this practice had not posed any danger to the public or subjected it to undue expense over the course of the 100 years that brokers had been using standard approved forms.

While this privilege may be taken for granted by many licensees, the idea of licensees drafting real estate contracts is not always universally embraced. For instance, the State Bar of Wisconsin occasionally questions whether licensees drafting real estate contracts are engaged in the unauthorized practice of law rather than the lawful practice of real estate. In 2003, the State Bar initiated a petition requesting that the Supreme Court create a definition for both the lawful practice and unauthorized practice of law. Under the language of that petition, the ability of real estate licensees to draft real estate forms on behalf of consumers and other parties would have vanished. Fortunately this precious privilege to draft state-approved forms on behalf of buyers and sellers was confirmed once again. On June 1, 2010, the Wisconsin Supreme Court unanimously voted to adopt SCR Chapter 23 Regulation of Unauthorized Practice of Law, which does not interfere with licensees' limited ability to draft real estate contracts provided they are held accountable for errors, misrepresentations and unethical practice.

Given this history, REALTORS® must be ever vigilant and demonstrate that they continue to deserve this privilege through competent use of state-approved forms.

Contracts are central to a broker's business. A listing or buyer agency contract creates the broker's relationship with his or her client. The agency contract determines the scope of the broker's duties and establishes the client's obligations if the broker successfully procures a ready, willing and able buyer, or if the buyer contracts to purchase the property the broker has found.

The earning of a broker's commission or fee typically requires that the buyer and the seller enter into a binding purchase agreement, that is, the offer to purchase. It is therefore critical for licensees to know exactly what is required to create a binding real estate purchase contract. Once the offer to purchase has become binding, the primary order

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of business is to oversee implementation. The agent assists the parties in completing those tasks required for the removal of the contract contingencies, trouble-shoots any concerns or problems along the way and generally makes the party comfortable with the property and the transaction.

This *Legal Update* studies some of these basic contract issues. The basics of contract formation are reviewed, with a focus on the listing contact, buyer agency agreement, offer to purchase and counter-offer. Other types of agreements that arise in real estate practice, such as the letter of intent and the first right of refusal, are also discussed. The Wisconsin Administrative Code rules for the use and modification of forms approved by the Real Estate Examining Board and the Department of Safety and Professional Services are also reviewed and illustrated.

Definition of Contract

To have a contract there must be an offer and an acceptance. The offer indicates a willingness to enter into a bargain and must be stated in definite terms. Acceptance is the communication of assent or agreement to the offered terms. When a specific method of acceptance is indicated in the offer, that method must be utilized when the offer is accepted in order to create a binding contract. In addition, each party must be competent and must give some consideration. A contract also must be for a lawful purpose or it may be void.

All Contracts and Agreements in Writing

Real estate contracts such as listing contracts, buyer agency agreements, offers, land contracts and deeds must be in writing to be valid and enforceable according to Wis. Stat. §§ 240.10 and 706.02. The requirement for written agreements is reinforced in Wis. Admin. Code § REEB 24.08, which provides, "A licensee shall put in writing all listing contracts, guaranteed sales agreements, buyer agency agreements, offers to purchase, property management agreements, option contracts, financial obligations and any other commitments regarding transactions, expressing the exact agreement of the parties unless the writing is completed by the parties or their attorneys or the writing is outside the scope of the licensee's authority under ch. REEB 16."

Similarly, Article 9 of the Code of Ethics indicates, "REALTORS®, for the protection of all parties, shall assure whenever possible that all agreements related to real estate transactions including, but not limited to, listing and representation agreements, purchase contracts, and leases are in writing in clear and understandable language expressing the specific terms, conditions, obligations and commitments of the parties. A copy of each agreement shall be furnished to each party to such agreements upon their signing or initialing."

REALTOR® Practice Tip:
All agreements with and between the parties should be in writing. A verbal message that that the seller accepts an offer or the buyer agrees to the terms of a proposed amendment is not binding unless it is confirmed in writing!

General Contract Formation

The three essential elements of any enforceable contract are an offer, acceptance and consideration. A valid contract is created by the mutual agreement of the parties. The agreement is reached when one of the parties makes an offer and the other party accepts.

Contract Formation: The Offer

An offer is the communication made by one party to another that gives the recipient the opportunity to agree to the offeror's terms and conditions and thus create a contract. It is the manifestation of the first party's willingness to enter into a bargain. The offer must be extended voluntarily, and is not valid if it is delivered without permission or made as the result of coercion.

A price quotation generally is not an offer, but rather an invitation to negotiate or submit an offer – depending upon the language used and the facts and circumstances. A newspaper ad or other advertisement is seen as an invitation to enter into negotiations or to patronize a business, unless, of course, the language specifies that it is an offer. The offer of a reward, on the other hand, may very well be found to be an offer that is accepted by the person performing the service or task. Clearly the circumstances and the language used are critical is determining whether an offer has been made.

Definite, Clear, Detailed Contract Provisions

All material terms of the offer must be expressed in certain and definite language. While it is impossible to say in advance exactly which terms will be material in any given contract, terms that identify the parties, price, property and time for performance are always critical. When describing these or any other terms of a contract it should be determined if the language could be interpreted differently by different people. Contracts containing uncertain or imprecise language such as "closing date to be determined" may cause disputes, delay closings, increase costs and be subject to legal challenge.

This definiteness requirement is an issue of contract formation, not interpretation. This is because the vagueness or indefiniteness of an essential contract term means there is no meeting of the minds and actually prevents the creation of an enforceable contract.

According to the Wisconsin Supreme Court, an offer to purchase may be void for indefiniteness if the Financing Contingency is not drafted with enough details. A financing clause stating, "this offer to purchase is further contingent upon the purchaser obtaining the proper amount of financing" was declared unenforceable for lack of definite terms in *Gerruth Realty Co. v. Pire*, 17 Wis. 2d 89, 115 N.W.2d 557 (1962). 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. This conduct must involve some interpretative conduct by each party, whether by performance or acceptance of performance by the other. An indefinite financing contingency cannot become definite simply because the buyer obtains financing because unilateral action by one party is not enough – the other party would have to demonstrate agreement or acceptance of the behavior.

REALTOR® Practice Tip: REALTORS® should draft all material terms and contingencies in clear, definite and certain terms to avoid placing their clients and customers in a position where they will need to hire attorneys, go to court and submit evidence in order to try to prove what the details of the contract really were intended to be.

Objective Standards

As the Wisconsin Court of Appeals explained in *Nodolf v. Nelson*, 103 Wis. 2d 656, 660, 309 N.W.2d 397 (Ct. App. 1981), "A contract is illusory when the contract is conditional on some fact or event that is wholly under the promisor's control and his [or her] bringing it about is left wholly to his [or her] own will and discretion...." A contract is illusory when it is conditioned on a fact or event wholly under the control of one party. A financing contingency is illusory and unenforceable if the contingency grants to one party the exclusive right to determine whether suitable financing has been obtained. Such a "subject to satisfaction" contingency is subjective and the other parties and the courts rarely have any way to know what will satisfy the provision. A contract that is illusory is no contract at all and is void.

In *Devine v. Notter*, 2008 WI App 87, the offer to purchase included a five-day attorney approval contingency that the sellers argued rendered the entire contract between them illusory and unenforceable. The sellers asserted that contingency made the contract illusory because either party could walk away from the deal for essentially any reason. The Wisconsin Court of Appeals noted that an illusory promise is a promise in form only. For example, "I promise to do as you ask if I please to do so when the time arrives." The promisor can keep that promise by either doing as the promisee asks or not; thus the promisor has total freedom to do as he or she wants.

The Court analyzed the attorney approval contingency as giving the parties two options: go ahead with the deal or consult with an attorney, who may object to any term other than price. The five-day limit soon eliminates the party's right to confer with his or her attorney, leaving the party with the remaining option of performing the contract as written. Thus the Court held the contract was not illusory because the attorney review period was strictly limited to the five-day time frame.

Additional Information: For further discussion of this case, see Pages 4-5 of the May 2009 *Legal Update*, "Case Law Update," at www.wra.org/0905.

While a contract with indefinite terms might be able to be rescued if the parties want to litigate and prove that there was mutual intent, a "subject to satisfaction" contract with no limitations or constraints likely is void and cannot be saved; the parties can only start over again and create a new contract.

REALTOR® Practice Tip: REALTORS® should draft all material terms and contingencies with objective standards to avoid the need to bring in the lawyers and go to court for a determination of whether the contract is illusory. The contract may be void if performance of a provision is solely subject to one party's satisfaction rather than mutually agreed-upon parameters.

Duration of Offer

If the offer is not accepted during the time period stated in the contract for acceptance, the offer then terminates. Other events that cause an offer to terminate are withdrawal prior to acceptance, death of the person making the offer, destruction of the property, or the making of a counter-offer by the party receiving the original offer.

Contract Formation: Acceptance

Acceptance creates an enforceable contract by expressing a meeting of the minds with respect to the terms set forth in the offer. 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 REEB-approved real estate offer to purchase forms, which specify the methods the seller may use to indicate that the offer to purchase has become a binding contract: (1) the offer to purchase must be signed by the seller to demonstrate acceptance, and (2) the signed offer must be delivered to achieve binding acceptance and cause the contract to be binding upon the parties. The REEB offers to purchase give the parties the ability to choose acceptable delivery methods. The parties may select delivery by mail, commercial delivery, fax or e-mail, with personal delivery serving as the default delivery method. The delivery of the signed offer must be accomplished on or before the acceptance deadline specified on the offer. This means that by the deadline, the accepted offer must be placed in the mail or with a commercial delivery carrier, personally delivered into the hands of the buyer, or transmitted by e-mail or facsimile.

Additional Information: For further discussion of delivery methods, see Pages 5-7 of the November 2009 *Legal Update*, "WB-11 Residential Offer to Purchase – 2010 Edition," at www.wra.org/LU0911.

The power of the seller, in a typical real estate offer to purchase scenario, to accept the offer can be terminated by the seller's rejection of the offer, by the lapse of time beyond the stated deadline for acceptance, by the buyer's revocation or withdrawal of the offer before binding acceptance, or by the death or incapacity of either party.

REALTOR® Practice Tip: The acceptance deadline in an offer to purchase is just that – the deadline by which time a party wishing to accept must complete the acceptance steps: signature and delivery. This deadline has no relevance if the offer is rejected or countered.

Hotline Q&A – Acceptance and Binding Acceptance

An offer was submitted to two sellers, but only Mrs. Seller signed it before the acceptance deadline. Mr. Seller did not sign it until the next day. Does the 14 days for the inspection contingency start the day after the first seller signed or the day after the second seller signed?

Lines 23-24 of the WB-11 Residential Offer to Purchase say that acceptance has occurred when all buyers and sellers have signed one copy or separate but identical copies of the offer. Binding acceptance requires the signatures of all parties plus delivery of the signed offer back to the buyer on or before the acceptance deadline.

The inspection contingency runs from the date of acceptance. In the described situation, that would be the day the last party, Mr. Seller, accepted the offer. In the described scenario, however, there is another issue of greater importance. If Mr. Seller did not sign until the day after the acceptance deadline, then there is not a binding offer. There could not have been delivery of the fully signed offer back to the buyer on or before the deadline because Mr. Seller did not sign until the next day. Signing or delivering an offer back to the buyer after the acceptance deadline is ineffectual and does not create a valid contract.

To correct this deficiency, one party (the sellers or the buyers) may counter the offer on the same terms and conditions, allowing ample time for signatures and timely delivery.

A buyer submitted an offer to the seller who could not decide whether to accept it. After the acceptance deadline passed, the seller decided to accept the offer. The buyer's agent asked the listing agent to draft an amendment to extend the deadline by two days. How can the agent extend the deadline for binding acceptance?

Binding acceptance occurs when an accepted offer is delivered back to the other party on or before the stated deadline for acceptance. Once the acceptance deadline has passed, the seller cannot accept and deliver the offer back to the buyer to create a binding contract. A valid contract is not created when the offer is signed or delivered late. However,

either the buyer or the seller may initiate a counter-offer back to the other party that incorporates the original offer without any changes. This use of the WB-44 Counter-Offer form will create a new acceptance deadline for the parties to meet.

REALTOR® Practice Tip: The acceptance deadline in an offer to purchase is the deadline by which time a party wishing to accept must complete the acceptance steps: signature and delivery. This deadline is strictly observed; an offer delivered back after the deadline is invalid.

Delivery of Offer to Seller after Acceptance Deadline Waives Acceptance Deadline

In *C.G. Schmidt, Inc. v. Tiedke,* 181 Wis. 2d 316 (Ct. App. 1993), the seller countered the buyer's offer. During the early afternoon of Aug. 20, the seller delivered a counter-offer dated Aug. 14 that had an acceptance deadline of noon on Aug. 20. On Aug. 21, the buyer signed the counter-offer and delivered it back to the seller. The seller's attorney later confirmed that the deal was set. But on Sept. 12, the buyer received a letter from the seller advising that the seller was withdrawing the counter-offer and would not close. The buyer sued for specific performance, which was granted by the trial court on summary judgment.

On appeal, the seller argued that no contract was formed because the counter-offer was null and void from the moment it was delivered to the buyer because delivery occurred after expiration of the stated acceptance deadline. The Court of Appeals found, however, that when the seller delivered the counter-offer after the acceptance deadline had passed, the acceptance deadline was deemed to have been waived. Thus, the Court held that the seller's delivery of the counter-offer after expiration of the stated acceptance deadline meant that there was no deadline for acceptance and the counter-offer was on the table until withdrawn by the seller. Since the buyer had accepted the counter-offer well before any attempted withdrawal by the seller, the contract was binding and the trial court's order directing the seller to convey the property to the buyer was affirmed.

Withdrawal

The buyer can withdraw the offer at any time prior to binding acceptance. Withdrawal requires only that the seller be advised that the buyer has withdrawn the offer. This can be done verbally as long as the seller learns that the offer is withdrawn before the seller has completed delivery of the signed offer back to the buyer. If the withdrawal communication arrives before all acceptance steps have been completed (signature and delivery, per the terms of the approved offers to purchase), the offer is revoked. Note that the standard here is receipt by the seller, not delivery. Receipt of any withdrawal notice or communication – written or verbal – is the cut-off line. Any subsequent attempt to complete acceptance of the offer, even if prior to the acceptance deadline, will have no legal effect.

The process of withdrawing an offer is one potentially full of pitfalls. Acceptance can be accomplished by acts difficult to pinpoint such as putting a signed copy of an offer in a mailbox. Notice of withdrawal does not technically have to be in writing; however, if an agent simply calls to indicate the offer has been withdrawn, there could potentially be a challenge unless the buyer has proof that all acceptance steps have not yet been completed by that point in time.

When withdrawal is being attempted, it is useful to first determine the status of the offer before stating the withdrawal message. Upon hearing the offer is withdrawn, a sophisticated seller might reply, "too bad, I just got back from dropping a signed offer in the mailbox." If it can be verified (and hopefully documented) that the offer had not in fact been accepted, then notice of withdrawal is less likely to be challenged.

REALTOR® Practice Tip: When withdrawing an offer, the first step is to communicate to the party with the offer, generally the seller, that the offer has been withdrawn before acceptance has been completed. This process should be documented as thoroughly as possible. Any verbal withdrawal communication should be immediately followed up with written confirmation: "This is to confirm that on Aug. 4 at 10:49 a.m., Angie Agent telephoned Lennie Lister and advised him that the XYZ offer to purchase was withdrawn effective immediately." Angie also follows up with e-mail or a fax confirming the withdrawal.

Contract Formation: Consideration

A contract consists of an offer, acceptance and consideration. In a contract, consideration is evidence of the intent to be bound to the contract. In order for an agreement to be enforceable, both parties must agree to give something of value to the other.

Consideration requires that a performance or a return promise be bargained for. The consideration must be adequate in the sense that it must be of some legally recognized value, conferring a benefit or causing a detriment. Mutual promises must pose some legal liability on the parties without option or discretion. Consideration need not be recited or expressed in writing, but it must exist. In a real estate offer to purchase, the consideration is the seller's promise to sell and transfer title to the property in exchange for the buyer's promise to pay the purchase price.

Agency Agreements: Listing Contracts and Buyer Agency Agreements

The discussion now turns to some of the specific contracts frequently used in real estate practice. The logical starting point is the listing contract and the buyer agency agreement since most transactions begin with one or both of these all-important agency contracts. Wis. Stat. § 240.10(1) contains the requirements for a legally enforceable real estate listing contract and buyer agency agreement. A listing contract or buyer agency agreement that does not comply with these requirements is void. Without a valid listing contract, a broker has no authority to market the property and procure a buyer, and no legitimate basis for asserting a right to commission. Without a valid buyer agency agreement, a broker has no authority to locate and negotiate for property on behalf of the buyer and no entitlement to any buyer's broker's success fee or other buyer agency compensation.

Wis. Stat. § 240.10(1) provides, "Every contract to pay a commission to a real estate agent or broker or to any other person for selling or buying real estate shall be void unless such contract or note or memorandum thereof describes that real estate; expresses the price for which the same may be sold or purchased, the commission to be paid and the period during which the agent or broker shall procure a buyer or seller; is in writing; and is subscribed by the person agreeing to pay such commission, except that a contract to pay a commission to a person for locating a type of property need not describe the property." The parties to a valid contract for commission are free to agree to amend the terms, in writing.

As discussed in *BRW Investment Realty Co., LLC, v. 3863 Humboldt, LLC* (Wis. App. 2006, No. 2004AP2700), the Wisconsin Supreme Court has stated that § 240.10(1) means just what it says and that the statute does not allow recoveries of real estate brokers' commissions based on *quantum meruit* or implied contract. Quantum meruit is a doctrine whereby a person would be paid a reasonable amount for labor and materials furnished, in the absence of a legally enforceable agreement between the parties. A broker's claim for commission or fees in a real estate transaction where the broker has no written contract complying with the terms of the statute is unenforceable.

A contract to pay a commission to a real estate broker for selling real estate must: (1) Describe the real estate, (2) indicate the sales or purchase price, (3) state the commission to be paid, (4) state the period during which the broker shall procure a buyer or seller, (5) be in writing, and (6) be signed by the person agreeing to pay the commission. The absence of one or more of these requirements can render a listing contract, a buyer agency agreement or any other contract for commission void.

REALTOR® Practice Tip: Any time a client refuses to pay commission, the broker should first look to his or her listing contract or buyer agency agreement and make sure that all of the required elements are stated. The required components must be there for the broker to be able to successfully sue for commission.

REALTOR® Practice Tip: Whenever using the approved listing contract and buyer agency agreement, licensees can rest assured that these contract forms include the required elements to secure payment for the broker. In those situations where a different form is used, for example, an REO asset manager provides their own listing contract, the broker may want to ensure that these necessary elements are present before signing the contract.

1. **Property Description:** While a formal legal description is always preferable, sometimes it is not available. Care should be taken to describe the property in a way that could only apply to one property. A property address, tax key number, fire number, etc., may be an acceptable description. If no description is provided other than "legal description to follow," that listing would be void. A buyer agency agreement, on the other hand, would not include a property description if the buyer's agent is retained to locate property, although a description of the type of property desired normally is included.

2. Price: A listing contract must state the list price. In value range marketing, real estate is marketed in a price range as opposed to the traditional list price. The seller's consent to value range marketing should include the specific price range to be used for advertising, as required by Wis. Admin. Code § REEB 24.04(4); the price at which the listing broker's commission is earned (list price) and the specific price to be used in the Multiple Listing Service if the property is going to be listed in the MLS. The buyer agency agreement asks for the price range of the property the buyer is seeking.

   Additional Information: For more information about range pricing, see Page 6 of *Legal Update 97.06*, "Real Estate Advertising Law," at www.wra.org/LU9706.

3. **Commission:** A listing contract and a buyer agency agreement must state the amount of commission that will be paid. Any listing calling for the broker to receive as commission all dollars received above a set sales price is a net listing and is illegal per Wis. Admin. Code § REEB 24.10. Any listing contract calling for fees to be paid in advance of closing must comply with the advertising and advance fee rules found

in Wis. Admin. Code ch. ATCP 114, at https://docs.legis.wisconsin.gov/code/admin_code/atcp/114.pdf.

4. **The listing term must be specified:** Both the beginning and end date must be filled in on a listing contract and a buyer agency agreement. The listing contract term is automatically extended for one year for any buyer who submits an offer during the stated term. The buyer agency agreement is automatically extended for one year for any property the buyer writes an offer on during the stated term.

   Additional Information: For a discussion of the other ways that listing protection may be created, see the February 2004 *Legal Update*, "Listing Procedures for the Prudent Broker," at www.wra.org/LU0402. See *Legal Update 05.09*, "Buyer Agency Practice," at www.wra.org/LU0509 and the November 2007 *Legal Update*, "WB-36 Buyer Agency Agreement- 2008 Revisions," at www.wra.org/LU0711 for discussion of "property protection" under the WB-36.

5. **The contract must be in writing:** The requirement that the listing contract and the buyer agency agreement must be in writing is consistent with Wis. Admin. Code § REEB 24.08 and Article 9 of the Code of Ethics. A situation where this very simple rule can be too easily forgotten is when a listing expires and the seller informally approves of continued marketing efforts without signing an extension or a new listing. Licensees who leave up their sign or continue marketing after expiration of the contract without a written extension in place may run afoul of Wis. Admin. Code § REEB 24.04 and other license law rules.

6. **Signatures:** The listing contract must be signed by whoever is agreeing to pay the commission – § 240.10 does not require that the owners sign the listing. The law also does not require that all the owners sign a listing contract in order for the listing contract to be enforceable against an owner who does sign. Therefore, if only the husband signs a listing, then only the husband is liable for the commission when the broker successfully procures a buyer, even if the wife is also on title.

   But make no mistake, a listing contract without the signature of all owners is a disaster waiting to happen. All of the owners on title will have to sign the offer to purchase, as well as any counter-offers and amendments, the deed and any land contract. All owners also need to sign the real estate condition report (RECR), lead-based paint (LBP) disclosure and other documents along the way. There may also be homestead and marital property issues to deal with, with divorce proceedings often thrown in the mix. If a broker proceeds with less than all of the owners' signatures on the listing contract, then the owners who sign are the clients and the owners who do not sign become customers. Any owner or broker considering a listing signed by less than all of the sellers should first confer with legal counsel regarding the myriad of potential problems that may be encountered. The only way around this would generally be through the use of a power of attorney.

   Additional Information: See Pages 4-7 of the June 2007 *Legal Update*, "Ownership and Title Pointers for Brokers," at www.wra.org/LU0706.

Hotline Q&A – Signatures

The broker exclusively sells businesses, many without real estate, using the WB-6 Business Listing Contract, and he is having difficulty collecting commissions. The broker understands the WB-6 is a personal services agreement where the individual who executes the listing contract is responsible. In investigating the collection of this money, a seller/attorney is claiming that he is not personally liable. How can this be resolved?

The listing contract and buyer agency agreement must be signed by someone agreeing to pay a commission. The law does not require that all the owners sign a listing contract in order for the listing contract to be enforceable against the owner who does sign. Whether a business owner is personally liable for commission will depend, in part, on how the individual entered into the listing contract. If, for example, the individual signed only as a representative of the entity, there

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may be no personal liability for the commission. In other instances, the seller may enter into a listing where the individual signs twice, once as a representative of the entity and again in an individual capacity. If the seller only signed once and the seller's signature was as a representative of the entity only, then it may be that only the entity, and its assets and resources, is bound and liable.

Additional Information: See Pages 5-9 of the May 2004 *Legal Update*, "Avoiding Liability When Signing and Making Referrals," at www.wra.org/LU0405 for additional pointers.

A broker's sister is going through a divorce. The sister and her husband need to sell their home. The sister wants to list the home, but her husband is hesitant to sign the listing and may be difficult when it comes to signing offers. Can the sister list the property without the husband's signature? If so, what happens when an offer comes in that is acceptable to the sister?

In Wisconsin, both spouses must sign all documents that convey an interest of their homestead property, including the offer to purchase and a deed or land contract. Generally speaking, a "homestead" is the home or residence of the married couple. The definition is broad and can cover multi-family properties such as a duplex so long as the couple, or even just one of the spouses, resides in one of the units. Either spouse may enter into a listing contract without the other spouse's signature because the listing contract is not a conveyance. However, to ensure that the transaction will be successful, the broker will be acting prudently if she requires the signature of both spouses on the listing contract and all other agreements relating to the transaction. If the broker took the listing from her sister knowing that the husband was refusing to sign offers and other documents, she would be obligated to disclose this to prospective buyers as information suggesting the possibility of a material adverse fact. The transaction will not go very far if the husband may not be willing to even sign an offer.

Hotline Q&A – One-Party Listings

The licensee would like to write a one-party listing. Can she have the listing term for one day and still have the one-year listing protection period? Can the buyers' names be entered in additional provisions and can multiple buyers be named in contract?

If the listing is to be a one-party in the sense that it is limited to a particular specified buyer or buyers, the title of the listing contract should be modified to indicate it is a "Limited" or "One-Part" Exclusive Right to Sell. A provision can be inserted in the Special Provisions lines to the effect that the provisions of this contract apply only to the following purchaser(s): ____. Other modifications can be made as then needed. The commission may be negotiated as a flat fee rather than a percentage of sales price. Consider whether listing protection is appropriate or if the length of time should be modified.

To create an enforceable listing agreement, a term must be included. If the one-party listing is to be for a short term, the term of the contract can simply be filled in accordingly. Again, any other adjustments can be made (listing protection, etc.).

The broker has a one-party listing that expires on the first of the month. On the listing there is no buyer name listed; it just states that it is a one-time listing. The sellers have now listed the home with another real estate company. If the broker sells the property now, would he have to split the commission?

A one-party listing must include the name of a specific buyer or buyers to be enforceable for those buyers. If there were no enumerated buyers, an exclusive right to sell listing would appropriately be used to market the property to any yet unknown buyer. Note that in the extension of listing provisions, a named buyer in a one-party listing may be protected, assuring the first listing broker commission if the buyer acquires the property during the listing protection period.

Commercial Lease Agency Agreement Requirements

Wis. Stat. § 240.10(2) states, "Every contract to pay a commission to any real estate agent or broker or to any person for leasing real estate for a term exceeding 3 years shall be void unless such contract, note or memorandum thereof describes that real estate; expresses the rent to be paid or a method to determine the same, the length of the lease, the commission to be paid, and the period during which said person shall procure a tenant; is in writing; and is subscribed by the person agreeing to pay such commission, except that a contract to pay a commission to a person for locating a type of property need not describe the property."

According to this provision, any contract for leasing real estate for a term exceeding three years must include specific information in order to be valid. Therefore, when a broker uses a commercial lease listing or a WB-36 Buyer Agency/Tenant Representation Agreement in a commercial leasing transaction where the lease may exceed three years, the broker should ensure that these elements are addressed. A form like the WB-36 would need to be completed or supplemented to specify the rent to be paid under the desired lease or a method for determining that rent, the length of the desired lease, and the commission to be paid for locating and/or securing a leasehold, assuming that the term of the WB-36 and the WB-36 signature

lines satisfy the remaining criteria.

Ending the Agency Agreement Early

A listing contract or a buyer agency agreement is a personal services contract that establishes a fiduciary relationship of trust and confidence between the client (seller or buyer) and the broker. Because the contract reflects an agency relationship, the client possesses the power to revoke or terminate the contract at any time. A client (the principal) cannot be compelled to remain in the agency relationship with a broker (the agent) with whom the principal no longer wishes to work.

The power to revoke or cancel the listing contract or buyer agency agreement must be distinguished from the right to revoke or cancel the listing contract or buyer agency agreement. The client always has the power to cancel the contract but may not have the right to do so. Canceling the agreement before its expiration date will typically constitute a breach of the contract terms and thus violate the broker's rights. The broker may then demand compensation for the damages sustained and reimbursement for out-of-pocket expenses as a result of the early cancellation. The broker cannot, however, sue the client for specific performance because of the agency relationship.

The 2008 WB-36 provides that, "Neither Buyer nor Broker has the legal right to unilaterally terminate this Agreement absent a material breach of contract by the other Party. Buyer understands that the parties to the listing are Buyer and the Broker (firm). Agents (salespersons) for Broker (firm) do not have the authority to terminate this Agreement, amend the compensation terms or shorten the term of this Agreement, without the written consent of the agent(s)' supervising broker." The Department listing contracts contain similar language.

Additional Information: More information about termination of listings is available in the September 2006 *Broker Supervision Newsletter* at www.wra.org/BSNsept06.

Additional Information: For more information about terminating buyer agency agreements, see the September 2005 *Legal Update*, "Buyer Agency Practice," at www.wra.org/LU0509, and the November 2007 *Legal Update*, "WB-36 Buyer Agency Agreement – 2008 Revisions," at www.wra.org/LU0711.

Offer to Purchase

The offer to purchase is one of the contracts that must be drafted to meet the requirements of the so-called real estate statute of frauds in Wis. Stat. § 706.02. This statute governs every transaction where an interest in land is created or conveyed.

Required Elements

Wis. Stat. § 706.02(1) provides the required components for transactions where an interest in real estate is created, alienated, mortgaged, assigned or otherwise affected under law or equity. Such conveyances must be in writing and:

(a) Identify the parties;

(b) Identify the land with reasonable certainty;

(c) Identify the interest conveyed, and any material term, condition, reservation, exception or contingency;

(d) Be signed by or on behalf of each of the grantors (sellers) (deed, easement, option, etc.);

(e) Be signed by or on behalf of all parties, if a lease or contract to convey (offer to purchase, land contract);

(f) Be signed, or joined in by separate conveyance, by or on behalf of each spouse, if the conveyance alienates any interest of a married person in a homestead (except conveyances between spouses and a purchase money mortgage); and

(g) Be delivered.

The courts are quick to enforce Wis. Stat. § 706.02(1) and will rule that attempts to contract not fulfilling these elements are invalid. In *Marking v. Surwillo* (Wis. App. 2006, No. 2006AP659), the trial court concluded "that a real estate contract must be signed to be enforceable under the Statute of Frauds," and that the offer was not signed by the buyer (Marking) until after the closing date and after the seller (Surwillo) had notified the buyer that she was not going to sell him the property. The trial court concluded that the offer did not meet the requirements under the statute of frauds and, therefore, was not a valid contract.

On appeal, the Court of Appeals observed that "While intent to contract is a necessary element for the formation of a contract, one's 'intent' does not obviate the statutory requirements of Wis. Stat. § 706.02. An enforceable contract to convey an interest in real property must be signed by *both* the grantor and grantee before it becomes an enforceable contract." For further discussion, see the case law summary on Pages 1-2 of the March 2007 *Legal Update*, "Case Law Update," at www.wra.org/LU0703.

The definition of a "conveyance" in Wis. Stat. § 706.01(4) contemplates that this written conveyance might also take the form of an electronic record with electronic signatures.

Addenda

The use of addenda and attachments is approved in Wis. Stat. § 706.02(2), which indicates that the essential elements of a valid conveyance need not necessarily appear in a single document, but rather may be satisfied:

(a) By specific reference, in a writing signed as required, to other writings

in existence when the conveyance is executed (incorporation by reference);

(b) By physical annexation of several writings to one another, with the mutual consent of the parties (attachments); or

(c) By several writings which show expressly on their faces that they refer to the same transaction, and which the parties have mutually acknowledged by conduct or agreement as evidences of the transaction.

The addenda used with the offers to purchase are incorporated by reference, sometimes attached, and typically identify and refer to the transaction, thus often meeting multiple criteria and leaving no doubt that the addenda are part of the parties' agreement.

REALTOR® Practice Tip: Wisconsin real estate practice as reflected in the REEB and WRA forms includes multiple statutory strategies for including additional documents to ensure licensees are in compliance when using addenda with offers and other conveyance contracts.

Hotline Q&A – Offer to Purchase

Who are the parties to the offer?

The sellers on title (and their spouses if the property is homestead) and the buyers wishing to take title are the parties to the offer. It is important to note that the broker is not a party (nor are any of the broker's agents). Matters between the brokers, such as commission, should not be addressed in the offer because the brokers are not parties to the offer, and any agreement made by the seller and the buyer only binds the parties. The lender in a short sale also is not a party. A short sale offer is contingent upon the lender's consent and approval, but that does not elevate the lender's status as a lienholder to that of a party.

Can an agent sign an offer for a seller or buyer?

Wis. Stat. § 706.03 states that an agent must be expressly authorized to sign on behalf of his or her principal and that the burden of proving the authorization is on the agent. A listing contract or buyer agency agreement does not provide such an authorization to any agent in a transaction. A licensee signing transaction documents for a party without proper written authorization risks discipline and sanction by the REEB.

It is not an ordinary part of licensee's authority as an agent, nor is it a good idea or practice, for licensees to seek or accept this authority. It is better to shift this authority to the party's attorney or a relative. Furthermore, given the broad use of e-mail, facsimile machines and overnight mail, there should only be rare circumstances where a power of attorney is even necessary.

Authority to sign for another ideally should be given in a written power of attorney, preferably notarized, with the fullest, most detailed instructions possible from the authorizing party. The person signing on behalf of another, called the attorney-in-fact, must be prepared to prove that he or she has the authority to sign if that authority is ever questioned, for instance, by a title company, a lawyer or another party to the transaction.

The person signing as an agent for one of the buyers is a spouse who is also signing on his own behalf. Is this a problem?

Pursuant to Wis. Stat. § 706.02, a valid real estate offer to purchase must identify the parties and be signed by or on behalf of all the parties. The wife cannot sign for the husband unless she has a power of attorney or other authorization to sign on behalf of the husband. The status of being a spouse doesn't automatically confer authorization to act as the other's agent to sign legal documents. If the wife indicates that she has authority to sign for her husband, it would be prudent to have the title company or other legal counsel approve the power of attorney or other authorization document. The wife would have the burden of proof that she had proper authority if the husband later challenged her actions on his behalf and indicated that she was acting without his authority. This is a trap for sellers because unless this is done by the book, the buyers may have a ready-made opportunity to get out of the contract should they change their minds.

Are all signatures required on the counter-offer for an offer to purchase if the home is in a trust and there are seven siblings scattered throughout the country? Or can the person with a power of attorney sign for all to guarantee binding acceptance? Are all signatures only needed at closing?

All required signatures are needed for all conveyances, including the offer (and any counter-offers, amendments, etc., thereto) and the deed per Wis. Stat. § 706.02. If the home is in a trust, the trust documents designate the trustee(s) authorized to bind the trust to contracts and to engage in any real estate sales and purchases. There may be one trustee or there may be two or more co-trustees. If all seven siblings are named as co-trustees, it may be prudent to have one of them given power of attorney by the other six in order to minimize the need to chase down seven signatures. However, an attorney or the title insurance company should review the trust instrument and applicable law to make sure that the trustees in this particular trust have the legal ability to grant a power of attorney in this situation. The authority of the trustee may not be delegable.

Additional Information: More information about signatures on behalf of various parties is

available on Pages 2-7 of the June 2007 *Legal Update*, "Ownership and Title Pointers for Brokers," at www.wra.org/LU0706.

Offer to Purchase Drafting Pointers

The knowledge and skills necessary to properly draft an offer to purchase are among the most important tools a REALTOR® has. When completing an offer to purchase, REALTORS® must be sure to complete the form in a comprehensive manner so that the parties can derive optimal benefit from the form provisions and avoid unintended consequences resulting from carelessness or inadvertent errors.

The Contract Must Clearly Reflect the Parties' Intent

The basic rule of contract drafting is to make the agreement reflect the intent of the parties. Wis. Admin. Code § REEB 16.06(8) requires 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." Agents should modify REEB-approved forms as necessary to reflect the agreement of the parties. Agents should never substitute their judgment in place of the parties' intent.

Hotline Q&A – Reflecting the Parties' Intent

A DSPS state auditor recently told a broker that brokers can line through an offer provision and make a change and have both parties initial it. The broker was taught there should be no cross outs on the REEB-approved forms. Who is right?

As far as the forms rules go, Wis. Admin. Code § REEB 16.06(3) provides, "A licensee may cross out provisions on approved form to reflect the agreement of a party to a transaction provided that the deleted provisions remain legible." The Department forms may be modified to reflect the intent of the parties. This technique may be used as the offer is drafted to indicate certain language does not apply.

When a party wants to make changes to an offer during negotiations, the line out method is less desirable. It is best practice for the party to initiate a counter-offer representing the changes desired by the other party. Use of the counter-offer during negotiations allows for clarity, legibility and distinct timelines for acceptance and delivery. Once an offer is accepted, if the parties want to modify the terms and conditions of the offer, an amendment should be proposed to represent the contract modifications agreed to by the parties.

The use of the counter-offer and the amendment is the clearly preferred technique for the broker. However, if the buyer or seller decides to modify unaccepted an offer and they cross out lines and write in language on the offer, initial and date the changes and have proper delivery, the contract and the changes may still be enforceable. It just may be more difficult to sort it all out when the parties create these informal counter-offers.

Fill In ALL of the Blanks

All blanks in an offer should be completed. If important blanks, for example, a blank giving the number of days for a deadline, are not filled in, a dispute may arise and the contract may fall apart or require judicial interpretation. Licensees should completely fill out approved forms. If a provision does not apply, they should fill the blank in with N/A or a dash (–). Agents should also emphasize to sellers the importance of fully completing disclosure documents, such as the RECR.

Hotline Q&A – Filling in the Blanks

There is an offer on the table with a bump clause. This offer does not state the number of hours on the blank to be filled in on line 316 of the WB-11 Residential Offer to Purchase for the buyer's response deadline when the seller gives the bump notice. How to proceed? Should the seller propose an amendment to the first offer to fill in the number of bump hours?

The primary buyer and the seller could agree to the number of hours by amendment. If the parties, however, cannot reach an agreement, they may need the court to determine the amount of time to use. Generally the courts will apply a reasonable time. The court may look at the market and determine what amount of time is usual or customary, i.e., 72 hours, 48 hours, etc. In the future, both the drafting agent and the listing agent want to be careful to assure the parties complete all blanks on the offer or mark provisions as "not applicable" (N/A).

Supervising brokers who conduct a reasonable review of the contracts drafted by the company's agents should be on the lookout for this type of error. They should ensure that such omissions are corrected as soon as possible, before the time when a bump notice might be given. It is much easier to correct the omission when the parties are not facing a scenario where the provision may be immediately employed.

Wis. Stat. § 709.03(form)C.26.m requires a mandatory RECR disclosure of whether or not the property is subject to a shoreland zoning mitigation plan, beginning with RECRs that are furnished to buyers on or after Jan. 1, 2011. What happens if, in January 2011, a buyer receives a RECR completed on an old form?

A buyer could rescind the buyer's offer to purchase based on the right

to rescind provisions in Wis. Stat. § 709.05. A prospective buyer who receives an RECR that is incomplete may, within two business days after receipt of the RECR, rescind the offer. A rescinding buyer has no liability to the seller and is automatically entitled to the return of any earnest money paid.

The right to rescind is the only remedy provided under chapter 709, so once the two business days have passed, a buyer may have no other remedy unless there is a shoreland mitigation plan that the seller has not otherwise disclosed. The offers to purchase generally incorporate the seller's RECR and include most items from the RECR in the definition of "Conditions Affecting the Property or Transaction," so a seller might also be in breach of contract if the seller fails to disclose a mitigation plan to the buyer – or does not address all of the RECR statements. It is important that sellers use a current RECR and complete all items or they risk rescission of the offer and possible breach of contract remedies.

Define Important Terms

Defining important or potentially controversial terms used in the offer can avoid many headaches and legal disputes later on.

Hotline Q&A – Defining Terms

The offer was written and accepted with the sellers providing "up to" $3,000 in closing costs to the buyer. The sellers can't be present at closing, so they pre-signed the closing documents a few days before. $3,000 was deducted from their proceeds and they were told by the title company that if the closing costs were less than $3,000 they would receive a refund. When the sellers asked the title company for a breakdown of the closing costs after closing, almost half of the $3,000 was applied to the buyer's homeowners insurance and a tax escrow for future taxes. The sellers feel that they should not have to pay for these prepaid expenses. What is determined to be "closing costs," and would the sellers be entitled to any refund?

The term "closing costs" is rather generic. Closing costs generally are expenses of the sale that must be paid in addition to the purchase price (in the case of a buyer's expenses) or be deducted from the proceeds of the sale (in the case of a seller's expenses). Some closing costs result from legal requirements; others are a matter of local custom and practice. There is no statutory definition of closing costs and it is not defined in the Department-approved offer to purchase forms. Thus, contract provisions shifting the responsibility for the payment of closing costs or creating closing cost credits without defining "closing costs" may lead to disputes between the parties.

Whenever a seller is crediting money toward the buyer's closing costs, it is best to describe precisely what is or is not included in the credit to avoid situations like the one the broker is describing. The definition of "closing costs" may be inclusive or exclusive. An inclusive definition lists permissible closing costs; an exclusive definition includes all fees and costs paid at closing except for those listed. If an amount is given for a closing cost allowance or credit, it should be clearly specified if the amount is a maximum (closing costs not to exceed a certain amount or closing costs up to a certain amount) and what will happen to the balance if actual costs do not reach the maximum credit or allowance. It is also wise to check with the lender in advance to make sure the provision will not violate the lender's underwriting standards.

Post-closing it will be very difficult for the sellers to get money back. The closing statements (including the sellers' closing statement signed by the sellers and the HUD-1 signed presumably by an agent on their behalf) usually have language stating that those closing statements detail the final numbers for the transaction and the parties consider them to be true and accurate. The sellers should consult with their attorney to determine what rights to legal action, if any, they have.

Additional Information: See the American Land Title Association discussion of closing costs at www.homeclosing101.org/costs.cfm; "Best of the Legal Hotline: Closing Costs" in the September 2004 *Wisconsin Real Estate Magazine* at www.wra.org/News/WREM/2004/September/Best_of_the_Legal_Hotline__Closing_Costs and "Best of the Legal Hotline: Smooth Closings – Overcoming Common Closing Issues" in the July 2010 *Wisconsin Real Estate Magazine* at www.wra.org/WREM/Jul10/SmoothClosings.

Incorporating Addenda by Reference

Wis. Stat. § 706.02(2) provides that additional terms and conditions can be added into a conveyance, such as a deed or an offer to purchase: (a) by specific reference to separate writings in existence at the time when the conveyance is signed; or (b) by physically attaching two or more writings to one another, with the mutual consent of the parties; or (c) if separate writings show expressly on their faces that they refer to the same transaction and the parties have mutually acknowledged by conduct or agreement that the writings taken together document the transaction.

A contract cannot incorporate any documents by reference that are not in existence at the time the contract is executed. For example, a statement in an offer that "legal description to follow per title commitment" may not be legally valid if the title commitment does not exist when the offer is accepted. An offer that does not contain an adequate legal description may not be valid or binding unless and until it is amended to add the appropriate legal description. Thus, a

legal description may be printed on an attachment that is incorporated by reference when the offer is signed, but an offer waiting for a legal description to be furnished later may not be binding.

Hotline Q&A – Incorporation of Addenda

The broker wrote an offer that includes an Addendum B for a well inspection, water test and septic inspection. The seller countered on price, but agreed to the Addendum B provisions without initialing Addendum B. When asked to initial and return Addendum B, the listing broker declined, indicating that since Addendum B was part of the original offer, and the original offer was countered, the sellers did not need to initial or sign except where they state they are countering. The listing broker did say the sellers have agreed to everything on Addendum B and they are proceeding with the inspections. What is the correct way to handle the situation when an offer is countered that has an addendum?

As long as the Addendum B was incorporated by reference in the offer, it becomes a part of the offer even without the seller's initials. For example, line 434 of the WB-11 Residential Offer to Purchase says, "ADDENDA: the attached ___ is/are made part of this Offer." It is not absolutely necessary legally to have the sellers initial or sign an addendum if the addendum is incorporated by reference in this manner.

It is, however, wise to have initials or signatures as a matter of prudent practice to confirm that the parties have reviewed each addendum. The parties are provided with a line to initial the addendum to confirm that the parties received all of the pages in the offer. The initialing helps guard against a party claiming they did not receive all of the pages and thus there could not have been a meeting of the minds. Securing party initials or signatures on each addendum will help diminish the number of disputes and make sure the parties understand that addenda are part of the contract. It may be helpful to go through the contract with the party and make sure they have received and read each addendum listed on line 434.

Additional Information: For further discussion of addenda use, see "Best of the Legal Hotline: Forms – One Size Does Not Fit All" in the November 2007 edition of the *Wisconsin Real Estate Magazine*, at www.wra.org/WREM/Nov07/OneSize.

Establish Solid Dates and Deadlines

If the contract fails to state the contract term or duration, the contract may be construed to be terminable at will. If the contract fails to state a deadline, the court will assume that performance is to occur within a reasonable time considering the circumstances. It is far preferable to make sure that the time frames agreed upon by the parties are accurately stated in the contract. Dates and deadlines should be reasonable, recognize a logical sequence of events and give sufficient time for the performance of preliminary or related tasks.

Hotline Q&A – Dates and Deadlines

A seller accepted and signed an offer to purchase on Aug. 4, 2012. The offer was not delivered back to the buyer until Aug. 5, 2012. What day is used for calculating dates and deadlines in the offer?

Lines 23 - 26 of the WB-11 Residential Offer to Purchase state, "ACCEPTANCE. Acceptance occurs when all Buyers and Sellers have signed one copy of the offer, or separate but identical copies of the offer. CAUTION: Deadlines in the Offer are commonly calculated from acceptance. Consider whether short term deadlines running from acceptance provide adequate time for both binding acceptance and performance."

Acceptance occurred when the seller signed the buyer's signed offer. Binding acceptance occurred when the seller delivered the offer back to the buyer according to the delivery terms in the offer. To calculate a deadline in the offer, look at the terms of the provision creating the deadline. If the deadline runs from acceptance, use Aug. 4 to calculate the deadline. If the deadline runs from binding acceptance, use Aug. 5 to calculate the deadline.

To determine the proper way to count days when calculating the deadline, refer to lines 174-181 of the WB-11: "Deadlines expressed as a number of 'days' from an event, such as acceptance, are calculated by excluding the day the event occurred and by counting subsequent calendar days. The deadline expires at midnight on the last day. Deadlines expressed as a number of 'business days' exclude Saturdays, Sundays, any legal public holiday under Wisconsin or Federal law, and any other day designated by the President such that the postal service does not receive registered mail or make regular deliveries on that day."

Therefore, from the facts provided and presuming the deadline is calculated from acceptance, day one would be Aug. 5, 2012. Thus if the deadline was three days after acceptance and Aug. 4 is a Saturday, day one is Sunday, day two is Monday and day three is Tuesday. Unless stated otherwise the three-day deadline would expire at midnight on Tuesday, Aug. 7.

Check the Boxes for All Optional Provisions Included in the Contract

Lines 31-33 of the WB-11 residential offer provide instructions for the use of the optional provisions in the offer preceded by an open box (☐). Any offer provisions that are optional need to have an "X" marked in the box preceding the provision or they

will not be included in the offer. The optional provisions are not part of the offer if the box is marked "N/A" or left blank. Similar instructions are found in the WRA's Addenda A and B, as well as in other local association or company addenda. Controversies sometimes arise over whether an optional contingency or an addendum provision is included in the offer if the box was not checked to specifically include that provision but other information has been written on blank lines within the provision.

Lines 31-33 provide: "OPTIONAL PROVISIONS Terms of this Offer that are preceded by an OPEN BOX (☐) are part of this offer ONLY if the box is marked such as with an "X." They are not part of this offer if marked N/A or are left blank."

Hotline Q&A – Check the Boxes for Optional Provisions

The seller received a WB-13 Vacant Land Offer to Purchase, and line 306 states that the buyer's proposed use is farming. No deadline is given on line 310 – it is left blank – and none of the boxes on lines 314-350 have been checked. How should the seller and the listing agent proceed?

The Proposed Use Contingencies indicates that the buyer intends to use the vacant land for farming. The buyer has not, however, checked any of boxes at the beginning of each sub-contingency and has not stated a performance deadline by which the buyer must provide notice that a sub-contingency cannot be satisfied. As a result, the buyer's intentions are not clear. A seller could accept the offer as is with the understanding that unclear provisions may prevent the necessary "meeting of the minds" required to form a valid contract. Ambiguity in contracts can lead to disputes.

A more prudent path may be for a seller to determine what the buyer intended to provide and counter the offer, or the seller could counter to remove the confusing provisions. If the seller has already accepted the offer, the seller or the buyer could offer an amendment removing the Proposed Use Contingencies, or including a deadline and selecting one or more sub-contingencies to capture the buyer's intent.

Additional Information: For more information on the WB-13 Vacant Land Offer to Purchase and the Proposed Use Contingency, see the April 2011 *Legal Update* at www.wra.org/LU1104. Also see the January 2005 *Legal Update*, "Contract Review," at www.wra.org/LU0501, and *Legal Update 98.12*, "Contract Interpretation and Remedies," at www.wra.org/LU9812 for information regarding contract interpretation.

Counter-Offers

A counter-offer can be understood as a new offer that is being issued by a party who has previously received an unacceptable offer. The legal effect of writing and delivering a counter-offer is the same as the rejection of the previous offer and the presentation of a new offer to the party who had submitted the previous offer. The reason we don't reject the offer and write a whole new offer is simply to avoid the unnecessary drafting of another offer with terms that are 95-percent identical to the offer previously written. By using the counter-offer form, only the terms that vary from the original offer are written out and all other terms remain the same and are incorporated by reference. This approach helps keep some sense of continuity in the negotiations and saves time.

A perfect example of a counter-offer as a rejection of the previous offer and the issuance of a new offer is what happens when a counter-offer is issued after the date set for acceptance in an original offer. Some licensees think it is necessary to extend the time period for acceptance in the original offer to cover the time when the counter-offer is issued. This extension of the time for acceptance is completely unnecessary. A counter-offer is legally a rejection of the previous offer. The offer will never be accepted. Therefore, the acceptance deadline in the offer is irrelevant. The only important acceptance deadline becomes the acceptance deadline stated in the counter-offer itself. Therefore, a seller could counter a buyer's offer months after receiving it. If six months after receiving a buyer's offer the seller decides he wants to sell on terms that vary only slightly from the terms in the buyer's original offer, the seller may write the terms that vary on a counter-offer and identify the buyer's six-month-old offer by reference. Again, there would be no need to extend the acceptance deadline in the buyer's original offer because the seller can no longer accept the original offer.

Once a counter-offer has been made, the offer that was countered can no longer be accepted. In the simplest situation, a seller counters the buyer's offer. After the buyer's receipt of the seller's counter-offer, the seller attempts to withdraw the counter-offer so that the original offer can be accepted (with time remaining for acceptance). In this situation, the seller clearly would be unable to accept the buyer's initial offer because the seller's counter-offer acted as a rejection. A rejected offer is null and void and cannot be accepted. The counter-offer kills the original offer, which cannot be revived by acceptance or performance. Once the seller issues the counter-offer, the seller cannot go back. The only way for the seller to reach a contract with the same terms as the original offer would be with another counter-offer that incorporates the terms of the original offer.

A more difficult situation arises when the seller or the seller's agent calls the buyer and indicates the seller is issuing

a counter-offer. However, before the seller delivers the counter-offer to the buyer, the seller changes his mind and attempts to accept the buyer's offer. In this case the seller may not accept buyer's offer. By stating to the buyer that the offer is being countered, the seller has given the buyer reason to believe that the offer has been rejected. Upon the buyer's receipt of the seller's verbal message, the original offer is rejected. Any manifestation of the seller's intent to not accept the offer operates as a rejection.

Such confusion can be avoided if all REALTORS® stick to written counter-offers and avoid conversations about a party's intention until the party's action is documented in writing.

While the most common example of a counter-offer is a seller countering a buyer's offer, all of the principles discussed in this *Update* apply equally to counter-offers issued by a buyer after receiving an unacceptable counter-offer from a seller. While it is somewhat unusual, a seller also may issue the first contract offer in the negotiations – an offer to sell. The same principles apply identically to a buyer's counter-offer issued in response to a seller's unacceptable offer to sell.

Counter-offers can be created by the parties in ways other than the use of the REEB -approved WB-44 Counter-Offer. Any time a party accepts an offer or counter-offer but also writes a change on the document, this also operates as a counter-offer. This modification causes the acceptance to become a counter-offer, which must be accepted by the other party. This can be done by having the parties initial and date the changes, but this method of countering is not desirable and should be avoided. Often the markings the parties write on the form may be difficult to read, the sequence of events is hard to trace and everyone becomes confused. Licensees must always choose the REEB-approved WB-44 Counter-Offer.

Hotline Q&A – Counter-Offers

A CE instructor recently said that the dates and deadlines in the offer to purchase do not have to be heeded if a counter-offer is being made. This is not what some brokers have been doing. Instead, acceptance, rejection or counters were always done before the deadline in the original offer. If the dates and deadlines passed, the brokers would ask for an extension. Which is correct?

A counter-offer may be initiated, by either party, at any time – the acceptance deadline in the offer becomes irrelevant because the offer is not being accepted. A counter-offer can be thought of as a new offer that is being issued by a party who has previously received an unacceptable offer. The writing and delivering of a counter-offer rejects the previous offer and presents a new offer to the party who had submitted the previous offer.

If the binding acceptance date passes, either the buyer or the seller can initiate a counter-offer to continue the negotiations. A counter-offer may be initiated before or after the previous dates for binding acceptance.

An agent had an offer that was countered a few times but did not go together. The sellers then came back and said they would take the terms of the last counter-offer, which had expired. The selling agent said the sellers should sign a new counter-offer and resubmit it to buyers. How should the agent proceed?

Either the buyer or the seller can initiate a new counter-offer at any time. The numbering of counter-offers is consecutive, regardless of who initiates the next counter-offer. The party initiating the new counter-offer may include the same terms and conditions as were stated in a previous counter-offer.

The WB-44 Counter-Offer Form

Immediately above line 1 of the WB-44, the parties are to state the number of the particular counter-offer in the sequence of the negotiations (the number is written on the blank line provided) and identify whether the counter-offer was originated by the seller or by the buyer (by striking). The number designation refers to the total number of counter-offers that have been issued in the transaction, not to the number of counter-offers issued by the particular party. For example, the third counter-offer issued in a back-and-forth negotiation would be: "Counter-Offer No. 3 by (~~Buyer~~/Seller)." This is explained at line 52 of the WB-44.

Incorporation by Reference (Lines 3-5)

Lines 3-5 of the WB-44 provide that, "**All terms and conditions remain the same as stated in the Offer to Purchase except the following: [CAUTION: This counter-offer does not include the terms or conditions in any other counter-offer unless incorporated by reference.]**"

This language means that the only offer provisions under consideration are those stated in the original offer to purchase and those stated in the current counter-offer. Provisions from previous counter-offers are not automatically brought forward, but may be included by reproduction of the entire provision or through incorporation by reference. Provisions incorporated by reference may be identified in the subsequent counter-offer by identifying the particular counter-offer and specifying the number of the counter-offer provision or the lines containing the provision.

For example, "paragraph 3 of counter-offer No. 2 by Buyer is acceptable and is included in this counter-offer," or "lines 10-16 of counter-offer No. 3 by

Seller are incorporated herein as it fully set forth" would accomplish the goal of carrying forward a provision from as previous counter-offer without having to restate the entire provision. This is explained in lines 48-51 of the WB-44.

Warning Regarding Withdrawal

Lines 35-36 of the WB-44 state, **"NOTE: The Party making this Counter-Offer may withdraw the Counter-Offer prior to acceptance and delivery as provided in lines 31-34."**

This language is provided to educate the parties that the time period for acceptance stated in the contract does not prevent the party who issued the counter-offer from withdrawing it any time prior to binding acceptance. Too often a party in receipt of an offer or counter-offer mistakenly believes he or she has until the date stated in the contract to accept the offer. In reality, the party has only until the earlier of (a) the date set for acceptance or (b) the party's receipt of actual notice of withdrawal to accept the offer or counter-offer.

Right of First Refusal

The right of first refusal (ROFR) most often given in real estate transactions provides that the potential purchaser has the first right to buy the particular property upon the terms and conditions offered by another buyer. The person given the ROFR typically has the right to match the price, terms and conditions offered by the other buyer. This presumes that the terms of the other buyer's offer must be given to the person holding the ROFR so that he or she can decide whether to match those terms and buy the property or let the other prospective buyer purchase the property.

Wis. Admin. Code § REEB 24.12(2) requires any licensee in a transaction who has knowledge of a ROFR to disclose that fact in writing, in a timely manner, to all interested prospects. In other words, the existence of the ROFR is treated like it was a material adverse fact relative to all prospective purchasers, renters and others interested in acquiring an interest in the property. If the listing agent or a cooperating agent (selling agent, sub-agent, buyer's agent, etc.) knows there is a ROFR on the property, this must be disclosed to all prospects in writing. Once the disclosure has been made to a prospect, an agent may deliver a copy of that prospect's offer to purchase, exchange agreement, option contract or lease to the person holding the ROFR. The requirement for timely disclosure dictates that a party must have had notice of the ROFR before submitting his or her offer or other proposed contract to the owner. The listing agent may use the WRA's Disclosure of Material Adverse Fact (WRA-DMAF) letter, available in zipForm.

Clearly it is important for the listing agent to know about any possible ROFRs as early as possible so that they can be disclosed. The listing agent should be alert for any signs of such agreements and may want to add that to the questions asked at the listing appointment. The agent working with the buyer, on the other hand, should be prepared to manage the buyer's expectations. The buyer should understand that the existence of the ROFR may mean that the buyer's offer and purchase is not a sure thing and that there may be delays as the parties and the attorneys decide what the provision means and what process and timeline will be followed in observance of the ROFR.

The drafting of a ROFR is best left to an attorney. Too often a licensee comes across a situation where "Bob Jones has a first right refusal in the adjacent property" is the sum total of what apparently was intended to create a ROFR. When that happens it is best in involve legal counsel to help decide how this sparse provision will be observed and implemented, if at all.

Hotline Q&A – Right of First Refusal

Is there a right of first refusal form?

No. The agent may refer parties to legal counsel to draft a right of first refusal. Only an attorney, not a REALTOR®, may draft a separate, free-standing right of first refusal agreement.

The seller had two properties for sale – a home and a vacant lot next door. The agent is working with a buyer who is going to write an offer on the home. In the offer, the buyer is going to indicate that the buyer has right of first refusal on the vacant lot next door. If the buyer closes on the home and the seller passes away a few months later, is the right of first refusal still valid?

Provided the right of first refusal is properly drafted, it may remain valid even if the seller were to pass away. In order to assure that it would be honored, the right of first refusal could be placed in a separate document and recorded with the Register of Deeds.

There is no pre-printed DSPS-approved form for a right of first refusal. To ensure that any right of first refusal provisions in an offer are competently drafted and adequately address the parties' needs and concerns, these provisions should be drafted by an attorney.

Any right of first refusal should include a detailed description of how and when the right of first refusal will be implemented. The description should include the names of the parties; a description of the property; the price, unless the price and other terms are determined by the terms offered by a third-party buyer; the deadlines by which each party must act if a third-party offer is received; and the overall term length of the right of first refusal. The right of first refusal also

may indicate that the right is binding on the parties' heirs and assigns.

Additional Information: For information about the disclosure of rights of first refusal, review *Legal Update 00.09*, "DRL Rule Revisions," at www.wra.org/LU00.09.

Letters of Intent

A letter of intent (LOI) is an agreement to agree in the future. Under Wisconsin law, an understanding and intent to reach an agreement in the future is not enforceable. Since an LOI is generally considered to be an informal agreement, it often takes the form of a letter or memorandum. Essentially, an LOI is preliminary negotiations, an effort to determine if the parties are serious about entering into a potential transaction in the future memorializing the basic agreement of the parties.

In commercial transactions, an LOI is an invaluable tool used to determine if parties agree on key aspects of a possible deal. The use of an LOI greatly reduces the premature drafting of offers or leases. While the majority of LOIs successfully open the door for the parties to negotiate and often conclude in consummating a commercial offer to purchase or lease, there is a danger that a court may determine it is a contract. While commercial agents often assist parties in preliminary negotiations by way of an LOI, the practitioner is strongly encouraged to utilize an LOI drafted by an attorney since there is no state-approved or WRA-created LOI form.

LOIs are dangerous because they can easily become a legal contract or create legal obligations that the parties may not have intended or contemplated if the LOI is not carefully drafted. A seemingly harmless modification to an LOI can turn it into a legal contract or create an unintended legal obligation. In addition to the possibility of inadvertently creating an enforceable contract or obligation, real estate licensees must observe the specific regulatory limitations imposed for the practice of real estate. Wis. Admin. Code Chapter REEB 16 regulates the extent to which real estate licensees are allowed to draft contracts and practice law by the use of approved contractual forms. Exceeding the authorized practices found in the rules can subject a licensee to DSPS discipline and charges of unauthorized practice of law. In 1961, in a narrow 4-3 decision, the Wisconsin Supreme Court confirmed the real estate licensee's limited right to practice law in a real estate transaction. In *State ex rel. Reynolds v. Dinger* (1961), the Supreme Court held that when a licensee uses the state-approved forms to accomplish the intent of the consumer, it is the practice of law and provides a useful benefit to the public. A real estate licensee's role is to complete offers and other contracts for their clients and customers using preprinted forms. A real estate licensee can help with negotiations, which could potentially include an LOI between buyers and sellers, as well as assist with arranging financing, inspections and closings. A real estate licensee cannot provide legal or tax advice, unless that real estate licensee is also an attorney. Only an attorney can advise the parties as to their legal rights under the terms of the transaction documents.

Hotline Q&A – Letters of Intent

Can a real estate licensee draft a letter of intent?

A letter of intent (LOI) is an agreement to agree in the future. Because a LOI is generally considered to be an informal agreement, it often takes the form of a business letter or memorandum. Under Wisconsin law, an understanding and intent to reach an agreement in the future is not legally enforceable. However, a LOI can easily – and accidentally – become a legal contract or create legal obligations that the parties may not have contemplated or intended if the LOI is not precisely drafted. Accordingly, it is generally best that legal counsel handle the preparation of an LOI.

An LOI must make it very clear that the parties are simply expressing interest and do not intend to create a contract or become bound until a contract is signed in the future. If the LOI is simply an agreement to negotiate further in the future, the document should expressly state that the parties are not bound until a formal contract is executed. If an LOI is used in negotiations, it may be presented to the seller for the seller's consideration. The seller is not required to agree to the LOI to continue negotiations; however, it may be used as a tool to facilitate the negotiation of a transaction. LOIs are commonly used in commercial and business transactions, but infrequently seen in other situations.

Additional Information: See "The Purpose and Power of Letters of Intent" in the November 2012 edition of the *Wisconsin Real Estate Magazine* at www.wra.org/WREM/Nov12/LOI.

Approved Forms and Legal Advice

Chapter REEB 16 of the Wisconsin Administrative Code regulates the extent to which real estate licensees are allowed to practice law by use of approved forms (contracts). Exceeding the authorized practices found in the rules can subject a licensee to DSPS discipline and charges of unauthorized practice of law.

Wis. Admin. Code § REEB 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."

This section looks at the forms that licensees may use, what it means to "use" a form, when modification is appropriate, when approved forms are required, the requirement that the use of forms be incidental to real estate practice, the use of addenda, creating different types of listings and escrow agreements.

What forms can licensees use?

Under Wis. Admin. Code § REEB 16.03(1), individuals with broker's licenses can use the following approved forms:

- Forms prepared and approved by the REEB.
- Forms prepared and approved by the State Bar of Wisconsin for deeds, mortgages, mortgage notes, truth-in-lending disclosures, land contracts, release of mortgage, satisfaction of mortgage, assignment of mortgage and assignment of land contract.
- Uniform commercial code forms: 1, 2, 3, 4, 11, 410, 411, 430, 445, 450 and 451.
- Contractual forms for the sale, purchase, or rental of real estate or a business opportunity located in another state, if the contractual forms are those which licensees may legally and customarily use for such transactions in the state where the real estate or business opportunity is located.
- Forms prepared by governmental agencies for use in programs administered by them under authority provided by law.
- Forms to be used for a property management agreement between a broker and a landlord, prepared by the broker entering into the agreement, the broker's attorney, or the landlord, that contain provisions relating to leasing, managing, marketing and overall management of the landlord's property.

Under Wis. Admin. Code § REEB 16.03(2), persons with salesperson's licenses can use the following approved forms:

- Forms prepared and approved by the DRL.
- Contractual forms for the sale, purchase, or rental of real estate or a business opportunity located in another state, if the contractual forms are those which licensees may legally and customarily use for such transactions in the state where the real estate or business opportunity is located.
- Forms prepared by governmental agencies for use in programs administered by them under authority provided by law.
- Forms to be used for a property management agreement between a broker and a landlord, prepared by the broker entering into the agreement, the broker's attorney, or the landlord, that contain provisions relating to leasing, managing, marketing and overall management of the landlord's property.

Hotline Q&A – Use of Government Forms

When the broker sold a HUD home, the parties only signed the special HUD addenda and the required HUD contracts; they did not sign the WB-11 offer. Do the parties need to sign the WB-11?

Real estate licensees may use forms prepared by governmental agencies for use in programs administered by them under authority provided by law per § REEB 16.03(1)(d). Approved offer to purchase forms are not required if there is a comparable governmental agency form appropriate to the transaction.

Additional Information: Detailed information regarding HUD property sales, including training webinars, is available on the Best Assets website at www.best-assets.com/bestassets/Miscellaneous.aspx?id=150.

Hotline Q&A – Use of Online Offer

The broker has an REO (foreclosure) listing. There is an online offer component to the negotiation. The seller requires the broker to enter certain terms into an online form and then the REO company verbally accepts the offer. Once it is verbally accepted, should the broker put in the MLS that it has an accepted offer or should the broker wait until he gets the signed contract back from the seller?

Licensees may have no choice but to electronically provide the seller with terms that may be acceptable to the buyer. Since this may be a type of electronic record, any buyers who are consumers should first provide electronic consent. REO asset managers often respond verbally to offers and will not provide written counteroffers. This creates a problem because there is no legal binding contract under Wisconsin law until there is a paper or electronic contract signed by both parties; licensees must never mislead buyers into thinking otherwise.

Wis. Stat. § 706.02, which sets forth the formal requirements for a valid real estate conveyance, requires the terms of the contract to be in writing to create a binding real estate contract. It would appear that until such time as a written offer has been accepted and delivered, there is no binding contract that would trigger the change of status in the MLS. The broker should review the MLS rules to make sure he is in compliance with those rules. When working with REO sellers, Wisconsin real estate licensees must still comply with Wisconsin law and regulations.

What does it mean to "use a form"?

Wis. Admin. Code § REEB 16.02(5) instructs that, "Use a form" means to complete a contractual or conveyance form by filling in the blanks or

modifying printed provisions on a form for the purpose of accomplishing the intent of a party in a specific real estate transaction. Under § REEB 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.

Hotline Q&A – Use of Seller's Listing Contract Form

The broker is working with a hotel broker from out of state to market a Wisconsin property. The hotel broker has a listing contract he would like the Wisconsin broker to use. Can the broker use the hotel broker's contract? What portions of the Wisconsin contract are required to be added?

Wisconsin real estate licensees must use state-approved forms. Wis. Admin. Code § REEB 16.03 regarding approved forms defines "use a form" to mean to "complete a contractual or conveyance form by filling in the blanks or modifying printed provisions on a form for the purpose of accomplishing the intent of a party in a specific real estate transaction." A seller can hire a broker to market a property with a non-approved listing form and the broker can sign the form, but cannot fill in the blanks. The broker must also make sure to comply with Wisconsin law regarding providing agency disclosure to clients, which may necessitate providing a separate Broker Disclosure to Client form to the client. A broker must comply with the duties to all parties in a transaction, including disclosure of all material adverse facts in writing and in a timely fashion and the additional duties the broker owes to a client.

A broker should also review the non-approved listing contract to make sure it complies with Wis. Stat. § 240.10 that requires that any contract to pay a commission to a real estate agent describe the real estate, express the price, state the commission and the term of the agreement, be in writing, and be signed by the person agreeing to pay the commission. A broker will also want to review the listing contract for important protections such as protected buyer provisions, which are not a matter of state law but are a contractual provision. If the contract does not address the extension of listing in the case of protected buyers, the broker is not entitled to those protections.

Even when using a non-approved listing, a broker must still comply with state law that requires the broker to inspect the property prior to the listing contract; ask the seller about the condition of the structure, mechanical systems and other relevant aspects of the property; and request that the seller respond in writing.

Hotline Q&A – Modifying Approved Forms

A buyer is requesting to pay the success fee under the WB-36 Buyer Agency Agreement only if there is a closing, and wants to cross out certain lines in the WB-36 to accomplish that end. Can the WB forms be changed?

Wis. Admin. Code § REEB 16.06(3) provides that as long as the deleted provisions remain legible, a licensee may cross out provisions on an approved form to reflect the agreement of the parties. The WB-36 Buyer Agency/Tenant Representation Agreement commission provisions may be modified to reflect the terms negotiated by and between the broker and the buyer client. The standard of performance may be based on a successful closing, if that is acceptable to both. Then language that would no longer reflect that agreement could be stricken.

Can a broker use white-out to change terms that the buyer or seller does not want as part of the offer?

According to Wis. Admin. Code § REEB 16.06 (3), licensees may cross out provisions on an approved form to reflect the agreement of the parties provided the deleted provisions remain legible. The use of white-out would violate this rule.

When must an approved form be used?

A licensee must use approved forms when the licensee is acting as an agent or a party in a real estate or business opportunity transaction, according to § REEB 16.04(1). If there is no approved contractual form for the transaction and the licensee is acting as an agent, the licensee can negotiate an agreement but the parties or their attorneys must draft the contract, per § REEB 16.04(3). For those kinds of real estate or business opportunity transactions for which the REEB has not approved a contractual form, a licensee – acting as an agent or a party – is authorized by § REEB 16.04(2) to use contractual forms drafted by a party or an attorney, provided that the name of the drafter is imprinted on the form. For the purpose of this rule, a listing broker is a party to the listing contract transaction.

Hotline Q&A – When Approved Forms Are Unavailable

May a Wisconsin-licensed broker draft a commercial lease (for office space)?

The REEB has no approved forms for leases that must be used by Wisconsin real estate licensees. Wis. Admin. Code § REEB 16.04(2) provides that licensees can use lease forms drafted by the owner or lease forms drafted by an attorney. Therefore, owners of rental properties may direct the broker to use forms drafted by attorneys available in the marketplace. The broker may complete the forms as directed by the owners.

Wis. Admin. Code § REEB 16.04(2) provides, "When to utilize approved forms: (2) For those kinds of real estate or business opportunity transactions for which the department has not approved contractual forms a licensee, when acting as an agent or a party, may use contractual forms

drafted by a party or an attorney, if the name of the drafter is imprinted on the form before use by a licensee. For the purpose of this subsection, a listing broker is a party to the listing contract transaction."

The broker is the selling agent on an REO property. The bank/owner has agreed to put in a new well. The buyer's lender wants that in writing. In speaking to the listing agent, the selling agent told him she would send over an amendment stating that fact. The listing agent said the bank/owner would not sign it. The only thing the bank/owner will sign is its own form. The selling agent said she can't fill out the bank/owner's forms. The listing agent disagreed and e-mailed an amendment that is not a state-approved form. The listing agent has filled out the REO# and the seller and buyer information, and wants the selling agent to fill in the buyer's lender required statement. The selling agent believes she cannot "fill in" other forms. Who is correct?

Wis. Admin. Code § REEB 16.02(5) prohibits the "use" of unapproved forms; "use" is defined to mean completion of a form by filing in the blanks. All government forms, including HUD and VA (when used for the sale of properties owned by the government agency), are approved forms for licensee use.

Some REO companies ask licensees to "fill-in the blanks" on a preprinted offer provided by the REO seller. Wis. Adm. Code § REEB 16.04, however, requires Wisconsin licensees to use Wisconsin-approved forms if an approved form is available for that purpose. One alternative is for the licensee to negotiate the terms of the offer or amendment and then have the parties or an attorney complete/fill in the blanks.

Are licensees required to use the WB-36 Buyer Agency/Tenant Representation Agreement? Or can a licensee create his or her own exclusive agency representation agreement?

While the Wis. Admin. Code Chapter REEB 16 prohibits the "use" of unapproved forms, "use" is defined to mean completion of a form by filling in the blanks (Wis. Admin. Code § REEB 16.02(5). Forms may be modified on a per-transaction basis or pre-printed addendum can be added in accordance with the provisions outlined in Wis. Admin. Code § REEB 16.06.

A licensee may hire an attorney to draft a specific buyer agency agreement customized for a particular buyer in a specific situation provided that the broker does not need to "use" it by filling in any blanks – the broker would only sign the customized buyer agency form prepared and printed by the attorney. The attorney would have printed out all information and there would be no blanks other than signature lines.

A licensee may not create his or her own buyer agency form with blank lines because licensees are required to "use" the WB-36, per Wis. Admin. Code § REEB 16.04.

Forms Use Must Be Incidental to Real Estate Practice

If a licensee is approached by a friend or a relative to "help out" in a transaction, the licensee cannot use the approved forms without first entering into a listing or buyer agency agreement. Wis. Admin. Code § REEB 16.05(3) provides that "a licensee may use approved forms only in those transactions in which the licensee is acting in a capacity as licensee or in which the licensee is a principal, and in either case the use of such forms is incidental to the real estate practice of the licensee." Licensees who think that signing a "listing" is an easy way to help out should realize that they are taking on full legal liability for a transaction in which they are only minimally involved. To say this is inadvisable would be an understatement

Hotline Q&A – Broker Must Do More than Fill Out Approved Forms

A buyer has negotiated with a FSBO seller on price. The seller wants the broker's agent to draft the offer and handle the closing for a fee. Is this legal?

Wis. Admin. Code § REEB 16.05(3) limits use of approved forms to transactions where the licensee is an agent or a party. Such use must be incidental to the licensee's real estate practice.: "A licensee may use approved forms only in those transactions in which the licensee is acting in a capacity as licensee or in which the licensee is a principal, and in either case the use of such forms is incidental to the real estate practice of the licensee." Moreover, Wis. Admin. Code § REEB 16.05(4) provides: "A licensee may not make a separate charge for completing an approved form in conjunction with a transaction."

These provisions, when taken together, are interpreted by the REEB to mean that a licensee cannot use an approved form unless a listing or buyer agency agreement is entered into or unless the licensee is a party in the transaction. Wis. Admin. Code § REEB 16.05(3) and the Department's interpretation thereof originated decades ago from the concern that broker completion of conveyance forms constituted the practice of law, as was discussed in the *State v. Dinger* case. In *Dinger*, the Court found that such overlapping into the sphere of the legal profession could only occur when such activities are incidental to the broker's trade or business.

A licensee may not enter into an agency agreement just to draft the agreement between the parties because it may be considered the unlicensed practice of law. The drafting must be incidental to the practice of real estate. If the parties to the transaction have come to an agreement about the terms of the pur-

chase of real property, they should be referred to an attorney to draft their agreement. If the agent entered into a one-party listing with the seller, the agent must provide brokerage services besides just drafting the offer. This would likely include licensee inspection of the property and disclosure of material adverse facts and apparently would involve the negotiation of terms other than price.

REALTOR® Practice Tip: To help ensure that the valuable privilege to draft real estate contracts is not taken away, licensees should: 1) use only forms approved for use under Wis. Admin. Code § REEB 16.03, 2) use approved forms only in those transactions in which the use of the forms is incidental to real estate practice (§ REEB 16.05(3)), and 3) never make a separate charge for completing a form (§ REEB 16.05(4)).

Addenda Use

Wis. Admin. Code § REEB 16.06(4) and (5) set forth the applicable rules for use of addenda by Wisconsin real estate licensees:

(4) Except as provided in sub. (5), a licensee may use a pre-prepared addendum form and attach it to an approved form under the following circumstances:

(a) The addendum has been prepared by the broker or the broker's attorney; and

(b) The addendum is incorporated by reference into the approved form and the approved form and the addendum are properly related to one another; and

(c) The addendum relates to the blanks on an approved form; or alters or supplants optional provisions within an approved form.

(5) A licensee may use a pre-prepared addendum which supplants or alters the printed provisions of an approved form only if:

(a) The addendum has been drafted by an attorney who is identified on the addendum;

(b) There are no optional or multiple choice provisions in the addendum;

(c) There are no blanks or fill-in provisions in the addendum except for spaces for the signatures of the parties and those items required under par. (d); and,

(d) The addendum is incorporated by reference into the approved form and the approved form and the addendum are properly related to one another.

Additional Information: See Pages 1-3 of the March 2005 *Legal Update*, "Customizing the Offer to Purchase," at www.wra.org/LU0503.

REO Addendum

The REO purchase contract typically starts on a DSPS-mandated offer to purchase form, but the REO asset manager often has a lengthy, hard-to-understand REO addendum that negates contract rights and protections for the buyer. One of the biggest challenges for REALTORS® is providing brokerage services without engaging in the unlicensed practice of law by interpreting the addendum for the buyer. An agent may share general information or explanations about REO transactions – for instance, that REO addenda are notorious for shifting the risk of the transaction to the buyer – but may not give legal advice. Instead, they can ask the listing agent if the seller is likely to accept any offers from buyers who do not agree to the addendum terms and refer the buyer to legal counsel with specific questions. At the same time, REALTORS® should not lose sight of the fact that it is unlikely that the buyer will successfully purchase the property if the REO addendum is rejected or countered.

Hotline Q&A – Addenda Use

The REO seller has asked that cooperating brokers complete the REO addendum when submitting any offers. Can the broker fill in the REO addendum?

Licensees may use the REO addendum only if it complies with Wis. Admin. Code § REEB 16.06 (5). Wis. Admin Code § REEB 16.06(5) allows a licensee to use a pre-prepared addendum that supplants or alters the printed provisions of an approved form only if: 1) the addendum has been drafted by an attorney who is identified by name on the form, 2) there are no optional or multiple choice provisions in the addendum and 3) the only blanks or fill-in provisions are for the parties' signatures and those that connect the addendum to the approved form. If the REO addendum does not meet these criteria, the buyer or the buyer's attorney will need to complete it.

Recently the broker encountered an "as is" addendum for a listing in the MLS. However, the addendum was not an approved REEB form, did not identify the author, and was not signed by the seller or the seller's agent/broker. The document only asked the buyer to sign. The intent of the addendum is pretty clear, stating that the personal representative/seller has limited knowledge of the property and has not made any representations regarding the property. The buyer's agent recommended the buyer seek legal counsel prior to signing. Is it appropriate to include such a document without knowing who drafted it and without the seller's and agent's signatures?

Licensees may use a pre-prepared offer addendum that complies with Wis. Admin. Code § REEB 16.06(4) or (5).

Wis. Admin. Code § REEB 16.06(4) provides that a licensee may use a pre-prepared addendum containing provisions that relate to the information that would be filled in on the blanks

on an approved form, or that modify or supplant the optional provisions or contingencies set forth in the approved forms. An example might be the financing or inspection contingency in an offer to purchase. In practice, this type of addendum may be drafted by the broker or an attorney. A licensee may complete any fill-in-the-blanks or make selections when using this "optional information" addendum.

The distinction between § RL 16.06 subsections (4) and (5) is the information within the addendum. Subsection (4) permits the broker or an attorney to draft an addendum that is incorporated into the approved form. The addendum must relate to the blank lines on the approved form or must alter or replace optional provisions within the approved form. Subsection (5) permits a licensee to use an addendum if it is drafted by an attorney who is identified on the addendum for items that fall outside of subsection (4) and that change pre-printed, non-optional language. Subsection (5) states that the attorney-drafted addenda cannot contain optional provisions, multiple choice provisions, blanks or fill-in provisions except for signature lines. The bottom line is that if an addendum rewrites provisions of an offer that are not optional, it must be drafted by an attorney. This "language modification" type of an addendum may not be filled in by the licensee other than with signatures and incorporation provisions.

Whether any pre-prepared addendum is appropriate for a specific transaction must be decided on a case-by-case basis. Although pre-prepared addenda are available, a broker must be discerning about when to use addenda.

A legal document should indicate the drafter of the document. Also, to be part of the agreement between the parties, both the buyer and the seller should sign the document. However, it is possible that a judge may consider the document binding on the buyer if the document includes the buyer's signature. The buyer should consult an attorney to determine the effect of signing the addendum.

Hotline Q&A – Licensees Must Use Current Forms

An offer that was drafted on an old form was verbally accepted. Does the offer need to be rewritten on a current form?

Based on license law, licensees shall present promptly all offers received (see Wis. Admin. Code § REEB 24.13). Therefore, the listing agent should submit the offer to the seller and explain the advantages and disadvantages of the terms as drafted on the old offer form. The seller should realize that, if accepted, the offer on the old form can form a binding contract and the parties will be bound to the terms and conditions stated therein.

Because the parties do not yet have binding acceptance, the buyer could choose to withdraw the offer on the old form and prepare an offer using the current form. A buyer withdrawing an offer to resubmit another offer risks the seller accepting an offer from a different buyer.

The co-broke agent could face possible disciplinary action from the DSPS for failure to use the new offer form; - all licensees must use an approved form like the WB-11 Residential Offer to Purchase beginning on the mandatory use date, which was March 1, 2010, for the WB-11. Wis. Admin. Code § REEB 16.06(7) provides, "A licensee shall use the latest approved version of an approved form."

Creating Different Types of Listing Contracts

Wis. Admin. Code § 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." As defined in Wis. Admin. Code § REEB 16.02, "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.

Hotline Q&A – Exclusive Agency and Open Listings

A broker has an exclusive agency listing with a seller. A buyer's agent in the MLS is negotiating directly with the seller in hopes of getting a higher commission. This buyer was procured through the listing broker, not through the seller. The seller is a developer who has a broker's license, but he did not list the property with his company. Is this legal?

In an exclusive agency listing, the property is listed with only one listing broker, but the seller retains the right to sell the property by himself or herself without owing a commission to the broker.

To modify the 2008 WB-1 Residential Listing Contract-Exclusive Right to Sell to produce an exclusive agency listing, the following items should be modified or deleted:

1) delete the phrase "right to sell" from the title and line 1 of the listing and insert in its place the word "agency;"

2) add a provision under Additional Provisions on lines 242-250 to the effect that "Broker's commission is not earned based on lines 40-49 of the Commission section if the offer accepted, option granted or exchange agreement entered into by Seller is with a purchaser procured by Seller;" and

3) delete the words "by Seller" from line 46 in the Commission section. The broker, perhaps with the assistance of an attorney, may wish to review the

other provisions in the WB-1 to see if other modifications may be helpful.

Often in an exclusive agency listing, the broker remains obliged to draft the offer and other necessary paperwork and close the transaction, even though the broker is providing these services for free because the seller found the buyer. To avoid this outcome, the listing broker may wish to draft an exclusive agency listing contract as before, but add that any buyers found by the seller are exclusions, thus releasing the broker from the obligation to provide brokerage services for free. The parties then could work with their attorneys on the offer.

As another alternative, the listing broker may wish to draft the listing to provide that he or she will be paid a reduced commission amount instead of no commission if the seller procures the buyer. This would be an exclusive right-to-sell, variable rate listing contract.

How does a broker amend an exclusive right to sell commercial listing contract to make it an open commercial listing contract?

In an open listing, the seller retains two or more brokers to act simultaneously in marketing the property. The seller must pay a commission only to the broker who produces a ready, willing and able buyer. If the seller personally sells the property without the assistance of any of the brokers, the seller does not owe a commission.

To modify the WB-5 Commercial Listing Contract-Exclusive Right to Sell to produce an open listing, the following items should be modified or deleted:

1) delete the word "exclusive" from the title and line 1 of the Listing;

2) add a provision under Additional Provisions on lines 258-270 to the effect that "Broker's commission is not earned based on lines 55-59 of the Commission section unless the offer accepted, option granted or exchange agreement entered into by Seller is with a purchaser procured by Broker"; and

3) delete the words "by Seller, or by any other person," from line 60 in the Commission section.

It may also be helpful to indicate in the title or in the Additional Provisions section that the listing is an "open listing." The seller may also wish to delete the Extension of Listing (listing protection) section on lines 74-78 of the listing in an open listing situation.

Escrow Agreements

A well-written escrow agreement is optimal to minimize issues in negotiating and fulfilling the terms of the post-closing escrow. Real estate licensees are not authorized to draft escrow agreements.

Hotline Q&A – Escrow Agreements

The parties wish to have their earnest money in an interest bearing account or bank escrow account rather than the broker's trust account. Can this be done? Can a broker draft an escrow agreement? Does it depend on whether the escrow funds are held in the broker's trust account?

Wis. Admin. Code § REEB 18.06 contemplated situations where parties to a transaction may not want the broker to hold the earnest money in the broker's real estate trust account. The parties may designate an escrow agent other than the broker. In such situations the broker may not draft the escrow agreement. The escrow agreement must be drafted by the parties or an attorney. If the parties are using a different escrow agent, the broker may not hold the funds in the broker's real estate trust account, nor may the broker act in any way as custodian of the funds. The funds, pursuant to the escrow agreement, shall be held by some other party, such as a bank, savings and loan association, credit union or attorney.

The parties are in dispute about repair work that cannot be finished before closing. Do they need to have an escrow agreement, and must it be in writing?

A well-written escrow agreement will minimize disputes regarding a post-closing escrow. Real estate licensees are not presently authorized to draft escrow agreements. If the parties place funds in escrow, the funds may be held in the broker's trust account or by another person until some future occurrence, provided an agreement to that effect is prepared by the parties or an attorney. Wis. Admin. Code § REEB 18.07(1) would allow a broker to draft the escrow agreement if a form for this purpose was approved by the REEB for use by licensees pursuant to § REEB 16.03. However, the REEB has never promulgated such a form so the parties or an attorney must draft the escrow agreement. There is an exception to these rules under § REEB 18.07(2) that provides a broker may hold occupancy and possession escrows, escrows for final tax prorations and escrow charges owed by the seller but not yet billed provided the closing statement shows that the broker has these funds.

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