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Legal Update

A WRA Publication Exclusively for the Designated REALTOR®

Inside This Issue

2002 REALTOR® Highlights

As another year passes by, REALTORS® may wonder if they have missed something important among the new developments that have evolved within the fast-paced real estate industry. This *Legal Update* attempts to bring members up to date on important legal information that was in the spotlight during 2002.

The *Update* begins with two new significant developments that are necessary to complete the picture of the year's important REALTOR® information: (1) new REALTOR® Code of Ethics rules for agents seeking to assist a buyer who is party to a buyer agency agreement and for listing agent disclosures regarding cooperative compensation, and (2) new rules for closing heating oil storage tanks.

The *Update* then highlights many of the items that have appeared throughout 2002 in the *Legal Updates*, the *Wisconsin REALTOR®* and the *Commercial Real Estate Updates*. These summary items are arranged by topic, including REALTOR® member issues, office practice issues, property management issues, disclosure issues, land-use issues, transactional issues and environmental issues.

Year-End Developments

Two new year-end developments for REALTORS® in 2002 are the new Code of Ethics provisions and the new rules for closing heating oil tanks.

New Rules for REALTOR® Cooperation

At the November 2002 NAR meetings, several amendments to the REALTOR® Code of Ethics were enacted and will take effect on Jan. 1, 2003. The most significant changes made include revised Standards of Practice regulating the conduct of a licensee in a position to work with a buyer who is a party to a buyer agency agreement, and governing a listing broker's disclosures to his or her prospective client regarding the terms of the compensation that will be offered to cooperating brokers.

Working with Buyers who are Parties to Buyer Agency Agreements: Standard of Practice 16-13

Standard of Practice 16-13, as revised effective January 1, 2003, states:

"All dealings concerning property exclusively listed, or with buyer/tenants who are subject to an exclusive agreement shall be carried on with the client's agent or broker, and not with the client, except with the consent of the client's agent or broker or except where such dealings are initiated by the client. (Adopted 1/93, Amended 1/98)

Before providing substantive services (such as writing a purchase offer or presenting a CMA) to prospective purchasers, sellers, tenants or landlords ("prospects"), REALTORS® shall ask prospects whether they are parties to any exclusive representation agreement. REALTORS® shall not knowingly provide substantive services concerning a prospective transaction to prospects who are parties to exclusive representation agreements, except with the consent of the prospects' exclusive representatives or at the direction of prospects."

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The first question raised by the amendment is the meaning of the term "exclusive representation agreement." In Wisconsin, the DRL-approved listing contracts give listing brokers the exclusive right to sell and market a property. Such a listing contract is certainly an "exclusive representation agreement." Therefore, Wisconsin licensees may not provide significant services to property owners without first asking whether the owner is a party to a listing contract. If the owner is subject to a listing, the licensee cannot provide substantive brokerage services without the consent of the listing broker or upon the direction of the owner.

However, the vast majority of buyer agency agreements in Wisconsin only provide exclusivity in the sense that the broker who is a party to the buyer agency agreement is the only buyer's broker that the buyer may work with throughout the term of the contract. The buyer may still work with and negotiate directly with owners and owner's agents. Because it is not clear whether the DRL-approved buyer agency agreements constitute "exclusive representation agreements," the WRA legal staff conferred with the NAR Legal Department. NAR has advised that an "exclusive representation agreement" is intended to include agency agreements where just one broker has been retained to work on behalf of the client. Accordingly, Wisconsin WB-36 buyer agency agreements would be viewed by NAR as "exclusive representation agreements."

Under that interpretation, if a REALTOR® is the agent manning an open house or has a friend or relative that is a prospective buyer, the REALTOR® may not write an offer for that buyer prospect without first asking the prospect if he or she is a party to a buyer agency agreement.

If the prospect is a party to a buyer agency agreement, that does not mean that the REALTOR® cannot write the offer for the prospect—that will be a question of the REALTOR®'s professional conduct standards and perhaps an office policy manual issue. NAR, however, has indicated that it is permissible for the REALTOR® to ask the prospect if he or she would like the REALTOR® to write an offer to purchase. This will be helpful in situations where the buyer's agent is absent and the buyer is ready to draft an offer.

Disclosures to Prospective Listing Contract Clients: Amended Standard of Practice 1-12

Effective Jan. 1, 2003, Standard of Practice 1-12 is revised to state:

"When entering into listing contracts, REALTORS® must advise sellers/landlords of:

> 1) the REALTORS®'s ~~general~~ company policies regarding cooperation ~~with~~ 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 … "

This amendment dramatically changes the concept long-observed in Wisconsin that a listing broker is not required to disclose his or her compensation policies to sellers or others. This amendment requires brokers to disclose to the owner the company's cooperation policies and the compensation amounts that will be offered to cooperating brokers when entering into a listing contract.

The WRA legal staff also posed a question to NAR concerning this amended standard of practice. When asked how extensive this disclosure of compensation amounts needed to be, NAR advised that brokers should disclose their MLS compensation splits, tell the owner if they have policy letter compensation agreements with various brokers and indicate that the owner may see a copy of the policy

letters upon request. This should be manageable for those brokers who offer a wide range of compensation arrangements through policy letters. Brokers should consider disclosing the compensation offered in their policy letters if it is substantially different than the MLS compensation or if the primary means of offering compensation in the market area is by policy letter.

The amendments to Standards of Practice 16-13 and 1-12 go into effect on Jan. 1, 2003. For further information, go to http://www.realtor.org.

New Heating Oil Tank Removal Rules

REALTORS® and property owners should be aware of the Department of Commerce's new rule for the removal of heating oil tanks. The revisions require that all heating oil tanks, most often found inside homes and other buildings, be disconnected or removed from service when furnaces are converted from oil to LP or natural gas. The new heating oil tank revisions in Wis. Admin. Code § Comm 10.475 apply to storage tanks that are connected to and supply fuel oil to furnaces and other heating appliances on the premises.

The new rules state:

1. If the tank is being removed, the tank and all connected piping, including all vent and fill piping, must be emptied and purged of all vapors, cleaned and removed from the premises.

2. If the tank and/or piping is not all removed, the tank and all piping must be emptied and purged of all vapors. If the tank is not removed, the tank vent shall remain open and intact. If the outside fill pipe is not removed, it must be filled with concrete to the top of the pipe and capped. Any other piping that is not removed must be capped or otherwise sealed.

Any contractor performing this heating oil tank removal process on behalf of the owner is responsible for compliance with these requirements. The owner must also give written notice to the current heating oil supplier within seven days of the tank removal or closure that the tank is no longer in service and to stop all future fuel oil deliveries. This notice may be given verbally if a delivery is scheduled within the seven days.

This new rule is in addition to the existing UST and AST regulations. The heating oil tank rule can be obtained by going to the Department of Commerce Web site at ftp://www.commerce.state.wi.us/ER-Comm10-PhaseIFinalRule.pdf. Questions on the new heating oil tank revision may be directed to Sheldon Schall, Storage Tank Regulation Section Chief, Department of Commerce, (608) 266-8076 or sschall@commerce.state.wi.us.

💻 **REALTOR® Resource Page—Underground Storage Tanks:** includes *Legal Updates* about USTs and ASTs and links to the DCom regulations, UST & AST tank database, The Real Estate Agents page, the May 1, 2001 underground storage tank upgrade requirements, underground storage tank closure guidelines, and information about farm fuel tanks. All of these links can be found at http://www.wra.org/Resources/resource_pages/ust_resources.htm.

REALTOR® Member Issues

The following section summarizes NAR guidance for using new technologies including Internet data exchange (IDX) programs, virtual office Web site (VOW) and Limited Service or Limited Representation Listings (LR), followed by a valuable review of procuring cause and REALTOR® mediation basics.

Internet Data Exchange (IDX)

REALTORS® should no longer be shocked to discover that their competitors are displaying listings from other MLS companies on their Web sites. This is IDX advertising at work.

IDX allows participating firms to give each other blanket permission to advertise each other's listings. Each MLS participant giving this permission also receives reciprocal permission from other participants. Participants who opt out of IDX cannot display listings from other participants. Each MLS is required to implement an IDX policy. The MLS determines whether the addresses of listings should be displayed on the Internet.

For more information, go to NAR's Field Guide to Internet Data Exchange (IDX) and Virtual Office Web sites (VOWs) at http://www.realtor.org/libweb.nsf/pages/fg902.

Virtual Office Web Sites (VOW)

A virtual office Web site (VOW) refers to a business model where a participant's Web site functions as the electronic equivalent of the participant's office. It is like having your entire office automated and stationed online. A VOW Web site includes active listings of other MLS brokers, displays listings to qualified buyers interested in the listings, and prevents unqualified, general access to this information through a password barrier or other firewall.

See NAR's white paper regarding virtual office Web sites at http://www.realtor.org/mempolweb.nsf/pages/VOWwhitepaper?OpenDocument&Login. NAR's proposed policy governing use of MLS data in connection with Internet brokerage services offered by MLS Participants ("Virtual Office Websites") (Revised November 2002) can be viewed at http://www. realtor.org/mempolweb.nsf/pages/VOWproposal?OpenDocument&Login. The NAR Board

of Directors will study this proposal and consider it for adoption at its next meeting in May 2003. The Board wanted to allow time for a better understanding of the policy proposal at all levels of the REALTOR® organization.

In the meantime, a MLS cannot adopt the recommended policy or rules that apply specifically to VOWs in advance of establishment of a VOW policy by the NAR Board of Directors. The recommended policy imposes new VOW-specific requirements that are currently not authorized under existing NAR policy. Until new policies are adopted, all existing MLS rules must be applied to all MLS participants, including those operating VOWs.

For more information, go to NAR's Field Guide to Internet Data Exchange (IDX) and Virtual Office Websites (VOWs) at http://www.realtor.org/libweb.nsf/pages/fg902.

Limited Service or Limited Representation Listings (LR)

Limited service brokers are licensed brokers who offer their seller-clients little or no property marketing services other than submitting the property listing to MLS, often for a flat fee. The listing also commonly provides that the seller will pay a fee to any cooperating broker involved in the sale of the property. An MLS may not reject these listings on the basis that the listing broker provides only a limited degree of service to the seller, or even no service at all other than submission of the listing to the MLS. It is also inappropriate for an MLS to reject these listings simply because the listing agreement provides that the seller, instead of the listing broker, will pay the cooperating broker. An MLS may, in its discretion, adopt a "disclosure rule" whereby the listings of limited service brokers are identified in the MLS so that cooperating brokers know at the outset that they may have to provide more services than "usual."

For more information, go to http://www.realtor.org/LetterLw.nsf/Pages/0500lowserve?OpenDocument.

Procuring Cause

The rules for determining entitlement to cooperative compensation are often confusing to REALTORS® but a few basic rules help to bring the picture into focus:

> **REALTOR® Practice Tips**: A cooperating broker must have a compensation agreement with a listing broker before procuring cause or any other standard can be applied.

> **REALTOR® Practice Tips**: Procuring cause is not the universal standard of performance in all real estate transactions, as licensees often assume. Procuring cause is the automatic standard only in MLS transactions. If a property is not listed in the MLS or if the potential cooperating broker is not an MLS participant, then the listing and cooperating brokers must affirmatively select procuring cause if they want it to be the applicable standard.

Procuring cause is the uninterrupted series of events that results in a successful transaction. In other words, what "caused" the successful transaction to come about? A successful transaction means a sale that closes or a lease that is executed. In more practical terms, procuring cause is the concept that determines who is entitled to collect the money offered by the listing broker. In the context of an arbitration hearing, procuring cause involves determining whether or not the broker bringing the arbitration is procuring cause and thus entitled to the offered compensation. There is no one act which determines procuring cause—it can only be answered by a full, knowledgeable consideration of all the facts of the case.

When determining procuring cause, the critical time frame to analyze begins when the buyer is introduced to the property and ends when the seller accepts an offer to purchase. The reason is easy to understand if you "follow the money." The listing broker is being paid to market the property and get it sold, in other words, to tell potential buyers about the property until one of them writes an offer to purchase that the seller accepts. The job that the listing broker is paying the cooperating broker to do runs from the marketing of the property until a buyer writes an offer to purchase that is accepted.

The preeminent written authority explaining procuring cause, as applied in REALTOR® arbitration hearings, is the Code of Ethics and Arbitration Manual, specifically Appendix II to Part Ten—Arbitration Guidelines (Suggested Factors for Consideration by a Hearing Panel in Arbitration). It is extremely important that all REALTORS® read this information, including the sample fact situations, and refer to it whenever confronted with a potential procuring cause issue. The Appendix is available online at the NAR Web site: http://www.realtor.org/CEAM.nsf/eab2553e51d2fd9d86256818004d74ad/cf041701d377170e8625687a007875bd. Excerpts also appear in *WRA Legal Update 02.04*, available online at http://www.wra.org/Legal/Legal_Updates/2002/lu0204.asp.

REALTOR® Mediation

Effective Jan. 1, 2002, REALTOR® boards are required to provide mediation and arbitration services to members and their clients. Members must be given the option to submit their disputes to mediation instead of going to arbitration. REALTORS® can use mediation to resolve disputes with other REALTORS® or with

their clients or customers.

Mediation is an attempt to bring about a peaceful settlement or compromise between disputants through the objective intervention of a neutral party. Mediation is a confidential settlement process and is entirely voluntary. In the mediation process, a mediator helps the parties reach a settlement of their disputed. The mediator does not decide the issues or dictate a decision upon the parties. Instead, the mediator allows the parties to reach their own consensus resolution.

For more mediation information from NAR, go to http://www.realtor.org/mempolweb.nsf/PSPol?Openview and click on Mediation Tools/Resources. A handy summary of the REALTOR® mediation process appears WRA *Legal Update 02.09* (http://www.wra.org/Legal/Legal_Updates/2002/lu0209.asp).

Office Practice Issues

The 2002 developments in the area of broker office practice include the DATCP telephone solicitation and no call list rules, RESPA concerns with administration or transaction fees, and tax implications of the employee/independent contractor classification of real estate agents.

What REALTORS® Should Do About the Telephone Solicitation Rules

REALTORS® may be surprised to find that DATCP's no call rules broadly regulate telephone solicitations to potentially include many daily business calls made by REALTORS®. REALTORS® may risk penalties and possible litigation unless they register as telephone solicitors or adjust their business practices.

The legislature set out to regulate and monitor telephone solicitors, but DATCP expanded the definition of "telephone solicitation" so that most business people (including REALTORS®) who make non-exempt "telephone solicitation" calls must register with DATCP. A "telephone solicitation" is defined by DATCP as an unsolicited telephone call that encourages the consumer to purchase property, goods or services, or a call that is part of a plan or scheme to encourage the consumer to buy property, goods or services.

These "telephone solicitation" calls include not only traditional telemarketing activity but also telephone calls a REALTOR® makes to his or her clients or customers to remind them to order the septic test required by the offer contingency or to obtain an insurance binder for closing.

No agent can legally make a "telephone soliciatation" call unless the broker is registered with DATCP as a solicitor or the purpose of the call is exempt.

1. Make Your Calls Exempt

Brokers should confer with their attorneys and take steps to make sure that their follow-up and closing preparation calls to their clients and customers are not classified as "telephone solicitations." In other words, brokers make their follow-up and closing preparation calls fit into one of the exceptions to the definition of "telephone solicitation." The "telephone solicitation" definition contains several exceptions, including telephone calls made:

- In response to the consumer's request for that call. Brokers may, after conferring with legal counsel, consider inserting language in all new and existing agency agreements and all new and existing agency disclosures (starting immediately) to the effect that: "(Seller) (Buyer) requests but does not require Broker to telephone (seller) (buyer) regarding issues, goods and services related to the real estate transaction. This request will terminate at such time as Broker is no longer providing brokerage services to (seller) (buyer)."
- To a current client. A current client is a person who has a current agreement to receive, from the caller or the person on whose behalf the call is made, property, goods or services of the type promoted by the telephone call. Tinkering with the definition of clients and client services, may be considered, but only upon the advise of company legal counsel.

2. Telephone Solicitation Registration

Brokers who allow or require cold calling may not be able to escape DATCP's telephone solicitation registration requirements and fees. Contact DATCP for your registration packet (608) 224-4999, fax: (608) 224-4939, or online at https://nocall.wisconsin.gov/web/includes/help/telemarketerfaq.asp, to pay your fees, and to register. If the broker is registered then the agent can make "telephone solicitation" calls.

3. Do Not Call List

Brokers that have registered will receive the "Do Not Call" list. No agent may make a "telephone solicitation" call to any telephone number shown on the Do Not Call list, even if an agent is making a follow-up call to a party in a transaction, unless the call falls under one of the "telephone solicitation" definition exemptions.

See *Legal Update 02.11* (http://www.wra.org/Legal/Legal_Updates/2002/lu0211.asp) for further discussion of the DATCP telephone solicitation rules and a complete list of the exceptions to the definition of a "telephone solicitation."

Unearned Transaction Fees Under RESPA

The unearned fee rule under Section 8(b) of RESPA states, "Splitting charges. No person shall give and no

person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed." A recent RESPA policy statement has caused concern among REALTORS® regarding whether they may include administrative or transaction fees in their commission structures.

REALTOR® Practice Tips: Until the application of this policy has been finally clarified, brokers must proceed with caution with respect to any administration or transaction fee charged to their clients. Steps to take that will help ensure the legitimacy of fees include:

- Avoiding additional fees for goods and services that were previously provided and included in the base commission fee. It may give the appearance that you are charging an excessive fee for a service that was previously provided.
- Labeling fees as accurately as possible and providing the client with a clear description of what the fee entails. Putting special labels on those fees, such as "transaction fees" or "administrative fees" will certainly call unwanted attention to them.
- Making sure that fees are fully disclosed to the client prior to the client entering into the agency relationship. The DRL requires that any administrative or other fees be disclosed to the client in writing before the client executes the listing contract or buyer agency agreement.
- Making sure the fee is for actual services that were provided
- Making sure that those services are reasonably priced. RESPA is not a rate-setting statute, but it is prudent to avoid excessive fees or profits.

Key Point: A more conservative position would be to identify any fees which cannot be directly related to a specific consumer service as commissions. REALTORS® may wish to review their fee policies with legal counsel as HUD has done little to clarify its position on this issue for the real estate industry.

For a copy of HUD's RESPA Policy Statement 2001-1 regarding lender payments to mortgage brokers and unearned fees, go to www.hudclips.org/sub_nonhud/cgi/pdf/26321.pdf. A new NAR guide that explains HUD's RESPA Statement of Policy on Unearned Fees is available online. To access the guide, "Real Estate Transaction Fees: To 8(b) or not 8(b), That is the Question," go to www.realtor.org/realtororg.nsf/pages/respasec8b?opendocument. Laurie Janik, General Counsel of the National Association of REALTORS®, also addressed this topic in the January 2002 edition of the REALTOR® Magazine, which can be found at www.realtormag.com/RMODaily.nsf/All/B415A9DA7.

Are Agents Really Employees or Independent Contractors?

Broker-Salesperson Relationship

The determination of whether a real estate agent or other office personnel is an employee or independent contractor is important for several reasons. Federal and state income tax must generally be withheld from wages paid to employees. An agent's status as an employee or an independent contractor also impacts Social Security and Medicare payments, federal and Wisconsin unemployment compensation, Wisconsin workers' compensation, and other taxes. Failure to comply with these tax responsibilities or the misclassification of an employee as an independent contractor can result in the assessment of back taxes, interest, and penalties against the broker's company and/or the broker.

Independent Contractors

An individual's status as an employee or independent contractor for income tax purposes is generally made under the IRS 20-factor test. The 20 factors appear on page 15 of *Legal Update 00.12* (http://www.wra.org/legal/Legal_Updates/2000/lu0012.asp).

Statutory Independent Contractors

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

- The individual must be a licensed real estate agent.
- Substantially all of the real estate agent's remuneration for the services performed as a real estate agent (appraising property, advertising and showing property, closing sales, leasing property, recruiting, training, and supervising other agents, but not property management) must be directly related to sales or other output rather than to the number of hours worked (at least 90 percent of compensation must come from commissions); and
- A written agreement must exist between the real estate agent and the broker/company for whom he or she works, and it must provide that the real estate agent will not be treated as an employee with respect to such services for federal tax purposes.

Unemployment Insurance(UI)

Under Wisconsin unemployment insurance (UI) law, the definition of employee is quite broad (a nine-factor test). However, most real estate

agents fall under the UI law exemption in Wis. Stat. § 108.02(15)(k)7 for services provided by real estate agents or salespersons who are paid solely by commission for their services.

REALTOR® Practice Tips: Every broker or real estate office should compensate real estate agents solely by commission in order to remain exempt from UI contributions.

Workers' Compensation

The Department of Workforce Development (DWD) maintains that all real estate agents and personal assistants working for a broker or company must be employees because of the supervisory duties placed upon that broker or company under license law. The DWD insists that real estate salespersons and licensed brokers who work for real estate brokers or companies are employees of that broker or company under the Wisconsin Workers' Compensation Act. Brokers and companies are also generally responsible for maintaining workers' compensation insurance for all personal assistants who are hired by the broker or by the broker's agents.

Brokers wishing to challenge the DWD position should do so only upon the advice of legal counsel.

A small firm with no workers' compensation insurance coverage could go bankrupt if a serious injury were sustained. Wis. Stat. § 102.82 provides that all uninsured employers shall pay DWD the amount paid to the employee to cover injuries plus twice the amount determined to equal what the uninsured employer would have paid during periods of illegal nonpayment for workers compensation insurance in the preceding three-year period. Actions to recover payment of these penalties can amount to tens of thousands of dollars. For more information, contact the DWD Workers' Compensation Division at P.O. Box 7901, Madison, WI 53707-7901, (608) 266-1340, fax (608) 267-0394.

See *Legal Update 00.12* (online at http://www.wra.org/legal/Legal_Updates/2000/lu0012.asp) for further discussion of the implications of employee or independent contractor status.

Property Management Issues

Landlords and property managers continued to wrestle with carpet cleaning and commercial lien issues in 2002.

Landlords Should Avoid Carpet Cleaning Fees

In 1999 the Department of Agriculture, Trade, and Consumer Protection (DATCP) legal staff indicated that: "It is not illegal per se for the landlord and tenant to agree that the tenant will clean the carpet or pay for the carpet to be cleaned at the end of the lease term. However, the landlord may not withhold the charges for such carpet cleaning from the tenant's security deposit, unless the tenant committed "damage, waste or neglect." Therefore, if the tenant does not clean the carpet at the end of the lease and there is only normal wear and tear on the carpet, the landlord's remedy for this breach is to seek damages through small claims court."

Since that time, the Wisconsin attorney general's office has issued an informal opinion to DATCP evaluating the carpet cleaning issue with an eye toward Wis. Stat. § 704.07. That statute provides that it is a landlord's duty to keep the premises "in a reasonable state of repair." The opinion interprets this duty to include routine carpet cleaning at the end of a tenancy. In addition, § 704.07(1) states "An agreement to waive the requirements of this section in a residential tenancy is void." Thus, the opinion concludes, any agreement that waives the landlord's duty to perform routine carpet cleaning at the end of a tenancy or attempts to shift this duty to the tenant is void.

This informal attorney general's opinion conflicts with DATCP's prior opinion. Although it has no precedential value and is strongly disputed by many, it does sound a warning to landlords whose leases require tenants to clean the carpet or pay for carpet cleaning at the end of the tenancy. Landlords who want to be certain that their leases will withstand any legal challenge from tenants or DATCP may find it advisable to remove all provisions making tenants responsible for performing routine carpet cleaning or paying for routine carpet cleaning at the conclusion of the tenancy.

Commercial Lien Law Update: Property Management Agreement

A broker lien is used in a property management situation to secure the property manager's fees due under a property management agreement or listing for lease. It may be used for commercial properties such as office or retail space and for residential properties as long as the managed rental property has nine or more units.

Notice of Intent to Claim Broker Lien for Property Management Agreement or Lease Listing

The notice of intent to claim broker lien must be provided to the rental property owner at least one day before the lease listing or property management agreement is signed.

Notice of Broker Lien for Property Management Agreement or Lease Listing Transactions

The Notice of Broker Lien in the case of a lease listing or property management agreement must be filed with the register of deeds and mailed to the owner no later than 90 days after

the broker earns a commission, or the broker receives notice that he or she has earned a commission. A fee is considered to be earned on the date that the fee payment is due under the property management agreement. Thus, the broker need not file any broker liens until such time that the broker has notice or knowledge that the owner failed to pay a commission that was due and in default for 89 days.

The broker may use broker liens to encourage an owner to make timely commission payments. If the owner is 90 days in default, the broker can file a broker lien and satisfy it once the commission payment has been received. If the owner is again 90 days in default with a subsequent payment, the broker can file another broker lien. This hopefully would not be necessary because after the broker has filed one broker lien, the owner is apt to make serious efforts to avoid a repeat of the broker lien process.

Commercial Lien Trailer Bill Drafted

The WRA will be seeking introduction of a bill designed to fix the notice and filing obligations under the commercial lien law. Under the proposal, a notice of lien rights must be included in the broker's agency agreement but does not have to filed at the register of deeds. The bill also extends the coverage of a broker's lien rights to include mixed-use commercial properties.

Commercial lien forms are available on WRA ZipForms. A detailed discussion of broker lien procedures is found in *Legal Update 98.09* (http://www.wra.org/Legal/Legal_Updates/1998/lu9809.asp).

Disclosure Issues

Disclosure issue highlights for 2002 include a review of required disclosures of agricultural properties assessed under the use value system, the seller's and the REALTOR®'s duties to disclose, "as is" sales, disclosure of sex offender registry information, agency disclosures to sellers who are not clients, and lack of insurability as a potential material adverse fact.

Use-Value Assessment of Agricultural Land

Under the use-value assessment method of assessing Wisconsin agricultural land for property tax purposes, farmland is assessed based upon its agricultural productivity rather than its potential for development or fair market value. In a use-value system, the use of the land is the most important factor in determining its assessed value. If the use of agricultural land assessed under the use value system is changed to a nonagricultural use, so that the property is no longer classified and valued as agricultural land, the then-current owner must pay a penalty. In other words, if the buyer of agricultural land assessed under the use-value system changes the use of the land, the buyer may have to pay the penalty.

The use-value system seems to be in a constant state of flux as the Wisconsin Department of Revenue has once again amended the law governing use value assessments of agricultural land (a summary of all of the changes may be found online at http://www.dor.state.wi.us/news/021008.html. The changes, which are effective Jan. 1, 2003, have a significant impact in terms of the disclosures that must be made by REALTORS®.

Sellers Must Disclose Farmland Use-Value Assessments

Key Point: Under prior law, sellers were obligated to disclose if the property had been assessed under the use-value system. Effective Jan. 1, 2003, sellers must also disclose if the land is subject to a penalty under the use-value system or if a penalty on the property has been deferred.

REALTOR® Practice Tips: Although not specifically required by the use-value law, sellers and REALTORS® should also disclose that buyers who purchase and change the use of agricultural property assessed under the use-value system may be subject to a potentially substantial penalty, given that such a penalty would likely be considered a material adverse fact.

The WRA is in the process of updating its forms to reflect these changes.

REALTOR® Practice Tips: The WRA's real estate condition report (RECR) forms each include an item in the "Additional Information" section that asks the seller to indicate whether land sold with the property has been valued under the use-value assessment system. Language is being added to these forms to prompt sellers to disclose whether there is a penalty or a deferred penalty if there is agricultural property under the use-value system. Revised forms will be available on ZipForms and in printed copies of the vacant land condition reports around the end of the year.

REALTOR® Practice Tips: If a buyer intends to buy and develop the farmland or otherwise change the use of the agricultural land being purchased, the buyer's offer to purchase should include an investigation contingency. The contingency should give the buyer ample time to confer with the local taxing authorities to determine the amount of any use-value penalty and obtain any other pertinent tax information.

Under the amendments going into effect for 2003, use-value assessments apply to "pure" agricultural land such as pasture or cropland, but not to land under buildings even if the buildings are devoted primarily to farm use. The penalty, in general terms, is 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. For additional information about the changes to the use value law for 2003, go to http://www.dor.state.wi.us/news/021003.html or to www.wra.org/online_pubs/wr0902/wr0902.htm.

REALTOR® Resource Page—Use-Value Assessment: This page includes *Wisconsin REALTOR®* articles, Legal Hotline Hottips, Wisconsin Department of Revenue resources, and legislative information. Go to http://www.wra.org/Resources/resource_pages/use_value_resources.htm.

Duty to Disclose: 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. By completing the RECR, the seller is indicating his or her notice or knowledge of the listed property conditions.

REALTOR® Practice Tips: REALTORS® should not complete the RECR for the client. Licensees should never address and answer the RECR items for the seller.

REALTOR® Practice Tips: REALTORS® should not give the seller legal advice. Listing agents may give the seller a general explanation of the Chapter 709 seller disclosure law and the RECR form. If sellers have questions about whether a specific item constitutes a defect, the seller should be referred to legal counsel.

REALTOR® Practice Tips: Amendments to the RECR may be required 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. If this occurs before acceptance of a buyer's offer to purchase, then the RECR must be amended and submitted to the buyer. The RECR may be amended by completing either (1) a new RECR form or (2) an RECR amendment form. The seller has no duty to amend the RECR after acceptance of the buyer's offer.

Disclosure of Material Adverse Facts (sample form)

I, _____ (name of licensee), am licensed in the state of Wisconsin as a real estate broker/salesperson [STRIKE ONE]. Under Wisconsin law, real estate brokers and salespersons are required by Wis. Stat. § 452.133 and Wis. Admin. Code § RL24.07 (2) & (3) to make prompt written disclosures to buyers and sellers about material adverse facts and about information suggesting the possibility of material adverse facts.

An adverse fact is a condition or occurrence that is generally recognized by a competent licensee as having a significant, adverse affect on the value of the property, as significantly reducing the structural integrity of the property, or as presenting a significant health risk to the property's occupants. An adverse fact also includes information that indicates that a party is not able to or does not intend to fulfill his or her contractual obligations.

An adverse fact is material if a party indicates it is of such significance, or if it 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 the party's decision about the terms of such a contract.

As a Wisconsin licensee, I am thereby obligated by law to disclose the following information constituting a material adverse fact or information suggesting the possibility of a material adverse fact: _____

(Plainly state only the facts without drawing conclusions, attach supporting reports and documentation)

It is recommended that the sellers and buyers in this transaction obtain expert assistance to conduct property inspections, testing and other investigations as are appropriate regarding this information. The undersigned licensee will draft inspection or investigation contingencies, amendments, notices and other documents as directed by the parties. Sellers and buyers should contact their attorneys with any questions concerning their legal rights and obligations.

_____

Signature of licensee

Duty to Disclose: Licensee Disclosure of Material Adverse Facts

A REALTOR® has inspection and disclosure duties under Wis. Admin. Code § RL 24.07 and Wis. Stat. § 452.133. This process is generally conducted in the following manner.

1.) The REALTOR® inspects the property.

2. If the REALTOR® is the listing

agent, he or she asks the seller about the condition of the structure, mechanical systems and other relevant aspects of the property as applicable.

3.) The REALTOR® must decide whether any information he or she has gathered must be disclosed as a material adverse facts:

REALTOR® Practice Tips: Written disclosure of material adverse facts or information suggesting the possibility of material adverse facts must take place without unreasonable delay, given the circumstances, and must be given to all parties—the sellers and prospective buyers. The disclosure may take different forms including the seller's RECR, a letter from the REALTOR® or property data sheets. This disclosure might follow a format along the lines of the sample form on page 9 of this issue.

Key Point: A REALTOR® may not have to disclose information if:

- The seller discloses the information on the RECR.
- The party knows about the material adverse fact or can discover it through reasonably vigilant observation.
- Disclosure of the material adverse fact is prohibited under law.
- Disclosure would constitute or contribute to unlawful discrimination under state or federal fair housing law.
- A property was the site of a specific act or occurrence (death, haunting, etc.) if the act or occurrence had no effect on the physical condition of the property or structure.
- If the information appears in a written report prepared by a qualified third party and provided to the parties.
- The information is the presence of certain family homes, community?based residential facilities and nursing homes. 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).

Duty to Disclose: As Is Sales

Generally, an "as is" clause means that the seller (1) will not complete a 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." The "as is" clause alerts the buyer that he or she is responsible to determine the condition of the property being purchased. 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. The seller cannot create unreasonable risks or cause foreseeable harm and not warn potential buyers and others who visit the property.

2. The seller cannot actively conceal or prevent investigation and discovery of defects.

3. The seller cannot make false affirmative representations about the property. The "as is" clause does not necessarily exonerate a seller who is concealing a defect or misleading a buyer.

4. The seller must disclose defects that are difficult to discover.

Use of 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 provide for no seller right to cure in the inspection contingency, leaving the buyer in a take-it-or-leave-it situation.

The use of an "as is" clause also does not release REALTORS® from their duty to disclose. For more discussion of the licensee's disclosure duties, go to *Legal Update 02.07* available online at http://www.wra.org/Legal/Legal_Updates/2002/lu0207.asp.

REALTOR® Resource Page—Disclosure: This page includes disclosure *Legal Updates*, Wisconsin disclosure statutes and rules, Legal Hotline Hottips, Wisconsin Department of Regulation & Licensing digest links, and court cases. Go to http://www.wra.org/Resources/resource_pages/use_value_resources.htm.

Sex Offender Registry

Disclosure of Sex Offender Information in Real Estate Practice

Real estate licensees, landlords, property managers, and sellers all have a duty, if asked by a person in connection with a real estate transaction, to disclose any actually known information concerning sex offenders. If asked whether a particular person is required to register as a sex offender, the location of sex offenders in a neighborhood, or any other information about the sex offender registry, the licensee, owner or property manager must disclose whatever actual knowledge he or she has on the subject. However, the real estate licensee, owner or property manager will have immunity relating to the disclosure of such sex offender information if he or she instead promptly gives the person a written notice indicating that the person may obtain sex offender/registry information by contacting the DOC:

Notice: You may obtain information about the sex offender registry and persons registered with the registry by contacting the Wisconsin Department

of Corrections on the Internet at http://www.widocoffenders.org or by phone at (877) 234-0085.

Instead of repeating rumors and gossip or misstating information about sex offenders in the neighborhood, the licensee, owner or property manager can instead just refer the person to the registry for factual and accurate information. In addition, the licensee, owner or property manager will be immune from liability for any act or omission related to the disclosure of any information about sex offenders or the registry requested by consumers or their agents in real estate transactions. Often the safest practice is to refrain from disclosing any rumors or other information and instead just give all prospects the written referral to the DOC.

For a copy of the sex offender disclosure statutes pertaining to real estate licensees, property managers and property owners see page 7 of *Legal Update 02.05*, available online at http://www.wra.org/Legal/Legal_Updates/2002/lu0205.asp.

What does a consumer find in the sex offender registry?

A consumer may conduct a sex offender search by last name or by ZIP code. The public online registry allows a search of offenders by location, but it is really a search by ZIP code only, not a search by municipality or address. The registry includes people in Wisconsin who were convicted of a sex crime in Wisconsin or in other states or countries on or after Dec. 25, 1993. As of May 6, 2002, there were 13,280 sex offender registrants in the system.

Information available to the public includes a registrant's name; any aliases; date of birth; gender; race; a physical description including height, weight, hair color, eye color, and markings like tattoos or scars; a recent photograph; the offense requiring registration; conviction information; and whether the individual is currently incarcerated, under DOC supervision, or released from custody and supervision. The registry also gives the registration start and end dates, and contact information including the correctional facility if the person is incarcerated, the field supervision office if the person is under active community supervision, or the DOC Sex Offender Registration Program office if the person is not under DOC supervision. The registry accessible to the public does not disclose the registrant's address, job, school or vehicle information.

REALTOR® Resource Page—Sex Offenders Registry: This page includes *Legal Updates*, Legal Hotline Hottips (including a listing of the WRA forms where the sex offender disclosure language has been inserted), Wisconsin Sex Offender Registry resources, and Wisconsin Department of Corrections contact information. Go to http://www.wra.org/Resources/resource_pages/sex_offenders_registry_resources.htm.

Agency Disclosure for Sellers who are not Clients

What relationship does a listing broker have with the owners who have not signed the listing contract? While REALTORS® always prefer to have all owners sign their listing contracts, circumstances sometimes prevent this. For example, both spouses in a divorce situation or multiple siblings who inherited a property from a parent's estate may not want to sign the same listing contract with the same broker.

If only one owner signs a listing contract, that owner is the broker's client. All other owners will become the broker's customers if the broker provides brokerage services to them per Wis. Stat. § 452.01(3m) & (3s). If, for example, a non-signing owner participates in negotiations with the listing agent and the seller/client who signed the listing, that nonsigning owner is treated as a customer and must be given an appropriate agency disclosure form indicating that the owner is a customer. The nonsigning owner does not have client level rights and cannot "order the broker around." If the broker never has any direct dealings with the nonsigning owner (eg., an attorney handles all elements of the transaction for that party) and never provides brokerage services to that party, then the broker has no agency relationship with the nonsigning owner and would have no agency disclosure obligation.

In a situation where the broker discovers after the listing that there are persons with ownership interests different from those of the owners who signed the listing, the issues are more complex and it may be best to confer with legal counsel before proceeding. For further discussion of these issues, see the March 2002 issue of the *Wisconsin REALTOR®* at http://www.wra.org/legal/wr_articles/wr0302_legal.htm.

Insurability As A Material Adverse Fact

As insurance companies struggle with a variety of economic challenges they are faced with hard decisions regarding whether they will write insurance policies on real estate and what risks those policies will cover. Insurance coverage may be difficult to find, at least at a reasonable rate. Home buyers have a serious need for information about the insurability of their property, coverage exclusions, appropriate deductibles, etc. Real estate licensees are not insurance experts, but they should urge buyers to consult with their insurance agents early on, ideally at the same time that they are pre-qualifying for a mortgage. Buyers need to learn about the risks commonly excluded from homeown-

ers insurance policies and about any property conditions that may need to be addressed in the offer to assure coverage. Whether the insurability issue is an adverse material fact remains an open question subject to an analysis of the facts and circumstances of the transaction.

For additional information on this topic, see NAR's Field Guide to Insurance Availability, which can be found at http://www.realtor.org/libweb.nsf/pages/fg718.

Land-Use Issues

Land-use developments in 2002 included new nonpoint source contamination rules for construction sites, new certified survey map procedures, planned floodplain mapping modernization, extension of the DNR's GIS Registry to list sites of prior soil contamination, a United States Supreme Court decision regarding moratoria, EPA' s new ECHO database, and resources for the DNR's wetlands mitigation rules.

Construction Site Erosion Control and Storm Water Management

The State of Wisconsin is taking a new approach to addressing runoff or nonpoint source pollution—a primary threat to the health of Wisconsin's water resources. DNR and DATCP administrative rules to control polluted runoff from agricultural, non-agricultural and transportation sources went into effect Oct. 1, 2002. The Department of Commerce and the Department of Transportation worked with the DNR to develop non-agricultural and transportation performance standards. One controversial aspect of the rulemaking process revolved around the issue of mandatory buffers. The DNR will develop a buffer performance standard by the end of 2007 based on research conducted by the University of Wisconsin between now and 2005.

The nonpoint rules govern the management of stormwater both during and after construction. The rule requires anyone who disturbs more than five acres to design a stormwater management plan that reduces the sediment from the water that runs off the site during and after construction by 80 percent; controls peak flows from major storm events after construction; provides a relatively undisturbed protection area around lakes, streams, and wetlands after construction; and allows a portion of stormwater to infiltrate into the soil on-site after construction.

Until March 1, 2003, the rule applies to any construction site that disturbs more than five acres of land. After this date, the rule will apply to any construction site that disturbs more than one acre of land. Implementation dates will not apply to projects currently in progress and in other circumstances. Upcoming EPA regulations anticipated in 2003, however, may cover every construction site that has one acre or more of land disturbance and require a storm water permit.

For further details, the DNR Web page for Construction Site Erosion Control and Storm Water Management is found at http://www.dnr.state.wi.us/org/water/wm/nps/const.htm. Also see the DNR fact sheet regarding run-off standards at http://www.dnr.state.wi.us/org/water/wm/nps/pdf/FinalNR151SubchapterIIIFactSheet.pdf.

Change In Certified Survey Map Procedures

As part of the state's 2001-03 biennial budget, a number of changes were made to the certified survey map (CSM) regulations to make them consistent with the subdivision regulations. Most of the changes are technical in nature and relate to how the surveys must be performed, but others impact the CSM approval and recording process.

Under the new changes, communities must act (approve, conditionally approve, or reject) on a CSM within 90 days after it has been submitted. If the community fails to act within 90 days, the CSM is deemed approved. In addition, CSMs must be recorded within six months from the last approval and 24 months of the first approval. If the CSMs or subdivision plats are not recorded within this time, they are no longer valid and the land divider must go back through the approval process.

For additional information on these new changes, please contact Renee Powers with the Wisconsin Department of Administration's Plat Review Department at (608) 266-3200 or visit the department's Web site at http://www.doa.state.wi.us/index.asp. See the comprehensive checklist of requirements for certified survey maps at http://www.doa.state.wi.us/dhir/documents/plat_csm.pdf.

Floodplain Mapping Modernization Planned

Floodplain maps are used by REALTORS®, lenders, communities, design professionals, builders, and regulators for a variety of purposes. Accurate floodplain delineations are vital when making planning decisions regarding structure location, solid waste disposal, hazardous material storage and transportation routes. Understanding floodplain locations is critical to developing effective, comprehensive plans as part of Wisconsin's new Smart Growth law.

The majority of the existing Flood Insurance Maps (FIRMs, developed by FEMA) were approximated using 10-foot contour-interval topographic maps. The dissatisfaction with these approximate methods is clear—countless letters of map amendments have been issued to remove properties from the mapped floodplain (thereby giving the property owner an exemption from the mandatory

flood insurance purchase requirement). Conversely, some areas that are actually flood prone, but not shown as such on the FIRMs, continue to be developed by unsuspecting landowners. In addition, changes on the ground such as paving and bridgework have modified the dynamics of rainwater runoff. However, the increasing inadequacy of floodplain maps has not gone unnoticed. The Bush Administration has proposed a significant increase in federal funds for new floodplain mapping which would also mean increased funding for mapping in Wisconsin.

Floodplain maps

Because it will take years to revise and modernize floodplain mapping, the existing FIRMs will be used in the interim. To make FIRMs more accessible, the DNR has scanned and geocoded all of the floodplain maps for the state.

- **REALTOR® Resource Page—Land-Use Section:** This page houses the REALTOR® Resource pages addressing annexation, brownfields, Comm 83 & private septic systems, floodplains, impact fees, private property rights, Smart Growth, use-value assessments and Wisconsin's wetland mitigation.

  The **Floodplains Resource Page** describes floodplains and gives a list of features that may signal the presence of floodplains. There also are links to DNR floodplain information and the DNR page for interactive maps. These links can be found at http://www.wra.org/Government/Land_Use/floodplains/default.htm.

GIS Registry Expands To Include Residual Soil Contamination

Recent DNR rule changes clarify the criteria for applying deed restrictions to contaminated properties where residual soil contamination remains after site closure. The rule changes include a soil geographic information system (GIS) registry to replace the use of most soil deed notices. The soil GIS registry will be similar to the groundwater contamination GIS registry for groundwater contamination at http://gomapout.dnr.state.wi.us/org/at/et/geo/gwur/index.htm. Sites closed with residual soil contamination will be placed on the soil GIS registry as a means of notifying future owners/users of the property of the existence of soil contamination.

Placing this information on the Internet is a means of notifying future owners/users of these properties of the existence of residual soil contamination. Public notices published in a local newspaper will no longer be required when closure is approved with a soil performance standard, and most deed notices will no longer be needed. If a site is on the registry with soil contamination, it means that no further cleanup is required. However, if the soil is excavated or a cap or cover is removed or not adequately maintained, the soil may need to be treated and/or disposed. The registry includes all affected properties—if contamination originated on one property and crossed a property line, both properties will appear on the registry y. Local governments, buyers, lenders, developers, REALTORS®, consultants and others can use the registry to find contaminant data and basic information about the cleanup.

For more information, administrative rules may be purchased from Document Sales, P.O. Box 7840, Madison, WI, 53707, or by calling (608) 266-3358. These rules can also be found on the Revisor of Statutes Web page at www.legis.state.wi.us/rsb/code. For additional information about the new rule changes and general information about the GIS Registry, go online to http://www.dnr.state.wi.us/org/aw/rr/wi_regs/index.htm and http://www.dnr.state.wi.us/ org/at/et/geo/.

Supreme Court Rules That 32-Month Moratorium Is Not A "Taking" Per Se

The U.S. Supreme Court ruled 6-3 in favor of a 32-month building moratorium in the case of the *Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency*. The Court endorsed the role that moratoria play in the comprehensive planning process, and rejected argument for the establishment of a categorical rule that whenever the government imposes a deprivation of all economically viable use of property, no matter how brief, it constitutes a taking. The Court indicated the better approach would encompass careful examination and weighing of all the relevant circumstances including, but not driven by, the length of the delay.

The Court did not say local governments have the authority to enact moratoria or that a moratorium will never constitute a taking. This is important because Wisconsin does not provide specific statutory authority for countries or towns to enact moratoria, and provides very limited authority for cities, villages, and arguably towns with village powers. It did not rule that a 32-month moratorium will never constitute a taking. These distinctions may be increasingly important if municipalities increase use of moratoria as they prepare for Smart Growth implementation.

Echo Database

The Enforcement and Compliance History Online (ECHO) is a Web tool at www.epa.gov/echo developed and maintained by the Office of Enforcement and Compliance Assurance (OECA) for public use. The ECHO Web site, publicly accessible and EPA-maintained, provides compliance and enforcement information for approximately 800,000 regulated facilities nationwide. The ECHO Web site allows users to using

ZIP codes or addresses to find permit, inspection, violation, enforcement action, and penalty information covering the past two years about facilities in their communities. Facilities included on the site are Clean Air Act (CAA) stationary sources, Clean Water Act (CWA) facilities with direct discharge permits (under the National Pollutant Discharge Elimination System), and generators/handlers of hazardous waste regulated under the Resource Conservation and Recovery Act (RCRA). The data indicate a facility's record of compliance with environmental regulations (primarily the Clean Air Act, Clean Water Act, and Resource Conservation and Recovery Act) by showing dates and types of violations and the seriousness of the violations. The data also show if a facility has had an enforcement action by the State or EPA and any penalties assessed.

U.S. Army Corps Clarifies Wetlands Regulatory Program

The U.S. Army Corps of Engineers recently issued new and modified nationwide permits to authorize certain minimal-impact projects in wetlands under Corps jurisdiction. These changes are a slight improvement over the previous set of nationwide permits and include clarifications on appropriate environmental protections when authorizing discharges of small amounts of dredge and fill material into U.S. waters. For more information, go to the U.S. Army Corps Web site at http://www.hq.usace.army.mil/cepa/releases/clarify.html.

Wetland Mitigation Resources

- **REALTOR® Resource Page—Land-Use Section:** This page houses the REALTOR® Resource pages addressing annexation, brownfields, Comm 83 & private septic systems, floodplains, impact fees, private property rights, Smart Growth, use-value assessments and Wisconsin's wetland mitigation. The Wetland Mitigation Resource page includes a PowerPoint presentation on the new rule, information on how to prepare a practical alternatives analysis, and other information wetland mitigation decision-making process. There also are links to DNR floodplain information and the DNR page for interactive maps. These links can be found at http://www.wra.org/Government/Land_Use/wetlands/default.htm.

Real Estate Practice and Transaction Pointers

Offer to purchase pointers such as securing compensation in non-MLS and referral transactions, the use of inspection and testing contingencies, addressing mortgage fraud, assisting Spanish-speaking parties, and proposed RESPSA reform were hot topics with REALTORS® in 2002. Other transactional areas of interest this past year included time-share forms and practice, guiding buyers with misrepresentation claims and bulk sale procedures.

Setting Compensation in Non-MLS Transactions

In transactions where there is no MLS or where one of the brokers involved is not an MLS participant, policy letters and compensation agreements are often used to establish the terms of cooperative relationships and offer compensation in a transaction. In these situations, the MLS safety net is not there. There is no automatic offer of cooperation and compensation, and no pre-designated standard of performance for earning a commission. Procuring cause does not determine who gets paid unless the brokers have agreed that procuring cause is the standard of performance. Unless the brokers have a standing policy letter agreement or a specific compensation agreement for that transaction, the listing broker has no obligation to pay the cooperating broker.

Policy Letter Provisions

While the focus of policy letters is typically a compensation amount or rate and a statement indicating what must be done to earn that compensation, a wide assortment of other provisions may be appropriate for policy letters. Members may wish to enlist the assistance of their company attorney to develop a policy letter format that is appropriate to the company's marketplace and transactions. The policy letter has to be clear and exact and explained in plain language that may be understood by brokers from different market areas or states.

Basic Provisions

Identify the brokers/companies and give contact information, state the term or duration of the agreement and/or how it can be terminated, precisely state the formula(s) or rate(s) for compensation, state what must be done to earn the compensation, and state what the receiving broker must do to accept the terms and conditions of the policy letter (typically signature and delivery back).

Specialized Provisions

State any geographic or other scope of applicability limitations, state the procedures for confirmation of valid real estate licenses (especially for out-of-state brokers), require that cooperating brokers have E & O insurance, require selling brokers to submit agency disclosures signed by buyers before an offer is submitted, require verbal notice of buyer agency upon first contact, require submission of RECR & LBP addenda signed by buyers with offers, require negotiation of incentive payments for licensees purchasing properties for their own use, state procedures for presentation of offers, state procedures for scheduling and conducting showings, prescribe enforcement mechanisms such as compensation

reductions, and designate a method for dispute resolution.

Compensation Agreements

Written compensation agreements generally are used to establish compensation for a single transaction. A cooperating broker should always attempt to enter into a compensation agreement before submitting any offers to purchase or lease to the listing broker. The listing broker may lose incentive to agree to the cooperating broker's compensation proposal once the listing broker has an offer in hand.

REALTOR® Practice Tips: The following points should be addressed in any compensation agreement:

1. Describe or identify the property

2. Name the parties

3. Name the brokers

4. Identify agency relationship

5. State the offer and acceptance of cooperation

6. State the amount of the commission or fee in clear, specific terms

7. Indicate when compensation shall be paid

8. State the standard of performance (what must be done to earn compensation)

Checklist for Referral Fee Agreements

Referral agreement should always be put into writing for the protection of all licensees involved in the arrangement.

REALTOR® Practice Tips: The following points should be addressed in any referral agreement:

1. The full names and contact information for the referred parties;

2. The full names of the referring and receiving agents and companies;

3. Company addresses and contact information;

4. Confirmation of the referring agent's real estate license;

5. Disposition of the fee if the referring agent goes to another company;

6. How referral fees will be handled if the referral is not exclusive to the receiving company;

7. A clear and precise statement of the basis for computing the fee;

8. Exactly who is responsible to pay the fee and to whom the fee should be paid;

9. The performance standard that must be met before the fee is earned; and

10. The term or length of the referral agreement.

For further discussion of the non-MLS compensation, go to WRA *Legal Update 02.01*, available online at http://www.wra.org/Legal/Legal_Updates/2002/lu0201.asp.

Distinguishing Inspections from Testing

An "inspection" is defined as an observation of the property and does not include testing of the property. A "test" is defined as the taking of samples of materials such as soils, water, air or building materials from the property and analyzing them in a laboratory or other facility. The home inspection contingency in the WB-11 residential offer to purchase authorizes inspection of the entire property, including follow-up inspections required to verify the status of questionable areas identified in the original inspection. However, no testing is authorized (except for carbon monoxide and gas leaks) without a testing contingency.

Difficulty arises in some transactions when a home inspector proposes to investigate elements such as LBP or moisture content. These investigations may be inspections or tests depending on the methodology used. For example, an XRF machine will determine if there is LBP in a property. This is an inspection, because there is no sample taken, only a reading of lead levels. On the other hand, taking paint or dust samples for lab analysis would be a test and require a testing contingency. A moisture level investigation will ordinarily be an inspection because a moisture meter only takes an electronic reading of the moisture levels present in the air. No sample is taken and therefore the use of a moisture meter is authorized under the WB-11 inspection contingency. REALTORS® must always work with a buyer to ensure that the offer includes proper authorization for all the tests which need to be performed.

Combatting Mortgage Fraud

Mortgage fraud occurs anytime a participant in a real estate transaction misrepresents facts with the intent to bilk another party of money it is not entitled to. Fraud may occur when there are two sets of offers drafted, one representing the "real deal" the other the fraudulent transaction. Fraud can also occur when the parties have inflated the sales price by using a "forgivable" second mortgage or phony work orders.

Mortgage fraud can be committed by any of the participants in a real estate or mortgage transaction including sellers, buyers, real estate brokers and salespersons, mortgage brokers, mortgage bankers, appraisers, and loan originators.

How to Respond to Mortgage Fraud

The following examples demonstrate proper REALTOR® responses to suspected mortgage fraud in their transactions.

Facts: A broker received a call from a lender who is going to make a loan in the amount of the $79,000 appraised value rather than the $72,000 offer price. The lender wants the broker to rewrite the offer for $79,000 and wants the seller to give the buyer $7,000 back at closing.

Facts: The original offer was for $75,000 and the buyers requested that the seller pay $3,000 toward the buyers' closing costs. The seller countered for $79,900. The mortgage broker says that the underwriter will not lend if the seller is paying closing costs and there is a price adjustment in a counter-offer. The underwriter wants the broker to rewrite the offer to show a $79,900 sales price and backdate the new offer to the date of acceptance in the original offer.

Facts: A licensee prepares an amendment that provides for a $10,000 roof repair credit and shares the amendment with the lender. The lender instructs the title company not to put the credit on the closing statement.

Broker Response: § RL 24.085 directs, "no licensee shall draft or use any document which the licensee knows falsely portrays an interest in real estate." If REALTORS® believe that fraud is being committed in a transaction, they should take the following steps:

1. If the REALTOR® is asked to rewrite an offer to purchase, prepare it in a 100 percent accurate and inclusive manner. Refer back to the original offer and the purchase price and dates therein. Specifically state that the new offer supersedes and replaces the original offer for $____, dated ____, which offer is hereby withdrawn and cancelled. The replacement offer must use the current dates, including the dates on the signature lines. To do otherwise would be leading the broker's clients and customers down the road to committing fraud, a fraud to which the broker would be a party.

2. If the mortgage broker or lender is asking for something that seems suspicious or improper, ask for the request in writing.

3. If the lender and/or others persist with a fraudulent scheme, issue a written memo or letter warning the parties, the lender and other involved providers of the fraud and urging them to consult with their attorneys and rectify the fraud. If they do not, the REALTOR® should cease participation in that transaction.

4. Report apparent fraud situations to DFI or other appropriate agencies. Provide extensive detail and copies of relevant documents.

A variety of additional state and federal agencies are attempting to combat mortgage fraud. Mortgage fraud will continue unless complaints are filed and these agencies are given information about what transpires in the marketplace.

To report mortgage fraud committed by licensed and certified real estate appraisers, real estate brokers or salespersons, call the Department of Regulation and Licensing at (608) 266-7482 or go to www.drl. state.wi.us/Regulation/consumer_services/complaint_form.html.

To report mortgage fraud committed by mortgage bankers, mortgage brokers or loan originators, call the Department of Financial Institutions at (608) 261-7578 or go to www.wdfi.org/fi/mortbank/.

To report any other person engaged in mortgage fraud, call the U.S. Department of Justice, the U.S. Attorney's Office and the FBI (operating a mortgage Fraud Task Force out of Milwaukee) at (414) 276-4684.

REALTOR® Resource Page—Mortgage Fraud: This page includes links to federal and Wisconsin resources and DR Hottips to help you navigate this frustrating area. All of these links can be found at http://www.wra.org/Resources/resource_pages/mortgage_fraud.htm.

¿Habla Español?—Offer and Listing Line-by-Line Guide in Spanish

The English line-by-line guide to the WB-1 Residential Listing and the WB-11 Residential offer and the WRA Addendum S have been translated into Spanish and are now available on the WRA Web site and in print format. The Spanish translation documents break down the English document section by section and provide the Spanish translation immediately below each section of the English explanation. The documents were prepared by the WRA in cooperation with WHEDA.

REALTOR® Resource Page—Translation Issues: This page includes *Legal Updates* and links to federal and Wisconsin resources. The page provides links to HUD's "Looking for a Better Mortgage" brochure, the WRA's line-by-line explanations of the residential listing contract and offer to purchase, and WHEDA's homebuyer's guide, all in both English and Spanish. Aids to assist in translating between English and Spanish are also provided. All of these links can be found at www.wra.org/Resources/ resource_pages/translation_issues.htm.

Proposed RESPA Reform for Closing Cost Estimating

HUD has proposed to abandon the current good faith estimate (GFE) procedure for estimating a buyer's closing costs under the Real Estate

Settlement Procedures Act (RESPA). Instead, HUD has proposed two new systems—a revised GFE system and a guaranteed mortgage package (GMP) system. Under the revised GFE system, lenders would identify the specific terms (interest rate, APR, monthly payments) of the mortgage loan requested by the applicant, and give prices for each of seven major categories of settlement costs including appraisal services, title services and title insurance, surveyors, pest control, etc.

With a guaranteed mortgage package agreement (GMPA), a packager (most likely a lender) enters into a contract with the loan applicant. The packager offers the applicant a loan on specific terms and with a guaranteed interest rate that cannot change for at least 30 days unless indexed. The packager also offers a single guaranteed price for the GMP, which includes virtually all services and charges that would be provided or incurred in connection with making and closing the loan. The prices, payments, and arrangements between lenders who offer GMPAs and providers of services in the GMP would be exempt from the RESPA kickback and unearned fee rules, which would continue to apply to the revised GFEs. This will likely motivate lenders to use a GMPA system instead of the new GFE.

HUD believes that the GMP system will result in lower prices paid for settlement services because packagers will aggressively seek discounts in third-party service prices. HUD also concludes that locally based small businesses that provide settlement services will continue providing third party settlement services under packaging, but it may be at lower prices and revenues.

The text of the proposed rule in 24 CFR Part 3500, entitled "Real Estate Settlement Procedures Act (RESPA); Simplifying and Improving the Process of Obtaining Mortgages To Reduce Settlement Costs to Consumers," may be obtained at http://www.alta.org/govt/issues/02/67fr49134.pdf. HUD's 109-page Economic Analysis and Initial Regulatory Flexibility Analysis of the proposed rules can be found at: http://www.hud.gov/offices/ogc/ea-chapters.pdf. For the reaction of the title insurance industry, see the extensive analysis of the American Land Title Association at http://www.alta.org/. NAR's summary and commentary on this proposal can be viewed at http://www.realtor.org/gapublic.nsf/pages/respalanding. It expected that there may be a further delay as various agencies and groups further analyze the proposal.

Time-Share Transactions

The Wisconsin Time-Share Ownership statutes are found in Chapter 707 of the Wisconsin Statutes (http://www.legis.state.wi.us/statutes/01Stat0707.pdf). Time-shares can be thought of as a type of condominium used for vacation and recreational purposes. Instead of owning a condominium unit outright for residential purposes, time-share owners usually either own or simply have the right to use a time-share unit for one or more intervals or weeks each year. Time-share salespersons can only work with the initial sales of time-shares by the developer, leaving real estate licensees to work with parties involved in subsequent sales of time-shares.

The New Time-Share Listing Contract and Revised WB-27 Time Share Contract (Resale by Non-Developer)

For the first time, time-share salespersons and other real estate licensees have a specialized form for listing time shares—the WB-8 Time Share Listing Contract, and the DRL has updated the WB-27 Time Share Contract (Resale by Non-Developer).

REALTOR® Practice Tips: Listing agents should try to find out as much as possible about the time-share property and instruments and the particular time-share estate(s) to be sold before they even sign the listing contract. An agent must understand the time-share concept and review the time-share instruments to identify exactly what amenities, features, fees, etc. are included with the particular time-share estate.

WB-26 Time Share Contract (Sale by Developer)

The DRL has not yet produced a revised WB-26 Time Share Contract (Sale by Developer), leaving the 1990 version of the WB-26 as the current DRL-approved form. Time share developers, real estate licensees, and their attorneys may wish to review the form with respect to the financial disclosure requirement found in Wisconsin consumer law and the federal truth-in-lending requirements.

For further discussion of time shares, go to *Legal Update 02.03*, available online at http://www.wra.org/Legal/Legal_Updates/2002/lu0203.asp.

Buyers Cannot Rely on RECR When Inspection Report Evidences Leakage

In a recent case, the seller's real estate condition report (RECR) indicated they were not "aware of defects in the basement or foundation (including cracks, seepage and bulges)." However, the home inspector's report noted water stains and signs of prior seepage. The report recommended that dirt should be brought in to fill around the foundation and raise the grade to pitch away from the house and that the grades be adjusted annually to help keep the basement dry. Nonetheless, the buyer closed. The following spring, water seeped in the basement every time it rained and drain tile problems were discovered.

The buyer sued the seller for breach

of contract and misrepresentation. To sustain a claim for intentional misrepresentation, a buyer must prove: (1) the seller made a false representation of fact which the buyer "believed to be true and relied on to his or her detriment," (2) the seller knew that the representation was untrue or "made it recklessly without caring whether it was true or false," and (3) the seller "made the representation with intent to defraud and to induce another to act upon it." The jury found the sellers liable and awarded the buyers $5,875.25 in damages. The seller appealed and the Wisconsin Court of Appeals held that the buyers could not have justifiably relied on the sellers' representation about the basement once they became aware of the home inspector's report to the contrary prior to taking title.

REALTOR® Practice Tips: REALTORS® should always urge the parties in a transaction to use independent inspectors and experts like a registered home inspector. If an inspection report conflicts with the offer, RECR or other prior representations concerning the condition of the property, the defect must be addressed before the buyers close. Closing the transaction essentially waives any claims the buyer might have against the seller if the offer is not amended to provide for repairs, an escrow for repairs after closing, a price reduction, rescission of the offer, etc.

Walker v. O'Brien (Ct. App. 2001, Case No. 00-3046), (http://www.wisbar.org/res/capp/2001/00-3046.htm). For further discussion, see http://www.wra.org/legal/wr_articles/wr0102_legal.htm.

Bulk Sales Procedural Review

The bulk transfer law applies when the seller sells a major part of inventory (stock-in-trade), or inventory and equipment. "Inventory" includes goods held to be sold, leased or furnished under service contracts, raw materials, work in process, and materials used or consumed in a business. "Equipment" includes goods other than inventory, farm products, or consumer goods used in a business (e.g. tables, linen, dishes, etc. in a restaurant business).

The law is designed to protect the rights of the seller's creditors, and to protect the buyer from becoming liable for the seller's debts. To ensure compliance, the buyer must require that the seller to furnish a sworn list of the seller's existing creditors and the amounts owed. The parties then prepare a list of the inventory (and equipment) that is going to be transferred to the buyer. Note that the bulk sales section of the business offer provides that the delivery of a fully executed copy of the offer to the seller constitutes the buyer's demand for a list of creditors and the list of inventory (and equipment) being transferred.

The buyer next must give written notice to each creditor on the seller's list of creditors at least 10 days before the buyer takes possession of the inventory (and equipment). The notice must indicate that a bulk transfer is about to be made; the names and addresses of the seller and the buyer; whether the seller's debts will be paid in full as they fall due as a result of the transaction; and if so, the address to which the creditors should send their bills. The notice must be delivered personally or sent by certified or registered mail to all creditors on the seller's list plus all persons which are known to the buyer to have claims against the seller.

Parties involved in bulk transfers are well advised to seek the assistance of legal counsel to ensure strict compliance with the law. For the actual text of the bulk sales law see: http://www.legis.state.wi.us/statutes/01Stat0406.pdf

Environmental Concerns

Key environmental concerns in 2002 included mold management in real estate transactions, new private onsite wastewater treatments systems under Comm 83, arsenic in orchards, lead-based paint and other drinking water and well issues.

Managing Mold Issues in a Real Estate Transaction

It may be helpful to address any moisture or mold concerns discovered during the pre-licensing inspection before the property is listed. Armed with consumer fact sheets about mold, the listing agent should explain to the seller the areas of concern discovered during the agent's inspection. Quick seller action is important because of health and safety concerns and because it will contain costs. A seller is more likely to clean small amounts of mold him or herself while a buyer will be more likely to engage in mold testing and hire professional mold remediators. If mold contractors are needed, the seller who acts before the listing can control expenses by carefully selecting professionals who act responsibly and practically and who do not overreact or overcharge consumers.

If there is evidence of any moisture or mold problems, the seller should consider whether he or she will repair and clean them or remediate any mold before proceeding with the listing. See the *Legal Update 02.06* or the consumer brochures and other resources on the Mold REALTOR® Resource page at http://www.wra.org/Resources/resource_pages/Mold_resources.htm for the proper mold cleaning guidelines.

Broker List of Reliable Mold Remediation Contractors

If the seller wants to hire a contractor to do the cleanup, the listing agent will be performing a valuable service to the seller, the buyer and everyone involved by maintaining a list of com-

petent mold remediation contractors, industrial hygienists and other mold experts. When looking for contractors to put on a list for clients and customers, check for experience, accreditations and references, and ask about the standards or guidelines used. Not only should the listing agent insist that the seller only use contractors from this list, but the agent should also convince the seller that any buyers who intend to bring mold contractors in for testing or remediation work must also choose contractors from the list.

Disclosure is Key

Disclosure is the key to avoiding liability for mold problems. REALTORS® must be prepared to make written disclosure of any known moisture and mold problems or conditions not disclosed by the seller in the RECR or otherwise disclosed to the parties. Licensees should never give opinions about the presence, extent or toxicity of any suspected mold—buyers who want to test for mold must have a testing contingency giving proper authorization from the sellers.

Disclosure of past incidents of mold growth or water intrusion is also critical. If a past mold and/or water problem has apparently been rectified by the owner, the prudent REALTOR® will always disclose whatever information he or she has about the past incident. This may be accompanied by documentation showing the measures taken by the owner and mold contractors to eliminate the problem. However, REALTORS® are not scientists and cannot be sure when harmful mold is gone and if it will come back. Likewise, some water problems such as seepage in the basement tend to reoccur despite vigilant efforts to control the situation.

The existence of mold in a home is not per se a defect. Mold is all around and presumably is in every house. Whether mold is a defect will depend upon location, quantity, relation to water or moisture sources and other related circumstances.

Most authorities recommend inspection rather than testing. The inspector, of course, should look for visible mold growth in a property, but should also look for evidence of water intrusion, and musty or other odors suggesting the presence mold colonies. If the observed mold-associated conditions constitute a defect, the buyer will have the opportunity to address the situation without resorting to the expense and uncertainty of mold testing.

If a buyer wants to have mold testing performed, a testing contingency will be needed. Testing for mold does not fall within the standard home inspection contingency in the residential offer to purchase.

The WRA sample mold testing contingency allows the parties to name qualified contractors and certified labs. Because there are no authoritative scientific standards to be applied, these labs and contractors must determine the appropriate testing methodologies and the standards applied to interpret the lab test results. REALTORS® in the transaction can be helpful by providing lists of competent and reliable mold remediation professionals and by pointing out reported problems with less than reputable contractors.

For additional discussion, see *Legal Update 02.06* which can be found online at http://www.wra.org/Legal/Legal_Updates/2002/lu0206.asp.

- **REALTOR® Resource Page — Mold**: includes links to *Legal Updates*, mold information articles, consumer fact sheets, government resources, clean-up and prevention resources, mold glossary resources, REALTOR® mold resources, health effects resources, victim resources, and legal resources. Go to http://www.wra.org/Resources/resource_pages/Mold_resources.htm.

Beware of Local Septic Regulations

In preparation for the full implementation of the new Comm 83 septic code, many Wisconsin counties are revising their local septic regulations (Comm 83 allowed counties to delay implementation of the new code until Jan. 1, 2003). Many of these codes contain onerous soil inspection requirements that will cost homeowners thousands of dollars. One county adopted a soil inspection requirement that requires a backhoe to dig soil samples every time a house with a septic system is sold or remodeled, even if the house sells several times during the same year. REALTORS® should check with their county code administrators and become familiar with any revisions to their septic system code and its requirements for properties with private septic systems.

- **REALTOR® Resource Page — Comm 83-Septic System Bill:** This page includes *Legal Updates*, *Wisconsin REALTOR®* articles, and links to DComm's septic system descriptions and diagrams, DComm resources, and septic system installer lists. Go to http://www.wra.org/Resources/resource_pages/Comm83_resources.htm.

Old Orchards May Have Lead and Arsenic in the Soil

In response to concerns about health risks associated with pesticides used in orchards until the 1960s, the WRA has worked cooperatively with the DNR and the Department of Agriculture, Trade and Consumer Protection (DATCP) to develop a Lead/Arsenic Pesticide Addendum. This addendum prompts the seller to disclose any information the seller has about use of the property as an

orchard prior to 1960 and about any use of lead or arsenic-based pesticides. The addendum also gives the buyer the opportunity to elect a pesticide investigation contingency to investigate any residual levels of pesticides in the soils.

Lead arsenate pesticides were used to control insects in orchards from the 1890s to the 1960s. Research shows that the lead and arsenic remain in the soil long after the pesticide was used. As long as the soil remains covered with trees and grasses, there is not much of a health concern. When orchards are converted to residential areas, the possibility of long-term human exposure to residual lead and arsenic in the soil in play areas and gardens can become a health concern. Childhood exposure to lead can cause developmental and nervous system problems, and high levels can also affect the nervous system and kidneys of adults. Long-term exposure to arsenic can cause several types of cancer.

DATCP documents that explain the process of testing soils for lead and arsenic pesticides can be found on the DATCP lead arsenate Web page at http://datcp.state.wi.us/arm/agriculture/pest-fert/pesticides/accp/lead_arsen.htm. For health-specific issues, see the Wisconsin Department of Health and Family Services fact sheet at www.dhfs.state.wi.us/eh/ChemFS/pdf/LeadArsPest.pdf or call DHFS at (608) 266-1120. For further discussion of the Lead/Arsenic Pesticide Addendum, go to http://www.wra.org/legal/wr_articles/wr1102_legal.htm.

Applying for a Lead-Safe Certificate

Registered lead-safe property is property registered with the Wisconsin Department of Health and Family Services (DHFS) meeting the lead-safe property standard. To be lead-safe, painted surfaces, such as windows, walls, stairs, and floors must be in good condition and no paint chips or hazardous levels of dust-lead may be present. In other words, lead-safe means that no hazard or danger from lead-based paint (LBP) was found at the property when the property was inspected.

Lead-safe certificates can be issued for a term ranging from nine months to 20 years, depending on extent of the long-term LBP hazard reduction that has been achieved. Properties with certificates are posted on the DHFS Internet-based registry. The rules impose high maintenance standards for lead-safe property owners to ensure that tenants and other occupants are protected from LBP exposure. Registry properties must be regularly inspected for LBP hazards, and owners must promptly repair any LBP problems, use only certified persons to perform LBP activities, and follow special rules when work may disturb LBP.

Owners planning to apply for a lead-safe certificate may consider getting work done on their properties before applying for the certificate because once a property is in the registry, only certified workers may be used for work that disturbs more than two square feet of paint. The owner and his staff may do some of this work—called non-abatement LBP activities—on their own before, but not after, a certificate is issued. Property owners can perform maintenance and remodeling work that disturb painted surfaces, and non-abatement LBP activities such as repainting LBP surfaces and repairing friction surfaces on windows and doors, provided they first learn about LBP hazards and lead-safe work practices.

To find out how to safely work with LBP surfaces, free copies of the following booklets may be obtained from the National Lead Information Center by calling (800) 424-LEAD, ordering them online at http://www.epa.gov/opptintr/lead/nlicdocs.htm#disclose, or downloading or printing them from the listed Web sites:

- "Lead Paint Safety: A Field Guide for Painting, Home Maintenance and Renovation Work" [Item #396 HUD] at http://www.hud.gov/lea/LBPguide.pdf;
- "Reducing Lead Hazards When Remodeling Your Home" [Item #400 EPA] at http://www.hud.gov/lea/rrpamph.pdf.
- "Lead in Your Home: A Parent's Reference Guide" [Item #017 EPA] at http://www.epa.gov/lead/leadrev.pdf.

Any remodeling or renovation projects also may be done before the owner applies for a certificate. Renovations include the removal or modification of painted surfaces or painted components as well as large structures such as walls or ceilings, large surface replastering, major replumbing, and window replacement. Renovators and remodelers must distribute a LBP pamphlet and other LBP information and notices to owners and occupants of housing built before 1978 before commencing work. Other work designed to permanently eliminate LBP hazards—called abatement—will require certified LBP contractors regardless of whether the work is done before or after the owner receives a certificate.

Wisconsin Asbestos and Lead Page

The primary source for almost everything property owners need to know when seeking a lead-safe certificate is the Wisconsin Department of Health and Family Service's (DHFS) Asbestos & Lead page, which can be found at http://www.dhfs.state.wi.us/dph_boh/Asbestos_Lead/index.htm. Here you can find the registry of lead-free and lead-safe properties and a great deal of LBP information including the Wisconsin Statutes (Wis. Stat. §§ 254.11-254.30) and

Wisconsin Administrative Code rules (Chapter HFS 163) that govern the registry process, a list of Wisconsin labs accredited for LBP analysis, the forms needed to apply for registration and to use once a property is in the registry, a listing by city and by county of certified lead investigators and certified abatement contractors, summaries of the lead-free and lead-safe certificate process, a listing of local health departments, and information about certified workers.

For a summary of the procedure for applying for a lead-safe certificate, go to *Legal Update 02.08* which is available online at http://www.wra.org/Legal/Legal_Updates/2002/lu0208.asp.

- **REALTOR® Resource Page—Lead-Based Paint:** This page emphasizes the importance for REALTORS® to recognize the complexity of this issue and how it impacts their business. This resource page includes *Legal Updates* and Hottips relating to this topic, the DHFS Asbestos and Lead page, LBP forms, guidelines for homeowner and contractor lead-safe work practices, Wisconsin lead-based paint litigation, Wisconsin lead-based paint statutes and rules, the federal LBP disclosure and renovation rules, and information about the training and certification of LBP personnel. All of these links can be found at http://www.wra.org/Resources/resource_pages/LBPresources.htm.

Drinking Water and Wells

Drinking water and well issues often arise in real estate transactions, both with properties served by public and private water supplies.

Public Water Sources—Community Confidence Reports

Public water utilities regularly perform exhaustive water purity tests. The EPA requires community water suppliers to summarize the results of these tests in annual drinking water quality reports and distribute them to their customers in Consumer Confidence Reports (CCR). If a homebuyer wants information about the drinking water quality at a property served by a public water system, a CCR may be obtained if you know the exact name of the community water utility. REALTORS® may wish to keep the current CCRs for the public water systems serving their market area on hand for the convenience of their customers. Steps for retrieving a CCR are described at http://www.dnr.state.wi.us/org/water/dwg/CCRTips.html and http://www.dnr.state.wi.us/org/water/dwg/CCRTrouble.html. Additional DNR information about CCRs may be found at http://www.dnr.state.wi.us/org/water/dwg/ccr/ccrinstructions.htm.

For more information about public water quality issues, contact the local water utility, which is best equipped to answer questions about your local water supply. The DNR provides the best statewide source for public water system information on their Web site at http://www.dnr.state.wi.us/org/water/dwg/test2.htm. For an EPA overview of drinking water issues, read "Water on Tap: A Consumer's Guide to the Nation's Drinking Water" at http://www.epa.gov/safewater/wot/wot.html, or go to the EPA's Ground Water & Drinking Water resources at http://www.epa.gov/safewater/. For other assistance, contact the Safe Drinking Water Hotline at 1-800-426-4791.

Well Water Contingencies

About two-thirds of Wisconsin's population drinks water drawn from over 750,000 private wells. There are no CCRs for private wells so homebuyers generally must include a well water testing contingency, such as the one in the WRA Addendum B, in their offers to purchase in order to obtain an appropriate well water quality report.

Water Contaminants

When testing well water, it is important to know what contaminants to test for and how to properly conduct the testing. The local DNR water quality specialist will be familiar with local conditions and can indicate what tests should be done in a given area. Local DNR water quality specialists are listed at http://www.dnr.state.wi.us/org/water/dwg/regionstaff.htm or can be reached at (608) 266-0821. The DNR identifies bacteria, nitrates, and lead tests as the most important for wells in Wisconsin, but other testing may be necessary due to local conditions. Other important tests may include tests for atrazine and other pesticides, arsenic, radium, VOCs and iron. Detailed discussion of these water contaminants can be found in *Legal Update 02.10* available online at http://www.wra.org/Legal/Legal_Updates/2002/lu0210.asp.

The Well Code

The DNR well code in Wis. Adm. Code Chap. NR 812 (see http://www.legis.state.wi.us/rsb/code/nr/nr809.html) is based on the sound premise that if a well and water system is properly located, constructed, installed and maintained, a private well should provide safe water continuously without the need for treatment. Chapter NR 812 is applicable to both potable and nonpotable wells (a nonpotable well is a well that is not used for drinking or sanitary purposes). The well code addresses the types of contractors qualified to install and inspect wells, the criteria for placing a well, restrictions on basement and pit wells, and procedures for abandoning wells no longer in use.

Private Well Abandonment Ordinances

Wis. Admin. Code § NR 811.10 (can be accessed at http://www.legis.state.wi.us/rsb/code/nr/nr809.html) requires that municipalities with

municipal water systems have a well-abandonment ordinance to protect municipal water supplies from private, and possibly contaminated, wells within the municipality. The ordinances call for the abandonment of all unused, unsafe and non-code-compliant private wells unless the owner obtains a permit to continue the well. REALTORS® should be familiar with their local private well abandonment ordinances.

- **REALTOR® Resource Page—Water Quality:** This page includes links to *Legal Updates*, Wisconsin DNR resources, the DNR Drinking Water and Groundwater Web site, Consumer Confidence Report—Public Water Supplies, information for homeowners with private wells, Environmental Protection Agency (EPA) resources, and the "Your Community" search page, which includes a list of regulated facilities by ZIP code. This search will tell you which businesses and facilities handle toxic waste, discharge waste into the water or air, etc. Go to http://www.wra.org/Resources/resource_pages/water_supply_resources.htm.

Resource Publications

The following publications are valuable resources for real estate legal and practice information.

1. **Wisconsin Statutes and Administrative Codes**. The 2001 edition of the Statutes and Administrative Codes book is available in hardcopy (PUB281) for $6.00 (order at http://www.wra.org/Products/results.asp?category=BOOKS&token=~). The electronic version of the statutes and codes, which satisfies the § RL 24.16 requirement to keep a copy of the real estate administrative rules on file in each office. It is housed on the WRA Web site under the Legal Section tab at http://www.wra.org/Legal/Code_Book/default.asp.

2. **2001 Edition—Wisconsin Real Estate Law**. This edition of the "Law Manual" has been drafted as a real estate law and practice reference guide for brokers and attorneys. The prior edition was completely updated with several new chapters by Scott Minter from the University of Wisconsin Law School; Richard Staff, general counsel for the Wisconsin REALTORS® Association; and contributing author, Debra Peterson Conrad, director of legal services for the Wisconsin REALTORS® Association. To order or for more information, go to the WRA Web site at http://www.wra.org/Products/results.asp?PC=PUB285, or call (800) 279-1972 or (608) 241-2047.

Wisconsin Real Estate Clause Manual. To order your copy of the 2000 edition of the Wisconsin Real Estate Clause Manual call (800) 279-1972. This edition was co-authored by Scott Minter and Rick Staff and contains many new contingencies, including attorney approval clauses that have been drafted to comply with the standards necessary to have an enforceable contract. Member price is $25. To order or for more information, go to the WRA Web site at http://www.wra.org/Products/results.asp?PC=PUB280, or call (800) 279-1972 or (608) 241-2047.