WISCONSIN REALTORS® ASSOCIATION

LEGAL UPDATE

A MONTHLY GUIDE TO WISCONSIN REAL ESTATE LAW & POLICY

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2016 REALTOR® Highlights

Another year passes by and REALTORS® may wonder if they have missed something important among all of the new developments that occurred in 2016. This *Legal Update* attempts to remind members of any legal information or practice tips that they may have missed this past year. This *Update* provides an annotated index to the legal issues covered in 2016 in the *Legal Updates* and the *Wisconsin Real Estate Magazine*. Brief summaries of legal issues from 2016 are followed with links to one or more publications or online resources that may be reviewed for a more complete discussion of the particular topic.

In this *Update* the legal highlights from 2016 are arranged by subject, including license law modernization, forms, transaction pointers, advertising, private property rights/land use, shorelands/waterfront property, office issues, landlord/tenant practice, and case law.

IN THIS ISSUE

License Law Modernization 2016

2015 Wisconsin Act 258 substantially modernized Wisconsin Statute Chapter 452, the chapter of the statutes that most significantly impacts members' daily real estate practice. 2015 Wis. Act 258 has it all, from the creation of an independent contractor safe harbor to eliminating timeshare licensing, from reducing the statute of limitations time frames that limit when real estate licensees can be sued, to the deletion of real estate apprenticeships, and everything in between. This section reviews changes to independent contractor status, worker's compensation, unemployment insurance, the statute of limitations, electronic records, business entities and firms, business representatives, independent practice, supervision, record retention and personal assistants.

Independent contractors

The determination of whether an individual is an employee or independent contractor is important for many reasons. Federal and state income tax is withheld from wages paid to employees, but not from compensation paid to independent contractors. The employee/independent contractor status also determines Social Security and Medicare payments, federal and Wisconsin unemployment compensation, Wisconsin worker's compensation, tax on self-employment income, and the deductibility of business expenses. Independent contractor status may be determined three different ways in Wisconsin: the common law 20 factor test, the federal tax law independent contractor safe harbor and the new Wis. Stat. § 452.38 safe harbor.

The role of a manager or supervising broker is generally inconsistent with the firm's need to maintain a lack of control over independent contractors. Managers generally are employees with respect to managerial activities that are subject to the control of the firm, but may also be independent contractors to the extent they engage in sales activities. Note that these "dual service" persons are now accommodated under Wis. Stat. § 452.038 as outlined on pages 5-6 of the April 2016 *Legal Update*, "License Law Modernization 2016," at www.wra.org/LU1604.

Real estate agents may qualify as statutory independent contractors under § 3508(B) of the Internal Revenue Code for federal tax purposes if they meet the following three criteria:

- They are licensed real estate agents.
- Substantially all payments for their services as real estate agents are directly related to sales or other output, rather than to the number of hours worked.
- Their services are performed under a written contract providing that they will not be treated as employees for federal tax purposes.

The independent contractor safe harbor in § 452.38 requires the following:

1. A written agreement between the firm and the licensee that provides the licensee shall not be treated as an employee for federal and state tax purposes.
2. 75 percent or more of commission related to sales or output and paid by the firm to the licensee during a calendar year is directly related to the brokerage services performed by the licensee on behalf of the firm.

REALTOR® Practice Tips

Every firm should have independent contractor agreements with all licensees associated with the firm who are intended to be independent contractors for income tax and other purposes. Each agreement should specify that the licensee will not be treated as an employee for state or federal tax purposes. In addition, substantially all, or 75 percent, of the typical agent's compensation and/or commissions must be directly related to the provision of real estate services and directly related to sales or other output, including the performance of services, rather than to the number of hours worked. Fulfillment of these criteria should satisfy both the federal tax law and the Wis. Stat. § 452.38 independent contractor safe harbors.

For individual tax purposes, independent contractors are treated as self-employed and generally must file and pay quarterly estimated income tax payments. If estimated tax payments are not made, the tax liability and underpayment interest due when filing an income tax return may be sizable. See the IRS Self-Employed Individuals Tax Center at www.irs.gov/individuals/self-employed for more information.

The WRA Real Estate Independent Contractor Agreement (ICA) was updated to embrace the new provisions and terminology of the 2016 Chapter 452 modernization legislation and is available in zipForm. In the form, the term "firm" refers to the licensed business entity or the sole proprietor broker who has engaged licensees to perform real estate services. The licensee engaged by the firm may be an individual who holds a broker's license or a salesperson's license or a licensed business entity. The ICA provides that the licensee shall not be treated as an employee for federal and state tax purposes, and confirms the agent's status as self-employed. It provides that the firm shall pay the agent on the basis of production and output, that is, commission, and not the number of hours worked, in accordance with the attached Compensation Exhibit where the firm may delineate the details of the firm's commissions. The ICA emphasizes that the agent must ensure that transaction documents used, prepared or received by the agent are distributed to the parties and that copies of all transaction and brokerage service documents are submitted to the firm.

Worker's compensation

The prior requirement to carry workers' compensation insurance for agents was counterintuitive to the entire concept of an independent contractor. Previously, the Department of Workforce Development (DWD) interpreted the relationship between a firm and the agent to be an employer/employee relationship because of the supervisory responsibilities of the firm. Accordingly, 2015 Wis. Act 258 eliminates the requirement for brokers to pay worker's compensation insurance for agents, but provides firms with the ability to offer worker's compensation insurance if they wish without forfeiting independent contractor status. Wis. Stat. § 102.07(8)(bm) now provides that a real estate firm is not required to carry worker's compensation for an agent who meets the § 452.38 independent contractor safe harbor test. Thus Wisconsin joined 29 other states in exempting real estate agents from worker's compensation coverage.

From "Question: How Do You Feel About This? Statutorily protecting your independent contractor status," in the June 2016 edition at www.wra.org/WREM/June16/Chapter452.

The law does not dictate whether a firm has employees or independent contractors. If the firm hires employees, then the firm will be required to treat those individuals as such for taxes and benefits. Agents and firms always have the opportunity to enter into an employer/employee relationship. This law retains this option and ensures, for the most part, that the decision about which relationship to adopt should be made by the firm and agent — not by the court.

DWD FAQ suggests a negligence claim could be filed against the firm if the firm chooses not to carry worker's compensation. An agent could attempt to sue a real estate firm for negligence. However, it is unclear how a real estate firm would be responsible for negligence when the person is an independent contractor. If a firm chooses not to carry worker's compensation, and the agent fell down a flight of stairs, then the agent should be unsuccessful in a worker's compensation claim because that agent is an independent contractor. However, the agent could attempt to make a claim against the seller's homeowner's insurance. If the seller didn't have homeowner's insurance, the agent could attempt to sue the seller for negligence. For a negligence claim to be made when an agent is personally injured off-site, the agent would have to show that the firm has some sort of supervision responsibility in that situation.

From "Five Things to Know About Workers' Compensation: Release of revised DWD workers' compensation FAQ creates need for clarification," in the October 2016 *Wisconsin Real Estate Magazine* at www.wra.org/WREM/Oct16/WorkersComp.

Unemployment insurance

Previously firms were generally not legally required to pay Wisconsin the unemployment insurance (UI) contributions for their real estate agents because of the UI law exemption for services provided by a real estate agent or salesperson paid solely by commission. Effective October 1, 2016, this exemption in Wis. Stat. § 108.02(15)(k)7 provides the same exemption when at least 75 percent of the agent's compensation is related to real estate sales or output.

Two-year statute of limitations

A statute of limitations is the amount of time in which someone is able to file a lawsuit against another or the amount of time in which criminal action can be taken against someone. Before the creation of the new Wis. Stat. § 452.142, real estate licensees, including their firms, could be sued based upon a listing, buyer agency agreement or offer to purchase within a six-year period after a closing on a transaction or the date of a listing or buyer agency agreement. Under the new § 452.142 two-year statute of limitations, the two years begins upon whichever of the following occurs first:

(a) A transaction is completed or closed.

(b) An agency agreement such as a listing contract or a buyer agency agreement is terminated.

(c) An unconsummated transaction is terminated or expires.

REALTOR® Practice Tips

The reduction in the number of years one may be liable is not an invitation to throw all common sense, ethics and respect for the law out the window. Actually, a reduced statute of limitations for real estate licensees and their firms may encourage greater scrutiny of the licensee and the firm's actions in a real estate transaction earlier in the timeline than under the previous law.

MORE INFORMATION

For more information about the new statute of limitations, watch the LegalTalks video at www.wra.org/LegalTalks/StatuteOfLimitations and see "Where the Grass Is Green and the Statute of Limitations Is Two Years," in the April 2016 *Wisconsin Real Estate Magazine* at www.wra.org/WREM/Apr16/Statute.

Electronic records

The new Wis. Stat. § 452.42 provides that records may be retained in an electronic file format.

Dinger codified

The new Wis. Stat. § 452.40 codifies the *Dinger* case and the Wisconsin Supreme Court rules that authorize real estate licensees to complete state-approved forms. Wis. Stat. § 452.40(1)(b) simply states, "A firm and any licensee associated with the firm may use a form approved by the board under s. 452.05(1)(b) in real estate practice." The new Wis. Stat. § 452.40(1)(a) says forms are completed per the instructions of the parties.

REALTOR® Practice Tips

Under the new Wis. Stat. § 452.40(2), licensees are not permitted to provide legal advice or opinions concerning the legal rights or obligations of parties to a transaction, the legal effect of a specific contract or conveyance, or the state of title to real estate, as was the case before.

Business entities and firms

A "firm" refers to a licensed individual broker acting as a sole proprietorship or a licensed broker business entity. Any licensee affiliated with or under the license of a firm is referred to as "associated with." Wis. Stat. § 452.01(1o) defines "associated with a firm" to mean "to have been engaged by a firm to provide brokerage services to the firm's clients and customers on behalf of the firm and under the firm's supervision, including as an employee of the firm or as an independent contractor, or both." Individuals are either licensed salespersons, licensed brokers or unlicensed assistants, while a business entity may only have a broker's license. Only individuals can be licensed as salespersons. A licensed broker business entity (a licensee) may associate with another licensed broker business entity.

Business representative for multiple entities

Wis. Stat. § 452.12(2)(a) was amended to provide a licensed broker may act as a business representative for more than one licensed broker business entity if the broker has the express written consent of each licensed broker business entity to act as a business representative for each one. The broker may then provide brokerage services for each entity.

Independent practice

The new Wis. Stat. § 452.30(6) clearly states that a broker who is associated with a firm may engage in independent real estate practice in his or her own name or under a licensed business entity. If a broker associated with a firm would like to participate independently, the broker must:

1. Obtain written approval from each firm the broker is associated with.
2. Obtain approval to have other licensees work under the broker in the independent practice.

3. Obtain confirmation that the broker in independent practice, and not the firm, is responsible to supervise any licensees working under the broker.
4. Avoid any conflict of interest with each firm with which the broker is associated.
5. Notify the DSPS of the name under which the broker will be engaging in independent practice.

The firm is not responsible for the broker's independent practice because the independent practice is not "associated with the firm."

From "Beyond the Looking Glass: Chapter 452 changes modernizing business entity licensing," in the March 2016 *Wisconsin Real Estate Magazine* at www.wra.org/WREM/Mar16/Chap452.

The WRA Independent Practice Agreement (IPA) was created to assist firms and brokers in implementing the Wis. Stat. § 452.30(6) independent practice requirements and is available in zipForm.

Supervision

Wis. Stat. § 452.132(5)(a) provides "A firm that is a licensed broker business entity shall delegate the performance of the duty to supervise licensees associated with the firm to a supervising broker who is a licensed individual broker." Under Wis. Stat. § 452.12(3), a firm has liability for brokerage services provided on behalf of the firm if there is no proper supervision of the licensees associated with the firm in accordance with § 452.132 and any rules promulgated by the REEB. A firm must supervise the agent's brokerage services by ensuring a supervising broker for the firm is assigned, and the supervising broker must be a licensed Wisconsin broker. Additionally, the firm is responsible to confirm agents have current licenses and for the custody and safety of all documents and records relating to the transactions submitted to the firm by the agent. Most of the supervision responsibilities that had appeared under Wis. Admin. Code chapter REEB 17 have been placed in the statutes.

REALTOR® Practice Tips

A firm has no liability for the brokerage services provided by agents associated with the firm if the firm complies with the specific responsibilities stated in § 452.132 and any REEB rules regarding supervision. This would include providing written office procedures, access to a copy of the REEB rules, and access to a supervising broker, and conducting a reasonable review of transaction documents and records. That makes the firm's compliance with the statutes and rules crucial. If the firm complies the firm should have no liability for the brokerage services provided by the agents associated with the firm.

The supervising broker must review agency agreements, offers, leases and other documents executed by the parties to the transaction, as well as records relating to the transaction used by the agent and submitted to the firm, including trust account records. The § 452.132(4) standards for this review are limited to:

- Confirming that the required written agency disclosure to customers or clients was given.
- Confirming that any applicable form approved by the REEB has been used.
- Confirming that the forms have been completed by filling in the blanks in a manner consistent with the structure of the form.
- Communicating to the agent any errors in how the forms were completed that are apparent on the face of the document and known to the supervising broker reviewing the document.

Per § 452.132(6), the agent must:

- Discuss with the party with whom he or she is working or representing any error communicated by the supervising broker.
- Allow the party to determine if he or she wishes to request any changes to address the error made in the transaction document.
- Submit to the firm in a timely manner all agency agreements, offers to purchase, leases, and other documents that are executed by the parties and records related to the brokerage services provided on behalf of the firm and transactions if these records are used or received by the agent.

From "Supervise This: A discussion of a firm's supervision and responsibilities," in the May 2016 *Wisconsin Real Estate Magazine* at www.wra.org/WREM/May16/Chapter452.

Record retention

The Wis. Admin. Code § REEB 15.02 rules for distribution of copies of documents indicate an agent must provide an exact and complete copy of a document to a person who has signed it if the document was used, prepared or received by the agent. These rules include landlord-tenant transactions. § REEB 15.02 specifically provides that an exact and complete copy of a listing contract or agency agreement accepted and signed by all parties must be promptly distributed to the client.

As far as record retention, § REEB 15.04 provides the firm must retain documents and records for two years unless a longer time frame is required by federal law — for instance, a LBP disclosure — or unless there is an ongoing REEB investigation. This retention obligation pertains to exact and complete copies of all listing contracts, agency agreements, offers to purchase, leases, closing statements, deposit receipts, cancelled checks, trust account records and other documents or correspondence received or prepared in connection with any transaction. The two years run from the closing of the transaction. If there was no closing then the time is measured from the date the listing contract or buyer agency agreement is terminated. The REEB may not require copies be submitted after the end of the two years. This rule confirms that electronic or digital means may be used to retain records, as is also stated in Wis. Stat. § 452.42.

From the April 2016 *Legal Update*, "License Law Modernization 2016," at www.wra.org/LU1604 and the May 2016 *Legal Update*, "Firm Management under the 2016 Modernization Act," at www.wra.org/LU1605.

Personal assistants

Unlicensed personal assistants may only perform clerical and administrative duties and cannot provide services that generally require a license, such as hosting an open house, showing property, or drafting or explaining a contract. Generally, an assistant will be considered an employee if the party who engaged the assistant retains the right to control what the assistant does and how it is done. Because of the nature of the job to be performed, it's most likely an unlicensed assistant

will be classified as an employee. Either the agent or the firm that hires an unlicensed assistant will be the employer responsible for the tax withholding for this employee: federal income tax, FICA (Social Security and Medicare), FUTA (federal unemployment compensation), state income tax, and any other applicable taxes or payments. If the assistant is hired as an independent contractor, the assistant is responsible for his or her tax obligations.

Licensed personal assistants are licensees associated with the firm who can work in the same way as other licensees, subject to the limitations imposed contractually under the agreement they have with the firm and any licensees they are assigned to work with. Licensed personal assistants, like other licensees, often are independent contractors but can be employees as well.

REALTOR® Practice Tip

If the licensed personal assistant meets any of the independent contractor tests, then the licensed personal assistant may be treated as an independent contractor. In the case of a licensed personal assistant not providing brokerage services, the assistant may not be an independent contractor under the above criteria. If a licensee is not providing brokerage services, then the licensee may be an unlicensed personal assistant, regardless of whether that person holds a license.

An agent or a firm may hire an unlicensed personal assistant, but only a firm may engage a licensed personal assistant.

Wis. Stat. § 452.34 in large part codifies what used to appear in Wis. Admin. Code § REEB 17.12 and defines an "unlicensed personal assistant" as an individual engaged to provide services for which a real estate license is not required. It also contains the requirement to have a written agreement between a licensee engaging an unlicensed personal assistant and the licensee's firm and states the rule that an unlicensed personal assistant may not assist a licensee at an open house without the direct, on-premises supervision and presence of a licensee. The assistant also may not provide any services for which a license is required while at an open house. "Open house" means a showing of real estate open to the public for viewing without an individual appointment.

From Change Is on Its Way: A look into one of the largest pieces of legislation relating to the practice of real estate," in the February 2016 *Wisconsin Real Estate Magazine* at www.wra.org/WREM/Feb16/Change.

The WRA Unlicensed Personal Assistant Agreement was updated to comply with recent legislation including the new Wis. Stat. § 452.34 and the changes to the administrative rules and is available in zipForm.

Any concerns or administrative burdens associated with hiring an unlicensed personal assistant may be eliminated when the firm engages a licensed personal assistant who holds a real estate license. The licensed personal assistant must be engaged by the firm. If the licensed personal assistant is to engage in any licensed activities, such as drafting contracts, local board and MLS rules generally will require that dues and fees be paid with respect to licensed personal assistants in the same manner in which they are paid for licensed salespeople.

The WRA Licensed Personal Assistant Agreement was updated to comply with the recent legislation and remove the checklist of duties a personal assistant might perform, leaving itemization of tasks to the parties completing the agreement. The Licensed Personal Assistant Agreement, available in zipForm, is not legally required, but a written agreement setting forth the parameters of the relationship is beneficial and recommended.

From the June 2016 *Legal Update*, "Personal Assistant Rules & Forms," at www.wra.org/LU1606.

License law modernization resources

- April 2016 *Legal Update*, "License Law Modernization 2016," at www.wra.org/LU1604.
- May 2016 *Legal Update*, "Firm Management under the 2016 Modernization Act," at www.wra.org/LU1605.
- June 2016 *Legal Update*, "Personal Assistant Rules & Forms," at www.wra.org/LU1606.
- "Changes to Wisconsin Statute Chapter 452: Frequently asked questions," in the June 2016 *Wisconsin Real Estate Magazine* at www.wra.org/Chap452FAQ.
- Wis. Stat. Chapter 452 at docs.legis.wisconsin.gov/statutes/statutes/452.pdf.
- LegalTalks video series: "Wis. Stat. Ch. 452 Changes" at www.wra.org/LegalTalks/Chapter452.
- Chapter 452 FAQ: www.wra.org/Chap452FAQ.
- "Change Is on Its Way," in the February 2016 *Wisconsin Real Estate Magazine* at www.wra.org/WREM/Feb16/Chapter452.
- "Beyond the Looking Glass," in the March 2016 *Wisconsin Real Estate Magazine* at www.wra.org/WREM/Mar16/Chapter452.
- "Where the Grass Is Green and the Statute of Limitations Is Two Years," in the April 2016 *Wisconsin Real Estate Magazine* at www.wra.org/WREM/Apr16/Chapter452.
- "Supervise This," in the May 2016 *Wisconsin Real Estate*

Magazine at www.wra.org/WREM/May16/Chapter452.

- "Question: How Do You Feel About This?" in the June 2016 *Wisconsin Real Estate Magazine* at www.wra.org/WREM/June16/Chapter452.

Forms

This section overviews the new WB-1 Residential Listing Contract, the new WB-42 Amendment to Listing Contract and the new Disclosure to Clients and Disclosure to Customers language.

WB-1 Residential Listing Contract — 2016 Revisions

The terminology throughout the 2016 WB-1 Residential Listing Contract was modified to mirror the Wis. Stat. Chap. 452 revisions that define a "firm" to mean either a licensed broker business entity or a licensed sole proprietor broker.

Commission

The Commission section on the first page of the WB-1 was reorganized and subheadings were inserted to provide better clarity and understanding.

REALTOR® Practice Tip

Note that under the Calculation subheading at lines 43-49, it speaks of applying a percentage to the different amounts, so it may be wise to complete the commission blank on lines 27-28 by stating a percentage which in turn may be applied to the total consideration, the list price or the offered purchase price as the case may be. There is also room to also indicate variable commissions and any administrative fee in the blank. For example, x% plus $xyz.

Under the Due and Payable subheading, the 2016 WB-1 indicates that once a commission is earned, it is due and payable at the earlier of closing or the date set for closing, even if the transaction does not close, unless stated otherwise in writing. "Even if the transaction does not close" was added in response to the concern raised in the *Ash Park* case that a residential home seller without an attorney would not otherwise understand that it was possible for a commission to be due even if there is not a closing. This would be rare. See the discussion of *Ash Park, LLC v. Alexander & Bishop, Ltd*. on pages 1-3 of the November 2015 *Legal Update*, "Case Law Update Fall 2015," at www.wra.org/LU1511.

REALTOR® Practice Tip

The language saying that the commission may be due even if the transaction does not close may be explained by saying that if the firm has done its job and secured an enforceable contract and the seller then changes his mind and backs out, refusing to close, that is hardly fair to the firm if the firm has done all of the work to achieve an offer ready for closing.

REALTOR® Practice Tip

If there is an enforceable contract and the buyer does not close, the seller may pursue legal action against the buyer, such as specific performance or damages, and would then pay commission. But if this situation is resolved with a Cancellation Agreement and Mutual Release whereby the earnest money goes to the seller, the Earnest Money provisions on lines 272-279 state the seller's choice to accept the earnest money as the total liquidated damages means that the firm's commission will be no more than one-half of the earnest money after reimbursement of any cash advances made for the seller.

Buyer financial capability

The Buyer Financial Capability section at the bottom of the first page also is in response to *Ash Park*. The concurring opinion indicates the Chief Justice believes the responsibility for investigating the financial resources of the buyer rests with the firm. This is concerning because real estate licensing and training do not require that licensees investigate or analyze a party's financial ability. Instead the buyer works with a lender to obtain a prequalification or preapproval letter, a loan commitment or other proof of funds that demonstrate the buyer's financial capability to the seller.

Disclosure to clients

One of the best improvements to the WB-1 is in the Disclosure to Clients section, formerly called the Broker Disclosure to Clients. Changes to the language, as a result of the Wis. Stat. Chap. 452 modernization revisions, make this section more user friendly and understandable for property owners.

When the sellers choose an agency relationship model in the listing contract, they can check a box, rather than having to place their initials on a line. The consumer must still proactively select one of the three agency models:

Multiple representation with designated agency: Both parties must agree to multiple representation with designated agency. The same real estate firm may represent both parties, and because the firm has permission from both parties to participate in designated agency, each agent for a party may fully negotiate on behalf of his or her respective party. There must be two agents involved: one on behalf of each client.

Multiple representation without designated agency: Both parties again must agree to multiple representation. However, under multiple representation without designated agency, the real estate firm and its agents must play the role of neutral facilitators in the transaction.

Reject multiple representation: Often referred to as single agency, the party is basically saying, "I want to be the only client of your firm in my transaction."

From "Change Is on Its Way: A look into one of the largest pieces of legislation relating to the practice of real estate," in the February 2016 *Wisconsin Real Estate Magazine* at www.wra.org/WREM/Feb16/Change.

MORE INFORMATION

To further review the agency relationship models, see the October 2010 *Legal Update,* "Agency Law Revisited," at www.wra.org/LU1010.

Fixtures

The list of possible fixtures now includes water softeners, satellite dishes, audio/visual wall-mounting brackets — but not the audio/visual equipment, and in-ground pet containment systems — but not the collars.

Protected buyer enhancements

Protected buyer status now may arise if a prospective buyer views the property with the seller. The word "discussing" was changed to "communicating" to clearly encompass electronic communication such as email, texts, tweets, as well as face-to-face communication. The written list of prospects attending individual showings or negotiating with agents must be delivered no later than three days after the expiration or any early termination of the listing. A sentence was added at the end of the protected buyer definition to reinforce that when an individual sees the property and later forms an LLC to be the buyer that the seller does still owe commission.

Termination of listing

If the seller wants to bring the contract to an end before the contract end date, the Termination of Listing section specifies that the seller must deliver written notice, using an approved delivery method, to the firm. Should the agent wish to bring the contract to an end, a written notice signed by the supervising broker must be delivered to the seller using an approved delivery method.

REALTOR® Practice Tip

By popular demand, there is now a Delivery of Documents and Written Notices section on the top of the last page of the WB-1 that is similar to the section by the same name that appears in the REEB-approved offers. That means there will be no need to use the WRA Addendum D with this form!

WB-42 amendment to listing contract

Changes were made so the WB-42 Amendment to Listing Contract may be used to amend the WB-37 Residential Listing Contract — Exclusive Right to Rent and commercial lease listings, as well as other listings. The check boxes were removed and the caution was reworded to say, "This Listing belongs to the Firm. Agents for Firm do not have the authority to enter into a mutual agreement to terminate a listing contract, amend the commission amount or shorten the term of a listing contract, without the written consent of the Agent(s)' supervising broker," and a line is provided where the supervising broker may sign.

From the March 2016 *Legal Update*, "WB-1 Residential Listing Contract and WB-42 Amendment to Listing Contract — 2016 Revisions," at www.wra.org/LU1603.

From "Top 10 Things You Should Know About the WB-1," in the June 2016 *Wisconsin Real Estate Magazine* at www.wra.org/WREM/June16/WB1.

MORE INFORMATION

For more information about the changes to the WB-1 residential listing, watch the LegalTalks videos at www.wra.org/LegalTalks/WB1.

Disclosure to clients

A person, business or other party becomes a client when that party executes an agency agreement. Wis. Stat. § 452.135 requires that the prospective client also be provided with a written copy of the mandatory Disclosure to Clients statement when the client enters into a listing, buyer agency or other agency agreement if the correct Disclosure to Clients language is not incorporated within the agency agreement. If brokerage services shall be provided with regard to property primarily intended for use as a one- to four-family residential property, then the firm must ask the client to sign to acknowledge receipt of the separate Disclosure to Clients.

The Broker Disclosure to Clients language in the present state-approved listing contracts and buyer agency agreement forms became obsolete as of July 1, 2016. The Disclosure to Clients form will need to be used with all listing contracts and other agency agreements that have not been revised to incorporate the new mandatory disclosure language. At this point in time, the Disclosure to Clients has been incorporated into only the WB-1 Residential Listing Contract. Beginning July 1, 2016, all other agency forms appearing in zipForm will have the old language lined out and will automatically appear together with the new Disclosure to Clients. For the instructions for making this modification for paper forms, visit www.wra.org/BDClientInstructions.

From "The Wonderful World of Disclosure to Clients! Use consumer-friendly language to update agency agreements," in the July 2016 *Wisconsin Real Estate Magazine* at www.wra.org/WREM/July16/Disclosure.

Current form cleanout

A broker received an amendment from a cooperating agent on an outdated form. Should the listing broker present the outdated amendment form to the seller?

January 1, 2016, brought with it a new WB-40 Amendment to Offer to Purchase, WB-41 Notice Relating to Offer to Purchase, WB-44 Counter Offer and WB-45 Cancellation Agreement and Mutual Release. To avoid grabbing an outdated WB form or prior versions of the RECR, VLDR or addenda, be sure to replace old paper documents with current forms. Notwithstanding form misuse by the licensee, which could result in discipline by the REEB, the proposal should be presented to the party, even if outdated and/or poorly drafted, regardless of terms or conditions.

July 1, 2016 changes to forms

July 1, 2016, triggered the use of the new WB-1 Listing Contract and WB-42 Amendment to Listing Contract. In addition, any Broker Disclosure to Customers and Broker Disclosure to Clients forms also will be outdated then and should be disposed of. For zipForm users, the old forms will be removed and new forms available for use.

From "The Best of the Legal Hotline: Spring Cleanup," in the June 2016 *Wisconsin Real Estate Magazine* at www.wra.org/WREM/June16/Hotline.

Transaction Pointers

A large number of laws, forms and other considerations impact real estate transactions. This section of the *Update* takes a look at time of sale/time of purchase, "as-is" disclosures, disclosure of interest, misrepresentation liability, listing protocol, offer acceptance, licensee inspections, home inspection and inspection contingency, testing, procuring cause, escalation/acceleration clauses, short sales, damage after acceptance, and boundary lines.

Time of sale includes time of purchase

Under a new law that went into effect in July 2015, local units of government are prohibited from requiring inspections, property improvements or repairs or payment of related fees at the time of sale or transfer of title. A time of sale (TOS) requirement under Wis. Stat. § 706.22 is an obligation that must be performed prior to a closing when a property is sold. 2015 Wis. Act 176 added provisions to Wis. Stat. § 706.22 make it clear that "time of sale" also means "time of purchase." The time of sale restrictions apply to buyers and the time of occupancy as well as to sellers and the time of sale or property transfer. Wis. Stat. § 706.22 is now a prohibition on the imposition of local time-of-sale, purchase or occupancy requirements.

REALTOR® Practice Tip

REALTORS® should inform officials about the revised Wis. Stat. § 706.22 prohibiting the enforcement of local TOS requirements, both new and pre-existing, and provide them with a copy of the law. Note: Any disputes regarding the applicability of a TOS requirement to a specific transaction should be referred to legal counsel.

MORE INFORMATION

See "Time of Sale Requirements: Coming to a Community Near You?" in the October 2014 *Wisconsin Real Estate Magazine*: www.wra.org/WREM/Oct14/TOS; Wis. Stat. § 706.22: docs.legis.wisconsin.gov/statutes/statutes/706/22; 2015 Wis. Act 176, sections 29-40: docs.legis.wisconsin.gov/2015/related/acts/176 and TOS handout resource page: www.wra.org/TimeofSaleQA.

From the February 2016 *Legal Update*, "Landlord/Tenant Legislation for 2016," at www.wra.org/LU1602.

"As-is" seller liable for nondisclosure

An "as-is" clause will not protect a seller from liability in all cases. Parties include "as-is" clauses in contracts for a variety of reasons, but the most common goal is to limit liability arising from condition issues, title problems, unpaid taxes or assessments, or other post-closing surprises. REO sellers almost uniformly include "as-is" clauses in their sales contracts. In a recent case the buyer was awarded $50,000 in damages when the REO seller failed to disclose the water leakage problem that grew into a mold problem, despite repeated warnings from the listing agent. In addition the seller claimed no knowledge of the problem. To read the Court of Appeals opinion, see *Fricano v. Bank of America*, 2015AP20 (Dec. 23, 2015) online at www.wicourts.gov/ca/opinion/DisplayDocument.pdf?content=pdf&seqNo=158224.

From "Seller Liable for Damages in As-is Sale," in the February 2016 *Wisconsin Real Estate Magazine* at www.wra.org/WREM/Feb16/As-is.

Disclosure of interest

- Licensees are required to obtain the written consent of the parties to the transaction when working with immediate family, or a business or entity in which the licensee has an interest. Consent is normally obtained in the offer or other contract.
- A buyer's agent is required to disclose buyer agency at the earlier of first contact with the seller or listing broker, a showing, or other negotiations, in those situations when the property is a one-to-four family residential property.
- A licensee acting as a party rather than as an agent must disclose that status to the other party or the other party's agent in writing.

From "The Best of the Legal Hotline: Disclosing the Allegiance of Parties and Agents" Creating transparency in the real estate transaction," in the February 2016 *Wisconsin Real Estate Magazine* at www.wra.org/WREM/Feb16/Hotline.

Misrepresentation liability

Broker liability may arise as a result of misrepresentation, including concealment and the failure to disclose where this is required. Misrepresentation may be found if a licensee incorrectly states that a particular aspect of a property is in good condition when it is not. Liability for misrepresentation can be founded on intentional fraud, negligence or strict responsibility.

REALTOR® Practice Tips

A licensee may be liable if he or she makes false affirmative statements about the property, even when the offer includes an "as-is" clause. The licensee undertakes full responsibility for accuracy when making statements in a transaction where silence would suffice.

Wis. Stat. § 452.23(2)(b) is straightforward in relieving the broker from the duty to disclose information related to the condition of the property when an inspection is conducted by a qualified third party who renders a written report disclosing that information to the parties.

A Wisconsin licensee can be liable for inaccurate statements that appear to the buyer to have been made from the broker's own personal knowledge. When a broker receives data from the seller, the city treasurer's office or another third party, and then restates the information in a data sheet or other advertising as if it were fact, the broker may be held responsible for the accuracy of the information. REALTORS® should specifically attribute data used in advertisements, such as acreage, square footage and assessed values, to its source.

From "Broker Liability for Misrepresentations: Cases and lessons from the Wisconsin courts," in the October 2016 *Wisconsin Real Estate Magazine* at www.wra.org/WREM/Oct16/Liability.

Liability prevention

The pre-listing inspection requires "a reasonably competent and diligent inspection of accessible areas of the structure and immediately

surrounding areas of the property to detect observable, material adverse facts." To facilitate documentation of a licensee's observations at the pre-listing inspection, the WRA created the Listing/Selling Agent Visual Inspection Form, available in zipForm.

The listing agent should log in to RPR to see available information that, depending on location, may include legal descriptions, tax information, mortgages, photos or prior sales information. Additionally the listing broker may ask the title company to complete a search and hold, identifying potential title issues. At the listing meeting, the listing agent should ask the seller the hard questions – such as what are known liens and mortgage balances. The listing broker may wish to use the WRA's Listing Questionnaire Regarding Title Issues to help identify potential title issues not evident in recorded documents.

From "The Best of the Legal Hotline: Pre-venting Broker Liability," in the October 2016 *Wisconsin Real Estate Magazine* at www.wra.org/WREM/Oct16/Hotline.

Basic offer pointers

- Do not claim an offer has been accepted until it is in writing and delivered.
- If the binding acceptance date has lapsed, use a counter-offer to continue negotiations.
- Timely deliver accepted offers to assure binding acceptance.
- Deadlines expressed as a number of days from an event, such as acceptance, are calculated by excluding the day the event occurred.
- Keep on top of the parties' time frames because a missed deadline can cause a transaction to abruptly end.

From "The Best of the Legal Hotline: Basic Training," in the March 2016 *Wisconsin Real Estate Magazine* at www.wra.org/WREM/Mar16/Hotline.

Licensee duty to inspect

Wis. Admin. Code § REEB 24.07 gives detailed instructions for how to comply with the inspection duty in every transaction. A listing agent must inspect the property prior to entering into the listing and ask the seller to comment on the condition of the property in writing. Just like the agent's duty to inspect, the duty to ask the seller to comment on the condition of the seller's property is nonnegotiable and cannot be waived even if the seller is selling "as-is." All other agents must inspect a property prior to or during a showing unless the licensee is not given access for a showing. An agent who writes an offer for a buyer on a property the agent has not inspected because he was not given access is not violating the rule related to inspections, but may be in danger of violating the duty to provide competent service with reasonable skill and care. The agent can ask her supervising broker for an inspection checklist to use when listing a property or to use when working with a buyer. If the supervising broker does not have a preprinted checklist, the supervising broker can develop one or use the WRA's preprinted form.

From "Inspect Yourself: Breaking Down Your Duty to Inspect," in the August 2016 *Wisconsin Real Estate Magazine* at www.wra.org/WREM/Aug16/InspectYourself.

Home inspection: notice or amendment

Amendment path: The timing in the amendment will be strongly influenced by the amount of time remaining in the inspection contingency. Generally the buyer wants to give the seller enough time to make an informed decision on requested repairs, but also wants enough time remaining to give a notice of defects if the seller does not agree to the amendment.

Notice path: The home inspection must be conducted by a Wisconsin-registered home inspector who provides the buyer a written report that includes defects as defined in the offer; the buyer lists the defects to which the buyer objects in the written notice of defects; and the inspection report and notice of defects are timely delivered by a delivery method authorized in the offer.

Simultaneous notice and amendment: It is legitimate for the buyer to issue a notice of defects and an amendment simultaneously, giving the seller choices. Per the offer, once a notice of defects is delivered, the offer will become null and void if the seller does not timely give written notice of the seller's election to cure the defects. It is therefore important for the simultaneously offered amendment to contain language to tie up the notice of defects "loose end," if the amendment is accepted, often by having the parties agree to withdraw the notice.

From "The Best of the Legal Hotline: Home Inspection or Amendment Revisited," in the August 2016 *Wisconsin Real Estate Magazine* at www.wra.org/WREM/Aug16/Hotline (be sure to see the linked Home Inspection Contingency Flowchart).

Inspection versus testing

With regard to testing, lines 398-399 of the WB-11 Residential Offer to Purchase state, "A 'test' is defined as the taking of samples of materials such as soils, water, air or building materials from the Property and the laboratory or other analysis of these materials." The inspection contingency specifically only authorizes inspections, not testing, per line 410 of the WB-11. In order for the buyer to be permitted to test, a testing contingency must be added to the contract.

When it comes to an inspection, lines 396-398 state, "An 'inspection' is defined as an observation of the Property which does not include an appraisal or testing of the Property, other than testing for leaking carbon monoxide, or testing for leaking LP gas or natural gas used as a fuel source, which are hereby authorized."

As far as access, lines 399-401 provide, "Seller agrees to allow Buyer's inspectors, testers and appraisers reasonable access to the Property upon advance notice, if necessary to satisfy the contingencies in this Offer. Buyer and licensees may be present at all inspections and testing." Although the buyer engages individuals to conduct the home inspection or testing authorized in the offer, the seller may choose to attend or have an agent attend the inspection or testing as well.

> "In order for the buyer to be permitted to test, a testing contingency must be added to the contract."

From "Uncovering the Truth: Inspection and Testing Provision and the Inspection Contingency" in the August 2016 *Wisconsin Real Estate Magazine* at www.wra.org/WREM/Aug16/UncoveringTheTruth.

Home inspection quiz

The buyer had 12 days for inspection and conducted a roof inspection. The roofer stated that the roof should be replaced within two years. The buyer proposed an amendment asking the seller for a roof replacement credit. The amendment had a binding acceptance date after the inspection contingency deadline. When the seller did not respond, the buyer delivered a notice of defects and CAMR, well after the contingency deadline, asking for his earnest money back. Why is this not effective?

A. The notice of defects is late, beyond the inspection contingency deadline, so the inspection contingency is deemed satisfied.

B. The buyer failed to deliver a copy of the inspection report so the contingency is considered satisfied.

C. Submission of an amendment has no effect on the deadline for the notice of defects.

→D. All of the above.

If the first offer falls through, what does the seller do with her copy of the first buyer's home inspection report?

A. Put it in the bottom of her birdcage because it is no good to a buyer who did not hire the home inspector and pay for the report.

→B. Use it as the basis for amending the RECR.

C. Give it to the listing agent so he can get cost estimates for repairs.

D. Tell the second buyer he can rely on the inspection report.

From "Inspection Contingency Quiz," in the August 2016 *Wisconsin Real Estate Magazine* at www.wra.org/WREM/Aug16/InspectionQuiz.

Procuring cause

In procuring cause, there are no predetermination rules of entitlement to commission. The first broker who shows the property is not automatically procuring cause, and the first broker is not automatically procuring cause because she was the first one to give the buyer the data sheet or to send email through a contact management program. Likewise the second broker is not automatically procuring cause because he drafted the offer. Another procuring cause myth is the broker who has buyer agency is automatically procuring cause — this is not true. The determination of procuring cause requires analysis of the entire course of events.

If the buyer was abandoned due to the first broker's inaction, the second broker's actions can create a second series of events resulting in a successful procuring cause claim. Estrangement occurs if the first broker engaged in conduct that caused the buyer to terminate the relationship. Examples of actions that could be estrangement include refusal to draft an offer, antagonistic behavior toward the buyer, acting without the consent of the buyer, acting in a manner contradictory to the buyer's direction, or possibly the failure to properly disclose and obtain consent regarding an immediate family relationship. If the buyer was estranged, the second broker's actions can create a second series of events resulting in procuring cause.

From "The Best of the Legal Hotline: Procuring Cause," in the May 2016 *Wisconsin Real Estate Magazine* at www.wra.org/WREM/May16/Hotline.

MORE INFORMATION

For more information about commission questions, watch the LegalTalks video, "The Real Estate Commissions Box" LegalTalks, at www.wra.org/LegalTalks/CommissionsBox.

Procuring cause

Procuring cause is not the universal standard of performance in all real estate transactions as licensees often assume. Procuring cause is the automatic standard in MLS transactions.

The issue of procuring cause comes down to one concept: who caused the sale of the property? Determination of procuring cause is a conclusion drawn from a full, knowledgeable consideration of all of the facts of the case. Procuring cause looks at the uninterrupted series of events that result in the sale of the property to the buyer. There are no black-and-white rules that determine entitlement to commission. Automatic procuring cause is not granted to the broker who drafts the offer or the broker who first shows the property, commonly called the threshold rule. There are no actions that in and of themselves preclude a firm from being procuring cause. For instance, the fact that no agency disclosure is given or signed, or that the broker did not inspect the property, does not necessarily mean the broker is not procuring cause. A case-by-case review of all facts and circumstances must be conducted to determine who is procuring cause.

From "Understanding Procuring Cause," in the December

2016 *Wisconsin Real Estate Magazine* at www.wra.org/WREM/Dec16/ProcuringCause.

Escalation or acceleration clauses, back-up or secondary offers

If a buyer is very interested in a property and knows the seller has been presented with other offers, can the buyer say they will pay more than any other offer?

Yes, negotiating price at an amount above another offered price is a legitimate negotiation strategy. The offer must state the price the buyer is willing to pay and that price will be determined by referencing the price from another offer. The equation used to determine price must be clear and unambiguous. Drafting issues to consider include: using only another bona fide offer to determine price, a maximum price that would be offered, requesting the seller provide copies of other offers directly to the buyer, and the time allowed for another offer to be used to set a price.

In the case where a seller has a primary offer and multiple secondary offers, does any secondary buyer have the right to be elevated before another?

No offer is first unless one of the secondary buyers has negotiated specifically to be elevated first. A buyer may, in additional provisions or in an addendum, modify the secondary offer provisions to require the seller to elevate that secondary offer into primary position if the primary offer fails. It is of utmost importance the seller does not unintentionally accept more than one modified offer as the seller cannot elevate more than one buyer into primary position at one time.

🗁 From "The Best of the Legal Hotline: Maneuvering in Markets with Multiple Buyers," in the July 2016 *Wisconsin Real Estate Magazine* at www.wra.org/WREM/July16/Hotline.

ⓘ MORE INFORMATION

For more information about the closing of the buyer's property contingency and secondary offers, watch the LegalTalks videos at www.wra.org/LegalTalks/BuyerContingency and for more information about price escalation clauses and multiple counter proposals, watch the LegalTalks videos at www.wra.org/LegalTalks/EscalationClause.

Short sales

The offer to purchase is an agreement between the buyer and seller. The lender has the power to agree to the short sale, but is not a party to the offer to purchase and cannot "reject" the buyer's offer. The seller may accept secondary offers when there is an accepted primary offer, whether the primary offer is subject to lender approval of the short sale or not. A short sale addendum should be used when a short sale is anticipated. A short sale offer may be drafted to either allow a buyer to withdraw at any time, at any time after a deadline or only for a certain period of time. When the WRA Addendum SSO is used in a transaction, there is an optional lock-in period for the buyer. A broker cannot put his or her interest in commission ahead of the duty to help the parties complete the transaction.

🗁 From "The Best of the Legal Hotline: Short Sale Refresher," in the September 2016 *Wisconsin Real Estate Magazine* at www.wra.org/WREM/Sept16/Hotline.

Damage after acceptance

Unless modified, the WB-11 provides in the Property Damage Between Acceptance and Closing section that if the damage is in an amount of not more than 5 percent of the selling price, then the seller is obligated to repair the property and restore it to the same condition that it was in on the day the offer was accepted. If the damage is more than 5 percent the seller must promptly notify the buyer in writing of the damage, and the buyer has the option to cancel the contract. If the buyer goes forward the buyer is entitled to the insurance proceeds. Since the damage is after acceptance, the seller has no duty to amend the RECR but may instead provide a notice to the buyer or the listing agent may disclose the damage as a material adverse fact. If the seller amends the RECR after acceptance, then a buyer may successfully argue the buyer's two-business-day right to rescind under Wis. Stat. § 709.05(3) has been resurrected.

🗁 From "What Is Your Damage, Seller? Damage after acceptance and effects of amending the RECR," in the September 2016 *Wisconsin Real Estate Magazine* at www.wra.org/WREM/Sept16/Damage.

Boundary lines

When a buyer asks where the boundary lines of the property are located, don't walk the line. Licensees should suggest the buyers engage the services of a surveyor and include a survey contingency in the offer to purchase. Licensees may also choose to qualify any representations. For instance, "the seller said the west boundary line of the property is the fence line. However, I am not a surveyor. So if the boundary location is important to you, I strongly encourage you to include a survey contingency in the offer to purchase." Under current law, a Wisconsin licensee can be found liable to a buyer for inaccurate statements made by the licensee that appear to the buyer to have been made from the licensee's own personal knowledge. REALTORS® are recommended to specifically attribute data used in advertisements, such as acreage, square footage and assessed values, to its source and/or use general disclaimers. Disclaimers may not, however, provide certain and absolute protection in all cases.

🗁 From "Y'all Can't Walk No Line: A reminder about refraining from explaining the boundary line location," in the January 2016 *Wisconsin Real Estate Magazine* at www.wra.org/WREM/Jan16/Line.

Best of the hotline 2015

Advertising another broker's listings: The agent must have consent to advertise listings from other brokers or firms per license law. If the information or photographs are obtained from the MLS, they may only be used with authority or consent per the MLS rules. The MLS rules provide that MLS property listing data may be distributed based upon the interest of prospective purchasers.

Inspections with "as-is" transactions: When purchasing an "as-is" property, it is very important for a buyer to learn as much as possible about the condition of the property. The inclusion of "as-is" does not preclude the buyer from conducting testing and inspections per the contract. Consequently, the buyer may include testing and inspection contingencies in the offer. Wis. Admin. Code § REEB 24.07 requires that licensees perform reasonably competent and diligent property inspections and disclose material adverse facts and information

suggesting the possibility of material adverse facts to the parties in writing. This requirement still applies and is not waived in "as-is" sales.

From "The Best of the Legal Hotline: Hotline Reprise 2015" in the January 2016 *Wisconsin Real Estate Magazine* at www.wra.org/WREM/Jan16/Hotline.

Advertising

In the ever-changing world of social media there is a lot to keep track of when it comes to advertising. This section reviews the use of drones, copyright, advertising ethics, promotions and prizes, and signs.

Drone regulations

Under the new rules, a pilot's license is no longer required to operate a drone for commercial use. Rather, an operator may have a pilot's license with the necessary training course or a remote pilot certificate. In addition, the drone itself must be registered with the Federal Aviation Administration (FAA). A drone can fly within a 400-foot radius of the structure as long as it does not fly any higher than 400 feet above the top of the structure. Drones are prohibited from flying over people not directly involved in the drone operation unless those people are located under a covered structure or in a stationary vehicle that would provide adequate protection in the case of an accident. Drones are allowed to fly only during daylight hours and are not to exceed 100 miles per hour. The new FAA rules are primarily focused on protecting the safety of the national airspace. As a result, the rules don't address privacy-related issues, traffic concerns or other related issues. However, state and local jurisdictions have their own separate laws that may impose additional restrictions on drone usage.

From "10 Things REALTORS® Should Know About the New Drone Regulations," in the August 2016 *Wisconsin Real Estate Magazine* at www.wra.org/WREM/Aug16/Drones.

Keeping online activities legal

Virtually every original work that is ultimately fixed in a tangible medium of expression is eligible for copyright protection, and in most cases, copyright protection is instantaneous upon fixation. Copyright vests in the author many rights, including:

- Making and distributing copies.
- Making derivative works.
- Making public performances and display.
- Licensing the use of the work by another.

Giving attribution to the author of the protected work does not relieve the person posting the material from liability for infringement. You may not be plagiarizing the work, but you are infringing on the copyright.

The Federal Trade Commission (FTC) regulates the use of testimonials and endorsements in advertising. The FTC guidelines on the use of testimonials and endorsements state: "Endorsements must be truthful and not misleading. If the advertiser doesn't have proof that the endorser's experience represents what consumers will achieve by using the product, the ad must clearly and conspicuously disclose the generally expected results in the depicted circumstances, and if there's a connection between the endorser and the marketer of the product that would affect how people evaluate the endorsement, it should be disclosed."

The concept of phishing is relatively simple: someone will "bait" us

with a message, an email or a friend request, and we — the target or the fish — will take the bait and open an attachment that contains malware or provide information that can be used to harm us. Pay attention to your passwords — this seems pretty basic, and it is. Avoid the obvious "Password123" or your name and birthdate combination and don't use the same password for multiple accounts. Install updates — this is also very basic but is often forgotten.

From "Being Smart While Being Social" in the November 2016 *Wisconsin Real Estate Magazine* at www.wra.org/WREM/Nov16/Social.

Social media, advertising and ethics

A REALTOR® must obtain the consent of the seller or the landlord prior to advertising a specific identifiable property per Standard of Practice (SOP) 12-4. Advertisements must include the firm's name, in a reasonable and readily apparent manner per SOP 12-5 and indicate a licensee's status as a real estate professional. Websites must indicate the state where the real estate license is held in a reasonable and readily apparent manner per SOP 12-9. Under SOP 12-5, these disclosures may be made available via a link to the required information.

If you post on a site that allows comments and participation, be mindful that although there is some case law to indicate that a blogger is not liable for information posted by a third party on their blog, NAR has taken a different approach. SOP 15-3 states: "The obligation to refrain from making false or misleading statements about competitors, competitors' businesses, and competitors' business practices includes the duty to

publish a clarification about or to remove statements made by others on electronic media the REALTOR® controls once the REALTOR® knows the statement is false or misleading." REALTORS® have a higher level of duty than a member of the public. If you operate a blog, you must delete false or misleading comments or publish clarifications about them as soon as you have determined they are false or misleading.

From "Social Media, Advertising and Ethics," in the December 2016 *Wisconsin Real Estate Magazine* at www.wra.org/WREM/Dec16/Advertising.

Ethical commissions

SOP 1-12 provides in part that the listing broker must advise the seller or landlord of the company policies regarding cooperation and the amount(s) of any compensation that will be offered to subagents or buyer's agents working with potential buyers or tenants. SOP 16-14 provides that REALTORS® are free to enter into contractual relationships or to negotiate with sellers, buyers or others who are not subject to an exclusive agreement but shall not knowingly obligate them to pay more than one commission except with their informed consent.

Article 3 of the Code of Ethics provides REALTORS® shall cooperate with other brokers, unless it is not in the client's best interest. The obligation to cooperate does not include the obligation to compensate. For REALTORS® who participate in the MLS, once the listing firm has made the MLS offer of cooperation and compensation, the cooperating broker may earn the MLS offer of compensation by becoming the procuring cause of the sale. SOP 16-16 provides, "REALTORS®, acting as subagents or buyer/tenant representatives or brokers, shall not use the terms of an offer to purchase/lease to attempt to modify the listing broker's offer of compensation to subagents or buyer/tenant representatives or brokers nor make the submission of an executed offer to purchase/lease contingent on the listing broker's agreement to modify the offer of compensation."

From "Commissions, Compensation and the Code of Ethics: Are You Complying?" in the December 2016 *Wisconsin Real Estate Magazine* at www.wra.org/WREM/Dec16/Commission.

Professional conduct

The articles and standards in the REALTOR® Code of Ethics have a significant impact on daily brokerage practice. For instance, an offer is written with the buyer asking the seller to pay the buyer's broker's fee is acceptable. Article 16 of the Code of Ethics and NAR Case Interpretation #16-17 indicate that a buyer's broker may ethically condition an offer upon the seller paying the buyer's broker's fee on behalf of the buyer as a seller's expense. This request for the seller to pay the buyer agency fee does not necessarily prevent REALTOR® arbitration. SOP 17-4(5) provides that (a) if a buyer's broker is compensated by the seller and not by the listing firm, (b) the listing firm consequently reduces the commission owed by the seller, and (c) the listing firm ends up claiming to be the procuring cause, then that is arbitrable. In such cases, arbitration would be between the listing firm and the buyer's broker, and the amount in dispute is limited to the amount by which the listing commission was reduced.

SOP 12-7 provides, "Only REALTORS® who participated in the transaction as a listing broker or cooperating broker (selling broker) may claim to have 'sold' the property." A broker who has changed firms should include language when advertising properties sold indicating that the properties included listings from when she was affiliated with another firm. It is best to use disclaimers to eliminate possibly confusing or misleading representations.

From "Lessons in Professionalism," in the December 2016 *Wisconsin Real Estate Magazine* at www.wra.org/WREM/Dec16/Ethics.

Promotions, prizes and premiums

Incentives may be offered to sellers or buyers to induce them to sell or purchase real estate or to work with a particular broker. Incentives can be offered in any amount as a gift certificate, cash or personal property such as a home warranty plan, a savings bond, an appliance or some other item. Such incentives must be clearly documented in advance — prior to closing. The party should have a clear and thorough understanding of the incentive's terms and conditions. This documentation in advance is necessary to establish that the incentive is not a fee-splitting arrangement with an unlicensed individual, which would be illegal under Wisconsin law.

An entry into a prize drawing for liking the broker's Facebook page raises the question of whether the drawing for a prize would be part of an illegal lottery under Wis. Stat. §§ 945.04(5) & 945.02. A contest is generally defined as a lottery if a participant must give consideration to enter and the award is determined by chance. "Consideration" is anything that would be a financial or commercial advantage to the promoter, such as the participant sending in a coupon or visiting the store, with some exceptions. When considering the action of liking the broker's Facebook page, this would appear to have a consideration component, more than just visiting a location. See the Department of Agriculture, Trade & Consumer Protection's Contests and Promotions Guide at datcp.wi.gov/Documents/ContestsAndPromotions119.pdf.

From "The Best of the Legal Hotline: Promotions, Prizes and Premiums" in the April 2016 *Wisconsin Real Estate Magazine* at www.wra.org/WREM/Apr16/Hotline.

Sign classification ordinances

In *Reed v. Town of Gilbert* the United States Supreme Court held that under the First Amendment, laws imposing different signage rules based on communicative content are presumptively unconstitutional and may be justified only if the government has narrowly tailored the law to serve compelling state interests. Should the local municipality consider modification of its sign ordinances in a way that prohibits real estate signage, there are legal principles at play that suggest that the outlawing of real estate signs is not legally permissible. Real estate signs create nondiscriminatory access to housing and are supportive of federal and state fair housing laws. While many may use electronic resources to locate properties, there are still many consumers who find homes through traditional means or who don't have regular access to online resources. Physical signs can engage these consumers no matter their social and economic status.

From "Saving the Real Estate Signs: Protecting real estate signs under local ordinances" in the January 2016 *Wisconsin Real Estate Magazine* at www.wra.org/WREM/Jan16/Signs.

Private Property Rights/Land Use

The private ownership of property is a fundamental right upon which the United States was founded. The right to use property is among the basic elements of property ownership known as "the bundle of rights," which includes the right to possess, control and dispose of

the property. While state and local governments have broad authority to restrict these rights, this authority is not unlimited. State and local regulations must be fair and reasonable, and they must be enacted in accordance with due process requirements such as fair notice and public hearings. This section looks at notice regarding zoning changes, right to alienate interests in property, downzoning, resolving ordinance ambiguity, development moratoria, an adverse possession counter measure, common ownership of lots and TIF success.

Direct notice to property owners regarding zoning changes

To better inform property owners about their right to receive notice of proposed zoning regulations, new legislation requires local governments, including counties, towns and cities, to remind property owners at least once each year that they have the right to receive notice when ordinances impacting their properties are proposed.

REALTOR® Practice Tip

Property owners should submit a written request to their local municipality to be placed on the zoning change notice list, following any instructions given on the municipality's website or in the communications used for the municipality's annual reminder to property owners. Property owners may also contact the local clerk's office to ask how to best make this request to be put on the list.

Right to alienate interest in property

The new Wis. Stat. § 700.28 prohibits a city, village, town or county from prohibiting or unreasonably restricting the ability of property owners to freely alienate any interest in their real property.

Supermajority vote to downzone property

The new Wis. Stat. § 66.10015(1)(as) defines a "down zoning ordinance" as a zoning ordinance that affects an area of land by decreasing the development density of the land so that it will be less dense than was allowed previously with the result that there will be fewer inhabitants and smaller or fewer structures. The new Wis. Stat. § 66.10015(3) limits down-zoning by requiring a two-thirds majority unless the change in zoning was requested by or agreed to by the property owner.

From the September 2016 *Legal Update*, "Private Property Rights/Land Use Legislation 2016," at www.wra.org/LU1609.

Downzoning and regulatory takings

The Wisconsin Supreme Court has agreed to hear the *McKee v. City of Fitchburg* case that will likely provide additional guidance for determining when a regulation goes "too far." After the parcels were purchased and a proposed specific implementation plan (SIP) for the multi-family development was submitted to the city for review, the city downzoned the property from 128 units to 28 units in response to concerns raised by neighbors about the density. The city subsequently rejected the proposed multi-family development on the basis of the new lower density requirement. The developer sued the city, arguing he had vested rights in the zoning that existed at the time the SIP was filed and that the city's subsequent downzoning constituted a regulatory taking.

The concept of vested rights recognizes that, at some point in time, it is unfair to change the subdivision regulations, zoning changes and other rules and regulations affecting a property owner's ability to use or develop his or her property. As to the regulatory takings issue, the court will decide whether the sole test for determining a regulatory taking is whether the owner has been deprived of all or nearly all economically productive use of the property. Wisconsin courts have not yet recognized the *Penn Central* test established by the U.S. Supreme Court. Under that test a court is required to consider a variety of factors in determining whether a taking occurred, including the regulation's economic effect on the property owner, the extent to which the regulation interferes with the reasonable investment-backed expectations, and the character of the government action.

From "When Do Regulations Go Too Far? Wisconsin Supreme Court to decide important private property rights case," in the September 2016 *Wisconsin Real Estate Magazine* at www.wra.org/WREM/Sept16/Taking.

Private property rights provisions

Ambiguities in local ordinances: As recognized by current case law, new legislation provides that any ambiguities in local ordinances should be resolved in favor of a property owner's free use of property. In other words, if there is confusion about how a local regulation affects the use of property, the tie goes to the property owner.

Development moratoria for counties: Because a moratorium on land development completely shuts down development for a specified period of time, it can have a devastating impact on jobs growth, economic growth and the tax base. New legislation clarifies that counties, as well as cities, villages and towns, cannot enact development moratoria.

From "Bundle of Rights: Legislature Considers Private Property Rights Bill" in the January 2016 *Wisconsin Real Estate Magazine* at www.wra.org/WREM/Jan16/PropertyRights.

Protecting property from adverse possession claims

Adverse possession is a legal theory whereby a person can obtain title to another's lands by occupying those lands for an extended time. This occupancy must be: (1) actual possession of the entire amount claimed; (2) sufficiently open and visible to the titleholder; (3) notorious – the activities and signs of possession are sufficiently conspicuous to let the titleholder know someone else is acting like the owner; (4) excluding all others; (5) continuous and uninterrupted; and (6) hostile in the sense that the adverse possessor claims exclusive rights and his or her possession prevents possession by the titleholder. The adverse possession must last for the time set in one of adverse possession statutes.

REALTOR® Practice Tip

Under Wis. Stat. § 893.25, adverse possession is established if the person claiming possession of the disputed parcel, along with his or her predecessors in interest, is in actual, continued occupation of the disputed parcel for a period of 20 years, and the disputed parcel is protected by a substantial enclosure or is usually cultivated or improved. Adverse possession need only be shown to a reasonable certainty.

Effective March 1, 2016, Wis. Stat. § 893.305 created an "Affidavit of Interruption" process for a property owner to use to interrupt someone

whom the owner believes is trying to adversely possess the owner's land. The process is intended to restart the clock for the person who may be trying to adversely possess the owner's property.

The process

The affidavit of interruption process involves four steps as outlined in Wis. Stat. § 893.305(2):

1. The owner of the property records with the register of deeds in the county where the owner's property is located an affidavit of interruption along with a survey of the owner's property that was certified no less than five years before the date of recording.
2. After the owner records the survey and affidavit of interruption, the owner then provides notice to the person they believe adversely possesses the land.
3. The property owner records proof that the notice was provided to the suspected adverse possessor with the register of deeds in the county where the property owner's land is located.
4. If the property owner knows or had reason to believe the person adversely possessing the land is a neighbor, then the notice must be recorded on the neighbor's abutting land within 90 days of the neighbor receiving the notice.

REALTOR® Practice Tip

To ensure that any an affidavit of interruption and the other documents are competently drafted and adequately address the statutory requirements, the affidavit of interruption process is best handled by an attorney.

While the newly created is Wis. Stat. § 893.305 is a new option for property owner's to interrupt someone's possible adverse possession of land, real estate licensees should not get involved in the process or the interpretation of what it means when an affidavit of interruption has been recorded for the property. Instead, real estate licensees should encourage the party to reach out to an attorney so they can understand what it means for the party's situation.

From the November 2016 *Legal Update*, "Protecting Property from Adverse Possession Claims," at www.wra.org/LU1611.

Adjacent lot litigation

The property rights and the value of adjacent parcels of property may be impacted by the United States Supreme Court in *Murr v. Wisconsin*. The court will decide whether adjacent lots in common ownership must be combined when determining whether government regulation has "gone too far," requiring payment of just compensation under the "takings" clause of the 5th Amendment. Under St. Croix County ordinances, any existing lot that doesn't meet the new minimum lot size requirements is considered "substandard," but is buildable while substandard lots adjacent to another lot under common ownership must be merged into a single, buildable lot that meets the minimum lot size requirements. The Murrs filed a lawsuit for a regulatory taking. The Wisconsin Court of Appeals and the circuit court ruled that no taking had occurred because the two parcels together continued to have an economically beneficial use: a house could be built upon the two lots combined. The Wisconsin Supreme Court elected to not hear the case. The United States Supreme Court will be hear the case and decide whether adjacent lots in common ownership must be combined in all cases for determining whether a regulation has denied all economically beneficial use of the property. In other words, the court will determine the definition and scope of "property" for purposes of the 5th Amendment.

From "When Is a Lot Not a Lot? The U.S. Supreme Court to decide Wisconsin property rights case," in the May 2016 *Wisconsin Real Estate Magazine* at www.wra.org/WREM/May16/AdjacentLots.

Wisconsin TIF success

Tax incremental financing (TIF) is a method of financing that generates tax revenue to be used toward funding infrastructure and development. The TIF process allows a municipality to pay for public improvements and other eligible costs within a designated area, called a tax incremental district (TID), using the future taxes collected on the TID's increased property value to repay the cost of the improvements. The rationale behind TIF is that public investment will promote private development, jobs and tax base growth that would not otherwise occur absent the TID. TIF has been an important economic development catalyst in Wisconsin, and is one of the only tools Wisconsin communities have to promote job growth and attract new businesses.

Myth: TIF is "corporate welfare" for developers.

Fact: TIF is used to fund public infrastructure and other project costs necessary to build capacity for private investment that otherwise would not have occurred. The vast majority of TIF spending goes toward constructing roads and water mains or demolishing abandoned buildings.

Myth: TIF is a tax break for businesses.

Fact: Property owners within a TID pay the same tax rate as everyone else; the only difference is that some of their taxes go toward paying TID project costs.

From "TIF: The Sharpest Economic Development Tool in the Shed," in the July 2016 *Wisconsin Real Estate Magazine* at www.wra.org/WREM/July16/TIF.

Shorelands/Waterfront Property

Wisconsin's waters are crucial to property owners, tourism, recreation participants and those who simply enjoy the natural beauty. There is never a shortage of new legislation and developments with regard to Wisconsin waters and the properties along the shoreline. This section looks at changes to water levels, boathouses, wetland mitigation, NR 115 shorelands standards, appealing variances, setbacks and the ordinary high water mark.

Changes to lake water levels

Two changes to provisions in Wis. Stat. Chap. 31 now require the DNR to consider the impact on businesses as well as economic values and property values prior to adjusting lake water levels controlled by a dam or when considering the abandonment of a dam, in accordance with the holding in the *Rock-Koshkonong Lake District* case.

MORE INFORMATION

For discussion of the *Rock-Koshkonong Lake District v. Department of Natural Resources* case, see "Boundary Lines: Wisconsin Supreme Court Re-establishes Bright Line Between Private and Public Rights," in the September 2013 *Wisconsin Real Estate Magazine* at www.wra.org/WREM/Sept13/PropertyRights and pages 6-7 of the September 2013 *Legal Update*, "Case Law Update 2013," at www.wra.org/LU1310.

Boathouses

The changes relative to boathouses restrict the ability of counties to prohibit property owners from using boathouse roofs as decks, and clarifies that boathouses do not need to be used continuously for the storage of watercraft.

Practicable alternatives analysis for wetland mitigation

Although Wisconsin's wetland mitigation program allowed for small disturbances to wetlands if new wetlands could be established on site or on nearby sites, or if credits could be purchased from area wetland mitigation banks, this generally was not a viable option. Property owners were regularly told by the DNR that a practicable alternative to disturbing the wetland existed even if such alternative required purchasing property elsewhere. The most recent amendments to Wis. Stat. § 281.36 limit the practicable alternatives analysis to alternatives located on the same site of the proposed project for activities related to the construction or expansion of a single-family home, construction or expansion of a barn or farm building, or expansion of a small business facility. Only smaller disturbances up to 2 acres in size are eligible for this limited practicable alternatives analysis. This change to the practicable alternatives analysis makes Wisconsin law consistent with federal standards set by the U.S. Army Corps of Engineers.

MORE INFORMATION

For further discussion of wetland mitigation, see "Reasonable Alternatives: Wisconsin Lawmakers Modify Wetland Regulations," in the March 2016 *Wisconsin Real Estate Magazine* at www.wra.org/WREM/Mar16/Wetlands.

From the September 2016 *Legal Update*, "Private Property Rights/Land Use Legislation 2016," at www.wra.org/LU1609.

NR 115 as uniform standards

The ability of the counties to regulate shorelands in a manner that was more restrictive than the standards in Wis. Admin. Code chapter NR 115 (NR 115) was ended by the enactment of Wis. Stat. § 59.692(1d). The new Wis. Stat. § 59.692(1d) serves to make shoreland development regulations more uniform throughout the state. In addition, many NR 115 standards have been codified such as impervious surfaces and vegetative buffer zones.

REALTOR® Practice Tip

This development is beneficial in creating uniform standards across the counties, but creates the challenge of determining whether a particular county shoreland zoning ordinance provision is more restrictive than NR 115 or addresses a topic outside of NR 115.

DNR not to appeal variance decisions

An amendment to Wis. Stat. § 59.692(4)(b), which regulates the zoning of shorelands on navigable waters, prohibits the DNR from appealing a decision by a county board of adjustment to grant or deny a variance. The DNR may not issue an opinion on whether or not a variance should be granted or denied without the request of the board of adjustment considering the issue.

75-foot setback and setback averaging

The new Wis. Stat. § 59.692(1n) codifies the basic standard that structures be set back at least 75 feet from the ordinary high water mark (OHWM) of lakes and streams. The statute also includes standards for averaging the distances that neighboring structures are set back from the OHWM for purposes of allowing a less restrictive setback requirement for a proposed structure. The "setback averaging" process and parameters for different scenarios are specified.

The statute codifies current DNR shoreland zoning standards in NR 115 that exempt certain boathouses, gazebos, fishing rafts, telecommunications and utility facilities, and walkways, stairways, and rail systems from the general 75-foot setback requirement. Wis. Stat. § 59.692(1k)(a)2m also prohibits the enactment of a county shoreland zoning ordinance that prohibits or regulates the maintenance, repair, replacement, restoration, rebuilding or remodeling of all or any part of one of these structures in the existing three-dimensional building envelope of the structure.

Ordinary high water mark (OHWM)

The OHWM is the point on the bank or shore of a navigable stream or lake up to which the presence and action of the surface water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation or other easily recognized characteristics. Shoreland zoning standards generally apply only to unincorporated land that is within 1,000 feet of the OHWM of a lake, pond or flowage; or within 300 feet of the OHWM of a river or stream. Counties also must establish shoreland setback areas: areas within a certain distance of the OHWM in which the construction or placement of structures is limited or prohibited.

Under the new Wis. Stat. § 59.692(1h), if a professional land surveyor, in measuring a 75-foot building setback from an OHWM of a navigable water, relies on a map, plat or survey that incorporates or approximates the OHWM, the setback measured is the setback with respect to a structure constructed on that property if the map, plat, or survey relied upon is prepared by a professional land surveyor and the DNR has not identified the OHWM on its Internet site at the time the setback is measured.

REALTOR® Practice Tip

Thus, property owners may rely upon a setback line from the OHWM established by a professional land surveyor for purposes of establishing the 75-foot building setback under the shoreland zoning regulations. They are not, however, allowed to establish the location of the OHWM or establish setbacks for other purposes.

From the October 2016 *Legal Update*, "Shoreland Zoning Update 2016," at www.wra.org/LU1610.

Office Issues

The issues in this section are often of concern to firms. They include trust accounts, wire fraud scams, E&O insurance for personal transactions, broadband coverage, license renewals, rule changes, licensees changing firms, fair housing policy and safety.

Trust accounts

The decision whether to have a real estate trust account or not begs the question of whether a broker is required to have a real estate trust account. The answer is a qualified "no." The first rule of trust accounts: if you receive real estate trust funds, you are required to open a trust account and deposit the funds.

Although the REEB-approved offers to purchase outline a procedure for the holding of earnest money by the listing broker, the selling broker or the seller, this is not law and may be modified in the offer. As long as the parties agree, and modify the offer to reflect this, the earnest money may be held in the title company's trust account, an attorney's account or an account opened by the parties themselves for that purpose. The parties will want an escrow agreement, but the broker cannot draft it for them.

From "So You Don't Want to Have a Trust Account?," in the February 2016 *Wisconsin Real Estate Magazine* at www.wra.org/WREM/Feb16/TrustAccounts.

Wire fraud scams

Typically the criminal hacks into the email account of a real estate agent or other person in the transaction and uses that information to dupe the buyer into a fraudulent wire transfer. The criminal hacker will monitor the real estate professional's email, look for transaction information and lie in wait for the best opportunity. Then the hacker will send a legitimate-looking email informing the buyer of a last-minute change to the wiring instructions, and the buyer dutifully sends the money off to the criminal.

NAR offers suggestions for preventing wire fraud:

1. Avoid sending sensitive financial information via email or use encrypted email.
2. Use up-to-date firewalls and anti-virus technologies.
3. Educate parties about the possibility of fraud and the brokerage communication practices.
4. The person wiring funds should contact the intended recipient immediately before sending funds to confirm the wiring instructions using independently authenticated contact information.
5. Avoid opening suspicious emails and unsolicited attachments.
6. Clean out email accounts on a regular basis.
7. Change usernames and passwords on a regular basis, and use complex passwords with a combination of letters, numbers and symbols.

From "Please Wire Me Your Money! Protecting brokers and clients from wire transfer scams," in the March 2016 *Wisconsin Real Estate Magazine* at www.wra.org/WREM/Mar16/Scam.

MORE INFORMATION

For more information about wire transfer fraud, watch the LegalTalks video at www.wra.org/LegalTalks/WireTransferFraud.

Errors and omission (E&O) insurance for personal transactions

While the state may not require Wisconsin real estate licensees to carry E&O insurance, many companies require such coverage as part of an agent's independent contractor agreement or office policy. Who pays is up to the agreement between the real estate firm and the agent. E&O policies generally won't cover an agent for fraud, criminal acts, discrimination or libel. Many E&O policies do not cover real estate licensees acting as a principal in the transaction. Agents who are selling or buying a property for themselves may have no idea that they are not covered by their E&O policy.

In addition the recent legislative change to the statute of limitations for litigation against a real estate firm and its agents reduced the time frame in most cases in which a firm and its agents may be sued after a transaction closes from six years to two years. Licensees selling or purchasing their own property are not providing brokerage services on behalf of their firm. Therefore, arguably the two-year limit does not apply to real estate licensees acting as principals in a transaction.

From "Are You Operating Without a Net? E&O implications of acting as a licensee/principal," in the July 2016 *Wisconsin Real Estate Magazine* at www.wra.org/WREM/July16/Net.

Broadband

Broadband is a wide bandwidth data transmission with an ability to simultaneously transport multiple signals and traffic types. More simply, broadband is high-speed Internet access that is always on and is often contrasted with the traditional and much slower dial-up access. Internet availability and speed are becoming more important factors for both homebuyers and businesses when choosing where to locate. In some markets, the lack of Internet availability and adequate speed is affecting home sales, property values and economic development opportunities. The availability and speed of broadband also has a direct impact on property values and economic development activity. Many rural areas in northern Wisconsin have little or no Internet service, while rural areas in south central Wisconsin generally have good Internet service. Because broadband is currently not available in many rural areas of Wisconsin, state lawmakers have made rural broadband coverage a top priority and have developed several initiatives to improve Internet connectivity for rural homeowners and businesses.

From "Got Broadband? Prospective buyers and businesses

in rural areas want to know," in the October 2016 *Wisconsin Real Estate Magazine* at www.wra.org/WREM/Oct16/Broadband.

License renewals

The new Wis. Stat. § 452.12(5)(d) requires that a person applying for renewal of a broker's or salesperson's license complete questions wherein the renewal applicant must state whether he or she has been convicted of a crime since he or she last renewed the license or, for the first renewal, since he or she initially applied for the license. If the answer is yes, the renewal applicant will be asked for the date of conviction and a description of the nature and circumstances of the crime. The applicant must sign his or her name to attest to the accuracy and truthfulness of the information provided and acknowledge that the DSPS has the authority to conduct an investigation into the applicant's criminal convictions, assess forfeitures up to $1,000 against an applicant who is not truthful, and revoke the license of a person who fails to pay such forfeitures. In addition, the REEB may impose discipline if the licensee was convicted of a felony. The REEB makes a case-by-case decision in accordance with Wis. Admin. Code § REEB 24.17

It is also necessary to renew any broker business entity license. Under Wis. Stat. § 452.12(5)(bm), if the firm or business entity license is not renewed, the firm cannot engage in the brokerage activities covered by the license until the license is renewed. Furthermore, the licensees associated with the firm may not provide brokerage services on behalf of the firm until the firm's license is renewed. Wis. Stat. § 452.132(2)(c) requires each firm to confirm that each agent associated with the firm has renewed his or her real estate license and is properly licensed. If not, a firm may not permit the person to engage in real estate practice until the license is renewed.

> **"Wis. Admin. Code § REEB 17.03(3) clarifies that a broker may be associated with only one firm unless the broker is engaging in independent practice or acting as a busines representative."**

From "Renew Your License Before Midnight December 14: Don't let your golden carriage turn into a pumpkin!" in the November 2016 *Wisconsin Real Estate Magazine* at www.wra.org/WREM/Nov16/Renewal.

Rule changes

The Real Estate Examining Board (REEB), which is part of the Department of Safety and Professional Services (DSPS), promulgates rules directly impacting the real estate profession. Specifically, the REEB promulgates Wis. Admin. Code chapters REEB 11, 12, 15, 16, 17, 18, 23, 24 and 25. Due to the changes to Wis. Stat. chapter 452, changes to these rules were made on an emergency rule basis to keep in step with the statutory changes. The emergency rules had an effective date of July 1, 2016, and therefore were applicable as of that date – the same date as the majority of the Wis. Stat. Chap. 452 changes. These rule changes will become permanent sometime in 2017.

For example, Wis. Admin. Code § REEB 15.04 permits the ability to retain documents electronically or digitally and establishes a two-year record retention period unless required by federal law such as the lead-based paint law, or unless there is an active or ongoing REEB investigation. The Wis. Admin. Code § § REEB 16.02(5) and 16.06(8) definitions of "use of form" were made consistent with Wis. Stat. § 452.40(1) and provide that forms are to be completed per the parties' instruction, rather than their intent. Wis. Admin. Code § REEB 17.03(3) clarifies that a broker may be associated with only one firm unless the broker is engaging in independent practice or acting as a business representative.

From "Everybody Wants to Rule the World: A reminder of the rule changes effective July 1, 2016," in the November 2016 *Wisconsin Real Estate Magazine* at www.wra.org/WREM/Nov16/Rule.

Licensees changing firms

If a license is leaving a firm, Form #766 Notice of Termination of Licensee Associated with Firm must be filed with the DSPS.

In order for a broker to pay an individual a commission or referral fee, that individual must have a current real estate license. The individual must be licensed when the contract is entered into, when the commission or referral fee is earned, and at the time of payment. The individual can still receive commission or a referral fee after terminating from a firm so long as the licensee renews his or her license, and the payment from the former firm is allowable under the independent contractor agreement.

An individual may create an LLC with the Wisconsin Department of Financial Institutions at www.wdfi.org. Once an entity is formed, for example an LLC, the entity may apply for a Real Estate Business Entity license with the Real Estate Examining Board at dsps.wi.gov/Licenses-Permits/RealEstateBusinessEntity/REBEforms, however, the REEB will only issue an entity license if there is an individual with a broker's license for the entity.

From "The Best of the Legal Hotline: Time to Transfer?" in the November 2016 *Wisconsin Real Estate Magazine* at www.wra.org/WREM/Nov16/Hotline.

Disparate impact and affirmatively furthering fair housing

Disparate-impact liability occurs when a housing policy or practice causes a discriminatory impact on a protected class under the federal Fair Housing Act when there is no legitimate, nondiscriminatory business need for the policy. The groups that receive this protection under the federal act are based on race, national origin, color, religion, sex, familial status or disability. While it has always been clear that intentional discrimination violates the law, it has been less clear when a policy that is neutral or nondiscriminatory on its face has the effect of adversely affecting a protected class. Some housing policies that seem neutral in theory can exclude or segregate particular protected groups in practice. In *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.,* the court in a 5-4 decision found that the Fair Housing Act not only prohibits intentional acts of discrimination, but also prohibits policies and practices that have a disparate impact and are otherwise not justified by a legitimate rationale.

Affirmatively Furthering Fair Housing (AFFH) is a legal requirement that recipients of federal housing funding and grants further the purposes of

the Fair Housing Act (FHA). The courts have found that the purpose of the AFFH mandate is to ensure that funding recipients do more than simply not discriminate: they must take action to address segregation and related barriers for groups with characteristics protected by the FHA, as often reflected in racially or ethnically concentrated areas of poverty.

From "Waging the War Against Discrimination," in the April 2016 *Wisconsin Real Estate Magazine* at www.wra.org/WREM/Apr16/Discrimination.

MORE INFORMATION

For a fair housing review test your knowledge with the 2016 Fair Housing Quiz in the April 2016 *Wisconsin Real Estate Magazine* at www.wra.org/WREM/Apr16/FHQuiz.

Safety key for licensees, sellers and online

Successful agents must keep themselves safe, keep sellers' properties secure and safeguard online information. For personal safety, meet a new person at the office. Introduce prospects to colleagues, ask them to fill out a new customer form, and make a photocopy of their identification. Confine showings to daylight hours. Always get there early, retrieve the key from the lockbox, scout around the property, and then unlock and open windows and doors as reasonably appropriate to create emergency exits. Play follow the leader and allow the prospect to enter the property first. Go to showings or host open houses with a buddy, such as a colleague, family member or man's best friend, as is appropriate. Also take a look at the various safety apps that are available.

Remind sellers that strangers will be walking through their homes so they should hide or secure any valuables, prescription drugs or family photographs. Protecting yourself and your customers and clients from hackers and online predators is essential: don't open up the details of your life in social media, don't open suspicious emails because they may be "phishing" for personal identification information, and avoid storing clients' personally identifiable information for longer than absolutely necessary.

From "Safe. Secure. Successful." in the September 2016 *Wisconsin Real Estate Magazine* at www.wra.org/WREM/Sept16/Safety.

Landlord Tenant

The changes that landlords must adapt to in 2016 include a new process for evictions based on criminal activity, five-day notices, landlord or rental property registrations, and HUD screening policy based on convictions and arrests.

Criminal and drug-related activity

Wis. Stat. § 704.17(3m) allows a property owner to terminate a tenancy without providing the tenant an opportunity to cure the breach, if a tenant, a member of the tenant's household or one of their guests engages in criminal activity that threatens: the health or safety or the right to peaceful enjoyment of the premises by other tenants; the health or safety or the right to peaceful enjoyment of persons residing in the immediate vicinity of the premises; or the health or safety of the landlord or an agent or employee of the landlord. This provision also allows for the termination based on drug-related criminal activity involving manufacture or distribution of a controlled substance, but not for possession or use of a controlled substance. It is not necessary that the person engaging in the criminal or the drug-related criminal conduct be arrested or convicted.

Evictions for criminal and drug-related criminal activity require five-day notices that include specific information describing the activity and the tenant's rights.

REALTOR® Practice Tip

Landlords should be careful that this notice is completed by stating facts without any subjective commentary or embellishment. The advice of an attorney is most beneficial.

A tenant who is the victim of criminal activity cannot be evicted under § 704.17(3m). Wis. Stat. § 704.44, which lists the "Deadly Sins," indicates that a residential rental agreement is void and unenforceable if it contains a provision that "allows the landlord to terminate a tenancy of a tenant based solely on the commission of a crime in or on the rental property if the tenant, or someone who lawfully resides with the tenant, is the victim, as defined in § 950.02(4), of that crime."

Finally, under Wis. Stat. § 704.17(5)(b), any provisions for termination based upon criminal activity in leases or rental agreements entered into or renewed on or after March 2, 2016, are invalid if they are contrary to the new § 704.17(3m), which applies only to criminal activities or drug-related criminal activities committed on or after March 2, 2016.

5-day notices for non-rent breaches in month-to-month tenancies

Wis. Stat. § 704.17(1)(b) has been substantially revised to give the landlord of a month-to-month tenant the choice of giving the tenant who has committed a breach a five-day notice to remedy the default or vacate, or a 14-day notice terminating the tenancy.

Rental property certification, registration and licensing

The new Wis. Stat. § 66.0104(2)(e) addresses rental property registrations; no city, village, town or county may enact or enforce an ordinance that requires that a rental property or rental unit be certified, registered or licensed, except that an ordinance may require that a rental unit be registered if the registration only requires the owner's name, the name of a contact person, and an address and telephone number at which the contact person may be reached. Ordinances requiring registration of landlords also are permissible when the registration only requires the name of the landlord and an authorized contact person along with an address and telephone number where the contact person may be reached.

From the February 2016 *Legal Update*, "Landlord/Tenant Legislation for 2016," at www.wra.org/LU16012.

HUD's tenant screening guidance

Based upon disparate impact theory, HUD's guidance document, "Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions," found at portal.hud.gov/hudportal/documents/huddoc?id=HUD_OGCGuidAppFHAStandCR.pdf, calls into

question any screening standards based on a past history of arrests or convictions. A landlord or property manager with a policy excluding tenant applicants because of one or more prior arrests — without any conviction — cannot show that such is necessary to achieve a substantial, legitimate, nondiscriminatory interest. Denying housing based on an arrest record is not legitimate because arrests alone are not proof of guilt.

A landlord with a blanket rejection policy of any person with any conviction record — no matter when the conviction occurred, the nature and severity of the conduct, or what the person has done since — will be unable to prove that such policy or practice is necessary to achieve a substantial, legitimate, nondiscriminatory interest. An individualized assessment of relevant mitigating information is likely to have a less-discriminatory effect than categorical exclusions. Relevant factors may include the circumstances of the criminal conduct, the person's age at that time, the person's tenant history and signs of rehabilitation.

From "HUD's New Take on Tenant Screening Standards: Coping with the new restrictions for criminal arrests and convictions," in the May 2016 *Wisconsin Real Estate Magazine* at www.wra.org/WREM/May16/HUD.

Landlord tenant resources

- Pages 7-9 of the February 2012 *Legal Update* at www.wra.org/LU1202.
- July 2012 *Legal Update*, "Landlord Practice Pointers for 2012," at www.wra.org/LU1207.
- November 2013 *Legal Update*, "Landlord/Tenant Legislation for 2014," at www.wra.org/LU1311.
- February 2014 *Legal Update*, "Implementing 2014 Landlord/Tenant Legislation," at www.wra.org/LU1402.
- More rental resources are found at www.wra.org/Rental.

Case law

Recent real estate-related decisions from the Wisconsin Supreme Court and the Wisconsin Court of Appeals affect brokerage practice. They cover a wide range of topics including the following:

Land use

- Juggling adverse possession and riparian rights claim regarding boathouse (*Michael Walton v. James Wilke*).
- Wind siting rules do not directly impact the development, construction, cost or availability of housing in Wisconsin so housing impact statement is not required (*Wisconsin Realtors Association et al. v. Public Service Commission of Wisconsin*).
- After-the-fact wetlands fill permit deviates from required process (*Bye v. Wisconsin Department of Natural Resources*).
- Dairy farmer's fertilization of fields with liquid cow manure contaminates well water (*Wilson Mutual Insurance Co. v. Falk*).
- Encroaching ramp and deck outside scope of easement (*Harry A. Joles Jr. v. Anthony M. Sciascia*).
- Conflict between lakefront zoning ordinances resolved in favor of free use of property (*Reinders v. City of Delafield*).

Landlord-tenant

- Commercial landlord cannot evict the tenant without first providing required notice of default (*Logan v. Schultz*).
- Local government must eliminate any provision that requires landlords communicate information that is not required under federal or state law (*Olson v. City of La Crosse*).

- Federal law preempts state law opportunity to remedy in eviction from federally subsidized apartment for smoking pot (*Milwaukee City Housing Authority v. Cobb*).
- Double damages and attorney fees for wrongful withholding of security deposit (*Ganta v. Peterson*).
- Validity of lease and return of security deposit (*Chastity Young v. Landstar Investments LLC*).
- Conflicting lease terms confuse lease expiration (*Yeimidy Lagunas v. Wisconsin O'Connor Corporation*).
- Whether statute of frauds exceptions require leases longer than one year to be in writing (*Darlene Susan Hosto v. John Rebhan and Paula Rebhan*).
- Consequences of tenant paying rent after expiration of a written lease and landlord's acceptance (*M. Blank Properties, LLC v. George Cole)*.

Transactional

- Invalidation of policy prohibiting new owner's use of condominium recreational area until prior foreclosed owner's assessments paid (*Walworth State Bank v. Abbey Springs Condominium Association, Inc.*).
- Failure to timely vacate and remove property results in loss of escrow funds (*Larry R. Murphy v. Brian Pierce*).
- Bank "as-is" and exculpatory clauses do not relieve liability when bank had knowledge of mold (*Fricano v. Bank of America*).
- Contract language affords party only one remedy (*Nancy Key v. William Ryan Homes, Inc.*).
- Right of first refusal holder when property is foreclosed (*James D. Woodburn, Jr. v. Rock Solid Ventures, LLC*).

Appraisal

- Appraisers exceed authority in insurance appraisal (*St. Croix Trading Company/Direct Logistics, LLC, v. Regent Insurance Company*).
- Appraiser credibility and use of market rate comps for section 42 property assessment (*Regency West Apartments LLC, v. City of Racine*).

🗁 From the January 2016 *Legal Update*, "Winter 2016 Case Law Update," at www.wra.org/LU1601; July 2016 *Legal Update*, "Case Law Update Summer 2016," at www.wra.org/LU1607; and the August 2016 *Legal Update*, "2016 Case Law Update: Part 2," at www.wra.org/LU1608.

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