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Legal Update

A WRA Publication Exclusively for the Designated REALTOR®

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Duty to Disclose

A REALTOR® recently called the WRA Legal Hotline with an interesting disclosure question. The house next door to the home the REALTOR® has listed has an outdoor wood-burning furnace. The smoke from the furnace drifts up the hill to the listed house, and this has caused a dispute between the seller and the neighbor. In retaliation, the seller put up outdoor lighting that he keeps on all night. This upset the neighbor, so he put up signs declaring that his property rights were being violated. The seller has now taken down all of the lights and the neighbor has removed the signs, reflecting an apparent truce. The neighbor has asked the REALTOR® to tell potential buyers about the wood-burner and the smoke. The REALTOR® is unsure what needs to be disclosed about the smoke and the dispute.

Although the facts are a bit unusual, licensees frequently face the issues involved in this scenario: Will the seller disclose the condition on the Real Estate Condition Report? If the seller does not disclose the condition, must the licensee disclose it as a material adverse fact? Is this information suggesting the possibility of a material adverse fact that the licensee must disclose? In this and in many other circumstances, the question of whether the REALTOR® must disclose is only reached if seller has not already disclosed the information. Thus, REALTORS® must be thoroughly familiar with a seller's disclosure responsibilities before they can evaluate their own obligations.

This *Legal Update* examines a seller's and a REALTOR® duty to disclose information to the parties in a real estate transaction. The *Update* begins with a review of the seller's disclosure responsibilities under the Real Estate Condition Report (RECR), including tips for REALTORS® who are assisting sellers who must complete this form. The *Update* turns to a review of the remedies available to buyers when a seller has misrepresented or concealed a property defect, a review of non-residential property condition reports, and a discussion of "as is" clauses from the seller's perspective.

The *Update* then turns to a review of the REALTOR®'s duty to disclose, including a discussion of when disclosure is necessary and what the special circumstances are when disclosure is not required. The *Update* concludes with a section of Legal Hotline questions and answers regarding disclosure issues.

Seller's Duty to Disclose

The seller in a real estate transaction is asked to disclose property condition information and other information affecting the transaction several times throughout the process of listing and selling a property. The seller first is asked to represent to the listing broker whether he or she has any notice or knowledge of the items listed in the definition of "conditions affecting the Property or transaction" as of the date of the listing contract. The seller also is asked to represent to the buyer whether the seller, as of the date of the offer to purchase, has any notice or knowledge of the same list

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of items comprising the definition of "conditions affecting the Property or transaction." Each of the DRL-approved listing contracts and offers to purchase contains this definition, which varies a bit depending upon the type of property being sold.

In each of these cases, the seller's response to these inquiries may take the form of a Real Estate Condition Report (RECR). The RECR is used by the listing broker to determine whether there are any problem areas that need to be discussed with the seller and possibly repaired before the property is put on the market. It also provides the basis for the seller's disclosures to the prospective buyers.

The Chapter 709 RECR

All sellers subject to Wis. Stat. Chap. 709, whether broker-assisted or FSBO, must complete a Chap. 709 Real Estate Condition Report (RECR) or risk rescission of the offer to purchase. The RECR is not a warranty but rather a statement of the seller's knowledge and awareness of the property offered for sale.

RECR Applicability

Chapter 709 generally applies to all persons who sell or otherwise transfer Wisconsin real estate containing one to four dwelling units. A dwelling unit is defined as a structure or a part of a structure that is presently used or is intended to be used in the future as a home, residence or sleeping place by a person or by two or more persons maintaining a common household. Dwelling units include, without limitation, condominium units, timeshare property, living quarters in a commercial property and summer cottages.

Chapter 709 does not apply to:

1. Personal representatives, trustees, conservators and other fiduciaries appointed by or subject to supervision by the court, but only if those persons have never occupied the property. For example, if a personal representative lived in the property 20 years ago, that personal representative is not exempt and must complete an RECR. This exemption for fiduciaries, however, does not apply to persons holding powers-of-attorney because this relationship is created by contract, not by court appointment, and is not subject to direct court supervision.

2. Real estate that has not been inhabited, such as new construction and properties converted to residential from another use.

3. Transfers exempt from the Wisconsin real estate transfer fee, such as gifts between spouses, tax sales, foreclosures, condemnations and transfers by will.

There is no exemption from the Chapter 709 seller disclosure law based solely on the fact that the seller does not live in the property or is not familiar with the condition of the property. The owner of a rental duplex or a bank that has acquired a home by foreclosure, for example, is still expected to complete an RECR. A seller in this position can either

(a) Complete the RECR to the best of his or her knowledge. The RECR form has a line at item D.2 where the seller may indicate how many years the seller has lived on the property. If a seller has never lived on the property and puts a zero on this line, buyers should be alerted that this seller has little, if any, first-hand knowledge about the condition of the property.

(b) Retain a professional or expert to provide an inspection report to be used as the basis for completing the RECR. Owners have the option to substitute an expert's or professional's written report in place of the owner's own response if the information is in writing, furnished on time, and the entry to which it relates is identified. The experts and professionals which may be used in this manner include (1) licensed engi-

neers; (2) licensed land surveyors; (3) pest control businesses or individuals licensed by the Department of Agriculture, Trade and Consumer Protection; (4) contractors, provided the information supplied is limited to matters within the scope of the contractor's occupation; (5) public agencies such as a local, state or federal governmental units, departments, agencies or political subdivisions such as a city building inspector; or (6) a "qualified third party" as that term is defined in Wis. Stat. § 452.23(2)(b). An expert or professional providing information regarding one or more property condition statements must certify that the information he or she provided is true and correct to he best of his or her knowledge either on the RECR or on the expert's separate supplemental report. The seller can check the "See Expert's Report" column next to a property condition statement and then attach the expert's written report to the RECR or furnish the written information separately to the buyer.

(c) **Refuse to complete the RECR and sell "as is," risking buyer rescission**. The buyer may rescind the offer if the buyer has not received a completed RECR within 10 days of acceptance. The right to rescind is the only remedy provided under Chapter 709.

(d) **Refuse to complete the RECR and sell the property "as is," refusing to accept any offers from buyers who do not waive their Chapter 709 rescission rights**. Buyers may waive, in writing, the right to receive an RECR and/or the right to rescind the offer. Buyers should be advised to confer with legal counsel before waiving any of their rights. If the buyer proceeds to closing, the buyer's right to rescind is terminated.

Seller Completion of RECR

By completing the RECR, the seller is indicating his or her notice or knowledge of the listed property conditions. A "defect," as used in the RECR, means a condition that would have a significant adverse effect on the value of the property; that would significantly impair the health or safety of future occupants of the property; or that, if not repaired, removed or replaced, would significantly shorten or adversely affect the expected normal life of the premises.

For example, if the seller is listing a property where there had been fire damage to the siding but the siding had been replaced and painted, the decision to disclose information about the fire, the resulting fire damage and subsequent repairs will be a determination made by the seller or the seller with the assistance of legal counsel. Some sellers are reluctant to disclose past defects that have presumably been repaired and eliminated. Buyers, on the other hand, are often more comfortable when the past defect is disclosed, along with information about the repairs made, so that they at least have the opportunity to investigate and confirm elimination of the problem for themselves.

If an agent receives an offer to purchase on a three-story property that includes retail space on the first floor, office space on the second floor and four apartments on the third floor, an RECR is required because this property includes four dwelling units. The RECR, however, must be completed with respect to the entire property per Wis. Stat. § 709.01. If the property to be transferred is a condominium unit, the RECR must be completed with respect to the condominium unit, the common elements of the condominium and any limited common elements that may be used exclusively by the condominium unit owner.

REALTOR® Practice Tips: *Don't Complete the RECR for the Client.* Chapter 709 provides that the sellers or owners will be the ones completing the RECR. Sellers should complete the form themselves, preferably in their own handwriting. Licensees should never address and answer the RECR items for the seller. If a seller has difficulty writing or with the RECR, he or she should enlist the aid of a family member, attorney, friend or someone else to help. If a licensee helps a seller complete an RECR, it may look like the licensee was coaching the seller or answering for the seller.

REALTOR® Practice Tips: *Do Not Give the Seller Legal Advice.* Listing agents asking the seller to complete the RECR may give the seller a general explanation of the Chapter 709 seller disclosure law and the RECR form. Agents can tell the sellers that copies of the RECR will be given to prospective buyers when they tour the house and explain that a buyer making an offer may be able to rescind the offer if the buyer does not receive an RECR. If sellers have questions, however, about whether a specific item constitutes a defect, the seller should be referred to legal counsel. Agents should tell sellers that if they are uncertain, it may be safest to explain the condition on the RECR, but if the seller wants a legal opinion, he or she will have to contact an attorney.

Buyer Rescission

It is recommended that sellers subject to Chapter 709 complete an RECR as soon as possible. If a completed RECR is given to the buyer before he or she submits an offer to purchase, there will be no buyer rescission rights. If a buyer receives an RECR that discloses a defect, as defined in the RECR, after the buyer submitted an offer to purchase, the buyer may rescind the contract. A buyer can also rescind if he or she receives an RECR that is incomplete or incorrectly asserts that an item is not appli-

cable, or if the RECR is not received within 10 days of acceptance. A buyer may not, however, rescind an offer or option based upon a defect disclosed in an RECR, an amended RECR or an amendment to a previously completed RECR if the buyer was aware, or had written notice, of the nature and extent of the defect at the time the offer or option was submitted to the owner or owner's agent. All defects disclosed in an RECR prior to the time the buyer makes his or her offer cannot come back and bite the owner, provided the full nature and extent is adequately disclosed. That is why it may be better for sellers to overdisclose and give lots of details.

A buyer's rescission must be in writing and delivered to the seller or the seller's agent within two business days after the buyer or the buyer's agent receives the RECR, or within two business days after the RECR was due. This two-day period is computed by excluding the first day and including the last day. Thus the day the RECR is received, or the day the RECR was due, is not counted, and the buyer has until midnight on the second business day thereafter to deliver the rescission notice to the owner or the owner's agent.

REALTOR® Practice Tips: *How to Amend the RECR*. If the seller has already completed an RECR and then obtains information or becomes aware of a condition which would change a response on the completed RECR, and if this occurs before acceptance of a buyer's offer to purchase, then the RECR must be amended and submitted to the buyer. The seller, however, has no duty to amend the RECR if the new information or condition arises after acceptance of the buyer's offer. Wis. Stat. § 709.035 provides that the RECR may be amended by completing either (1) a new RECR form or (2) an RECR amendment form.

New RECR. The seller may simply take another RECR form and complete it to include the owner's changed responses. It may be helpful to write "AMENDED" across the top of the form, but this is not mandatory because the date in section A will distinguish the amended RECR from the original RECR. The amended RECR must be submitted to the buyer no later than 10 days after the seller accepts the offer.

RECR Amendment Form. The seller may instead complete an amendment to the previously completed RECR. The amendment form must state the address of the property, the owner's name, the date of the RECR being amended, the number of any property condition statement on the RECR which is affected by the new information, the seller's new response to the statement, and if the new answer is "yes," an explanation of why the seller's response changed to "yes." The amendment to the RECR, along with a copy of the original RECR if not already submitted to the buyer, must be submitted to the buyer no later than 10 days after the seller accepts the offer. For the convenience of the WRA members, the WRA publishes an Amendment to Real Estate Condition Report form (WRA-MCR)(1996).

Wis. Stat. § 709.05 provides that if an amended report is submitted to the buyer after the buyer had submitted an offer to purchase, then the buyer will have two business days to rescind the offer.

Seller Refusal to Complete RECR

If a seller refuses to complete an RECR, the agent should make sure that the seller understands that an RECR is a statement of what the seller knows about the condition of the property, not a warranty. The agent should also be sure that the seller understands that buyers may be able to rescind their offers if they do not receive a completed RECR in a timely manner. If the seller still refuses, the agent should ask the seller to sign a "Seller's Refusal to Complete Condition Report" form (WRA-SRR) or another form for the seller's informed consent indicating that the seller has read a written summary of the seller disclosure law and understands that his or her refusal may give buyers the right to rescind their offers to purchase.

The listing agent, however, will still have to ask the seller about the condition of the structure, mechanical systems and other relevant aspects of the property as applicable and ask that the seller provide a written response. The seller will still also have to disclose any "condition affecting the Property or transaction" in the listing contract and in any offer to purchase. A failure to disclose or a misrepresentation by the seller may lead to a buyer's lawsuit based upon breach of contract or misrepresentation.

Buyer Remedies for Seller's Failure to Disclose

Although Wis. Stat. § 709.05(4) provides that rescission is the only remedy under Chapter 709 for a seller who fails to make disclosures and comply with the seller disclosure law, other remedies are available to buyers. Buyers may use common law remedies like breach of contract or misrepresentation, or may use other statutes like Wis. Stat. §§ 100.18 & 895.80. As the following case summaries illustrate, omitting borderline or questionable property conditions from the RECR may not be prudent for sellers.

In Spivey v. Otto (Case No. 94-2990, Ct. App. 1996), the buyer decided to build an addition. During construction, the buyer learned that the floor joists were severely rotted, and that the seller had attempted to conceal

the rot by nailing two-by-fours next to the rotting joists. This was in direct conflict with the RECR which expressly stated that there was no mildew or rot damage to the property. As a result of the severe rotting, the house had to be demolished.

When suing the seller for intentionally misrepresenting the condition of the house, the buyer also sued the seller's father for helping conceal the defect, in other words, conspiring with the seller to commit fraud. The buyer offered testimony from a next-door neighbor who stated that he observed the seller and the seller's father nailing two-by-fours on each side of the floor joists to conceal a four-inch gap between the joists and the wall that resulted from the rot.

This case of seller misrepresentation and concealment and shows that those who assist a seller in such fraudulent activity may also be held accountable.

Wis. Stat. § 100.18, the False Advertising Statute

Wis. Stat. § 100.18(1) states in relevant part, "No person, firm, corporation or association, or agent or employee thereof, with intent to sell ... real estate.., or with intent to induce the public in any manner to enter into any contract or obligation relating to the purchase ... of any real estate ..., shall make ... an advertisement, announcement, statement or representation of any kind to the public relating to such purchase [or] sale ... of such real estate ... or to the terms or conditions thereof, which advertisement, announcement, statement or representation contains any assertion, representation or statement of fact which is untrue, deceptive or misleading."

Under this statute, a successful buyer may recover attorney fees and double damages from a seller. Note, however, that no attorney fees may be recovered from a real estate licensee engaged in real estate practice.

In Grube v. Daun, 173 Wis.2d 30, 496 N.W.2d 106 (Ct. App. 1992), the Court found that a potential claim for deceptive advertising under § 100.18(1) was present with respect to a broker's representations about the suitability of a property for various purposes. Although on its face this statute seems to apply only to advertising practices, the statute protects the public from all untrue, deceptive or misleading representations made in sales promotions, including representations made in face-to-face sales where no media advertising is involved and including real estate sales.

In the recent case of Kailin v. Armstrong, 2002 WI App 70, the Court found that buyers of a commercial rental property had valid claims against the seller under Wis. Stat. §100.18, but only with respect to representations made before the offer to purchase was accepted. The buyers alleged that the seller failed to disclose the rent delinquency of one of the eight commercial tenants in the property. On the other hand, the sellers argued that the statute does not apply to representations made after the acceptance of the offer to purchase because statements made to the other party to a contract are not statements made "to the public."

The Court found that a statement made to one person might constitute a statement made to "the public" under § 100.18. The most important factor in determining whether the public is involved is the relationship between the parties. Once the offer to purchase was accepted, the buyers were no longer the public—they had a contractual relationship with the seller. Statements made by the seller after a person has made a purchase or entered into a contract to purchase logically do not cause the person to make the purchase or enter into the contract. Thus, the Court concluded that the buyers' claim under Wis. Stat. § 100.18 is limited to untrue, deceptive or misleading representations made prior to the acceptance of the offer.

Wis. Stat. §§ 895.80 & 943.20, Damages for Misappropriation

Wis. Stat. § 895.80 gives a civil remedy to those suffering damages as a result of another's violation of Wis. Stat. § 943.20, a criminal statute. Wis. Stat. §895.80 also allows the court, in its discretion, to award all costs and attorneys fees, and to treble the damages.

§ 895.80(1) provides, in relevant part, that "Any person who suffers damage or loss by reason of intentional conduct that occurs on or after November 1, 1995, and that is prohibited under s.943.20 ... has a cause of action against the person who caused the damage or loss."

§ 943.20(1)(d) makes it illegal for anyone to "[Obtain] title to property of another person by intentionally deceiving the person with a false representation which is known to be false, made with intent to defraud, and which does defraud the person to whom it is made."

In Stathus v. Horst, (Case No. 00-0933, Ct. App. 2001), the buyers sued the sellers for misrepresentation. The trial court awarded the buyers $5,000 in compensatory damages, and $3,000 in attorney's fees. The trial court found that the sellers intentionally did not fully disclose the nature of 1) the water problems in the basement, and 2) the water problems caused by an underground spring creating a flow of water across the sidewalk in front of the house. After the sellers' first real estate agent was unable to sell the house because of those water problems, the sellers listed with another broker and filled out a new RECR on the property. The new RECR contained no disclosures relating to either the basement

seepage problem, or the spring problem. The trial court found that the failure by the sellers to disclose the basement and spring water problems was a false representation that they made with the intent to deceive the buyers.

The sellers argued that rescission was the sole remedy provided by Wis. Stat. § 709.05(4) if there was a misrepresentation in an RECR. The trial court, however, awarded damages under Wis. Stat. § 895.80. The trial court found that the sellers obtained title to the buyers' property (their money) within the meaning of § 943.20(1)(d).

The sellers argued that because the buyers knew about some water damage in the basement before they closed on the house, the buyers' reliance on the RECR was not justifiable. Their broker, however, had told the buyers, that the problem was not inherent in the basement but, rather, was caused by a one-time diversion of water from a neighbor's sump-pump. The sump-pump explanation reinforced the RECR representation that the basement did not have a water problem, so the buyers arguably continued to reasonably rely upon the representations in the RECR. Accordingly, the Court of Appeals upheld the trial court's finding in favor of the buyers.

Buyer Waives Warranty & Misrepresentation Claims by Closing

In Lambert v. Hein (Case No. 97-0708, Ct. App. 1998), the seller's RECR indicated that a water stain in the basement had been caused when a downspout had come off. Because of concern over the basement watermark, the seller, the buyer and the broker each had an expert contractor review the basement water problem. The experts' reports agreed that the problem with the water in the basement was more serious than the disconnected downspout, but disagreed over the best method of remediation.

While the sale was still pending, the buyer sued the seller for specific performance and for damages for fixing the basement water problem. When the transaction closed, the buyer amended his complaint to delete his specific performance claim and add a breach of warranty claim. The trial court held that the buyer had waived any defects by closing when he had full knowledge of the defective condition of the basement, and that any damages the buyer had suffered were the result of his own actions. Upon appeal, the Court of Appeals affirmed this decision.

The buyer argued that he had an "expectation interest" in the property that all would be as represented when the offer to purchase was accepted, and that his right to claim a breach of an express warranty was not affected by his going ahead with the purchase. The Court of Appeals disagreed, pointing out that the offer to purchase said that if the buyer did not submit a written disapproval based upon his own inspections, he took the property "as is." The purpose of the inspection provision was to give the buyer a chance to find defects and make an informed decision as to whether or not to buy the house.

The Court also held that once the buyer learned that the seller's representations were false, he could not justifiably rely on them. It was negligent for the buyer to rely on the seller's representation regarding the basement water stain mark once he had the experts' reports. The Court of Appeals held that the buyer waived his warranty and misrepresentation claims by choosing to complete the transaction while knowing of the basement defect.

This case emphasizes the importance of referring buyers to legal counsel before closing a transaction if the buyer has notice of defects that are not being addressed in the offer. REALTORS® in this type of situation should urge the buyer to work with an attorney to determine an appropriate course of action that will preserve the buyer's legal rights.

Proving the Case

In Schmelzle v. Ade (Case No. 98-1406, Ct. App. 1998), the buyer complained that the seller failed to disclose information regarding flooding, construction without permits, rotting boards, and electrical issues. Although the buyer described these problems in court, he failed to offer any evidence that the sellers knew or should have known of the problems prior to closing. For example, when asked if the sellers were aware that the boards underlying the roof were rotten, the buyer replied, "I wouldn't know if they knew or not." There was no expert testimony about the condition of the property, the cause of the condition, the noticeability of the condition or the amount of damages.

Essentially, the buyer relied upon the conflicts between the alleged condition of the house and the RECR to support his claim of misrepresentation, assuming that the sellers would have been aware of the property condition because they had lived there for sixteen years. The Court of Appeals, however, concluded that a mere conflict between the sellers' RECR and the alleged actual condition of the property does not provide sufficient evidence.

REALTOR® Practice Tips: *Buyer Remedies for Misrepresentation.*

- There are other remedies for a misrepresentation in a RECR, or a defect that is not mentioned in a RECR, besides rescission of the offer to purchase.
- Parties who believe that they can simply omit mention of a defect and sell their properties without consequence are in error!

- Buyers must prove that the seller knew or should have known about defects that are concealed or misrepresented before they can succeed in court. Proof is not always easy to find.

Non-Residential Seller Disclosure Reports

The Wis. Stat. Chap. 709 RECR applies to sellers of properties that contain one to four dwelling units. The WRA publishes a specialized RECR for farm properties designed to be used where there is a farmhouse plus agricultural land.

Chapter 709, however, does not apply to properties containing no dwelling units or more than four units. Nevertheless, listing brokers have an independent obligation under Wis. Admin. Code § RL 24.07(1)(b) to request that sellers provide a written response to the licensee's inquiries with respect to "the condition of the structure, mechanical systems and other relevant aspects of the property as applicable."

The WRA publishes real estate condition reports for transactions involving properties which do not contain dwelling units and therefore are not subject to Chapter 709. These forms include the WRA's Real Estate Condition Report-V for vacant land transactions and the WRA's Real Estate Condition Report-C for commercial transactions. These forms have been designed to serve two purposes: (1) they serve as the seller's written response to the listing broker's inquiries about the condition of the property being listed; and (2) they serve as the seller's disclosure report, which is referenced in the WB-3 Vacant Land Listing Contract and the WB-13 Vacant Land Offer to Purchase, and in the WB-5 Commercial Listing Contract and the WB-15 Commercial Offer to Purchase.

Both the Real Estate Condition Report-V for vacant land transactions and the WRA's Real Estate Condition Report-C for commercial transactions follow basically the same format. There is a paragraph following the lines for the seller's name, address and number of years he or she has owned the property, which explains that the report fulfills the licensee's duties under the inspection and disclosure rules of § RL 24.07.

The questions in these reports address the items listed in the definition of "conditions affecting the Property or transaction," found respectively in the vacant land offer and listing, and in the commercial offer and listing contract. If, for example, the seller has completed Real Estate Condition Report-V and furnished the buyer with a copy before the cooperating broker drafts the vacant land offer, the broker will not have to go over the 18 items listed in the definition of "conditions affecting the Property or transaction" in the vacant land offer and list those conditions that apply in the offer.

The WRA's Real Estate Condition Report-V for vacant land transactions and the WRA's Real Estate Condition Report-C for commercial transactions are not DRL-approved forms, they are not mandatory forms, and they are not RECRs of the kind required by Chapter 709 for transactions involving one to four dwelling units. They are, instead, helpful and useful forms which facilitate a listing broker's fulfillment of his or her vacant land or commercial property inspection obligations, and fulfill the seller's obligation to disclose "conditions affecting the Property or transaction" to the buyer.

The WRA does not, at present, publish a seller disclosure report for business transactions. REALTORS® may create their own forms by listing the items in the definition of "conditions affecting the Business, included property or the transaction" and providing spaces for the seller responses. These forms may be modeled after the WRA forms.

Note that all WRA real estate condition reports forms also include an item asking the seller to disclose if the property is assessed under the use-value assessment method of assessing Wisconsin agricultural land for property tax purposes. Under this system, farmland is assessed based upon its agricultural productivity rather than its potential for development or fair market value. Owners who change the use of agricultural land to a nonagricultural use must pay a penalty equal to the difference between the property taxes that would have been levied on the land if the land had been assessed at full market value and the property taxes levied on the land for the last two years that the land was valued under the use-value assessment system. Wis. Stat. § 74.48(1)(b) requires sellers of agricultural land that has been valued under the use-value assessment system to notify buyers if the land has been valued under the use-value assessment system, if the seller has been assessed a use-value assessment penalty or if the seller has been assessed a use-value assessment penalty that has been deferred.

All WRA property condition report forms also include the sex offender notice language for the protection of the seller early in the transaction. If sellers are asked whether a particular person is required to register as a sex offender, the location of sex offenders in a neighborhood or for any other information about the sex offender registry, the seller must disclose whatever actual knowledge he or she has on the subject. However, a seller will have immunity relating to the disclosure of such information if he or she promptly gives—or has already given—the person requesting the information a written notice advising that information about registered sexual offenders and the sex

offender registry may be obtained by contacting the Department of Corrections via either the Internet or a toll-free number. In other words, even if the seller may know something about sex offenders in the neighborhood, the seller will have immunity if the person asking the question is referred to the Department of Corrections. Instead of answering based upon what he or she has heard or read, the seller can instead just refer the person to the Department of Corrections for factual and accurate information.

"As Is" Sales—the Seller's Perspective

An "as is" clause may be used in the offer to purchase for any type of property. Sellers may choose to use this type of clause when they are under financial constraints and cannot commit any more funds to repairs. It may be used because there are environmental or other problems that the seller does not want to confront. It may be used when the seller is an estate or an elderly person who is physically or mentally unable to deal with the situation. In other words, there are no limits on who may use an "as is" clause or on the type of property that may be involved.

Generally, an "as is" clause means that the seller (1) will not complete an RECR or other seller condition reports, leaving the buyer primarily responsible for determining the condition of the property being purchased, and (2) will not repair the property or "cure any defects."

No RECR

In an "as is" transaction, the seller's duty to disclose is limited. The seller does not complete an RECR or any other seller condition report. This practice is not illegal if the buyer waives the right to receive an RECR. Even if the buyer does not waive this right, the buyer's remedy in an "as is" sale is typically limited to rescinding the transaction.

Most, if not all, information about the condition of the property will come from buyer inspection and investigation rather than from the seller. Accordingly, the seller should expect that the buyer will have numerous inspection, testing and investigation contingencies that will permit the buyer to fully investigate the condition of the property and withdraw from the transaction if the property condition is not satisfactory. However, the seller may not want any of these provisions to contain any seller right-to-cure clauses if the seller intends to sell the property in its current condition without investing any further time or money for repairs or improvements.

If the listing agent knows from the beginning that the seller will sell the property "as is," this may be indicated in the listing contract in the "Seller Representations Regarding Property Conditions" section. A seller might also want to direct the listing broker to not make any representations about the property, but this is effective only to the extent that material adverse facts are not involved. A licensee's duty to disclose adverse materials facts, or information suggesting the possibility of material adverse facts, overrides any duty to maintain a client's confidences or to follow the client's wishes.

It is usually helpful if the fact that a seller intends to sell a property "as is" is disclosed to buyers in a prompt manner. Ideally, this will be stated in the property data sheets and in the listing information on the MLS and/or the Internet. The seller may also wish to use a RECR form, fill in the information identifying the property in Section A, and write on the RECR that the property is being sold "as is" instead of completing the RECR items. However, an "as is" provision may be negotiated by the parties at any time.

Sometimes a seller does not decide to sell "as is" until marketing or even negotiations have begun. In this situation, the seller may have already completed a RECR. The seller's statement that the property is being sold "as is" will simply mean that the seller is not willing to accept responsibility for repairing or improving any property defects.

Limited Disclosures

The use of an "as is" clause does not necessarily mean that the seller does not have any disclosure duties. The seller may still need to make some disclosures about the property if latent or dangerous defects or other special types of circumstances are present.

1. *Seller Cannot Create Risks.* The seller has the duty to exercise ordinary care in refraining from any act that would cause foreseeable harm to another or create an unreasonable risk to others. A seller, for example, cannot dump unused pesticides and other hazardous chemicals in the vegetable garden or leave deep excavations uncovered without warning potential buyers and others who visit the property.

2. *Seller Cannot Conceal or Prevent Discovery of Defects.* The seller may be liable for misrepresentation if he or she actively conceals a defect or prevents a buyer from investigating the property and discovering the defect. For instance, sellers cannot place large heavy objects in front of basement cracks or basement wall seepage areas in order to prevent the buyer from discovering them or deliberately obstruct access to other defects without facing potential liability when the defect is later discovered.

3. *Seller Cannot Make False Affirmative Representations.* The seller may be liable if he or she makes false affirmative statements about the property, as was shown in Grube v. Daun, 173 Wis. 2d 30, 496 N.W.2d 106 (Ct. App. 1992). The broker in that

case argued that since the property was sold "as is," he had no duty to investigate and disclose because the "as is" clause shifted the burden of investigation to the buyer. The effect of an "as is" clause normally is to alert the buyer that he or she must determine the condition of the property being purchased. The court held, however, that when a seller or an agent of the seller makes an affirmative representation about the condition of the property, the seller or agent is not relieved by the "as is" clause from the duty to investigate before making the representation and to accurately report the results to the buyer. Although an "as is" clause will protect the seller and the seller's agent from most claims based on nondisclosure, it does not protect an affirmative statement about some aspect of the property. The buyer is entitled to rely upon the affirmative statement and expect full and fair disclosure of all material facts relevant to that aspect of the property.

In McCabe v. Midwest Evergreens, Inc. et al. (No. 95-2148, Ct. App. 1996), the seller's agent gave the buyer a fact sheet representing that the seller's property had a well and septic system. The buyer's offer to purchase required the seller to have the septic system pumped if it had not been pumped within the last year. The seller countered the offer and submitted an addendum that disclaimed all warranties as to the condition of the property and sold the property "as is."

At closing, the buyer discovered that the septic system had not been pumped. The seller had orally agreed to have the septic system pumped at his expense immediately after closing. A few days later, the septic system failed and the buyer could not find the septic tank. After eventually removing the front porch, the buyer discovered that the "septic system" consisted of a deteriorated fifty-gallon drum buried under the porch.

An "as is" clause generally shifts the responsibility to the buyer to determine the condition of the property being purchased, thus protecting the seller and his agent from liability because of negligent misrepresentation claims based on nondisclosure of facts. However, once a seller or his agent has made an affirmative representation about some aspect of the property, the buyer is entitled to rely upon the truth of that statement and expect full and fair disclosure of all material facts relating to that aspect of the property.

The Court of Appeals held that the seller's promise to have "septic system" pumped was a misrepresentation of fact because an inaccessible drum under the porch is not a "septic system" that was capable of being pumped. The Court further concluded that the buyer was not necessarily negligent for failing to obtain an inspection after being aware of the "as is" clause.

This case shows that a seller using an "as is" clause generally will be better off to make no representations about the property and to make sure that every representation, provision and statement that has to be made is 100 percent true. The "as is" clause does not exonerate a seller who is concealing a defect or deliberately misleading a buyer.

4. *Seller Must Disclose Defects that are Difficult to Discover.* The seller may be liable in an "as is" situation if he or she fails to disclose material conditions which the buyer is in a poor position to discover, as discussed in Green Spring Farms v. Spring Green Farms, 172 Wis. 2d 28, 492 N.W.2d 392 (Ct. App. 1992). In Green Spring Farms, the seller was accused of failing to disclose that the property was contaminated with salmonella bacteria. The Court found that real estate sellers have the duty to fully disclose to potential buyers the existence of conditions like damaged drain tiles or underground storage tanks which may be material to the decision to purchase and which the buyer is in a poor position to discover.

Thus the use of an "as is" clause is not always going to provide an escape for the seller from all disclosures. A seller's silence might form the basis of a misrepresentation claim if the seller had a duty to disclose.

In Fulton v. Vogt (No. 96-1972, Ct. App. 1998), four sisters inherited 75 acres of farmland that their father had farmed. The sisters listed the property, and they were contacted by a buyer who intended to purchase part of the land for a mini-storage facility. When the buyer commented on old sod cutting equipment he saw in the barn, the listing agent allegedly told him that sod had been grown on the land before and there was no reason why it could not be grown again. The buyer's offer to purchase the entire property was accepted and the buyer later found that the sod he grew on the land was unharvestable.

The contract stated that the "Properties are being sold in an as is condition—no warranties to be given." The trial court remarked that the "as is" language shifts the burden to the buyer to determine the condition of the property being purchased. This serves to protect a seller and his or her agent from claims based upon nondisclosure. There is an exception to this rule, however, when the seller or his agent has made an affirmative representation about some aspect of the property.

The buyer claims that one of the sellers and the listing agent made affirmative representations about the property when they remarked that there was no reason that the property could not be a successful sod farm. The trial court found that none of these statements constituted affirmative representations of fact because the statements were opinion.

On appeal to the Wisconsin Court of

appeals, the court observed that statements of opinion or statements regarding future events are not actionable because they are not representations of fact. The court found that the listing agent's statement about the suitability of the farm for sod farming was an opinion regarding something that might occur in the future.

No Repairs or Curing of Defects

An "as is" clause does not delete the inspection contingency. If a buyer has the right to inspect, the buyer still may give notice of defects. The seller in a true "as is" sale, however, will have negotiated the offer to provide for no seller right to cure in the inspection contingency because the seller has no intention of making any repairs. "As is" generally signals that the seller will not make any repairs or cure any defects—the buyer is on a take-it-or-leave-it basis.

If the buyer has an inspection performed and the inspection report contains some unacceptable items, the buyer will be released from the transaction if the buyer gives a notice of defects and the seller has no right to cure or if the seller does have the right to cure but does not elect to exercise this power. Similar provisions in investigation and testing provisions will lead to the same result. What the seller and buyer usually want is a mechanism whereby the buyer can back out if he or she is not satisfied with the present condition of the property. If the parties wish to renegotiate, they may propose to amend the offer or start over with a new offer.

Licensee's Duty to Disclose

A Wisconsin REALTOR®'s duty to disclose property conditions and other information affecting a transaction is substantially regulated by the Wisconsin Statutes and by the Wisconsin Administrative Code. That duty is first defined in Wis. Stat. § 453.133, and is expanded and further defined in Wis. Admin. Code § RL 24.07. Exceptions to the overall duty are carved out in Wis. Stat. § 452.23. The following discussion takes the following high-speed rail hypothetical scenario and examines it step-by-step in light of each of these provisions.

Fact Situation

A high-speed rail line may be coming to a community and a REALTOR® is listing a property about half of a block from the proposed route of the high-speed train. The track was visible, but the high-speed rail proposal was not a fact that the REALTOR® could observe during his or her pre-listing inspection of the property. Rather, the seller mentioned it when the REALTOR® inquired about the general condition of the property. The seller would prefer to not comment on the possibility of high-speed rail. There is concern that the train may create noise, vibrations, danger to children, and decreased property values. On the other hand, a home near the high-speed rail stop may be desirable to someone wanting to ride the rail to work each day instead of commuting by car. Although the high-speed rail system is being discussed, there is not any definite plan or budget to implement the proposal at the present time.

Step #1—Licensee Inspection of Property

The first step when listing a property is the listing agent's inspection of the property.

In the high-speed rail scenario, the REALTOR® did not learn of the high-speed rail proposal by inspecting the physical characteristics of the property.

Step #2—Licensee Inquiry About Property Condition

The second step when listing a property is the listing agent's inquiry to the seller about the condition of the structure, mechanical systems and other relevant aspects of the property as applicable.

In the high-speed rail scenario, the REALTOR® did learn of the high-speed rail proposal when he asked the

Licensee Duty to Inspect

Wis. Admin. Code § RL 24.07 Inspection and disclosure duties.

(1) **Inspection of Real Estate.**

(a) General requirement. A licensee, when engaging in real estate practice which involves real estate improved with a structure, shall conduct a reasonably competent and diligent inspection of accessible areas of the structure and immediately surrounding areas of the property to detect observable, material adverse facts. A licensee, when engaging in real estate practice which involves vacant land, shall, if the vacant land is accessible, conduct a reasonably competent and diligent inspection of the vacant land to detect observable material adverse facts.

(b) Listing broker. When listing real estate and prior to execution of the listing contract, a licensee shall inspect the real estate as required by sub. (1), and shall make inquiries of the seller on the condition of the structure, mechanical systems and other relevant aspects of the property as applicable. The licensee shall request that the seller provide a written response to the licensee's inquiry.

(c) Other licensees. Licensees, other than listing brokers, shall inspect the real estate as required by sub. (1) prior to or during the showing of the property, unless the licensee is not given access for a showing.

seller about the condition of the property.

Step #3—Determination of REALTOR® Duty to Disclose Material Adverse Fact

If the REALTOR® has learned of information that may need to be disclosed to prospective buyers via either the inspection of the property, from an inquiry of the seller or from other sources, then the REALTOR® must decide whether he or she must disclose the information as a material adverse fact. The REALTOR® will analyze this question by considering the following factors:

Factor #1—Seller Disclosure

If the seller discloses the information on the RECR, the REALTOR® generally will not have to disclose this information as a material adverse fact.

The REALTOR® in the high-speed rail scenario must consider whether the seller will disclose the possible high-speed rail on the RECR. The RECR is designed to allow the seller to disclose information about defects of which they are aware. Item C.25 may be applicable if the seller believes the information about the possible high-speed rail constitutes an awareness of proposed construction of a public project that may affect the use of the property. Item C.27 might also be used if the high-speed rail is considered under the catchall category of "other defects." This may be appropriate if the high-speed rail is deemed a defect because it would have a significant adverse effect on the value of the property. This may be difficult to determine without having an appraisal that projects the effect of high-speed rail on neighborhood property values.

The seller in the high-speed rail scenario decides not to disclose the high speed rail proposal and does not mention it on the RECR. That leaves the REALTOR® to decide whether he or she must disclose it.

Statutory Duty to Disclose

Wis. Stat. § 452.133 Duties of brokers. (1) Duties to all parties to a transaction.

In providing brokerage services to a party to a transaction, a broker shall do all of the following: …

(c) Disclose to each party all material adverse facts that the broker knows and that the party does not know or cannot discover through reasonably vigilant observation, unless the disclosure of a material adverse fact is prohibited by law.

(d) Keep confidential any information given to the broker in confidence, or any information obtained by the broker that he or she knows a reasonable party would want to be kept confidential, unless the information must be disclosed under par. (c) or s. 452.23 or is otherwise required by law to be disclosed or the party whose interests may be adversely affected by the disclosure specifically authorizes the disclosure of particular confidential information. A broker shall continue to keep the information confidential after the transaction is complete and after the broker is no longer providing brokerage services to the party.

Material Adverse Facts

A real estate licensee has a duty to disclose material adverse facts to all parties to a transaction per Wis. Stat. § 452.133(1)(c). "Adverse fact" and "material adverse fact" are defined in Wis. Stat. § 452.01.

Factor #2—Definition of Material Adverse Fact

A material adverse fact is defined in Wis. Stat § 452.01(1e) & (5g). Whether a particular condition or information constitutes a fact that a real estate licensee needs to disclose as an adverse material fact is a judgment that only the licensee can make after considering all of the facts and circumstances in the situation.

If a REALTOR®, as a competent licensee knows that a particular condition or information: (1) has a significant adverse affect on the value of the property; (2) significantly reduces the structural integrity of the property; (3) presents a significant health risk to the occupants of the property; or (4) is information that indicates that a party to the transaction is not able to or does not intend to meet their obligations under the contract, then the issue constitutes an adverse fact. If a party to the transaction were to so indicate, or if a competent licensee would generally recognize that this fact is of such importance that it would affect a reasonable party's decision to enter into a contract or would affect the party's decision about the terms of the contract, the fact is both adverse and material. If this fact is both adverse and material, then § RL 24.07(2) requires the REALTOR® to disclose the fact in writing and in a timely manner to all parties to the transaction, even if the REALTOR®'s client would direct the REALTOR® not to disclose.

Whether the potential for a high-speed rail constitutes a fact that a REALTOR® needs to disclose as a material adverse fact is a judgment that only a REALTOR® can make after considering all of the facts and circumstances in the situation. It is not clear whether a high-speed rail would have a significant adverse affect on the value of the property without specific data or an appraisal. A high-speed rail system would not significantly reduce the structural integrity of the property unless the

train was so near that the vibrations and noise actually caused structural damage. A high-speed rail would not normally present a significant health risk to the occupants of the property and is not information that indicates that a party to the transaction is not able to or does not intend to meet their obligations under the contract. A party to the transaction might indicate that they do not want to be near a high-speed rail because of the noise or potential danger to children. It is not clear if a competent licensee would generally recognize that this fact is of such importance that it would affect a reasonable party's decision to enter into a contract or affect the party's decision about the terms of the contract. In this scenario, there does not seem to be enough factual evidence to conclude that there is a definite material adverse fact.

Material Adverse Facts

Wis. Stat. § 452.01 Definitions. In this chapter:

(1e) "Adverse fact" means any of the following:

(a) A condition or occurrence that is generally recognized by a competent licensee as doing any of the following:

1. Significantly and adversely affecting the value of the property.

2. Significantly reducing the structural integrity of improvements to real estate.

3. Presenting a significant health risk to occupants of the property.

(b) Information that indicates that a party to a transaction is not able to or does not intend to meet his or her obligations under a contract or agreement made concerning the transaction. …

(5g) "Material adverse fact" means an adverse fact that a party indicates is of such significance, or that is generally recognized by a competent licensee as being of such significance to a reasonable party, that it affects or would affect the party's decision to enter into a contract or agreement concerning a transaction or affects or would affect the party's decision about the terms of such a contract or agreement.

Factor #3—Does Party Know or Can Party Observe the Fact

There are also other criteria in Wis. Stat. § 452.133(1)(c) that a REALTOR® should consider even if the REALTOR® believes there is a material adverse fact. The duty to disclose material adverse facts applies per Wis. Stat. § 452.133(1)(c) only if the party does not know about the material adverse fact and cannot discover it through reasonable vigilant observation. For example, a licensee is not obligated to disclose high voltage electric lines running across the yard because they are obvious.

The buyers in the high-speed rail scenario do not know about the potential plans for a high-speed rail system and cannot discern these potential plans through observation of the property, so this criterion would not exempt the REALTOR® from disclosure.

Factor #4—Is Disclosure Prohibited by Law

This duty to disclose material adverse facts per Wis. Stat. § 452.133(1)(c) does not apply if the disclosure of the material adverse fact is prohibited under law.

The disclosure of the high-speed rail proposal would not violate any laws known to the REALTOR®.

Factor #5—Is Fact Confidential

Wis. Stat. § 452.133(1)(d) prohibits licensee disclosure of a party's confidential information unless the information must be disclosed under Wis. Stat. § 452.133(1)(c) or § 452.23.

Although the seller does not want to comment on the possible high-speed rail system, it is not clear whether the seller intended to direct the REALTOR® to keep it confidential. It would be expected that any plans for a potential high-speed rail system would be a public record. The REALTOR® may refrain from disclosing the information to potential buyers only if the information is not required to be disclosed as a material adverse fact, under § 452.23 or by another law. The REALTOR® may wish to clarify with the seller if this is intended to be confidential information if the REALTOR® concludes that he or she is not otherwise compelled to disclose the high-speed rail plans.

The next factors the REALTOR® would consider would be whether he or she was exempt from material adverse fact disclosure under Wis. Stat. § 452.23.

Factor #6—Unlawful Discrimination

Wis. Stat. § 452.23(1) prohibits licensees from making any disclosures which constitute unlawful discrimination under state or federal fair housing law. Under Wisconsin law, a "disability" includes (1) a physical or mental impairment which substantially limits one or more major life activities; (2) a record of having such an impairment; and (3) being regarded as having such an impairment. This protection incluudes persons with HIV/AIDS under state and federal law. Accordingly, no disclosure concerning a property occupant who suffered from HIV/AIDS should be made.

The disclosure of the high-speed rail proposal would not violate any fair housing laws because no protected classes under fair housing law are involved in the scenario.

Factor #7—Stigmatized Properties

Wis. Stat. § 452.23(2) (a) states that a licensee is not required to disclose "that a property was the site of a spe-

Disclosure Duty Exceptions

452.23 Disclosures, investigations and inspections by brokers and salespersons.

(1) A broker or salesperson may not disclose to any person in connection with the sale, exchange, purchase or rental of real property information, the disclosure of which constitutes unlawful discrimination in housing under s. 106.50 or unlawful discrimination based on handicap under 42 USC 3604, 3605, 3606 or 3617.

(2) A broker or salesperson is not required to disclose any of the following to any person in connection with the sale, exchange, purchase or rental of real property:

(a) That the property was the site of a specific act or occurrence, if the act or occurrence had no effect on the physical condition of the property or any structures located on the property.

(b) Except as provided in sub. (3), information relating to the physical condition of the property or any other information relating to the real estate transaction, if a written report that discloses the information has been prepared by a qualified 3rd party and provided to the person. In this paragraph, "qualified 3rd party" means a federal, state or local governmental agency, or any person whom the broker, salesperson or a party to the real estate transaction reasonably believes has the expertise necessary to meet the industry standards of practice for the type of inspection or investigation that has been conducted by the 3rd party in order to prepare the written report.

(c) The location of any adult family home, as defined in s. 50.01 (1), community-based residential facility, as defined in s. 50.01 (1g), or nursing home, as defined in s. 50.01 (3), in relation to the location of the property.

cific act or occurrence, if the act or occurrence had no effect on the physical condition of the property or any structure located on the property." This statute is intended to apply to "stigmatized properties" which have been or are the site of a murder, suicide, a haunting or other notorious events which do not physically damage the property. If the event resulted in physical damage, the seller would normally be required to disclose the defect on the Wis. Stat. Chap. 709 RECR, unless the buyer had waived the RECR or the transaction was exempt.

The disclosure of the high-speed rail proposal does not involve any murder, suicide or haunting known to the REALTOR® and there has not been any other act or occurrence of this nature on the property.

Factor #8—Qualified Independent Inspection Report

No licensee disclosure is required if a written report that discloses the information has been prepared by a qualified third party and provided to the parties. A qualified third party means a federal, state or local governmental agency, or any person whom the broker, salesperson or a party to the real estate transaction reasonably believes has the expertise necessary to meet the industry standards of practice for the type of inspection or investigation that has been conducted by the third party in order to prepare the written report.

For example, in Conell v. Coldwell Banker Real Estate, 181 Wis. 2d 894, 512 N.W.2d 239 (Ct. App. 1994), the buyers did not receive a copy of the RECR until closing. The RECR indicated the basement had dampness and leaks/seepage. The home inspector's report said that there were two cracks in the basement wall, and that the south wall bowed which would require shimming the joints and possible future repairs. A wet basement condition item was checked both "yes" and "no" and the report said there had been past and present dampness in one corner. The report concluded that no apparent evidence of serious moisture problems existed.

After closing, the buyers discovered the basement had chronic water problems. They sued only the selling agent and broker, not the seller or the home inspector, for misrepresentation. The lawsuit alleged the agent had failed to adequately inspect and to disclose the water leakage as stated in the RECR. The trial court found for the selling agent and broker, and the buyers appealed to the Court of Appeals.

The Court of Appeals indicated that 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.

The disclosure of the high-speed rail proposal in the fact scenario did not involve any third party inspections or reports. If there was an appraisal indicating the effect of a high-speed rail system on property values, that could be relied upon by the REALTOR® in this manner.

Factor #9—Group Homes

Under Wis. Stat. § 452.23(2)(c), the presence of certain family homes, community-based residential facilities and nursing homes need not be disclosed to potential buyers. The definition of group homes is technical in nature. This section does not prohibit disclosure but merely clarifies that the licensee has no duty to do so. Any

Licensee Duty to Disclose

Wis. Admin. Code § RL 24.07 Inspection and disclosure duties.

(2) DISCLOSURE OF MATERIAL ADVERSE FACTS. A licensee may not exaggerate or misrepresent facts in the practice of real estate. A licensee, when engaging in real estate practice, shall disclose to each party, in writing and in a timely fashion, all material adverse facts that the licensee knows and that the party does not know or cannot discover through a reasonably vigilant observation, unless the disclosure of the material adverse fact is prohibited by law. This provision is not limited to the condition of the property, but includes other material adverse facts in the transaction.

Note: Certain "material adverse facts," as defined in s. RL 24.02 (12), may not be disclosed by law. For example, unless specifically authorized by a seller, a licensee may not disclose to a potential buyer the actual minimum sales price the seller will accept. See s. 452.133 (1) (d), Stats.

(3) DISCLOSURE OF INFORMATION SUGGESTING MATERIAL ADVERSE FACTS. A licensee, when engaging in real estate practice, who becomes aware of information suggesting the possibility of material adverse facts to the transaction, shall be practicing competently if the licensee discloses to the parties the information suggesting the possibility of material adverse facts to the transaction in writing and in a timely fashion, recommends the parties obtain expert assistance to inspect or investigate for possible material adverse facts to the transaction, and, if directed by the parties, drafts appropriate inspection or investigation contingencies. This provision is not limited to the condition of the property, but includes other material adverse facts to the transaction, including but not limited to defects and conditions included within the report form under s. 709.03, Stats. A licensee is not required to retain third party inspectors or investigators to perform investigations of information suggesting the possibility of a material adverse fact to the transaction.

licensee considering disclosure should first determine whether that disclosure would violate fair housing rules and thus be prohibited (i.e., "handicapped" occupants as a protected class).

The disclosure of the high-speed rail proposal in the fact scenario did not involve any group homes.

Factor #10—Information Suggesting the Possibility of a Material Adverse Fact

If the REALTOR® knows or is aware of information suggesting the possibility of a material adverse fact, § RL 24.07(3) states that the REALTOR® will be practicing competently if the REALTOR® makes timely written disclosure of the information suggesting the material adverse fact to all parties to the transaction, recommends the parties obtain expert assistance to inspect or investigate for the possible material adverse fact, and, if directed by the parties, draft appropriate inspection or investigation contingencies.

In the event that the REALTOR® determines that the high-speed rail proposal has no definite bearing on (1) the structural integrity of the property; (2) the health of the occupants of the property; or (3) whether a party to the transaction is not able to or does not intend to meet their obligations under the contract, and the REALTOR® remains uncertain about whether the information significantly and adversely affects the property's value, the REALTOR® will be practicing competently if the REALTOR® timely discloses information about the high-speed rail proposal in writing to the parties as information suggesting the possibility of a material adverse fact under § RL 24.07(3). This may be a prudent decision given in the high-speed rail scenario.

Step # 3—Format for Disclosure of Material Adverse Fact or Information Suggesting the Possibility of Material Adverse Fact

The disclosure by the REALTOR® in writing can take several different forms. If all known defects had been included in the seller's RECR, distribution of this report would constitute written notice. Other documents can be used to disclose defects in writing, ranging from a letter from the REALTOR® to property data sheets.

If a REALTOR® is looking to create a proper disclosure document, the following points should be addressed in a written letter or memo printed on the letterhead of the REALTOR®'s company. A REALTOR® would not use a WB-41 Notice Relating To Offer to Purchase because a REALTOR® is not a party to the transaction.

- The REALTOR® should identify him or herself as a licensed real estate salesperson or broker.
- The REALTOR® should indicate that he or she is making either a disclosure of material adverse facts or information suggesting the possibility of material adverse facts under Wis. Admin. Code § RL 24.07 (2)

or (3), respectively. In other words, the REALTOR® should cite the legal authority for making the disclosure so that the parties understand that the REALTOR® is obligated to make the disclosure under law.

- The REALTOR® should plainly and factually state the information comprising the material adverse fact or the information suggesting the possibility of the material adverse fact. The REALTOR® may include the good and the bad—additional facts that might qualify or soften the impact of the basic information being given may be included.
- Any reports or supporting documents may be attached to this disclosure document. For instance, there may be newspaper articles discussing the information.
- If the document is providing information suggesting the possibility of material adverse facts, the REALTOR® may also include a statement recommending that the parties obtain expert assistance to inspect the property or investigate the information given. The REALTOR® may also indicate that he or she will be happy to draft appropriate inspection or investigation contingencies if directed to do so by the parties
- This written disclosure document should be provided to all parties—the seller and all prospective buyers. It may be delivered to buyers by giving it to them along with the seller's RECR when they attend property showings or at some other appropriate time.

The REALTOR® in the high-speed rail scenario may prepare a document on his or her letterhead stating the information concerning the high-speed rail proposal in a factual manner. The REALTOR® should state the source of the information and indicate that it is a disclosure of information suggesting the possibility of a material adverse fact under Wis. Admin. Code § RL 24.07(3). If the REALTOR® has an appraisal report indicating the effects of a high-speed rail system on neighborhood property values or other official documents giving information about high-speed rail systems or the specific proposal, these may be attached to the document.

Step #4—Timing for Disclosure of Material Adverse Fact or Information Suggesting the Possibility of Material Adverse Fact

If the REALTOR® has determined that there is a material adverse fact or that there is information suggesting the possibility of a material adverse fact, then that disclosure must be made in a timely manner. Disclosure in a timely manner means that the REALTOR® must disclose to the parties without unreasonable delay given the current circumstances in the transaction. For example, it would be unreasonable to delay 24 hours in disclosing material adverse facts to a buyer who will be writing an offer to purchase that day, if it is reasonably feasible to make the required disclosure prior to the writing of the offer. However, circumstances may allow a later time for disclosure.

"As Is" Sales—The Licensee's Perspective

Generally, an "as is" clause alerts the buyer that he or she is responsible to determine the condition of the property being purchased. The use of an "as is" clause, however, does not release REALTORS® from their duty to disclose.

From the licensee's standpoint, Wis. Admin. Code § RL 24.07 requires that licensees perform reasonably competent and diligent property inspections of the property and disclose material adverse facts and potential material adverse facts to the parties in writing. These duties are not waived in "as is" sales. On the contrary, where the buyer is purchasing a property on an "as is" basis it is crucial for the buyer to learn everything possible about the condition of the property since the seller is not making any property condition disclosures. Generally, the buyer has a registered home inspector and perhaps other qualified experts inspect the property as a condition of the offer to purchase. This does not, however, excuse the licensee from his or her duty to assure that all known material defects are disclosed in writing to the buyer.

If the seller is a REALTOR® who wants to sell his or her property "as is," the sale will be subject to Standard of Practice 1-1, which states that when REALTORS® act as principals in real estate transactions, they remain obligated by the duties of the Code of Ethics. Article 2 of the Code of Ethics requires REALTORS® to disclose adverse facts, including those that may be apparent only to real estate licensees. Therefore, a REALTOR® using an "as is" clause arguably may do so only after disclosure of all material defects and conditions known to the seller/REALTOR®. The "as is" clause in this situation functions only as an indication that the seller/REALTOR® does not intend to make any repairs and that the buyer has to take the property the way it is.

Legal Hotline Questions & Answers

The following questions concerning disclosure issues were recently asked of the Legal Hotline:

As Is

Re: "As is" sale. The listing agent has written on the RECR that the property is being sold "as is" without warranty or representation by the seller and that the buyer is encouraged to have a professional home inspection done within 10 days of acceptance. The offer states in the Property

Condition Representations section that "Buyers acknowledge there is no property condition report on this property." The offer includes a home inspection contingency. If the seller counters that the buyer must sign the RECR where it says "as is," does this change the buyer's rights under the home inspection contingency in any way?

No. A buyer's signature on an RECR only signifies that the buyer has received a copy of the report. It does not change the terms and conditions stated in the offer to purchase. In an "as is" situation, the buyer still has the right to inspect the property and to give a notice of defects to back out of the offer if the condition of the property is unacceptable.

Amending the RECR

A seller had a home pre-inspected and the inspector came up with two defects and a list of repair items. Do the repair items have to be disclosed to potential buyers?

If the seller has an inspection report that discloses two defects, the seller should complete an amended RECR or an amendment to the RECR disclosing the defects (and any measures taken to rectify the same). If the items listed on the inspection report as repairs do not fit the definition of a defect, then they need not be disclosed. Although the seller may provide copies of the inspection report to buyers or share the repair items with buyers, this is not required.

The ultimate goal is to have any defects disclosed to buyers. If a seller fails to disclose a defect, the licensee must disclose it to the parties in writing and in a timely manner if it constitutes a material adverse fact.

When a buyer signs a RECR, it only means that the buyer acknowledges receiving it. It does not mean that the buyer "accepts" the defects. It does mean that the buyer has notice of the described defects. A buyer generally can not get out of a deal based upon defects the buyer had full knowledge of (the nature and extent of the defects) at the time the offer was written.

An agent took over a listing for another agent in the office. The seller has had two home inspections done for two different buyers and both buyers picked the same inspector. The home inspector wrote a bad report. What must be given to subsequent prospective buyers?

Wis. Stat. § 709.035 requires sellers to amend the RECR prior to the acceptance of a contract when they obtain information or become aware of any condition that would change a response on the RECR. The seller may choose to attach a copy of each of the inspection reports to the RECR to accomplish this disclosure. Although the home inspection reports may be provided, the agent should tell the buyer that the reports are for informational purposes only. Due to the home inspector administrative code provisions, the home inspector will not be liable to subsequent buyers for any errors or omissions contained in the original reports.

Material Adverse Facts

A licensee has a listing that is about three parcels away from the highway that cuts through the city. There is quite a bit of highway noise. The DOT is proposing a widening of the highway that would result in sound barriers being installed. The DOT says this is definitely going to be proposed to the state but it will be years before it is completed. At what point must the seller disclose this?

Since noise can be considered an adverse factor, the licensee should disclose, timely and in writing, that traffic noise may occur and that the DOT is considering installing sound barriers.

A closing on a home was scheduled after all contingencies were satisfied. The cooperating broker called yesterday indicating that the buyer would not show up for the closing because he had lost his job. The lender is still willing to fund the loan and still has the closing scheduled. The sellers have pre-signed the closing documents and are out of town. How to proceed?

Once a real estate licensee becomes aware of a material adverse fact, the license must make timely written disclosure. A material adverse fact is defined, in part, as " information that indicates that a party to a transaction is not able to or does not intend to meet his or her obligations under a contract or agreement made concerning the transaction." See § RL 24.02.

Although the sellers are out of town, the listing agent should attempt to make contact in any way possible to inform them of the buyer's comments. The agent should work with the parties to determine whether to proceed with the closing and refer the parties to their legal counsel if they need legal advice.

Stigmatized Properties

The seller has disclosed to the listing agent that they have a ghost on the third floor of their home. The seller never said anything about it previously because she feared that everyone would think that she was crazy. There was a showing the other day and a five-year-old boy also saw the ghost. Must this be disclosed on the RECR?

Wis. Stat. § 452.23(2) (a) states that a licensee is not required to disclose "that a property was the site of a specific act or occurrence, if the act or occurrence had no effect on the physical condition of the property or any structure located on the property." This statute is intended to apply to "stigmatized properties" which have been or are the site of a murder, suicide, a haunting or other notorious events that do not physically damage the property. If the event resulted in physical damage, the seller would

normally be required to disclose the defect on the Wis. Stat. Chap. 709 real estate condition report, unless the buyer had waived the report or the transaction was exempt from Chapter 709.

Even if there is no physical damage, there may be a sort of psychological damage present. Most agents realize that the buyer will probably find out about the event or occurrence anyway, typically from the neighbor. For that reason, real estate agents may encourage sellers to let them disclose problems in the house's history in order to avoid potential disputes.

The question of whether the seller must disclose a murder or a haunting is less clear. On the real estate condition report, the seller is asked to disclose conditions that would have a significant adverse effect on the value of the property. Although it is not easily quantified, it is possible that a brutal murder or a haunting could significantly affect property values or an owner's ability to resell a property.

While talking to a potential seller, an agent was informed that the seller's deceased spouse was cremated and the ashes were buried under a tree in the back yard. Is there a duty to disclose this to potential buyers?

This question may be analyzed on two different levels: (1) is it a stigmatized property, and (2) is it a burial site?

Wis. Stat. § 452.23(2) (a) states that a licensee need not disclose stigmatized properties that have been or are the site of a murder, suicide, a haunting or other notorious events that did not physically damage the property.

Most agents realize that there may be a type of psychological damage, at least in the minds of some people, even in the absence of physical damage. For that reason, real estate agents may encourage sellers to let them disclose problems in the house's history to persons who might be offended or alarmed by these events.

The burial site question was presented to Leslie E. Eisenberg, Burial Sites and Local Assistance Programs Coordinator at the Wisconsin Historical Society. She, in turn, referred the question to the Attorney General's office. They said this would be considered a burial site because "burial site" is defined in Wis. Stat. § 157.70(1)(b) to mean "any place where human remains are buried," and because "human remains" are defined in Wis. Stat. § 157.70(1)(f) to mean "any part of a body of a deceased person in any state of decomposition."

The existence of burial sites must be disclosed to the parties because it is illegal under state law to disturb a burial site. There are heavy fines that can be levied for those who disturb burial sites and even for those who fail to report the disturbance of a burial site. One way to deal with the burial is to have it surveyed by a registered land surveyor and forward the legal description to the State Historical Society for recording along with a protective covenant. That way the burial site will appear on all future title searches and subsequent landowners might qualify for a small property tax deduction.

For further information, see *Legal Update 00.07* and http://www.shsw.wisc.edu/histbuild/burialsites/about/office_background.htm. Caller may wish to contact the Burial Sites Preservation Programs Program at the Wisconsin Historical Society, 816 State Street, Madison, Wisconsin 53706; telephone (800) 342-7834; fax: (608) 264-6542; e-mail dcmarch@whs.wisc.edu or leeisenberg@whs.wisc.edu.

Home Inspection Reports

A listing agent is working with a seller whose listing expired with another broker. There were two previous home inspections done on the property for offers that fell apart. The listing agent picked up the reports from the previous listing broker. That broker told the listing agent that she couldn't show the inspection reports to new buyers because they belong to the first buyers. Is this true?

No. Although some home inspectors and buyers are sometimes concerned that someone else is benefiting from what the buyer paid for or will be able to sue the inspector for errors in the inspection, those concerns are unfounded. The home inspection statutes and regulations make it clear that the home inspector's liability is basically limited to his original buyer/client. The offer to purchase requires buyers to provide listing brokers with copies of all inspection reports—that is there to give the brokers additional information about the property condition that may be passed on to successive buyers. The policy of the DRL is to maximize the disclosure of property condition information to consumers.

Group Homes

A broker sold a home to a buyer about four to six weeks ago. The buyer put additional funds into the home. When she was ready to move in about three days ago, a neighbor told the buyer that there is a group home next door. The broker was not aware of this. The buyer said the broker should have known and told her. The buyer is going to have her elderly father live with her and says her father is very scared of "this type of people." She said that although she does not want to discriminate, she should have the right to associate with whom she wants. What is the broker's responsibility, if any? What are the buyer's rights?

Under Wis. Stat. § 452.23, the presence of certain family homes, community-based residential facilities and nursing homes need not be disclosed to potential buyers. The definition of group homes is technical in nature.

This section does not prohibit disclosure but merely clarifies that the licensee has no duty to do so. Any licensee considering disclosure should first determine whether that disclosure would violate fair housing rules and thus be prohibited (i.e., "handicapped" occupants as a protected class).

§ 452.23 may be viewed at http://www.legis.state.wi.us/statutes/01Stat0452.pdf. More information about federal fair housing laws may be viewed at HUD's Web site at http://www.hud.gov/offices/fheo/FHLaws/FairHousingJan2002.pdf, http://170.97.67.13/offices/fheo/FHLaws/index.cfm and http://170.97.67.13/offices/fheo/FHLaws/index.cfm.

Broker Liability for Disclosures

An agent recently received a call from a previous buyer/client regarding issues that have now come up. The agent suggested that she contact her attorney for direction. She is concerned because certain items were not disclosed in the RECR (use of neighboring properties, issues surrounding a proposed ethanol plant, sexual predator issues, a construction company mining gravel on site across the street, and undisclosed defects in the dwelling and sanitary system). Please advise.

Per the agent's account, none of the conditions the buyer spoke of were observable at the time of purchase nor did the agent know, or should have known, of the defects from other sources at that time. The agent has no duty to investigate potential material adverse facts. The agent must inspect the property and disclose known material adverse facts or information known by the agent that suggests the possibility of material adverse facts. The buyer should be referred to legal counsel.

Conclusion

And what of the fact situation from page 1 about the woodburning furnace, outdoor lights and property rights violation signs? The seller in that case should consider whether the smoke should be disclosed on the RECR. Smoke can certainly be an irritant if not an environmental or health concern. If the seller does not disclose the smoke, the listing agent must decide whether the smoke coming from the neighbor's woodburning stove is a material adverse fact or information suggesting the possibility of a material adverse fact. The facts do not appear to suggest an adverse affect on value because there does not seem to be any affect on the structural integrity of the property, and the smoke does not signify that a party can't or won't honor his or her contractual commitments. There might be a minor health risk, although this possibility must be evaluated by the listing agent who is familiar with these properties and in a better position to decide whether there could be a significant health risk. Because this smoke apparently irritated the seller enough to retaliate by installing the outdoor lighting, it may be wise to disclose the neighbor's woodburning stove, and the smoke that it creates, as a potential material adverse fact that bears some investigation.

By following the guidelines outlined in this *Update*, both sellers and REALTORS® may provide optimum property condition information for the benefit of prospective buyers and protect themselves from accusations of misrepresentation.

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