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Legal Update

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Revised Agency Law Implementation

Wisconsin real estate agency law will be modified beginning July 1, 2006, to simplify the law and offer choices to consumers. These changes are described in an academic manner in the April 2006 edition of *Legal Update* entitled, "Chapter 452 Modernization Act." The real challenge with any change in the law rests in the actual implementation of the changes by practitioners in the field. This *Legal Update* details implementation procedures, anticipates questions and concerns that may arise, and provides guidance for REALTORS® as they incorporate the agency law changes into their daily real estate practice.

In the discussion that follows, there are a couple of principles to bear in mind. Obviously agency relationships are established with the broker/company, not an individual agent, and office policies are set by brokers/companies. A listing contract is a contract reflecting the relationship between the seller and the broker/company and the buyer agency agreement is a contract reflecting the relationship between the buyer and broker/company. It is the broker/company which is the party to these contracts, not the agent. With respect to subagency, as well, this is a relationship between the broker/company and the listing broker. However, the following discussion is primarily addressed to and speaks in terms of what an agent might do in a given situation because it is the agents who are out there on the front line. They are the ones who most often take

action with regard to consumers and they must be aware of how the revised agency law impacts their day-to-day practice. This discussion may also inspire brokers/companies to create office policies which address some of the challenges and concerns that may arise when the revised agency law is implemented.

In addition, REALTORS® are aware that customer relationships can include sellers, not just buyers, as when a buyer's agent works with a FSBO, but the following discussion will focus on situations where the buyer is a customer. The discussion assumes that it is on or after July 1, 2006, unless otherwise noted.

The *Update* begins with a discussion of procedures and issues relevant to an agent working with buyers in the pre-agency stage where providing information is the focus. Procedures for using the Broker Disclosure to Customers form and guidelines for working as the subagent of the listing broker are reviewed, followed by a discussion of procedures for using the Broker Disclosure to Clients form with new and existing clients. Each section also includes a breakdown of the duties an agent working in each stage or relationship owes to the parties to the transaction. The *Update* then moves to the multiple representation issues confronting agents working with clients, followed by an overview of the procedure for waiving negotiation duties in limited service listing contracts. A glossary of agency terminology is also included.

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Pre-Agency Interactions with Buyer Prospects

When an agent first meets prospective buyers and finds basic market and property listing information for them, the agent no longer has to worry about cornering the prospects and forcing them to immediately decide what type of agency relationship they prefer. Under the revised agency law, agents may provide information and certain brokerage services without first establishing an agency relationship.

When an agent first meets a buyer prospect and begins providing information about the local market and properties for sale, does the agent have to give the prospect the Broker Disclosure to Customers?

This is no longer necessary beginning July 1, 2006. The agent may give the prospect the Broker Disclosure to Customers form at this point if the prospect has already decided against buyer agency or if the agent does not wish to provide brokerage services as a buyer's agent. The agent may also provide the Broker Disclosure to Customers form at this point if that is the policy of the agent's broker/company. Otherwise, the agent may wait a bit longer – the deadline for providing the form is the start of negotiations.

What is the agent's role and duties when providing information to the buyer prospect before giving the prospect the Broker Disclosure to Customers?

The revised law recognizes an initial stage in the interactions between an agent and a consumer when it is not yet necessary to require the consumer to choose an agency relationship. During this "pre-agency" stage, the agent may supply information and may conduct showings as long as the showings do not involve negotiation. The

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

With the advent of this pre-agency concept, there no longer will be a presumption that the agent who calls to set up a showing is a subagent, as was the case before July 1, 2006. The agency relationship and the allegiance of the agent making that call may not yet have been determined. When the listing agent asks the agent whom he or she represents, that agent may reply, "I don't know," or "that has not yet been decided" if that agent is working in the information-providing pre-agency stage.

An agent in the pre-agency phase owes the person he or she is providing brokerage services to (the buyer) the duties owed to all persons in a transaction. An agent owes all parties the duty to:

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

An agent in the pre-agency phase may not give advice or opinions relating to the transaction contrary to the interests

of any other person in that current or prospective transaction. This protects the interests of the seller, so a seller should not be threatened by the fact that the agent providing the buyer with information is not yet in an agency relationship. An agent in the pre-agency stage remains objective and neutral.

Note that the ability to provide information and conduct showings during the pre-agency phase of an agent's interactions with consumers requires that the individual providing these brokerage services have a valid real estate license. The fact that a stage where the focus is the provision of information to consumers has been recognized does not eliminate the necessity of having a real estate license. Pre-agency phase services are still brokerage services. Therefore, this modification in the law does not impact the authority, for instance, of an unlicensed personal assistant – someone without a license may not provide brokerage services at any time, as was the case in the past.

Working with Buyers as Customers

The discussion in this section analyzes the issues and choices faced by an agent who starts out working with a buyer prospect in the pre-agency phase and who later negotiates for the buyer as a selling or cooperating broker or, in other words, the subagent of the listing broker. The primary concerns for an agent in this situation are recognizing when he or she shifts from the “providing information” stage and enters the negotiation stage, and ensuring that the Broker Disclosure to Customers is given to buyers who do not choose buyer agency before negotiations begin. Agents working with these buyers do not have to concern themselves with multiple representation issues because

designated agency and multiple representation without designated agency arise only in client relationships.

When does a buyer have to decide whether he or she wants buyer agency or subagency?

A buyer and the agent must establish an agency relationship prior to beginning negotiations. A buyer may choose buyer agency or subagency. If the buyer wants a buyer's agent, then the agent will present the Broker Disclosure to Clients and the WB-36 buyer agency agreement to this prospect and have the buyer execute those documents to establish the buyer agency relationship. The agent may then negotiate on behalf of that buyer as a client. If the buyer prefers subagency, then the agent will present the Broker Disclosure to Customers to the buyer. Once this disclosure has been given, the agent will thereafter practice subagency and work as the agent of the listing broker.

When do negotiations begin?

Negotiations occur when an agent works on developing proposals for the other party's consideration or works on reaching an agreement between the parties.

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

Negotiations occur when the agent acts as intermediary or facilitator between two parties, when there is a back and forth, give-and-take discus-

sion about a proposal or about contract terms. If the agent is preparing an offer to purchase, that clearly constitutes negotiations.

For example, when a buyer asks how long the property has been on the market or about the age of the roof and the agent answers the inquiry, that is not negotiation. That is providing information. However, when the conversation turns to strategy or contract terms, for example, “Will the seller accept a lower offer since they have been trying to sell it for so long?” or, “Can I ask for a new roof if I make an offer?” then the buyer and the agent are entering the world of negotiation. The buyer and the agent are discussing potential strategy and beginning to develop a proposal.

Wis. Stat § 452.01(5m) defines “negotiate” to mean to assist a party – within the scope of the knowledge, skills, and training required under license law – in developing a proposal or agreement relating to a transaction.

Negotiation includes:

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

What is the procedure for giving the Broker Disclosure to Customers to a prospect?

The procedure for giving a customer the Broker Disclosure to Customers is basically the same as the procedure REALTORS® use for giving the Disclosure of Real Estate Agency to customers in transactions before July 1, 2006. The biggest difference is timing – the form need not be given right off the bat when the agent and the person first meet. Rather, the Broker Disclosure to Customers must be given before negotiation begins.

The Broker Disclosure to Customers is used when the agent's broker will be the subagent of the listing broker and will work as the selling or cooperating broker. The Broker Disclosure to Customers is also used if the listing agent or another agent of the listing broker is going to work with the buyer or when the buyer's agent or another agent of the buyer's broker is going to work with the seller. The Broker Disclosure to Customers form should be given to all persons who will receive brokerage services from the agent or the agent's broker and who are not the client of the principal broker.

The Broker Disclosure to Customers is very similar to the Disclosure of Real Estate Agency forms that REALTORS® use pre-July 1, 2006. Both include:

- ◆ A recitation of the duties owed to the customer
- ◆ A confidentiality notice and blank lines where the customer may list confidential information and information that might otherwise have been confidential that the customer is authorizing the agent to disclose (e.g., buyer's financial qualification information)
- ◆ Definitions of adverse fact and material adverse fact

- ◆ A notice informing the customer how to contact the sex offender registry
- ◆ Indication of who the agent and the agent's broker/company are working for
- ◆ Lines for the customer to initial to indicate receipt of the disclosure form

Items that are different in the Broker Disclosure to Customers include:

- ◆ The duties owed to a client are not listed
- ◆ There is a line where the customer may list home and cell telephone numbers and thus give consent to telephone solicitation calls
- ◆ The language used is a bit easier to understand ("plain English")

When asking a customer to sign the Broker Disclosure to Customers, the agent should have already described the choices the person has with respect to agency relationships. The agent should review the Broker Disclosure to Customers with the person and allow the person to read it. Important points to cover include the disclosure of materials adverse facts and confidential information. It may also prove helpful to obtain home and cell phone numbers that may be used in the transaction.

§ RL 24.07(8)(a)1 provides that, "prior to providing brokerage services to a party, each licensee shall provide a copy of the agency disclosure form required under s. 452.135, Stats. If the services are for the sale of real estate used or intended to be used principally for one- to four-family residential purposes, the licensee shall, at the time the disclosure is provided, request the party to acknowledge in writing the receipt of a copy of the disclosure form." Accordingly, an agent in a residential transaction, including vacant land transactions where the

land is to be used for one- to four-family residential purposes, must ask the party to sign or initial the Broker Disclosure to Customers form, just as with the Disclosure of Real Estate Agency form before. If a person refuses to initial the form, an agent may note the refusal in the agent's file, preferably on a copy of the Broker Disclosure to Customers form that includes the date and names.

In other words, the procedure for giving a customer an agency disclosure form after July 1, 2006, remains largely unchanged from before.

What is the procedure for giving the Broker Disclosure to Non-Residential Customers to a prospect?

The procedure differs only slightly from the procedure for giving the Broker Disclosure to Customers. The primary difference between the Broker Disclosure to Non-Residential Customers and the Broker Disclosure to Customers is that there are no lines requesting that the customer sign or initial the form to acknowledge that the customer has received it. Because there are no signatures or initials, there also is no provision for a consent to telephone solicitation because a consent to call under the FCC telephone solicitation law requires a signature to be valid.

Because there are no initials or signatures confirming receipt, the agent should note in his or her files when, where and to whom the Broker Disclosure to Non-Residential Customers was given. The Broker Disclosure to Non-Residential Customers is similar to the Disclosure of Real Estate agency – C, the form used in commercial transactions pre-July 1, 2006.

What is the agent's role and duties after the buyer has been given the Broker Disclosure to Customers?

If the buyer has decided against buyer

Glossary

- ▶ **Client:** a party to a transaction who has an agency agreement with a broker (listing contract or buyer agency agreement).
- ▶ **Customer:** a party to a transaction who is provided brokerage services by a broker but who is not a client.
- ▶ **Party:** a person seeking to engage in a real estate transaction.
- ▶ **Principal Broker:** a broker who engages a subagent to provide brokerage services in a transaction.
- ▶ **Subagency:** when a broker is engaged by another broker to provide brokerage services in a transaction, but is not the other broker's employee. For example, a cooperating broker works for a listing broker in attempting to find a buyer and sell the property.
- ▶ **Pre-Agency:** the initial interactions between an agent and a consumer when information is provided and preliminary brokerage services are provided to a consumer who has not yet decided whether he or she will be a customer or a client. The agent owes the consumer the duties owed to all persons and may not provide advice or opinions contrary to the interests of any other party.
- ▶ **Multiple Representation:** a relationship where the same broker/company has a listing contract with the seller and a buyer agency agreement with the buyer and both the buyer and the seller are involved in the same transaction.
- ▶ **Multiple Representation without Designated Agency:** the form of multiple representation where, with the consent of each client involved in the transaction, the broker/company provides brokerage services to each party and gives information and advice, but the broker/company and the broker's/company's agents cannot place the interests of one client ahead of the other during the negotiation of the transaction.
- ▶ **Designated Agency:** a multiple representation relationship in which each client of the broker/company receives negotiation services from agents of the broker/company who are not providing negotiation services to any other client of the broker/company in the transaction. With the consent of each client involved in the transaction, one or more of the broker's/company's agents are designated to provide full service, information, opinions and advice to the seller-client and other agents from the broker/company are designated to give information, opinions and advice to the buyer-client, all in the same transaction.
- ▶ **Negotiation:** to assist a party within the scope of the knowledge, skills, and training required under Wisconsin license law to develop a proposal or agreement relating to a transaction, including any of the following:
 - (a) Acting as an intermediary and facilitating or participating in communications between parties related to the parties' interests in a transaction. In this paragraph, providing advice or opinions on matters that are material to the person's transaction or showing a property does not, in and of itself, constitute acting as an intermediary or facilitating or participating in communications between parties.
 - (b) Completing, when requested by a party, appropriate Department of Regulation and Licensing (DRL) approved forms or other writings to document the party's proposal consistent with the party's intent.
 - (c) Presenting to a party the proposals of other parties to the transaction and giving the party a general explanation of the provisions of the proposal.
- ▶ **Person:** natural persons, corporations, partnerships, associations, governmental agencies and entities, and other legal entities.
- ▶ **Transaction:** the sale, exchange, purchase or rental of, or the granting or acceptance of an option to sell, exchange, purchase or rent, an interest in real estate, a business or a business opportunity.

agency then the agent's broker/company will be the selling or cooperating broker. This is a subagency relationship and the agent's broker is the subagent of the listing broker, but NOT THE SUBAGENT OF THE SELLER. Generally it is the listing broker (the principal broker) who is offering

cooperation and compensation, so this only makes sense. The cooperating agent has never seen the listing contract or met the seller so it makes no sense to have this agent treat the seller like a client.

A subagent owes the customer he or she is providing brokerage services to

(the buyer) the duties owed to all persons in a transaction. An agent owes all parties the duty to:

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

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

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

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

Working with the Buyer or Seller as a Client

This section looks at the basics of the revised agency law with respect to providing the proper agency disclosure language to a client at the proper time.

When does an agent have to start using the new broker disclosure forms?

The new broker disclosure forms are required for all new agency relationships created on or after July 1, 2006. If an agent takes a new listing, signs a new buyer agency agreement or begins working as the subagent of the listing broker beginning in July, the new agency disclosure forms – or the broker disclosure forms, as they are now called – must be used. These new

broker disclosure forms contain the new mandatory language explaining agency relationships, including multiple representation relationships such as multiple representation without designated agency and designated agency.

How should the Broker Disclosure to Clients be used when a seller enters into a new listing contract or a buyer enters into a new buyer agency agreement on or after July 1, 2006?

Wisconsin real estate licensees have grown accustomed to having the required agency disclosure language for clients included in the agency agreement – the listing contract or the buyer agency agreement – so the procedure that needs to be used at first may seem a bit strange to agents and brokers/companies. Starting July 1, 2006, and until the time that the DRL creates revised listing contracts and buyer agency agreements that include the new mandatory agency disclosure language for clients, Wisconsin REALTORS® should follow a two-step process: (1) have the WRA's Broker Disclosure to Clients form signed and (2) then execute the agency agreement.

(1) The WRA's Broker Disclosure to Clients form in many respects resembles the agency disclosure forms that REALTORS® have been using with customers over the years and the language used is similar to the agency disclosure language that appears in the existing DRL-approved agency agreements. But the primary difference is significant: the agency disclosure language in the present DRL-approved listing contracts and buyer agency agreement forms will become obsolete and inaccurate as of July 1, 2006. The Broker Disclosure to Clients thus should be used in conjunction with all agency agreements as the temporary measure that will ensure that all consumers receive current information about agency relationships.

The agent at this juncture is working with a person who intends to embark upon a client relationship. The first page of the WRA Broker Disclosure to Clients contains information helpful to the agent explaining client relationships: the duties the agent and the agent's broker owe to all parties and the duties the agent's broker and the agent owe to a client. This is followed by an explanation of material adverse facts and an explanation of multiple representation relationships. This portion of the mandatory language highlights the three choices that the client has with respect to agency relationships and, on the top of the second page of the form, instructs the client to select only one of three relationships: multiple representation with designated agency, multiple representation without designated agency or no multiple representation. The client is advised that the consent to multiple representation without designated agency or designated agency may be withdrawn at any time upon written notice to the broker. The mandatory language also includes an explanation of subagency. The WRA Broker Disclosure to Clients form follows this with a confidentiality notice to clients. The WRA form concludes with a consent to telephone solicitation and blank lines for client signatures acknowledging receipt of the form.

When asking a potential client to sign the Broker Disclosure to Clients, the agent should have described the choices the person has with respect to agency and multiple representation relationships. The agent should review the Broker Disclosure to Clients with the person and allow the person to read it. Important points to cover include the disclosure of materials adverse facts and confidential information.

The most crucial portions, of course, are the sections explaining multiple representation and subagency and the client's selection of a multiple repre-

sensation model. The agent should be familiar with these explanations and stand ready to answer any questions so that the client may make an informed decision and execute the form.

(2) Once the Broker Disclosure to Clients has been signed, the agency agreement (listing contract or buyer agency agreement) may be executed. Since the client has already been made aware of the revised law and because portions of the agency agreements will be obsolete and will incorrectly describe the law as of July 1, 2006, it may be helpful to line out sections that are no longer applicable. Provisions pertaining to agency disclosure and multiple representation in the pre-July 1, 2006 agency agreements will not be accurate and are appropriate to line out.

For example, lines 174-219 of the WB-1 Residential Listing Contract discuss agency relationships, but the discussion will no longer be proper once July 1, 2006 arrives. In the WB-36 Buyer Agency Agreement, lines 47-52, 57-83 and 103-113 become inaccurate starting July 1, 2006 and might be lined out. Rather than lining out each of these smaller sections in the WB-36, it may be simpler to line out lines 47-113. This includes some information regarding confidentiality that is not inaccurate, but may be lined out because it is also included in the Broker Disclosure to Clients form.

Should the Broker Disclosure to Clients be used when a seller already has a listing contract or a buyer already has a buyer agency agreement in place as of July 1?

The new broker disclosure forms may also be used if an existing client would like to change the type of client relationship authorized with regard to multiple representation. Such a client already has a listing contract or a buyer agency agreement, but would like to change his or her selection with

regard to multiple representation without designated agency and multiple representation with designated agency.

The client can decide on or after July 1, 2006 to sign the paperwork to change the multiple representation authorization from that point forward. An agent also might point out to clients that it might be advantageous to execute documentation before July 1, 2006, that will change the multiple representation authorization beginning immediately on July 1. The best way to document any change in the multiple representation authorization in these situations is with an amendment to the agency agreement with a copy of the Broker Disclosure to Clients attached.

Example # 1: On July 10, 2006, the seller decides that he would like to change the consent to multiple representation that he made when the listing contract was signed in April and would like, instead, to consent to designated agency.

- a. The listing agent can review the descriptions of agency relationships on the Broker Disclosure to Clients form with the seller and then the seller can initial to choose designated agency on the second page and sign and date the form.
- b. Next the listing agent can complete a WB-42 Amendment to Listing Contract. The "Other" item at line 12 may be checked and the agent may then indicate on lines 12-25 that the attached Broker Disclosure to Clients dated July 10, 2006, is made a part of the listing contract, and that the agency disclosure provisions on lines 174-219 of the WB-1 are deleted.

Example # 2: On May 31, 2006, a broker/company decides that it might be a good idea to send a copy of the Broker Disclosure to Clients form and some additional material explaining

the agency law revisions to each client with an existing listing contract or buyer agency agreement. The broker/company thinks it will be beneficial to have as many of their clients as possible consider designated agency and have the opportunity to change their authorization if so desired. The broker's/company's cover letter invites the client to review the enclosed materials and indicates that the agent they have been working with will contact them to answer any questions and see if they would like to make a change in the type of multiple representation service they receive. If a client wants to go ahead and change his or her prior selection, the agent can arrange a meeting with the client.

- a. The agent can review the descriptions of multiple representation relationships on the Broker Disclosure to Clients form with the client. The client then can initial to make his or her multiple representation choice on the second page and sign and date the form.
- b. Then the agent can complete an amendment to the client's agency agreement. The "Other" item may be checked and the agent may then indicate that effective on July 1, 2006, the attached Broker Disclosure to Clients is made a part of the agency contract, and the agency disclosure and consent to multiple representation provisions in the existing contract are deleted (refer to and delete using appropriate line numbers).

Does the Broker Disclosure to Clients form have to be used just with sellers and buyers or does it apply to property managers and landlords?

The Broker Disclosure to Clients, and the Broker Disclosure to Customers, for that matter, apply with respect to any situation where agency relationships are established and brokerage

services are provided. Although this *Update* focuses on sale transactions, the same principles and procedures hold true for rental situations. The Broker Disclosure to Clients, for example, needs to be used with WB-37 lease listings and with property management agreements, and with the WB-36 when used for a tenant representation, until these contracts are updated to include the new mandatory agency disclosure and multiple representation language.

What are the agent's duties when representing a client?

An agent representing a client owes the client the duties owed to all persons in a transaction. An agent owes all parties the duty to:

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

The agent representing a client also owes the client other duties owed just to clients.

- ☛ Duty of loyalty. The agent must be loyal to the client. This means that the agent:
 - Must place the client's interests ahead of the agent's interests and the interests of the other parties to the transaction.
 - Cannot disclose information or give advice to the other parties

in the transaction that is contrary to the client's interests, unless otherwise required by law.

There are other client duties an agent owes to a client in addition to the duty of loyalty:

- ☛ Information and advice. The agent must also give the client, upon request, information and advice on matters that are material to the transaction and that are within the scope of a real estate licensee's knowledge, skills and training.
- ☛ Material information. The agent must also disclose to the client all information known to the agent that is material to the transaction and not known by the client or discoverable by reasonably vigilant observation. This duty to disclose material facts, however, does not permit an agent to disclose other parties' confidential information or information that cannot otherwise be disclosed under law.
- ☛ Agency agreement. An agent's duties to a client also include the duty to fulfill the agent's obligations stated in the agency agreement and to honor any order of the client that is within the scope of the agency agreement, provided that the obligation or order is not inconsistent with any other duty.
- ☛ Negotiation. An agent has the duty to negotiate on behalf of the client, however, this duty may be waived.

Will agents have to use the Broker Disclosure to Clients with all agency agreements in the future?

The Broker Disclosure to Clients form will need to be used until the DRL-approved listing contracts and buyer agency agreement are revised to incorporate the new mandatory agency disclosure language required by Wis. Stat. § 452.135. The agency disclosure language in the existing listing

contracts and buyer agency agreement will become obsolete on July 1, 2006. Thus, the Broker Disclosure to Clients is largely an interim measure that will eventually fall into disuse.

Client Agency Relationship Selections

Agents working with clients, that is, sellers with listing contracts and buyers with buyer agency agreements, must be aware of the multiple representation relationship choices available to these parties. These agents must be prepared to explain the differences and answer questions that parties might ask regarding multiple representation concerns.

Designated Agency

Multiple representation with designated agency is a form of multiple representation. Multiple representation is a relationship in which two or more of a company's clients are parties in the same transaction. What makes a multiple representation relationship a designated agency relationship rather than a multiple representation without designated agency is that each client in the transaction receives negotiation services from different salespeople of the broker – a different agent negotiates just for him or her in any given transaction.

Designated agency applies only to clients and not to customers. Multiple representation with designated agency is a basic concept whereby the listing agent and the buyer's agent provide the same services that they ordinarily would. The only difference is that the listing agent and the buyer's agent both work for the same broker/company instead of each working for a different broker/company. In other words the broker/company of the listing agent and the broker/company of the buyer's agent are one and the same.

Multiple Representation without Designated Agency

Multiple representation without designated agency exists when one broker/company represents both the seller and the buyer, as clients, in one transaction. For example, if a seller lists his or her property with an agent from a broker/office and a buyer working with a buyer's agent who is also from the same broker/office wants to buy that listed property, that broker/office is a dual agent. Multiple representation does not occur when the buyer's agent comes from a broker/company different from the listing company.

How does an agent explain the difference between designated agency, multiple representation without designated agency and no multiple representation to a client?

When a client selects a multiple representation relationship, that client is contemplating a possible situation where the seller has a listing contract and the buyer has a buyer agency agreement, both with the same broker/company. If seller-clients and buyer-clients do not consent to multiple representation, this may impact the number of prospective buyers or available properties.

When clients do not consent to multiple representation, the broker/company may provide brokerage services to only one client in a transaction. If a seller does not consent to multiple representation, that generally means that all buyers who have a buyer agency agreement with the same broker/company where the property is listed will not be able to buy that seller's property unless they amend the buyer agency agreement to exclude that property and have "their" agent work as an agent of the seller, or unless they terminate the WB-36 and work with another broker/company or an attorney. If a buyer-client does

not consent to multiple representation, the buyer typically will not be able to buy any properties listed by the same broker/company unless they make one of those same adjustments.

Multiple representation comes in two forms: with or without designated agency. A broker/company may not provide brokerage services in either multiple representation relationship without the written consent of the broker's/company's clients who are parties to the transaction.

In multiple representation without designated agency, the broker/company and its agents may provide brokerage services to each client, but when it comes time to negotiate, they must remain neutral and cannot provide any advice or opinions that place the interests of one client ahead of the other. With designated agency, one or more agents represent the seller and one or more other agents represent the buyer and these agents provide full negotiation services to the clients. These designated agents may give the respective clients advice, opinions and strategies intended to further the interests of the client they are working with, but must maintain all confidentiality duties.

It may be helpful when explaining these concepts to consumers to use an analogy. A sports analogy such as a boxing match or a tennis match may be useful. Imagine, for example, a tennis match at Wimbledon. In a multiple representation without designated agency relationship, the broker/company is like the chair umpire and the broker's/company's agents are like the line officials. The tennis players are the parties and the tennis ball is the offer. The officials help the players make sure that they follow the rules and stay in bounds with the offer and the broker/company sits in the chair at mid-court and oversees the others, making the decision when there is a tough call. The chair umpire and line

judges provide assistance but they must remain neutral.

When designated agency is used, the roles change. The broker/company is still the chair umpire, but the broker's/company's designated agents become the tennis players. They volley back and forth trying to negotiate the best contract legally possible for each respective party.

What should an agent do if his buyer-client rejected all multiple representation relationships and now wants to see a property listed by the agent's broker/company?

The buyer may have a few options. The buyer could choose to change the selection he or she made with respect to multiple representation relationships and authorize designated agency or multiple representation without designated agency. The agent can simply give the client another Broker Disclosure to Clients form and allow the client to complete it, making sure that the client signs and dates the form.

The buyer may choose to amend the WB-36 buyer agency agreement to exclude the property. The agent would use a WB-47 Amendment to Buyer Agency Contract to exclude the listed property per lines 11-12 of the WB-36. The agent could then work as an agent of the seller and the buyer would be a customer with regard to the listed property. The agent should give the buyer a Broker Disclosure to Customers before beginning negotiations with regard to that property. The agent may be wise to note on the Broker Disclosure to Customers that it pertains only to the specific property. This choice involves a fair amount of paperwork and may be very confusing to the buyer and others.

The agent may politely explain to the buyer that the agent cannot show that property because the agent's company

represents the seller and cannot concurrently provide brokerage services to the buyer-client without an authorization to provide brokerage services in a multiple representation relationship. At that point, the buyer may agree to look for other properties, but the buyer might also decide to work with an attorney or another broker/company.

How does a broker/company keep track of which clients have consented to designated agency, consented to multiple representation without designated agency or rejected multiple representation?

This would seem to be a task for a broker's/company's computer consultant. If a broker assumes that most clients will consent to designated agency because the client still enjoys full-service negotiation assistance without constricting the pool of potential buyers or sellers, it may be easiest to keep track of those agency relationships that are not designated agency.

Once a system for keeping track of client multiple representation choices is established, the broker/company will need procedures whereby the system is checked each time an agent is looking for properties to show the buyer and any time a listing agent is looking for buyers "within the walls" of the broker/company.

The broker/company will also need to develop policies for determining what happens if there is not a match, for example, if the buyer's agent has found a perfect property and the seller has consented to designated agency but the buyer has only consented to multiple representation without designated agency or has rejected multiple representation. Does the buyer's agent not make the buyer aware of this listing; point it out and indicate designated agency is required to see

this property; or tell the buyer he or she can see this property but will have to make it an exception to the buyer agency agreement and have the agent work as a seller's agent with respect to this property, etc. There are a variety of steps that might be taken at this juncture. The broker/company is well advised to map out a plan for agents to follow or there may be rampant confusion and indecision among agents that will not contribute to efficiently selling properties.

Does every broker/company have to offer designated agency and multiple representation without designated agency?

No, each broker/company may set its own policies as to what varieties of representation will be made available to clients. Some brokers/companies may not be able to provide brokerage services in a multiple representation relationship if the company is very small and others may choose not to engage in multiple representation as a policy decision. In the past, not every broker/company provided brokerage services in a multiple representation relationship, and the situation will be no different on July 1, 2006. Brokers/companies are free to continue working with clients and customers in the same agency relationships they used before. Nothing is lost with the agency law revisions. Instead, additional options for agency relationships are available to those brokers/companies which choose to use them.

This does not mean, however, that the agents in those companies that do not practice multiple representation do not still have to use the Broker Disclosure to Clients form. They will still need to review the disclosure forms and obtain the signatures of their clients who will be made aware of the other options presumably offered by other companies. This may create a competitive disadvantage,

depending upon the policies and practices of other brokers/companies in the market area. The clients of such brokers/companies will execute the Broker Disclosure to Clients form to indicate that they reject multiple representation relationships.

Does a client's choice with regard to multiple representation affect the commission or fees the client might pay?

There could be an effect, depending upon the particular broker's/company's policy for offsetting commissions in multiple representation situations. The agency law revisions don't, however, impact how brokers/companies structure their commissions, nor did the pre-July 1 law regarding multiple representation impact commission structure.

Assume that the broker/company has a listing contract with the seller that provides for a commission of \$6,000 and the broker/company also has a buyer agency agreement with buyer B that calls for a buyer agency fee of \$2,800. Also assume that both the seller and the buyer consented to designated agency when they executed their respective agency agreements.

Example # 1: If the property were sold to buyer X, who is working with a completely different broker/company, this would be a co-broke situation. The listing broker would collect the \$6,000 from the seller and normally a portion of that would be paid to the cooperating broker.

- a. If the cooperating broker were a subagent, the listing broker would pay the cooperating broker commission pursuant to the MLS offer of compensation, assuming that broker was procuring cause. If this was not an MLS transaction, the listing broker would pay the cooperating broker commission based upon whatever compensation

agreement the two brokers/companies had made.

- b. If the cooperating broker were a buyer's broker, the listing broker would pay the buyer's broker commission pursuant to the MLS offer of compensation, assuming the buyer's broker was procuring cause. If this were not an MLS transaction, the listing broker would pay the buyer's broker commission based upon whatever compensation agreement the two brokers/companies had made. If the commission paid by the listing broker covers the fee due in buyer X's buyer agency agreement, buyer X typically need not pay any additional fees to the buyer's broker.
- c. The fact that the seller consented to designated agency has no bearing in this example because buyer X is working with a different broker/company.

Example # 2: If the property were sold to buyer B, designated agency would be in play. The listing broker would collect the \$6,000 from the seller, but what happens from there would depend upon the broker's/company's commission policies. This is not a co-broke situation because there is only one broker/company involved.

- a. If the broker/company takes \$2,800 of the \$6,000 commission the broker/company receives from the seller and applies it to the fee due under the buyer agency agreement, buyer B typically need not pay any additional fees per the buyer agency agreement.
- b. Hypothetically, a broker/company might not apply any of the \$6,000 listing commission to the fee earned under the buyer agency agreement with buyer B, possibly leaving buyer B to pay the \$2,800 fee. The WB-36 buyer agency agreement provides that the buyer must pay the buyer agency fee if the

owner or the owner's agent do not pay it.

A broker's/company's internal policies for how commission is collected and/or offset in multiple representation situations (both multiple representation with and without designated agency) potentially may affect what a client might owe for commission and fees. If there is such a potential, it should be disclosed to the client when the agency agreement is discussed and executed.

The Broker Disclosure to Clients notes that, "Your broker is required to disclose to you in your agency agreement the commission or fees that you may owe to your broker. If you have any questions about the commission or fees that you may owe based upon the type of agency relationship you select with your broker you should ask your broker before signing the agency agreement." This essentially reiterates a portion of the obligations that REALTORS® already have under Article 1 of the Code of Ethics:

Standard of Practice 1-12 provides, "When entering into listing contracts, REALTORS® must advise sellers/landlords of: 1) the REALTOR®'s company policies regarding cooperation and the amount(s) of any compensation that will be offered to subagents, buyer/tenant agents, and/or brokers acting in legally recognized non-agency capacities; ... and 3) any potential for listing brokers to act as disclosed dual agents, e.g. buyer/tenant agents."

Similarly, the recently revised Standard of Practice 1-13 provides, "When entering into buyer/tenant agreements, REALTORS® must advise potential clients of: 1) the REALTOR®'s company policies regarding cooperation; 2) the amount of compensation to be paid by the client; 3) the potential for additional or offsetting compensation from other bro-

kers, from the seller or landlord, or from other parties; 4) any potential for the buyer/tenant representative to act as a disclosed dual agent, e.g. listing broker, subagent, landlord's agent, etc."

Accordingly, REALTORS® should disclose to clients if there is any effect on commissions and fees resulting from the client's choice of a multiple representation relationship.

Client Agency Relationship Changes

Once a client has made his or her selection with regard to multiple representation relationships, some will undoubtedly change their minds. Agents must be prepared to properly document these changes of heart.

If a client withdraws his or her consent to designated agency in the middle of negotiations, does that automatically become a multiple representation without designated agency?

Yes, this is confirmed in Wis. Stat. § 452.134(4). The broker/company and the broker's/company's designated agents will immediately stop providing any information, advice, opinions or other brokerage services that give an advantage or place the interests of one of the broker's/company's clients ahead of the interests of another during negotiations. The broker/company and the broker's/company's agents may continue to provide brokerage services to the clients, but they must remain neutral and cannot place the interests of any of the broker's/company's clients ahead of the interests of another during negotiation.

How does an agent use a Broker Disclosure to Clients form when a client wants to change his or her mind and authorize designated agency?

If the client previously consented to multiple representation without designated agency or rejected multiple representation relationships, there arguably is no reason to withdraw what was done at that time. Until such time as the DRL-approved listing contracts and buyer agency agreement are updated to include the new agency disclosure provisions, the agent can simply give the client another Broker Disclosure to Clients form and have the client complete it, making sure that the client signs and dates the form. The date will be important and the agent should be sure that the client is given an exact copy of the document after the client has signed it. The original can go in the transaction file or some other secure place for safe-keeping.

Once the DRL-approved listing contracts and buyer agency agreement are updated to include the new agency disclosure provisions, the change may be made using an amendment to the agency agreement.

How does a client withdraw consent to designated agency or to multiple representation relationships?

A client may withdraw his or her consent to multiple representation without designated agency or designated agency at any time. The client is free to have such a withdrawal prepared by his or her attorney. The client may prepare and sign his or her own statement referencing the date and parties to the agency agreement, other identifying information such as a listed property's address, the effective date if the withdrawal is not immediately effective, and clearly stating that the client's prior consent to designated agency, or to multiple representation without designated agency, as the case may be, is withdrawn.

Another option for a client might be to use another copy of the Broker Disclosure to Clients form and write on it that the client's prior consent to designated agency, for instance, is hereby withdrawn, and then sign and date the form. The client may wish, at the same time, to ini-

tial the space on the top of the second page to reject multiple representation relationships, if appropriate.

Working with the Client in a Limited Service or Alternative Business Model

The revised agency law provides that a client may waive all or part of the broker's duty to negotiate in Wis. Stat. § 452.133(6). Such a waiver is not effective unless the broker first provides the client with a written disclosure containing all of the following:

- ◆ A statement that a broker has the duty to negotiate on behalf of the client per Wis. Stat. § 452.133(2)(d).
- ◆ A copy of the definition of negotiate found in Wis. Stat. § 452.01(5m).
- ◆ A statement that as a consequence of the client's waiver, the broker will have no legal duty to negotiate on behalf of the client, as would otherwise be required by Wis. Stat. § 452.133(2)(d).
- ◆ A statement that as a consequence of the client's waiver, the client may require the assistance of an attorney or another service provider to fulfill the client's goals and contractual duties in the transaction.

These provisions regulating the manner in which a client may waive negotiation duties will primarily apply to limited service brokers and other brokers with alternative business models. Brokers wishing to take advantage of this flexibility may be well advised to work with their attorneys in fashioning an appropriate form for this purpose.

Limited service brokers and others exploring alternate business models should keep in mind that they are still obligated to fulfill all of the other duties a broker owes to all person in a transaction and all of the other duties a broker owes to a client. In addition, there are other license law requirements that must be addressed. For further discussion of limit-

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ed service brokerage, see the March 2004 edition of the WRA *Legal Update*, "Limited Service Listings," online at www.wra.org/LU0411.

Agency Representation on Line 1 of the Offer

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

The following questions assume that the agent working with the buyer drafted the offer. The purpose of the disclosure on line 1 of the offer is to reconfirm whom the agent drafting the offer represents as an agent in the transaction.

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

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

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

When a designated agent drafts an offer, that agent is participating in a

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

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

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

Broker/Company Configurations

Does the broker/company need to have at least two agents (individuals) to do designated agency?

Yes, the practice of designated agency requires a separate designated agent for each party in the transaction. A sole proprietor broker/owner plus one agent is not enough because the broker/owner is the broker/company

and needs to supervise the other agents. Either the sole proprietor needs two agents, or one additional agent will do the trick if the sole proprietor forms a corporation or an LLC and that entity becomes the broker/company.

Can a sole proprietor practice multiple representation without designated agency?

A sole proprietorship is an unincorporated business owned and operated by one individual. Sole practitioners, as well as individual agents who are working as both the buyer's agent and the listing agent in a transaction, may practice multiple representation without designated agency. There is no requirement for a minimum number of agents working with the parties. The sole proprietor and his or her agents simply have to remain neutral and not place the interests of one party ahead of the other.

What happens when there is one agent working with a seller-client and a buyer-client who both consented to designated agency?

In this situation it is possible that the seller-client and the buyer-client each want to work just with the one agent even though their agency contracts are with the agent's broker/company. If so, the situation appears to have reached a logjam that is not going to break and move onward until and unless some aspect of the relationships changes. Brokers/companies may wish to study the problem and work with their company attorneys to develop office policies and/or document provisions that indicate a way for agents to resolve such a situation.

Some possible ideas for solving this predicament include:

- ◆ One or the other client withdraws his or her consent to designated agency, thus creating a multiple rep-

resentation without designated agency scenario, per Wis. Stat. § 452.14(4).

- ◆ This is a designated agency so the broker has the ability to assign or designate another agent within that broker/company to work with and represent one of the clients.
- ◆ The broker/company might include a fourth selection in the Broker Disclosure to Clients that states that the client consents to designated agency provided that if the client in a transaction also works with the same agent, that the consent automatically transforms into a consent to multiple representation without designated agency.

Want to learn more about the agency law revisions?

The WRA has developed a continuing education course that covers the revisions to the agency law and its impact on your business. CE 4B: "2006 Agency Law Revisions – Bringing the Law to the Practice" is offered around the state. See the dates and locations below. To register, call the number listed or visit www.wra.org/CE4BCourses.

June 7 – Sheboygan – 920-457-7908

June 14 – Pewaukee – 414-777-3007

June 16 – Stevens Point – 800-279-1972

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Sept. 14 – Brookfield – 800-279-1972

Sept. 25 – Madison – 800-279-1972- (must register for convention)

Oct. 3 – Hayward – 877-644-2265

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Oct. 12 – Brookfield – 800-279-1972

Oct. 18 – Madison – 800-279-1972

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Oct. 25 – Richfield – 262-338-8114 or 262-375-4730

Nov. 9 – Janesville – 608-755-4854

Nov. 10 – Madison – 800-279-1972

Nov. 15 – Brookfield – 800-279-1972


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